

THE POLITICAL CONSTITUTION OF PANAMA AS A GUARANTEE OF THE MARKET ECONOMY

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ABSTRACT

The history of the Panamanian isthmus, since time immemorial, has been linked to the benefits of its geographical narrowness, in relation to the natural transit of species and of course humans. In relation to the latter, migration from east to west, and after the conquest, from north to south especially, through land and sea connectivity, ending what in Panama is known as the transit economy. This model, based on trade, income and financial services, became the cornerstone of the national economy. Dr. Belisario Porras, in his project of a sovereign and independent nation, sanctioned the Code of Commerce in 1917, which was presented to the nation, more than a regulation of the acts of commerce and merchants, as a means in which the parties involved in the trade will find solutions to possible legal conflicts. Therefore, the rules on trade, try to be helpful, leaving the initiative of lucrative businesses to individuals, and this is guaranteed by our constitution.

Key words: Commerce, market economy, property, law, association, partnership, and act of commerce.

Constitutional basis of national commerce:

The model of social development in our country, responds directly to the active use of the right of private property, which, elevated to the rank of fundamental guarantee, directly influences the national economy, through mercantile traffic, and the development especially of the so-called service economy, which has historically characterized the Panamanian isthmus, due to its geographical situation.

The Political Constitution, within this model of State, represents a harmonic body of values, about how the social and political community should be configured, in order to find a practical application, and generate duties for the State as well as for the associates.

In this sense, the constitutionalization of the economy becomes necessary in order to guarantee

the rights not only of the socially less favored, but in the economic case, the fundamental norm seeks to create a framework of protection and guardianship on certain unappealable principles that benefit and ensure the production model ordinarily established in the country, for the generation of national and private wealth.

Private property is understood as the right or faculty to dispose of a thing, to the exclusion of another's will, and to claim the return of it if it is in the power of another (OCEANO COLOR Universal Encyclopedic Dictionary, 1985).

In coincidence with the above definition, the Dictionary of Common Law of the Argentine jurist Guillermo Cabanellas, states that private property is opposed to collective property and legally integrates property by antonomasia and domain (CABANELLAS, 1972).

In Panama, private property is guaranteed by the State, through its recognition as a fundamental guarantee, in the Political Constitution, Title III Individual and Social Rights and Duties, Chapter 1, Article 47, which textually states: Private property acquired in accordance with the Law by juridical or natural persons is guaranteed.

It is by means of this rule that the effectiveness of the means of production can be guaranteed, means that underlie mercantile activities, constituting acts of commerce, and therefore being regulated by commercial law.

From a broad sense, private property in commercial matters, includes all the elements proper to commercial activities, which protect its owner from the non-interference of third parties, such is the case of the commercial books, some of which even enjoy legal reserve (HENRIQUEZ SANCHEZ), and other rights that will be developed in this same section.

After placing in the hands of the associates the right to own material or immaterial goods, to have them with the spirit of owners, and to develop a sense of belonging over them, it is the Political Constitution itself, which dynamizes this right, in such a way, that it not only remains as a positive norm, developing for the common life in society, and protected by the civil norms, but it warns the holder of such property right, who is responsible for the economy of the country.

Article 282 of our fundamental norm establishes that the exercise of economic activities corresponds primarily to private individuals; but the State will guide, direct, regulate, replace or create them, according to social needs and within the economic guidelines it sets forth, in order to

increase the national wealth and ensure its benefits for the greatest possible number of the country's inhabitants.

With this, the State basically renounces to be an Entrepreneurial State, as defined by the Mexican author Jorge Fernandez Ruiz, to avoid being competition, and entrusts private individuals with a special responsibility, which consists in the generation of wealth, through the use of private property.

The State as an entrepreneur tends to obtain the objectives set with the lowest possible cost (FERNANDEZ RUIZ, 1982), which would clash with the principle of free enterprise and unfair competition, so much in vogue in times of commercial liberalism.

Private property, as a right, is profitable individually and socially, to the extent that its owners, exercise mercantile acts with the goods that belong to them, or that they pretend to belong to them, in such a way, that they can freely submit them to the mercantile traffic.

Although mercantile traffic is defined in this manual as an exchange of goods and services for money, it must be logically noted that it is not only the sale of products at wholesale or retail, but services for money, it is necessary to warn logically that it is not only the sale of products wholesale or retail, but it is indistinctly about manufacturing activities, digital, agricultural intermediation, rights and values in general, that is to say, it is about a true dimensionality based on profit, by means of the use of the right to private property.

Finally, the State has very special functions, which will serve as an accompaniment, not only for the benefit of its economy, but also for the sustainability of the country's productive systems. Therefore, it will plan economic and social development through specialized agencies or departments whose organization and operation will be determined by special laws.

However, the State as a political-administrative and social organization will also benefit its income, as long as the development of companies is not only perfectly geared, but also increases or grows progressively.

Fiscal management, namely, tax collection, tax exemptions to promote the development of companies in certain regions or sectors of the economy, public loans, regulation of the financial sector and the promotion of education, for the development of companies, enterprises and other activities, are precisely those to which the State must dedicate itself, according to our Political

Constitution.

Among other special functions, the State is obligated to the following in economic matters:

- Create autonomous or semi-autonomous institutions, national, regional or municipal, that promote the integral development of the sector or region, with low level of development.
- To plan state and municipal programs in cooperation with the Municipal or Intermunicipal Councils, for productive development.
- Create and organize by law the organization, jurisdiction, financing and supervision of such development entities.
- Create commissions of technicians or specialists to study the conditions and possibilities in all types of economic activities and formulate recommendations for their development.
- Promote the creation of private companies that operate in accordance with the recommendations mentioned in the previous paragraph, establish state companies and promote the creation of mixed companies, in which the State will participate, and may create state companies, to meet social needs and public security and interests.
- To found credit and development institutions or establish other appropriate means in order to provide facilities to those engaged in small-scale economic activities.
- Establish theoretical and practical centers for the teaching of commerce, agriculture, livestock and tourism, trades and arts, including manual arts, and for the training of specialized workers and industrial managers.

Now, on the other hand, apart from these functions whose genesis is the sustainability of the State, mainly through the economic activities developed by individuals, based on a principle guaranteeing the free exercise of private property, we find that, throughout the chapter on fundamental guarantees, there are political-legal elements, which will allow the development of article 282 previously mentioned, let us see:

a) The market: CWhen we analyze this concept that is merely economic, we must start from the meaning of location, that is, a place, since the market will always be an area, whether it is physical (such as municipal food supply markets, supermarkets and even shopping malls), or immaterial as it is the electronic or digital (Amazon, Encuentra 24, e-bay and the like).

Our Political Constitution, regarding the market, reserves in favor of traders and consumers, a series of rights and obligations, so that, under the principle of free enterprise, the dynamism of commercial activities, commercial loyalty and consumer protection is maintained.

In this sense, our fundamental norm includes ordinances in favor of the so-called free concurrence and free competition, in order to avoid the so-called market vices, which are: monopoly, oligopoly and concussion.

According to Law 45 of October 31, 2007, which dictates rules on consumer protection and defense of competition and another provision, free economic competition is understood as the participation of different economic agents in the same relevant market, acting without illicit restrictions in the process of production, purchase, sale, pricing and other conditions inherent to their economic activity (Article 9).

Competition can be understood as the rivalry generated between traders competing in a market to sell their goods or services. On the other hand, competition is the possibility for companies to have a business and compete in the market under the same conditions as others.

On the other hand, trade consists in the exchange of goods and services for money or the value that, according to the historical moment, is representative of capital. Trade in the market should not be subject to state intervention, and it is the market itself, which sets its methodology of controls and balances.

Thus, supply and demand, as theoretical principles of economics, are understood and accepted as the only two rules that control the market, and give support to the so-called liberal economy, also known as market economy.

We understand then, that:

- Supply: It is the amount of goods or services for sale or available for exchange, which exists in the market by its supplier.
- Demand: It is the quantity of product or service demanded, which consumers wish to acquire within an economy.

b) Guarantees for the market: Article 295 of the Constitution states the following: it is prohibited in commerce and industry any combination, contract or any action that tends to restrict or prevent free trade and competition and that has monopolistic effects to the detriment of the public.

The aforementioned provision goes on to state: The practice of operating a single natural or juridical person, series or chains of retail commercial establishments in a manner that makes ruinous or tends to eliminate the competition of the small merchant or industrialist belongs to this genre.

It culminates by stating that there will be popular action to challenge before the courts the execution of any combination, contract or action that has as its object the establishment of monopolistic practices, the law will regulate this matter.

Although the aforementioned constitutional excerpt is immersed in Title X of the national economy, it is evident that such prohibition legally constitutes a guarantee to develop commercial activities, for which reason it must be specified that the content of this provision includes the fundamental guarantee of free enterprise, having it as its main element.

Contrary to this guarantee and precisely the object of the prohibition of article 295, we find that there exist in the market, and that they are the following¹:

- **Monopoly:** appears when a single bidder of a certain good or service, that is to say, a single company dominates the entire supply market. As a consequence, when it appears in the market, there is only one company capable of offering a product or service that has no substitutes or similar products, and consumers who wish to purchase the good can only go to that supplier and accept the conditions that it imposes.
- **Oligopoly:** appears in a market where there are few competitors, each having the capacity to influence market variables (such as price and quantity).
- **Collusion:** consists of the collusion of certain economic actors who, by means of price management, avoid the participation of third parties (their competition), making their operations unsustainable.

This market vice not only works against competitors, but also against the State.

Collusion, therefore, is not good. It violates the rules of the free market, so those who participate in this undue form of business should be punished, because it is not only about circulating goods and services, but also about respecting fundamental guarantees that are pillars, to build our economy, which always for better or worse, is debated between the liberal and the social (OSELLAME, 2016).

The seriousness of collusion does not lie so much in its subjective character, i.e. the victim of this practice, but in its objective character, understood as our market system, and the violation on concurrence that brings as a consequence the speculative decontrol in the ratio of prices of goods and services held by a monopoly or oligopoly, finally affecting the weakest part of the market which is the consumer.

¹ Monopolistic practices may be absolute or relative illicit. In turn, there is in our legislation, economic concentration as a corporate mechanism for market control. Further reference Chapters II and III of Law 45 of October 31, 2007, which dictates norms for the protection of the market and consumer protection. Published in Official Gazette No. 25914 of November 7, 2007.

c) Fundamental guarantees in the service of commerce in general. In relation to this subject, it is important to extract from the same fundamental norm, the following:

- **Intellectual property:** Intellectual property relates to creations of the mind: inventions, literary and artistic works, as well as symbols, names and images used in commerce. Intellectual property is divided into two categories: Industrial property, which covers patents for inventions, trademarks, industrial designs and geographical indications.

Copyright, which covers literary works (novels, poems and plays), films, music, artistic works (drawings, paintings, photographs and sculptures) and architectural designs.

Rights related to copyright are the rights of performers in their performances, of producers of phonograms in their recordings, and of broadcasting organizations in their radio and television programs.

Intellectual property rights are similar to any other property right: they allow the creator, or the holder of a patent, trademark or copyright, to enjoy the benefits deriving from his work or from the investment made in connection with a creation.

These rights are enshrined in Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of the moral and material interests resulting from authorship of scientific, literary or artistic productions.

The importance of intellectual property was first recognized in the Paris Convention for the Protection of Industrial Property (1883), and in the Berne Convention for the Protection of Literary and Artistic Works (1886). The World Intellectual Property Organization (WIPO) administers both treaties (WIPO, S/F/E).

Our Political Constitution establishes in its article 53, that every author, artist or inventor enjoys the exclusive property of his work or invention, during the time and in the manner established by Law.

- **Freedom of association:** Freedom of Association is a right protected by our constitution in its article 39. It is therefore, a right that enables or allows citizens to constitute all types of associations (groupings of people or corporate organizations) regardless of their

interests; as long as these are not contrary to the Law.

This right is often confused with the right to unionize, or the right of membership in political parties.

Being the term association, a generic concept, we can understand then, it is any organization of persons (natural or juridical), that are created without lucrative purposes, and those that do pursue it.

These companies that pursue profit, or the purpose of obtaining profits, are recognized by the mercantile norms, and especially by our Code of Commerce, as commercial companies.

Article 39 establishes that it is permitted to form companies, associations and foundations that are not contrary to morality or legal order, which can obtain recognition as legal persons.

This is the right that the Panamanian State assures, and that contributes to the denomination of commerce, according to the need of the merchants to form companies, with diverse objectives (to add industry or to add capital), for the exercise of commerce.

The Supreme Court of Justice, regarding freedom of association, has pronounced the following (Action of unconstitutionality filed by licentiate Luis A. Barria M. against the phrase "...to municipalities, provincial governments, trusts, foundations and private companies" contained in Article 66 of Law No. 41 of July 1, 1998. Supreme Court of Justice, rapporteur: Delia M. Carrizo de Martinez. - Panama, December twenty-ninth (29), two thousand nine (2009):

As for the fundamental right of freedom of association, this poses the overcoming of the barriers imposed in the liberal State, tolerating that individuals, in the use of autonomy, may combine with their peers with the aim that the collective achieves the attainment of common objectives within the limits imposed by law, although with reduced State interference, since the State is limited to guarantee the provision of recognition, as well as the exercise of this right without coercion or violence, whether originating in the State itself or in private individuals; The only obstacle to the exercise of this prerogative would be imposed by those natural limits established for the preservation of the democratic regime, i.e. public order, national security and respect for other fundamental rights.

On the other hand, it is necessary to bear in mind that the exercise of this fundamental right has two aspects. On the one hand, it implies that the human person, within his various vital options, may form companies, groups and societies of all kinds to achieve lawful purposes, where the State must provide sufficient guarantees for their performance and operation. However, the fundamental right also embodies the possibility that the person may abstain from participating in any organism or collectivity. from participating in any constituted organism or collectivity; that is to say that this collective participation of the human person is always free and autonomous (cf. decision of November 22, 1995).

This concept has also been supported by the Inter-American Court of Human Rights, which, in interpreting Article 16 of the American Convention on Human Rights, stated:

144. Article 16(1) of the Convention establishes that those who are under the jurisdiction of the States Parties have the right and freedom to associate freely with other persons, without any intervention by the public authorities that may limit or hinder the exercise of the aforementioned right. In addition, they enjoy the right and freedom to assemble for the common pursuit of a lawful purpose, without pressure or interference that might alter or distort that purpose. As well as these negative obligations, freedom of association also gives rise to positive obligations to prevent infringements of freedom of association, to protect those who exercise it, and to investigate violations of that freedom. These positive obligations must be adopted, even in the sphere of relations between individuals, if the case so warrants.

* **Free exercise of profession:** Any technical, scientific and/or teaching activity and its derived responsibility, whether carried out publicly or privately, freely or in a dependent relationship, and which require the training granted by the degree provided by universities or by a competent authority, shall be considered as professional exercise.

However, we must not fail to consider that those persons who do not have degrees, to whom the Law does not establish a licensing requirement to practice, are not really professionals.

The contemporary concept of professional is circumscribed more to the continuous exercise of an activity, which allows to obtain a livelihood, than necessarily linked to an academic degree. For example, a shoemaker and a professional is a certified public accountant.

Our fundamental law intends to ensure that each one of us, by virtue of the aforementioned article 282, can carry out, without any restrictions other than those required by law, in a staff manner, acts that generate the exchange of goods and services, and allow the circulation of money, to boost the country's economy.

The article establishes that every person is free to practice any profession or trade subject to the regulations established by law regarding suitability, morality, social security and social security, membership in a professional association, public health, unionization and mandatory contributions. No tax or contribution shall be established for the exercise of liberal professions, trades and arts.

The Supreme Court of Justice, on the free exercise of the profession, as a fundamental guarantee, has disposed (Unconstitutionality lawsuit filed by Mr. Carlos Ameglio Moncada, on behalf of Mr. William Dario Ochoa Perea, against the phrase "to be a Panamanian citizen", contained in paragraph a. of Law 31 of January 11, 1983. Supreme Court of Justice. Presiding Judge:

(Rogelio A. Fabrega. Panama, May twentieth, nineteen ninety-nine):

It is not superfluous to enter into the analysis of article 40 of the Constitution, a norm which, in spite of not having been denounced within the constitutional articles that are considered violated, the Plenary, in its work of maximum interpreter of the Constitution, not only has to examine if the denounced violation has occurred, but also to pronounce itself on the violation of any other norm of the Constitution, especially when the analyzed norm is the one applicable to the content of the constitutional denunciation pointed out. Within this order of things, the Plenary appreciates that there has not been a violation of the constitutional norm recently mentioned. It is evident that, among the requirements for the free profession or trade, there is no requirement of birth; On the contrary, it is noted that the principle of freedom of exercise of professions and trades is not absolute, but is subject to the regulation that, with respect to such exercise, is established by law (principle of reservation of law), which may well indicate as a requirement for the exercise of the profession or trade in question, the quality of Panamanian nationals, provided it has support in another constitutional provision that is applicable as it does, in fact, the rule whose unconstitutionality is denounced; and the law is prone to indicate, within the requirements for the exercise of professions or trades, in some occasions the requirement of nationality and, in others, the requirement of being the father or mother of Panamanian children, as the plaintiff points out, with which a margin of freedom to the legislator can be appreciated, This means that there is a margin of freedom for the legislator, limited by the constitutional provision itself, at the time of regulating the professions and trades, that is,

regulations related to suitability, morality, social security and social security, membership, public health, unionization and mandatory contributions, as provided for in the constitutional provision under analysis.

It is therefore, as the Attorney General of the Administration has stated, that it is constitutionally lawful for a law regulating the practice of professions to restrict, deny or subject such practice to special conditions to foreigners, which is precisely the hypothesis established for the practice of veterinary medicine, a restriction that is consistent with the principle of equality, for the reasons listed in Article 20 of the Constitution, which includes, among others, work, as has already been pointed out.

- **Consumer Rights.** Article 49 of the Political Constitution of Panama recognizes it as a fundamental guarantee. It is, therefore, another right with a high legal value and that lies immersed in commercial relations.

The cited standard states that the State recognizes and guarantees the right of every person to obtain quality goods and services, truthful, clear and sufficient information on the characteristics and content of the goods and services acquired; as well as freedom of choice and conditions of equitable and dignified treatment. The Law will establish the necessary mechanisms to guarantee these rights, their education and the procedures for the defense of the consumer and user, the compensation of the damages caused and the corresponding sanctions for the transgression of these rights.

But what is consumer law? Consumer law is a global system of rules, principles, institutions and instruments of implementation, established by the legal system in favor of the consumer, to guarantee him a balanced position in the market in his relations with businessmen.

This definition displaces the previous conceptions on the law of merchants, of the codified commercial law. Thus unfolding the Principle of Attraction, contained in article 4 of the Commercial Code of the Republic of Panama, to achieve a symmetrical stabilization of the relations between merchants versus individuals, and causing a progressive demercantilization of the commercial relations and the correlative socialization of the new law, to make it more solidary and humanized.

This is a transformation that is increasingly operating in national and supranational legal

systems, through the gradual implementation of consumer protection rules, institutions and procedures.

This evolution will be completed to the extent that a series of degrees or levels of protection are successively integrated:

- a)** The normative recognition or declaration of consumer rights;
- b)** The establishment of substantive solutions of substantive law;
- c)** The instrumentation of mechanisms for the implementation of rights and substantive solutions;
- d)** The predisposition of consumer defense policies that are integrated with the legal protection system;
- e)** The allocation of these policies in favor of all sectors of the population and, particularly, of the most needy consumers.

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