

# SUPREME COURT OF PANAMA, EN BANC, ISSUES A QUESTIONABLE RULING OF UNCONSTITUTIONALITY THAT IMPACTS THE RIGHT TO COMPENSATION OF CRIME VICTIMS

BY PUBLIO CORTÉS

I comment in this occasion the sentence of October 15th, 2019, ruled by The Supreme Court of Justice of Panama, *en banc*, that declared unconstitutional a judicial ruling issued by The Superior Court (the second level court), during a civil process for compensation of damages derived from a crime, where the court agreed with the plaintiff AR, convicting the respondent APN for the payment of US\$10,000.00.

## BASIC FACTS OF THE CASE

- APN seems involved in a penal process for the crime against economical Patrimony (attempted theft), in damage for AR, that was suspended and derived to find a way through mediation.
- APN commits through mediation to

pay to AR on a given date, the amount of US\$10,000.00, given the arrangement for the damage caused. By fulfilling the agreement, the criminal process against APN could have been abolished, however APN unfulfilled the agreement established.

- Following the Accusatory Criminal System from the Criminal Procedure Code, the suspension of the criminal process releases, and the crime process continues.
- Once the accusation was established, APN reached a penalty agreement with the prosecution (Public Ministry), validated by the sentence of the judge on February 18th, 2014, for which APN was sentenced for eighteen months of prison and disabled for the exercise in public functions.



## The Civil part of the cause

- In 2016, AR began the civil trial against APN (ordinary procedure of higher quantity), in the search for compensation derived from the damages caused for the crime, whose sentence was established in 2014.
- AR evokes as a proof the agreement of mediation where APN had committed to pay US\$10,000.00, but then, did not comply.
- The Court in the first instance denies the lawsuit. On appeal, The Superior Court negates the decision and dictates the sentence on July 26th, 2017, where APN is convicted for the payment of US\$10,000.00. This sentence was final.

## Constitutional part of the cause

- Protected by article 206 of The Political Constitution of Panama, where it is established that unconstitutionality of "rulings" can be sued, APN filed action of unconstitutionality before The Supreme Court of Justice, against the civil ruling of July 2017, issued by Superior Court in the second level.

### **PLAINTIFF'S STATEMENT**

- APN states that the decision impugned violated article 32 of The Political Constitution of Panama, which establishes the principle of the Due Process of Law as follows:

*'One may be tried only for the competent authority and under the legal formalities, and not more than*



*once for the same criminal, administrative, police, or disciplinary causes'*

- The essence of the approach leans on a penal procedural norm, which says that, when a mediation agreement is violated, it lacks legal efficacy for the criminal cause that renews after the non-compliance. The plaintiff based on that rule, establishes that The Superior Court should not have used the mediation agreement during the civil process to convict APN to pay US\$10,000.00. Therefore, the plaintiff thinks that article 32 of the Political Constitution was infringed.
- Proof that the mediation agreement had no efficacy, according to the plaintiff, the criminal cause against APN was taken back and ended with a final sentence in 2014, while the civil lawsuit was filed in 2016.
- The plaintiff sustains that if a mediation agreement cannot be used in the penal way to convict, nor can be used in a civil approach

for the compensation sentence. In doing so, the plaintiff establishes that the sentence impugned violates the Due Process clause of the Constitution.

### NATION'S ATTORNEY GENERAL OPINION

- The Attorney General determines that the plaintiff has a discrepancy against the impugned sentence related to the way The Superior Court valued the proof in the civil cause, being that proof the mediation agreement. Acknowledges that APN is using the constitutional means, as a **"third civil level for review the case on the merits"**
- The prohibition established in the Penal Procedure Code, about using the debated and the conclusion of the mediation procedure as a proof, only encompasses the penal procedure. On the mediation agreement, the General Attorney specifies: ***This document retained its probative value to determine the defendant's civil liability***
- Article 204 of the Code of Criminal Procedure, which establishes the prohibition of evidential use in the criminal process of the rationales and evidence coming from the mediation procedure, ***"Nothing says regarding the ineffectiveness of the evidence of the mediation agreement in the civil cause."*** Nor does it contemplate the cited rule, the loss of legal effects of the mediation agreement in general, which gives rise for that evidence to be used in civil ways.

- It emphasizes on the fact that both civil and penal jurisdictions are different, to the point that based on the article 1706 of the Civil Code, there is an affirmation ***"for the recognition of the civil aim, and in no case is the intervention of the criminal jurisdiction needed"***
- According to the statement above, the Attorney General considers the ruling demanded does not infringe the principle of the Due Process of Law, therefore it is not unconstitutional.

### JUDGEMENT OF THE SUPREME COURT, *en banc*

The Court first elaborates a generic legal description about the principles of the Due Process, contained in article 32 of the Political Constitution, indicating that when the Law uses the phrase ***"In accordance with legal procedures"*** pursues that all processes are stuck to the rules previously established, in such a way that a person can defend effectively his rights.

This basis would not be respected if the person itself is not judged by the competent authorities, or if the right to be heard it is violated because of the lack of due notification, absence of bilateralism or contradiction, by total lack of motivation of decisions, if a person is prevented from its right of exercising motions to review established by Law, if the process applied is not regulated by Law, or if there is a procedure different than the one established in the Law. If any of these circumstances occur, there might be a **constitutional nullity**.

- It states that the impugned ruling ***“recognized an obligation from a mediation agreement entered into in a criminal proceeding”*** which was later breached
- Highlights the content of numerals 4 and 5 of article 204 and Article 211 of the Procedural Penal Code, according to which: (1) there is a prohibition to introduce in the criminal process as evidence the background of the mediation session; (2) also exists prohibition to enter the criminal process as proof of admission of guilt, the background of the mediation session; (3) the breach of the mediation agreement is not causal to dictate a guilty verdict; (4) The infringement of the mediation agreement cannot be considered as an aggravating consequence of jail sentence; (5) when the criminal proceeding for non-compliance of the mediation agreement restarts, in the state it was before mediation.
- Based on the above, it can be concluded that a Mediation Agreement terminates criminal action, but non-compliance implies the resume of criminal proceedings.



Source: La Prensa. Mag. Olmedo Arrocha

- After quoting article 128 of the Penal Code, where it is established that there is a civil responsibility derived from crimes, and article 1706 of the Civil Code, where it is established a civil action for a year derived from the crime, affirms the following:

*“This being the case, we can see that according to the procedures established in criminal matter, AR, had to file his claim within the criminal process or after the issuance of the judgment No 42-2014 of February 10 of 2014, that is, within a year (SIC.) established to file the civil claim, but not to use an instrument without legal effectiveness to declare a proven obligation, through the sentence contained by this constitutional route, the Superior Court violated guarantees of the Due Process to APN”.*

- Consequently, the Court considers that the impugned ruling violates Article 32 of the Political Constitution and, therefore, declares it unconstitutional

#### **DISSIDENT VOTE OF JUSTICE OLMEDO ARROCHA OSORIO**

Of the nine (9) Justices who conform The Supreme Court, *en banc*, there was a dissident. According to the regulations of the constitutional procedure of Panama, the dissenting opinion is also made public, nevertheless it does not modify the majority decision.



Below we summarize the criteria of the dissident vote:

- The integrity guard process of the Constitution is not designed for the Court to address discussions between individuals, regardless if the decision indirectly may benefit someone.
  - These processes must be protected from becoming a place to settle issues between individuals for which there are regular or extraordinary actions of appeal.
  - In this constitutional process ***"improperly the Plaintiff pretended, although paradoxically achieved, that this Justice Corporation became another or third level of regular discussion of dispute procedure, in particular, that was raised through the ordinary civil way"***. Adding that the civil process within it was issued the ruling impugned, fulfilled the double level review, and could not be subject to Cassation because unfulfilled the amount required.
- Quotes 4 sentences of the Court where were not admitted lawsuits of unconstitutionality, that sought to denature the mission of the Court in this matter. He states that it is "inexplicable" that the Court has disconnected in this case of that criterion.
  - He maintains that the majority ruling incurs an inappropriate "Inter-jurisdictional transportation" of a rule of the Code of Criminal Procedure to the Civil Jurisdiction. In that sense, quotes numerals 4 and 5 of the article 204 of the Criminal Procedure Code and, in few words, says they only apply in penal terms.
  - Citing various precedents from the Court, supports the "Principle of No Jurisdictional Primacy", reaching the conclusion that "it would be a legal absurdity to consider that the rules of a procedure within a jurisdiction, mark the interpretation and the dynamic that must be followed by another jurisdiction".
  - Although he considers that it was not appropriate to go to the bottom of the particular discussion, since the Court has taken the debate there, exposes that the majority ruling has seen the case as if it will be a restorative action for compensation, derived from the crime in a penal process mediation agreement that was used for a criminal conviction, within the same process in which said Agreement was not fulfilled. The discussion, he claims, is really on Civil Liability based on the Civil Code where it should prove the wrongful act, the damage and the causal relationship.

- The majority ruling assumes the premise that the ruling impugned was based solely on the Mediation Agreement as if it was the simple execution of an executive title. However, the dissenting magistrate quotes part of said ruling, issued within an ordinary civil process of a greater amount, in which the Superior Court records that the Mediation Agreement was just one more of the proofs.
- Qualifies as "delicate" that the majority decision will enter to recognize something so typical of the civil process, such as the status of limitation rule of one-year, according to the Article 1706 of the Civil Code, especially because said exception must be alleged by the claimant.

### MY OPINION

Clearly, the sentence of the majority of the Supreme Court is supported by a legal sophism. I must say that I share in all its parts, both the opinion of the Attorney General such as the one of the dissident Justice. I will explain it below:

The first question that deserves attention is: Should the Court have admitted a claim of this nature? In my opinion in no way. The action of unconstitutionality is not thought to replace the ordinary jurisdictions.

The two underlying arguments invoked by the plaintiff are:

- (1) Alleged use of a proof which existence has no legal basis or possible questioning of the evidentiary

assessment, both in a civil trial; and  
 (2) The possibility that the civil action tort for damages derived from the crime was filed out of the statute of limitations in the time frame.

None of them - even if they were valid - are configured as potential constitutional violations of the Due Process of Law, so far as they are elements of the ordinary civil contradictory, which already were debated in the first civil level (where the plaintiff AR lost) and that they were again in the second civil level (where the claimant AR won) configuring dual level control, an essential part of the right for the defense of both parties.

Having admitted the claim, the Court made the first mistake. Said mistake unknown, ironically, precisely the Civil Due Process of Law. Indeed, the alleged argument related to the statute of limitation should have been invoked by APN in the civil proceeding and judging by the reading of the Court ruling, it seems that he did not. Also, the topics on the validity or probative weight of the Proof of the Mediation Agreement were a matter of a Civil Cassation Extraordinary judicial review (for example by way of the causal evidentiary), however, that Extraordinary route was excluded as an option in this case, since the amount involved is less than US\$ 25,000.00. Therefore, the ruling of the Superior Court was final and an acquired right for AR.

Having admitted the claim for unconstitutionality, the Civil Due Process of Law was violated, since it

allowed to enter to debate in the constitutional headquarters, the statute of limitation that apparently was not alleged on time, such as the Civil Process establishes. And opened the door to question the evidentiary assessment the Superior Court did, despite it was a case which an amount did not have the right to the extraordinary judicial review named Civil Cassation.

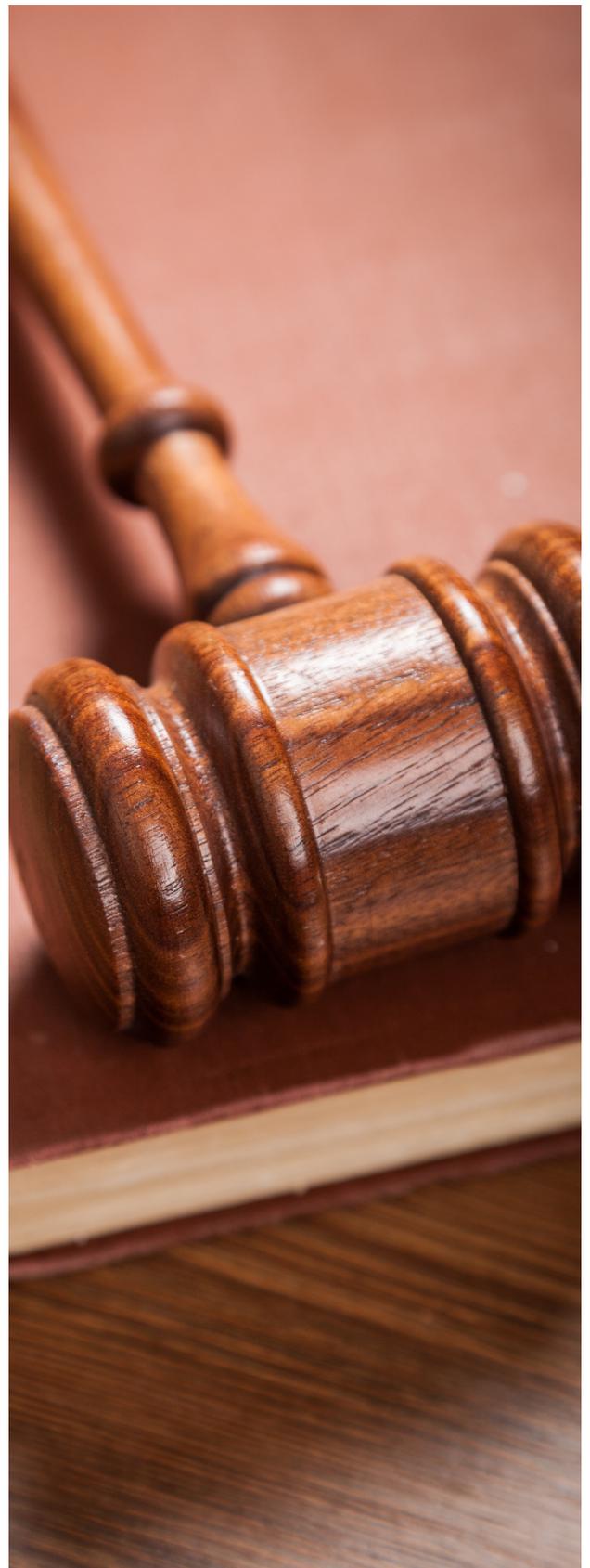
The next question would be: Doing abstraction that it is about topics of debate outside of constitutionality, Is the Court right on the merits of the case?

In my opinion, the Court is not right in the application to the civil process of a procedural rule code of the Criminal Procedure Code.

The often-cited rule of the Code of Criminal Procedure, which prevented the use of Mediation Agreement as evidence to convict the accused or to aggravate the ruling, it is a rule that cannot be extrapolated to civil proceedings where the contested judgment was issued. In that civil process, that element of proof can be provided perfectly, and it can be one of the supporting elements to determine the existence of civil liability tort.

Now, as for the statute of limitation issue, everything seems to indicate that the Court does have reason, it seems that the civil suit was filed after the period expired for the year that the Law accepts. However, -as we already said- it is a violation precisely of the Civil Due Process of Law, to even talk about that.

simply because it was not alleged by the party that corresponded to it, within the time the Civil Process establishes.



## **Final Comments**

The result is sad: we are facing a victim of a crime who had obtained a final judgment for compensation that no one could question. And in the end, it turned out that it was deprived of it, through the commented sentence of the Supreme Court.

The good thing about it is that in Panama, unlike the Common Law and other countries like Argentina, at the Federal level, constitutional jurisprudence is not a source of Law. This does not mean that it is unimportant. However, that characteristic makes it more likely that the criterion expressed in this judgment remains only for this case.

In other words, we hope that in future cases Court clarifies the situation again, so those crime victims are not limited in their right to allege evidence in proceedings before the Civil Jurisdiction when civil liability caused by criminal acts is debated.

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