



UNIVERSITY OF PERUGIA
DEPARTMENT OF PUBLIC LAW

“The Effectiveness of Rights in the Light of European Court of Human Rights
Case Law”

Section: **Criminal Law protection** - Principles of criminal law - *Lawfulness and no Retroactivity*

Title: *The stability of the “statute law”, the temporary nature of Jurisdiction: static and dynamic of "crime" and "punishment”*

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Judgement of reference: Constitutional Court, decision of 12th October 2012, nr. 230

Conventional parameter: Art. 7 ECHR

Key word: Principle of lawfulness; favourable retroactivity of criminal law; “diritto vivente” (consolidated law); overruling decision

Abstract

With the decision under review, the Constitutional Court answers the question whether the judicial interpretation participate or not in the production of the criminal law. In the introduction the Court separates the two dimensions of the criminal law: on the one hand is the interpretation, on the other hand is the “written” provision; on the one hand is the function of standardization of the law of the Supreme Court, and in particular of the United Sections (Corte di Cassazione - Sezioni Unite), which fundamentally promote the standardization of the following jurisprudence; on the other side are the legal phenomena that - general and abstract, abrogative and of annulment - change the rule “re-writing” it in time. In both fields, you can see a “favourable” evolution, which describes again and restricts the boundaries of the facts established by law as a crime.

The equalization between the one and the other phenomenon - that is, between the jurisprudential “revirement”, which eliminates the description of the fact as a crime and the abrogation of the provision of incriminating - would be justified by the jurisprudence of the Court of Human Rights, which around the art. 7 ECHR has built a concept of 'law' made by rules of legislative production and by rules of "Case-Law". Thus, the Court invokes the intervention of the Constitutional Judge in relation to art. 673 Code of Criminal Procedure, in order to adapt the norm - in particular - to the European principle of "enlarged legality" expressed by art. 7 ECHR, through the interposed parameter of the art. 117, paragraph 1, of the Constitution: in order to make revocable the definitive judgment of conviction (and pronunciations assimilated to it) even in the case of "jurisprudential change" determined by a decision of the United Sections (of the Supreme Court).



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The Constitutional Court rejects the equation, because these situations aren't similar. If it is true that the approach worded by the decision of the United Sections has the purpose to create an interpretation of the law which is firmly and generally homogeneous, however, this isn't a legally binding intervention (in an order of “civil law” - such as the Italian one - based on the principle of separation of powers), and rather "persuasive", susceptible to be rejected by the interpreter with the support of an adequate reason. Therefore, the "possibility of modifying" the court's decision does not approach the general and compulsory effects of the abrogative law and of the declaration of unconstitutionality, which affect instead "definitively" on the literal date that is written. In this framework, the Italian Constitutional Court excludes that the jurisprudential favourable overruling could overwhelm the principle of inviolability of criminal *res judicata*, that is expressive of the demand of certainty of punitive relations: exactly, it denies a constitutionally necessary "manipulation" of the art. 673 Code of Criminal Procedure through which make revocable the definitive sentence in the case of sudden occurrence of a jurisprudential reading that - *in bonam partem* - excludes the criminalization of the offense for which the sentence itself is intervened.

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