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Ordine internazionale e diritti umani

International Legal Order and Human Rights
Ordenamiento Jurídico Internacional y Derechos Humanos
Ordre juridique international et Droits de l'Homme

EXECUTIVE AGREEMENTS AND SECRET TREATIES: SELECTED ISSUES UNDER INTERNATIONAL LAW AND DOMESTIC LAW

This study deals with the issues raised by States' trend to enter into international agreements through a simplified procedure or to keep secret the content of some bilateral treaties. Far from being atypical elements of treaty practice, executive agreements and secret treaties raises several issues, both in international and domestic law.

On the international level, simplified procedures must be deemed as physiological, and not a threat to the democratization of the conduct of foreign policy. Only under strict circumstances, their actual use by the executive can determine a situation relevant for the applicability of the invalidity clause described in Article 46 of the Vienna Convention on the Law of the Treaties. Secret treaties are a specific sub-category of executive agreements and do not pose an autonomous issue of validity under international law: rather, they must be tested in their relationship with other international commitments and with the consequences deriving from their possible breach.

More interestingly, the domestic legal order may define stringent legal limitations for the Government, insofar the involvement of other constitutional organs is required in order to engage the State or transparency and publicity are expressly dictated. Much depends on the implementing practice: the case study of Italy is here dealt with, showing recent worrying trends in the field of migration governance and the limited impact of (however interesting) developments in the litigation at the ECtHR or in domestic courts. The full implementation of the Italian Constitution and of the related organic laws is thus advocated in order to reconcile international practice by the executive branch with the prerogatives of the Parliament and with the principle of transparency.