

V Leary

**International
Labour
Conventions
and
National
Law**

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INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW:

The Effectiveness of the Automatic Incorporation
of Treaties in National Legal Systems

VIRGINIA A. LEARY

Professor of International Law
Faculty of Law and Jurisprudence
State University of New York at Buffalo, U.S.A.



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Abbreviations

A.F.D.I.	Annuaire français de droit international
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int'l L.	American Journal of International Law
A.S.D.I.	Annuaire suisse de droit international
Brit. Y. B. Int'l L.	British Yearbook of International Law
Calif. L. Rev.	University of California (at Berkeley) Law Review (U.S.)
C.M.L. Rep.	Common Market Law Reports
I.C.J.	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.L.R.	International Labour Review
Mich. L. Rev.	Michigan Law Review (U.S.)
Minn. L. Rev.	Minnesota Law Review (U.S.)
Neb. L. Rev.	Nebraska Law Review (U.S.)
Neth. Int'l L. Rev.	Netherlands International Law Review
N.J.	Nederlandse Jurisprudentie
P.C.I.J.	Permanent Court of International Justice
Proc., Am. Soc. Int'l L.	Proceedings of the American Society of International Law
R.B.D.I.	Revue belge de droit international
R.C.A.D.I.	Recueil des cours de l'Académie de droit international de La Haye
R.C.D.I.P.	Revue critique de droit international privé
R.G.D.I.P.	Revue générale de droit international public
R.I.T.	Revue internationale du travail
U.N.T.S.	United Nations Treaty Series
U.C.L.A. L. Rev.	University of California at Los Angeles Law Review (U.S.)
U. Pa. L. Rev.	University of Pennsylvania Law Review (U.S.)
Vand. L. Rev.	Vanderbilt Law Review (U.S.)
Z.a.ö.R.V.	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

**Abbreviations of Titles of Publications of the
International Labour Office**

R.C.E.	Report of the Committee of Experts on the Application of Conventions and Recommendations (the number of the year precedes the R.C.E. citation and the page number follows)
R.P.	Record of Proceedings of the International Labour Conference (the number preceding the R.P. citation is that of the session; the page number and year follow the letter citation)
S.R.	Summary Reports on Ratified Conventions, submitted to the International Labour Conference (the number preceding the S.R. citation is that of the session; the page number and year follow the letter citation)

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Introduction

The relationship between international law and national law, in the past, was largely an interesting theoretical problem, engaging legal scholars in a doctrinal debate; it has now become an important practical problem, primarily as a result of the increasing adoption of treaties whose scope is not inter-state relations but the relations of states with their own citizens. These treaties are concerned with “the common interests of humanity” and have a quasi-legislative character.¹ Their efficacy depends essentially on the incorporation of their provisions in national law. The purpose of the present work is to consider how effectively the provisions of international labour conventions, a type of quasi-legislative treaty, are incorporated in the national law of states using the system of automatic incorporation of treaties. Thus, while the narrower focus of the book is the automatic incorporation of labour conventions in national law, the broader focus is the relationship between international and national law.

It was not intended, however, to undertake a theoretical study of the relationship of international law and national law, but rather an examination of the practical problems and complexities which have arisen in the incorporation of labour conventions in national legal systems. This work is an empirical study which elucidates the classic problem of the relationship between international law and national law by focusing on the factual situation in an area where there is close interaction between the two systems.

The proliferation of multilateral treaties which lay down general norms concerning the internal economic and social policies of states is a contemporary phenomenon of the international legal system.² Although such treaties are couched in terms of obligations for the ratifying state, the ultimate intended beneficiaries are individuals within the state. In the absence of a supra-national legal system, the effective incorporation of the norms of these treaties in national law is of crucial importance if they are to accomplish their purpose.

The international community is attempting today through the use of the treaty—the one major instrument in its legal arsenal—to obligate states to improve the lot of their residents and to guarantee individual rights. Used

from ancient times to regulate such inter-state or inter-communal matters as boundary lines and commercial exchange, the treaty is used today to regulate such internal matters as human rights, labour questions and economic policy. The reasons for this evolution are not difficult to perceive. It has become apparent that national resolutions of social and economic problems have significant repercussions in other countries. Hence, international regulation of such problems has become imperative. The use of the treaty for these purposes represents a radical transition in the purposes for which it has traditionally been employed. Can the treaty mechanism be effective in accomplishing these new purposes? The answer appears to be: Only if national legal systems effectively apply treaty norms.

States have adopted different methods of incorporating treaties in national law. Some states, such as the United Kingdom, the Commonwealth and the Scandinavian countries, employ the method of "legislative incorporation" (or "statutory transformation", as it is sometimes referred to). The norms of treaties become national law by this method only when enacted through the normal legislative process. A larger group of states have adopted the method of "automatic incorporation" whereby treaties become the "law of the land" immediately upon ratification (plus publication or proclamation in some countries). This method is employed by the United States and many European and Latin American countries.

This study examines the application of international labour conventions only in states which have adopted the system of automatic incorporation. It was decided to limit the study in this respect because automatic incorporation is widely considered to be a more effective and progressive method of ensuring the implementation of international conventional law at the national level than the system of legislative incorporation. Yet, the system of automatic incorporation raises a number of complex problems which do not exist under the system of legislative incorporation. A substantial number of states have adopted the technique of automatic incorporation since World War II. This study is thus particularly relevant to current constitutional trends.

International labour conventions were selected because they provide a wealth of primary source material for an examination of the methods, problems and obstacles of introducing treaty norms into municipal law. They are numerous and widely ratified and many have been in force for a considerable length of time. The extensive experience in the supervision of the implementation of these treaties by the International Labour Organization (ILO) has made it possible to obtain substantial information.³ The same wealth of information is not available concerning the application of other similar types of treaties.

International labour conventions obligate ratifying states to make

effective within their jurisdiction the standards laid down in the conventions. The conventions concern such matters as freedom to form trade unions, freedom from forced labour, non-discrimination in employment, social security and conditions of work.

In order to circumscribe the study within reasonable compass it was limited to an examination of the automatic incorporation of labour conventions within a selected number of states. Argentina, France, Mexico, the Netherlands, Switzerland and the United States were selected because they provide especially illuminating examples of problems of national implementation of labour conventions; they were not selected on the basis of geographic region or cultural diversity. Isolated examples from other countries, in particular, Colombia, Guatemala, Italy and Liberia, have also been included.

A comprehensive examination of the application of all types of treaties in each of the countries is not the aim of the study. The focus is rather on problems which have surfaced in the automatic incorporation of labour conventions only. The study has been organized, in general, on a "problem" not a "country" basis. Not all countries have had the same problems regarding incorporation nor to the same extent. Reference will not necessarily be made, therefore, to each country in the consideration of each point. Illustrative examples from the selected countries will be used as appropriate.

Only two of the countries included in the study—the United States and Liberia—are "common law" countries. The choice of constitutional system for the introduction of treaties into national law is not related to whether a country is a "common law" or "civil law" country. The two major "common law" countries—the United Kingdom and the United States—have adopted different systems regarding the introduction of treaty norms into national law. Although they are civil law countries, Argentina and Mexico have constitutional provisions similar to the "Supremacy Clause" of the U.S. Constitution which provides that duly ratified treaties shall become the "law of the land."

Problems relating to the incorporation of labour conventions are similar to those which are encountered in the incorporation of other comparable treaties. This study is particularly relevant in view of the recent entry into force of the two International Covenants on Human Rights.⁴ Although labour conventions have some aspects not commonly characteristic of other treaties, these aspects do not invalidate conclusions regarding their implementation in municipal law. Important studies have been made on the domestic application of the European Convention on Human Rights.⁵ The present work on domestic application of international labour conventions provides an additional examination of practical experience in the national implementation of quasi-legislative

international agreements. Like the earlier studies of the European Convention it highlights many inadequacies of domestic constitutional systems in effectively implementing treaties in national law—in particular, the problem of “non-self-executing” treaty provisions which has occasioned an exceptional amount of doctrinal discussion.

National court decisions and reports of ILO supervisory organs have provided the basic research material on which this case study is based.⁶ Governments have frequently reported to the ILO that conventions are effectively applied in their countries because under their constitutional system they are automatically incorporated in domestic law. The ILO supervisory bodies have examined these contentions in order to determine more precisely what limitations and problems exist in *effectively* applying treaties in automatic incorporation states. Their exploration of these limitations and problems provides the core of the study.

This examination of the automatic incorporation of labour conventions in national law touches on questions relating to public international law, the law of international organizations, and municipal constitutional law. It provides a striking example of the growing interaction between these various branches of law—an interaction which will inevitably become more widespread with the adoption of an increasing number of multi-lateral treaties concerning economic and social policies which are drafted and supervised by international organizations.

NOTES

1. For a perceptive treatment of the recent evolution of treaty law see Paul Reuter, *Introduction au droit des traités* (Paris: Armand Colin, 1972), chapter 1.

2. See Thomas Buergenthal, *Interaction of National Law and Modern International Agreements: Some Introductory Observations*, 18 Am. J. Comp. L. 233 (1970).

3. The present study of the national application of international labour conventions builds on the pioneering work of Nicolas Valticos. See references in bibliography.

4. See remarks by Louis Sohn in Stephen M. Schwebel, ed., *The Effectiveness of International Decisions* (Leyden: A. W. Sijthoff; Dobbs Ferry, New York: Oceana Publications Inc., 1971), p. 364: "... the U.N. has finally adopted the Covenants on Human Rights and the slow process of ratification has started. Once they become law ... many experiences of the ILO, and the European experience and others are going to become very relevant. It is really important to see the effectiveness of the various procedures that have been adopted by other organizations before embarking on the new U.N. venture."

5. Thomas Buergenthal, *The Effect of the European Convention on Human Rights on the Internal Law of Member States*, The British Institute of International and Comparative Law, International Law Series No. 5 (I.C.L.Q., Supplementary Publication No. 11 (1965)); Buergenthal, *The Domestic Status of the European Convention on Human Rights—A Second Look*, 7 Journal of the International Commission of Jurists, No. 1, 55 (1966); Philippe Comte, *The Application of the European Convention on Human Rights in Municipal Law*, 4 Journal of the International Commission of Jurists, No. 1, 95 (1962); Christian Dominicé, *La*

Convention européenne des droits de l'Homme devant le juge national, 28 A.S.D.I. 9 (1972); Andreas A. Khol, *The Influence of the Human Rights Convention on Austrian Law*, 18 Am. J. Comp. L. 237 (1970); A. H. Robertson, ed., *Human Rights in National and International Law* (Manchester: Manchester University Press, 1968).

6. The author also had access to unpublished information in files of the International Labour Office in Geneva.

CHAPTER 1

Labour Conventions and National Law

Lord McNair described the international labour convention as “one of the most striking innovations in the field of treaty-making which has occurred during the present century.”¹ Since 1919, more than 150 labour conventions have been drafted and adopted by the annual Conference of the International Labour Organization. Although they concern different subject matter, these conventions (hereinafter referred to as “ILO conventions”) share certain common features. A number of the innovative features of this large body of conventions result from the effort to regulate the internal law and practice of states through the device of the treaty.

Prior to the founding of the ILO, labour problems had traditionally been considered matters of domestic concern; the effective use of the treaty mechanism to achieve improved and more uniform labour standards necessitated new approaches to treaty-making. In order to ensure the ultimate adoption of appropriate labour standards by Member States, it was considered essential that employers and workers—in addition to government delegates—participate in the drafting of ILO conventions. Thus, employer and worker representatives participate on an equal basis with government delegates in the elaboration of international labour conventions. This feature has remained peculiar to the ILO and has not been adopted by other intergovernmental organizations. Other innovative features of ILO treaty-making (adopted because of the unique nature of labour conventions) are the omission of the practice of governmental signature to the text of drafted conventions, an understanding that no reservations may be made to the conventions and a requirement that Member States submit conventions to their legislative bodies.²

ILO conventions have not only been innovative but they have also been precursors of an ever-growing group of treaties, such as human rights treaties, which are intended to regulate national social and economic policy. Multilateral international agreements laying down general norms—so called “law-making” treaties—existed prior to international labour conventions but they largely concerned such inter-state matters as postal regulations, river and railroad communications and protection of the wounded in time of war. International labour conventions were