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Labour Human Rights in Portugal: Challenges to Their Effectiveness

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Abstract

This article discusses the relationship between Portugal and the International Labour Organization (ILO), considering the extent to which the ILO's system of international labour standards is recognised at the national level in the context of labour law and labour relations, and observes the ILO's special procedures (complaints and representations) in the field of international labour human rights. The use of the ILO's system of complaints and representations by national social actors is relevant for the configuration of the Portuguese labour relations system, considering that the changes and tensions emerging from labour relations gain expression and voice within these mechanisms. In order to assess the effectiveness of national laws and regulations, we analyse the effects of ILO's special control mechanisms on the state, law and labour relations system. Indeed, the use of the ILO's complaints and representations system seems to reveal the ineffectiveness of labour human rights in Portugal. The ILO's special procedures are analysed according to three functions: a political function as a result of the mediation state/labour civil society; an instrumental/procedural function referring to the regulation of conflicts; and a symbolic function related to the setting/expression of social expectations. The soft law characteristics associated with this mechanism as well as its results are also considered.

Key words

Labour human rights; labour relations; ILO; International Labour Organization; soft law; decent work;

Resumen

En este artículo se analiza la relación entre Portugal y la Organización Internacional del Trabajo (OIT), teniendo en cuenta el grado en que el sistema de normas laborales internacionales de la OIT es reconocido a nivel nacional en el contexto del derecho laboral y las relaciones laborales, y observa los procedimientos especiales (quejas y reclamaciones) de la OIT en el ámbito de los derechos humanos laborales

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internacionales. Para la configuración del sistema de relaciones laborales portugués, es relevante el uso que actores sociales nacionales hacen del sistema de quejas y reclamaciones de la OIT, considerando que los cambios y tensiones que emergen de las relaciones laborales adquieren expresión y voz dentro de estos mecanismos. Con el fin de evaluar la eficacia de las leyes y regulaciones nacionales, se analizan los efectos de los mecanismos especiales de control de la OIT sobre el sistema de relaciones estatal, legal y laboral. De hecho, el uso del sistema de quejas y reclamaciones de la OIT parece revelar la ineficacia de los derechos humanos laborales en Portugal. Se analizan los procedimientos especiales de la OIT en base a tres funciones: una función política como consecuencia de la mediación estado/sociedad civil laboral; una función instrumental/procedimental en relación con la regulación de conflictos; y una función simbólica relacionada con el marco/expresión de expectativas sociales. También se consideran las características de las "leyes blandas" asociadas con este mecanismo, además de sus resultados.

Palabras clave

Derechos humanos laborales; relaciones laborales; OIT; Organización Internacional del Trabajo; "leyes blandas"; trabajo decente

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1. Introduction

The ineffectiveness of workers' rights, the disparity in quality jobs[1] and unemployment are human rights violations that arise not only in the global South, but also in the most developed countries (Santos 2006, 2014). Global unemployment rose by nearly 4 million in 2013, reaching 199.8 million, with the global unemployment rate remaining broadly unchanged at 6 per cent. In addition, 839 million workers in developing countries are unable to earn enough to lift themselves and their families above the US$2 a day poverty threshold. This represents around one-third of total employment, compared with over one-half in the early 2000s (ILO 2014).

Considering the apparent apathy of states regarding these violations, transnational solutions for promoting labour human rights are increasingly providing complementary solutions to existing national systems (Ferreira 2005, 2014), particularly within the current context of the globalisation of labour relations, in which nation states are facing increasing challenges. This article investigates to what extent the ILO paradigm is perceived at the national level in labour relations regulation, considering the ILO special procedures of the supervisory system (complaints and representations) as a transnational board of appeal for labour human rights adjudication. The ILO special special procedures are perceived as the main indicators of the international protection of labour rights, outlined in the organisation's legal action system in order to monitor the effectiveness of international labour standards. We consider the hypothesis that the ILO supervisory system represent a legal symbolism – as a transnational body of labour dispute resolution – due to its fostering of the political legitimisation of labour rights, an indicator of the ineffectiveness of labour rights in Portugal.

This research takes an institutionalist perspective (Haworth and Hughes 2003, Trubek *et al*. 2005, Hassel 2008), which promotes the importance of transforming the transnational institutional infrastructure with the goal of deepening democracy in the world of work, and explores the labour human rights paradigm through an analysis of the exogenous influences on Portuguese labour relations. This perspective is mostly relevant for creating conditions of sociological visibility for interactions occurring at the national and transnational level between organisations, individual and collective social actors and labour standards.

The concept of decent work, considered a reference in the domain of labour, especially in the context of employment policies and matters of social cohesion, is also central to our research in analysing the influence of ILO mechanisms on labour relations and working conditions in Portugal. Attention is paid to, among other dimensions, its soft law characteristics, namely in that it establishes a set of standards that all countries should aim to reach, without prescribing an absolute and universal application of laws.

As such, our analysis of the ILO´s influence on the Portuguese labour relations system, primarily through its supervisory system, takes an analytical approach based on the aggregation of interactions between the state, civil society, social partners, labour administration and exogenous political and regulatory influences, comparing its impact on the institutional regulation of labour relations and labour democracy[2].

[1] Recent studies reveal that some OECD countries, despite showing good results with regard to the labour market (for example, high rates of employment), the scenario in matters of quality of work indicators is different, with some countries presenting low percentages of good jobs and others high percentages (ILO 2014). For instance, according to the European Industrial Relations Observatory, the proportion of temporary workers to fixed-term workers is particularly high in Spain, Portugal and Finland.

[2] The importance of labour democracy has been emphasised by several authors. For instance, Amartya Sen, in the ILO report "Your voice at work" (ILO 2000), states that the general value of democracy as a system of governance is the exercise of rights, which should not halt at the door of the enterprises.

We primarily follow a qualitative method in our content analysis of the support documentation referring to the special procedures (complaints and representations), although some quantitative methods are also utilised. We identified and analysed all of the complaints and representations processes submitted to the ILO against Portugal, both by ILO member states and by professional organisations, for failing to secure in any respect the effective observance of any convention to which it is a party within its jurisdiction. A total of 57 cases were analysed, beginning with the first complaint against Portugal in 1961 through the most recent in 2014.

The description of the main issues and social actors involved, according to the context and the historical moment of the submission of the complaints and representations, was based on several information sources, including documents accessed in collaboration with the ILO Office in Lisbon, the extensive information available on the ILO's website and the press.

2. The (in)effectiveness of labour human rights and the ILO's decent work agenda

In this section, we consider the challenges faced within the contemporary world of work, presenting a critical analysis of the (in) effectiveness of labour rights in addition to brief remarks anchored in concepts such as the symbolic use of law, soft law and embarrassment.

Our consideration of the divide between the tradition of civil and political rights and the tradition of economic and social rights is grounded in the perspective of the sociology of law, characterised by its interdisciplinary nature (Arnaud and Fariñas Dulce 1996), and highlights the symbolic dimension of the political function of law (Hespanha 2007, p. 232) in the wake of the critical legal studies movement[3], given its use as a political instrument.

The present theoretical reflection on labour human rights within a transnational normative context assumes humanity as its primary point of reference. Its main legal implementation is the international obligation of all states to be held accountable to the international community regarding the manner in which they exercise their jurisdiction over individuals; in this case, workers (Carrillo Salcedo 2001).

The strengthening of the debate on human rights is justified because the human rights paradigm represents the most complete and integrated policy perspective, based on the principle of universal ethics. The paradigm of human rights recognises universal principles in order to extend the ownership of civil, political and social human rights to as many people as possible, while simultaneously counteracting and preventing the abuses and violations to which they are exposed.

The ethical and theoretical foundation for the emergence of the international protection of human rights was the affirmation of a global community of people, beyond the relationships between states, and is considered to be the most

Michel Hansenne, director of the ILO International Labour Conference in 1992, in a document entitled "Democratization and the ILO," reminds us that political freedom is the guarantor of citizens' autonomy. More recently, Juan Somavia, as ILO Director, insisted on the requirement of democratic conditions for the actual implementation of decent work.

[3] Including those arising in the Frankfurt School and critical legal studies developed in the US since the 1970s (Arnaud and Fariñas Dulce, 1996). The critical legal studies movement emerged as critical of the way the American legal system remained oblivious to the political conflicts that divided the country, such as the Vietnam War, conscientious objectors, etc. Many of these conflicts involved legal issues and could be viewed from the perspective of law. What critical legal studies proposes is more than replacing one doctrinal opinion with another. It is, more radically, to replace the rules of legal practice and discourse to accept that other people can participate in the academic and jurisprudential dialogue of lawyers, hold other types of facts as relevant, speak another language and, above all, admit that law represents controversial knowledge whose choices also reflect ideology and policy choices (Hespanha 2007, p. 235).

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important dynamic of normative and conceptual transformation of the international order that occurred in the 20th century. This dynamic unfolded in three complementary vectors: a normative vector, meaning international legal texts covering all spheres of human dignity; a procedural vector, materialised in the gradual improvement of international systems for monitoring compliance with treaty-established human rights standards; an institutional vector, comprising the international system of human rights protection, including several structures of monitoring and supervision, with a mandate that, although not judicial in nature, uses the power of embarrassment (Pureza 2007) as its primary effective instrument.

The idea of human rights came into prominence after World War II at an important time for the international standardisation of civil, political, economic, social and cultural rights. However, this paradigm has been based on a global, ethnocentric and liberal approach to the state and law, privileging civil and political rights (individual rights) and shrinking collective rights of economic, social and cultural nature.

Over the last few decades, as a consequence of the primacy of first generation human rights, international human rights mobilisation movements, international organisations and labour institutions did not promote workers' rights as human rights (Gross 2006, p. 3), which have become particularly threatened in recent years, with millions of people finding themselves in situations of vulnerability.

This discussion focuses on the cleavage between the tradition of civil and political rights and the tradition of economic and social rights. While the first-generation of human rights always found ways to be submitted to international courts and are associated with rights violations that tend to be justiciable, the second-generation of human rights have not yet found a host for the problem of justiciability. Citizens have legal recourse to file complaints to the United Nations in cases of torture, the death penalty, freedom of expression or freedom of religion (i.e. personality rights and citizenship rights, or first-generation human rights), but there is no similar legal instrument allowing citizens to mobilise protective mechanisms regarding the second-generation human rights introduced to the international legal order under the International Covenant on Economic, Social and Cultural Rights.

The argument of the justiciability of civil and political human rights, which concedes them more effectiveness, is opposed to the idea of the programmatic nature of economic, social and cultural rights, which have a non-binding guidance and therefore reveal a high degree of ineffectiveness (Woodiwiss 2003, p. 4-10). It could be said that, even in terms of international human rights, there is a gap between the hard law of civil and political human rights and the soft law of economic, social and cultural rights.

Therefore, the legal system is unbalanced and there is a double standard in the meaning of the rights of democracy, rule of law and human rights, with priority given to rights involved in the "democratic functioning" of society – civil and political rights. These are collective rights because they are related to the functioning of society as a whole, as opposed to the human rights paradigm in which the human person is individually considered. This fact reveals the privilege given to first-generation human rights is particularly incongruous, from the perspective of justiciability.

In regards to the contrast between the number of people who die in armed conflicts and work related accidents[4], Woodiwiss (2003) contends that it is crucial to refuse

[4] According to ILO estimates, work accidents cause more deaths than armed conflicts, natural disasters or pandemics. Each year, over 250 million work accidents occur worldwide. An average of 5,000 workers dies in work accidents or of occupational diseases each day, which makes a total of 2.5 million deaths / year (ILO 2005).

the idea of privileging civil and political human rights in detriment of social rights, which means defending the thesis of the indivisibility of human rights.

It appears to be important, therefore, that the international legal system is provided with instruments that bind states to adopt measures ensuring the full exercise of economic, social and cultural rights: the right to work and equal pay, the right of workers to join trade unions and the right to an adequate standard of living are a few labour rights that lack a binding force in international law.

The challenges facing the world of work confirms the importance of studying the sociology of human rights (Woodiwiss 2003, Turner 2007), based on critical reflections on the world of work, and reinforces the notion that sociology can make a contribution towards the overall effectiveness of human rights. Aside from effectiveness, there is the space and the need for a general sociology of human rights, which proposes a conception of human rights as a means to an end, rather than as an end *per se*. This approach should allow for a conceptualisation under which no human law can replace another, strengthening the defence of the indivisibility of human rights.

The ILO's decent work concept is particularly salient in this context, considering its orientation towards creating conditions for the effectiveness of a global labour citizenship. This perspective is close to the institutionalist proposals that bring the question of legitimacy to the debate and highlight the role played by symbolic systems and knowledge systems, identified as social institutions.

The ILO's International Labour Standards are an expression of the institutionalist political-legal perspective, which aims to achieve greater justice on a global scale. The ILO paradigm of human rights promotion[5] based on the ILO's Declaration on Fundamental Principles and Rights at Work (1998)[6] is classified as soft law[7], given the absence of features like obligation, uniformity or justiciability.

Regarding the ILO paradigm based on soft law mechanisms, some authors believe that this is the strength of the organisation and not its weakness, considering it more appropriate than an inflexible approach that disregards national specificities (Salazar-Xirinachs 2004). Despite the absence of a univocal perspective of the soft law concept, its supporters question the effectiveness, relevance and appropriateness of using traditional forms of hard law within the broad context arising from national differences and the various issues faced by the international agenda (Trubek *et al.* 2005). However, soft law and the improvement of alternative dispute resolution[8] merged with new forms of legal pluralism and informality in dispute resolution may emphasise existing social inequalities.

[5] The provisions of the ILO (Convention and Constitution) become the model of the regulation of labour relations and the establishment of social rights, settling at the base of the construction of the welfare state. It is, effectively, from the creation of this organisation that states adopt, more systematically, standards and worker protection measures, both at the constitutional level (thereafter, of a social nature) as well as the infra-constitutional level. The rights to work; a fair and equitable wage; to freedom of association, collective bargaining and strike, in addition to social security, are referred to in national frameworks. In principle, this completes the minimum employment rights required to safeguard the dignity of the worker, though it does not guarantee them. It is naïve to ignore the fact that the promotion of the dignity of the worker as a result of the adoption of the aforementioned rights is largely based on concern for the balance and stability of capitalism. The roles of the ILO and of the internal legislation that will follow have secured, however, greater dignity for workers.

[6] This paradigm emphasizes the contrast between the regulatory paradigm that emerged from Bretton Woods in the 1940s, concerned with the social dimension, and the liberal paradigm of the Washington consensus.

[7] This concept, despite not having a unique meaning, is used in this article to refer to normative statements formulated as abstract principles and non-binding resolutions of international organizations.

[8] With regard to lessening judicial involvement and soft law mechanisms, what is at issue is the decline of traditional law and its forms of implementation and compliance through the imposition of sanctions. The law and the traditional system of penalties retreat in the face of the movement of "transference" to a target society according to a normative principle of self-regulation and self-determination of interests. The right of the state pulls back and gives rise to regulations negotiated between the parties concerned.

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The symbolic dimension of the ILO framework, especially the use of its general principles through the submission of complaints to the organisation, is a valuable argument within the national context, the power of embarrassment (Pureza 2007) being its privileged instrument as a mechanism of legitimisation through the symbolic use of law (Bourdieu 1989a, 1989b).

In the current context of economic crisis, social contradictions and challenges to labour law require not only the reconstruction of the dominant conception of the state[9], the law and the judiciary, but also of the effectiveness of national and international human rights at work, given that the state is unable to ensure their effective protection. Considering the limitations observed at the national level, the mobilisation of the protection of those human rights at the international level is even more important. Covenants and transnational regulatory agencies in the field of labour have converged on a common guideline for resolving labour disputes based on three ideas: promotion of social dialogue; development of alternative dispute resolution; and increasing prevention mechanisms.

On the other hand, some authors (Trubek 2000) have been arguing for a transnational perspective on labour relations that "rejects the idea that the adjustment possibilities are limited by the choice between the national and the global, understanding that more complex procedures can be built, interconnecting the various regulatory areas at many levels and across borders, developing standards, local practices, law, supranational and international law in the interest of effectively protecting workers and their rights". Although the role played by national systems is important, the effectiveness of labour standards and workers' rights depends on the involvement of transnational actors and transnational standards.

Considering the urgent need to discuss labour and social issues according to their transnational contexts, and the strains that ongoing reform processes create in the face of the labour human rights paradigm, the ILO's concept of decent work stands out by focusing on the promotion of a labour citizenship and transnational normative ambition (Ghai 2006), holding humanity as its foundational reference point and making its main point of legal intervention the imposition of international obligations on all states, holding them accountable to the international community in the way that they exercise their jurisdiction over workers.

In 1999, Juan Somavia presented the concept of decent work and its associated labour human rights at the International Labour Conference. Decent work essentially refers to people's aspirations for their working lives. These include: having opportunities for work that is productive and delivers a fair income; security in the workplace and social protection for families; better prospects for personal development and social integration; freedom for people to express their concerns, organise and participate in the decisions that affect their lives; and equality of opportunity and treatment for all women and men. Concern for the social dimension is also present in the affiliation of decent work with the Millennium Goals and the World Commission on the Social Dimension of Globalization Report "A Fair Globalization: Creating Opportunities for All" (2004).

The decent work concept also emerges as being virtuous, since it is an inclusive concept that incorporates precarious work, gender and discrimination issues, atypical and informal economies without avoiding the structured sector of the economy and regular work, thereby constituting a good springboard from which to revisit the assumptions of political and legal systems regarding labour relations.

[9] Human rights can guide judicial involvement in international relations and international codes, aimed at the construction of a multilateral and peaceful world community. It is this international community that can legitimise global distributive justice through the redistribution and reallocation of material resources on a global scale. This perspective is based on a methodological approach that, through a change of scale – that is, from national to global – finds its legitimacy in a community, which is no longer a national community but the international community (Henriques 2015).

We believe that achieving the objectives of decent work must be at the centre of global, national and local strategies aimed at economic and social progress. The multiple dimensions of decent work and the way they relate underlie the analytical framework concerning the interdependence of labour rights, employment, social security and social dialogue (Ghai 2006, p. 23). The four dimensions of decent work – employment, social protection, workers' rights and social dialogue – are reciprocally influential, with the aim of maximising the synergies between each of the elements, involving institutional policies and options that allow for the constraints and strains of labour relations to be overcome (Ferreira 2008).

After this brief analysis of the importance of the ILO and its regulatory framework in the face of the ineffectiveness of labour human rights, in the next section we will present a characterisation of the relationship between Portugal and the ILO, namely with regard to the complaints and representations submitted to the ILO against Portugal.

3. Portugal and the ILO's supervisory mechanisms: complaints and representations

The ILO's Declaration on Fundamental Principles and Rights at Work, adopted in June 1998 in response to the concerns of the international community regarding the process of globalisation and the social consequences of trade liberalisation, made clear that labour rights are universal, applying to all people in all states - regardless of the level of economic development. It specifically mentions groups with special needs, including the unemployed and migrant workers, and recognises that economic growth alone is not enough to ensure equity, social progress or the eradication of poverty.

ILO member countries reaffirmed their good-faith commitment to respect, promote and realise the principles of freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced labour, the effective abolition of child labour and the elimination of discrimination in employment and occupation (Hansenne 1999, Blanchard 2004).

Focusing its action on the dignity of work and the protection of workers and their families, the ILO has developed various means of supervising the application of Conventions and Recommendations in law and practice following their adoption by the International Labour Conference and their ratification by States. There are two kinds of supervisory mechanism: regular system of supervision and special procedures. The regular system of supervision is based on the examination by two ILO bodies of reports on the application in law and practice sent by member States and on observations in this regard sent by workers' organizations and employers' organizations: the Committee of Experts on the Application of Conventions and Recommendations and the International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations. Unlike the regular system of supervision, the special procedures are based on the submission of a representation or a complaint: procedure for representations on the application of ratified Conventions; procedure for complaints over the application of ratified Conventions and special procedure for complaints regarding freedom of association (Freedom of Association Committee).

Conventions are binding once ratified by the states. However, these conventions do not establish a regime with immediate effect in states' legal systems, since there is a possibility of not ratifying the adopted texts. The complaints and representations system assumes a relatively different procedure, particularly concerning the competent bodies, the monitoring of processes, the issues and the severity of the issues involved, and the legitimacy of the actors involved.

The monitoring and control of the effectiveness of international labour standards through the special procedures – the Committee on Freedom of Association, the

Commission of Inquiry and Conciliation Commission – fit within the ILO's traditional system of action (Alston 2005) on a legal basis (Blanpain 2004, p. 10), and it can be generically acknowledged that, at the transnational level, they reproduce the logic of adjudication or intervention by a third party in the usual conflict resolution of national systems. So, the ILO supervisory system can be conceptualised as a transnational "board of appeal" for labour conflicts occurring in a national space, primarily due to the fact that the Portuguese case has revealed a gap between the commitment made to the ILO during the ratification process and subsequent conformity to the standards (Rodrigues 2013).

Our analysis of the ILO complaints system considers its three functions: the political function, resulting from the mediation effect between the state and civil society of work; the instrumental function, related to conflict resolution; and the symbolic function, associated with setting social expectations. Furthermore, we also consider the soft law features associated with this mechanism and their consequent results.

In the case of democratic countries where there is already a strong incorporation of international labour standards, far beyond the fundamental and priority conventions, the formulation of complaints and representations to the organs of special control preserves the adversarial logic of national social partners (Ferreira 2005). The "exhaustion" of the conflict resolution system and social dialogue at the national level has a functional equivalent in the special control mechanisms, and its mobilisation is strongly tied to the standard and tradition of national labour relations systems. Furthermore, a nation's moments of highest social crisis and conflict can also induce demand for the mechanisms of the special procedures.

In the Portuguese case, the evolution of the labour relations system seems to have been extensively influenced by the ILO labour governance paradigm, which is reflected in the political and legal mobilisation of the complaints system, the realisation of the ineffectiveness of labour human rights in Portugal and demonstrating the reconfiguration of the relationship between the state and civil society of work. In this regard, the presence of the social partners should be noted, wherefore the ILO's activity as a means of resolving labour disputes is directly related to the associative principle and social dialogue[10].

The mechanism of complaints and representations is provided for in Articles 26 through 34 of the ILO Constitution. Complaints are filed against a member state that has not implemented a ratified convention by another country that has ratified the same convention. They can also be submitted by a delegate to the Conference, or by the governing body itself.

After receiving the complaint, the governing body may nominate a committee of inquiry composed of three independent members who will then conduct an in-depth analysis of the complaint in order to formulate recommendations regarding the measures that should be taken to resolve the problems at stake. If a country refuses to take the recommendations into account, the governing body may employ the measures foreseen in ILO Constitution, whereby "In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the

[10] The activity of the European Court of human rights in the field of labour must also be referred to, since it has handed down important decisions on issues such as the rights of movement of workers, of discrimination between men and women, sexual discrimination and on matters relating to the delay of ongoing processes in national courts. Without having a streamlined form of access to the European Court of human rights in employment, given the procedural limitations preventing more widespread access, decisions and judgments by the European Court shall be listed by their innovative character of potential demand to be promoted in the future. In the formal non-judicial domain and associated with the violation of the rights of the European Charter on employment in areas such as child labour, work schedules and discrimination, the possibility of trade unions, NGOs or workers submitting complaints to the European Commission should also be noted (Ferreira 2005, p. 200-214).

Conference such action as it may deem wise and expedient to secure compliance therewith" (Art. 33, ILO Constitution).

Article 33 measures were used for the first time in the ILO's history in 2000. In this case, the governing body asked the International Labour Conference to take suitable measures to compel Myanmar to stop using forced labour. A complaint was lodged in 1996, under Article 26 of the Constitution for the violation of Convention 29 (Forced Labour 1930), and the appointed committee of inquiry had confirmed a broad and systematic use of forced labour.

Regarding complaints related to freedom of association, it is important to recall that freedom of association and collective bargaining are part of the ILO's founding principles. Upon adoption of Conventions 87 (Freedom of Association and Protection of the Right to Organise) and 98 (Right to Organise and Right to Bargain Collectively), the ILO established that these principles should be subject to another supervisory procedure in order to guarantee their enforcement, even by those countries that did not ratify the conventions. To this end, the Committee on Freedom of Association (CFA) was created in 1951 with the mission of analysing complaints against violations of freedom of association principles, even when the state at stake had not ratified the conventions. The complaints are initiated by employers' or workers' organisations against a member state.

The Committee on Freedom of Association is set up by the governing body and it is composed of an independent president, three employers' representatives and three workers' representatives. If the complaint is admissible (valid in formal terms), a dialogue is initiated with the relevant government. If the CFA concludes that there has been an infringement on the standards or the principles of freedom of association, a report shall be produced and submitted to the governing body with recommendations on how to solve the case. The government is invited to take the CFA's recommendations into account and implement them. If the country at stake has ratified the conventions, the Committee of Experts shall take care of the legal aspects. The CFA may also opt to propose a procedure of direct contact with the relevant government, namely with governmental representatives and social partners.

The complaints procedure is governed by Articles 24 and 25 of the ILO Constitution. Professional organisations of employers or workers are entitled to present a complaint to the Board of Directors of the ILO[11] in the event that "any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party," and furthermore, "the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit." At this point, a tripartite committee composed of three members of the Board of Directors will be created and will analyse the complaint and the government in question's response. A report will then be prepared and submitted to the Board of Directors, explaining the legal aspects and the practices concerned, evaluating the information presented and proposing recommendations. The representations procedure is confidential and the governing body may decide to: a) file without further action; b) adopt the complaints procedure; or c) publish the representation and its reply (if there is one).

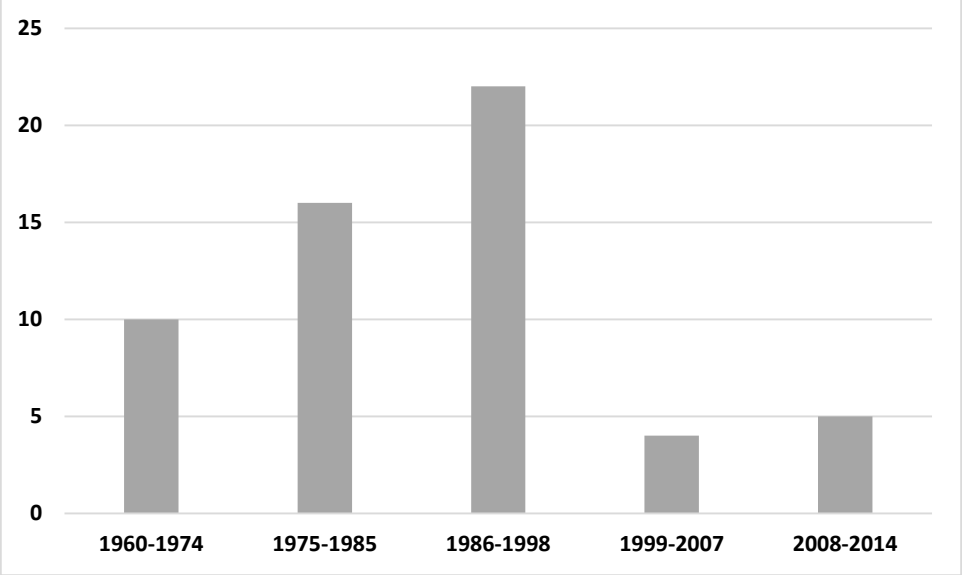
Whenever a case is filed without further action, the Constitution ensures that, "If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it" (ILO Constitution, Art. 25). Namely, if the

[11] National or international worker and employer organisations may submit a complaint, as stated in Article 24 of the ILO Constitution. Workers cannot submit a complaint directly to the ILO, but can transmit the information to their respective organisation.

representation results from the non-compliance with Conventions 87 and 98 (on the matter of the Right to Organise), normally the Committee on Freedom of Association will be responsible for its analysis.

With regards specifically to the analysis of complaints and representations, we considered it appropriate to study all of the complaints against Portugal since the first was filed in 1961. This methodological approach is justified mainly by the fact that analysing only the complaints subsequent to 1974 would exclude the famous complaint that the Republic of Ghana presented against Portugal regarding forced labour in the colonies imposed during the fascist regime. Failing to consider this complaint would, empirically-speaking, represent an enormous waste of information in a study of the relationship pattern between Portugal and the ILO. Therefore, the analysis presented in this article covers all complaints and representations made to the ILO against Portugal (until 2014), representing a total of 57 processes.

Chart 1: Complaints and representations submitted to the ILO against Portugal



Source: ILO

Concerning forced labour, Portugal was denounced in February 1961 by the government of the Republic of Ghana for maintaining forced labour in the Overseas Provinces of Angola, Mozambique and Guinea-Bissau, violating Convention 105. The ILO concluded that Portugal was not complying with all the obligations imposed by the convention on the abolition of forced labour since the date it had entered into force (1960). At the time, the seriousness of the situation and of the infringements justified creating a committee of inquiry to analyse the case – the first in the history of the ILO. After 1963, when a committee was set up to analyse the issue of apartheid in South Africa, the debates at the International Labour Conferences of the ILO became quite political regarding the "colonial" question. That year, the ILO expressly reproached all forms of colonialism. In 1965, the ILO publicly adopted a resolution condemning the maintenance of forced labour in Portuguese colonies, particularly in Angola. In 1966, the Committee published a special report recognising that Portugal had introduced some alterations to its legislation moving towards harmonisation with the forced labour conventions. A parallel problem to that of forced labour, according to the ILO, was that the situation Portugal had created in its colonies threatened peace and safety in Africa. The ILO considered the Portuguese Government's application of trade union legislation in Angola, Mozambique and Guinea-Bissau clearly infringed upon Conventions 87 and 98 of the ILO.

Therefore, at the beginning of the seventies, the ILO adopted another condemnatory resolution on the situation of freedom of association. Several recommendations had been made for revising the labour legislation in force in the territories of Angola, Mozambique and Guinea-Bissau, as well as several direct contacts to ensure that the Portuguese government would also guarantee the proper functioning of the labour inspection services.

Between 1960 and 1969, still during the fascist regime, there were an extensive number of cases, although most had been filed by the ILO itself. During the political regimes of the military dictatorship and the "Estado Novo" (New State), Portugal was often denounced by the ILO for systematic violation of the conventions on Freedom of Association and Forced Labour. During this period, the violations concerning freedom of association were lodged by international trade union organisations and the cases had been filed without further action, whether for formal reasons or because the political context had changed; that is, with the transition to a democratic regime, some of the reasons for dispute had disappeared.

After 1974, the ILO's influence – particularly through the Committee on Freedom of Association – on the Portuguese system of labour relations was reinforced[12]. Within the framework of a democratic society, the principle of freedom of association received legal recognition both at the constitutional and the ordinary legislation levels. That is why the complaints brought against the Portuguese government had a paradigmatic value[13].

The period between 1980 and 1989 saw the greatest number of complaints and representations submitted to the ILO against Portugal. This happened in the aftermath of an economic crisis with strong repercussions on the employment system, and this was the time of Portugal's integration in the EEC (1986), of the IMF's second programme of stabilisation (1983/84), and the start of the industrial renewal process, as well as of changes deriving from the introduction of new technologies (Campos 1994).

The fairly neoliberal political context of the time, illustrated, for example, by several privatisations, issues with wage arrears, the institutionalisation of social dialogue, the reconfiguration of the pattern of industrial relations, the relatively offensive measures against workers and syndicates and the recognition of civil servants' right to bargaining and taking part in the definition of their working conditions, were some of the constraints Portugal was facing at the time.

Beyond these weakening factors of workers' actions for representation, union pluralism had been reinforced, as had the competition between the General Confederation of Portuguese Workers (CGTP-IN) and the General Union of Workers (UGT). All these elements contributed towards the hypothesis that the complaints brought before the ILO had worked as a "safety valve" for labour conflicts during a period characterised by great instability in the system of labour relations, wherein the state's regulating role was being questioned along with the reinforcement of the pluralist character of the intermediation system of interests on the workers' side (Ferreira 2005).

[12] In this respect, we should mention a study by Maria de Fátima Falcão de Campos (1994), which examines the complaints against the Portuguese Government submitted to the Board established by the ILO to monitor the application of the principles on freedom of association -- the Committee on Freedom of Association, describing the international sources of law in the field of freedom of association, in particular the ILO conventions that constitute the basic texts on the subject and the specific monitoring system of social rights.

[13] Moreover, it is recalled that in the period prior to 1974, two claims were filed against Portugal for violation of trade union rights.

Regarding the content of the complaints and representations, most of the cases are concerned with fundamental rights[14], with the exception of one where no mention to a particular convention was made (it has thus been excluded) and another one which related exclusively to employment policy, a complementary matter of priority, though not fundamental. The cases concerning freedom of association represented the majority of the 57 total procedures[15].

Table 1: Complaints and representations submitted to the ILO against Portugal, by theme

Themes	No. of cases
Exclusively on freedom of association	46
On freedom of association and other matters simultaneously[16]	2
Exclusively on forced labour	4
Exclusively on discrimination	1
Exclusively on employment policy	1
Failure to comply with the Declaration of Philadelphia	1
Other fundamental rights (Safety and Health at Work and job security)	2

Source: ILO

As explained above, the representations and complaints have relatively different proceedings, namely in terms of the competent bodies involved, the monitoring of the processes, the subject matters and their seriousness, and the legitimacy of the actors bringing the cases before the ILO. Therefore, we have chosen to make autonomous, qualitative evaluations of the cases.

Considering the period between 1981 – the date of the first complaint lodged after the 25th of April 1974 – and 1998, 22 complaints were communicated to the ILO regarding freedom of association. These complaints may be grouped into three categories: collective bargaining within public service; the state's interference in collective bargaining; and the right to freedom of association (Campos 1994). Of this set of 22 complaints registered in the 1980s and 1990s, 13 were made in the period between 1981 and 1986.

In the 80s, the ILO had decreased its normative activity on matters of freedom of association. In return, it intensified efforts to promote and supervise the enforcement of the convention. Meanwhile, the shift in world politics that occurred after the fall of the Berlin Wall and the generalisation of the market economy triggered the evolution of several countries' legislation and a substantial rise in the number of member states and of ratifications of core conventions regarding freedom of association (87 and 98).

We will now take a look at the complaints and representations submitted to the ILO against Portugal between 2008 and 2014. The year 2008 was punctuated by the bankruptcy of Lehman Brothers, the fourth largest bank in the United States, which set in motion a world system collapse and a crisis which aggravated the economic and social crises that had been simmering since the 1990s.

In 2009, a complaint against the Portuguese Government was presented by CGTP-IN concerning fundamental rights and freedom of association (Conventions 87 and

[14] Matters deemed Fundamental Rights are: Forced Labour; Freedom of Association; Discrimination and Inequality; Child Labour: International Labour Organization Classification.
[15] The cases filed with no further action were also included.
[16] Matters like: general working conditions (wages, paid holidays), discrimination, and forced labour and labour inspection.

98). The subject of this complaint referred to the adoption of legal provisions that restricted the workers of a postal and telecommunications company from exercising their right to collective bargaining.

In 2011, the Occupational Association of Professional Police Officers (ASPP/PSP) filed a complaint against the Portuguese Government for violating the fundamental rights and health and safety conditions of workers. The complainant organisation alleged that the Government of Portugal had failed to comply with the obligations contained in Convention 155 by not giving due effect, in law and in practice, to its provisions with regard to workers in the Public Security Police (PSP). The complainant organisation also alleged breaches of the Council Directive 89/391/EEC of June 12th, 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (as amended by European Parliament and Council Directive 2007/30/CE); Articles 7, 8, 23 and 24 of the Universal Declaration of Human Rights; Articles 2, 3, 6, 21 and 22 of the European Social Charter (Revised); and Articles 9(d), 64, 59(1)(c) and 59(2)(c) of the Constitution of Portugal.

More recently, in 2013, the Union of Labour Inspectors (SIT) filed a claim with the International Labour Office, in accordance with Article 24 of the ILO Constitution, alleging Portugal's non-observance of the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Occupational Safety and Health Convention, 1981 (No. 155).

Also in 2013, a complaint was filed against the Portuguese Government by the Union of Dockworkers, Cargo Handlers and Maritime Clerks in central and southern Portugal, Union XXI – Trade Union Association of Administrative Staff, Union of Dockworkers of the Port of Sines, Union of Dockworkers of the Port of Aveiro, and the Union of Dockworkers, Cargo Handlers and Clerks of the Port of Caniçal. These unions alleged non-observance by Portugal of the Dock Work Convention, 1973 (No. 137). The complainant organisations recall that the legal framework governing dock work was established under Legislative Decree No. 280/93 of August 13th, 1993, of which Section 2(a) stipulates that the dock labour force shall be exclusively comprised of workers in possession of a card certifying that they are duly employed and shall perform their duties under an employment contract of indefinite duration. According to the complainant organisations, this national legislation fulfilled the main objective of Convention 137, which was – and still is – to guarantee the stability of employment and remuneration of dockworkers. For their part, dockworkers should be available to carry out regular work in the port and depend on their work as such for their main annual income. The collective agreements concluded at the level of the various national ports, established in accordance with the Convention, also set out to attain this objective.

In 2014, the National Federation of Unions of Workers in Public and Social Services (FNSTFPS) presented a complaint alleging non-observance by Portugal of the Forced Labour Convention, 1930 (No. 29), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), established under Article 24 of the ILO Constitution by the National Federation of Unions of Workers in the Public and Social Services (FNSTFPS). This complaint was against the labour regime regarding the unemployed that are placed on Public Administration employment contracts, denouncing the situation of exploitation that this framework sets up and complaining about the maps integration staff in performing their duties. The CGTP estimates that there may be more than 600 000 Public Administration workers in this situation. The Union believes that this situation negates the concept of decent work as defined by the ILO and constitutes a form of forced labour, since the unemployed cannot reject it, or else they lose their unemployment benefits. The complaint was addressed to the Director-General of the ILO and refers to the violation of the Conventions No. 29 e 111 and Recommendation No. 111 relating to forced labour and discrimination at work and in employment.

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The themes of the 57 complaints and representations against Portugal[17] are, mostly, surrounding fundamental rights[18]. There are 46 cases made exclusively on the basis of freedom of association, which constitute the majority of the complaints and representations. There are two cases on freedom of association and, simultaneously, other subjects. There are also four cases of forced labour, a case of discrimination, a case of employment policy, a case of violation of the Declaration of Philadelphia and two cases concerning other fundamental rights (health, hygiene and safety at work and job security).

Regarding the economic sector and the actors who lodged complaints with the ILO, the main complainants have been trade unions of the sectors of transport and telecommunications (through unions of maritime and air transport) and the civil service, and most cases were submitted by individual unions. Also noteworthy, at the national cross-sector level, is that the CGTP-IN took positions at several times during the eighties. What stood out during the sixties and early seventies was the strong denunciation of the embarrassing trade union situation in Portugal by international trade union structures, which took a stand because the Portuguese unions were unable to do so.

Complaints and representations to the ILO can, after an initial review and screening, be closed for not meeting the required conditions for reception of a case. Of the 57 total cases, about 14% of them were closed. The receivability of a complaint is subject to the following conditions: (a) it must be communicated to the International Labour Office in writing; (b) it must originate from an industrial association of employers or workers; (c) it must make specific reference to Article 24 of the Constitution of the Organization; (d) it must concern a Member of the Organization; (e) it must refer to a Convention to which the Member against which it is made is a party; and (f) it must indicate in what respect it is alleged that the Member against which it is made has failed to secure the effective observance of the said Convention within its jurisdiction[19].

4. Final considerations

Workers are the largest group of people vulnerable to human rights abuses. Around the world, we are witnessing the degradation of the conditions of work and life, the naturalisation of insecurity and increasing inequalities and unemployment. This is the dimension that calls to governments and international organisations to act in the defence of human dignity.

The exercise of thinking about labour rights is far from reaching any consensus and faces challenges in some ways similar to those faced by human rights. This demanding exercise must refuse *a priori* prescriptions and follow a hermeneutic "of suspicion" which exhaustively questions the conditions, effects and political-legal implications underlying the current agenda.

An approach of human rights from the perspective of their (in) effectiveness led us to an analysis in which transnational solutions for resolving labour disputes are taking on a growing role of complementarity with regard to national systems, particularly in the current context of the transnationalisation of labour relations, in which nation-states are proving to face growing difficulties in managing labour conflicts.

Although legal regimes, wages and working conditions are defined at the national level, transnational systems may take on a complementary role to national systems of industrial relations, strengthening the rights of workers through a set of

[17] Includes the set of cases that were also archived.
[18] Matters which constitute fundamental rights, in accordance with the classification assigned by the ILO, are as follows: forced labour; freedom of association; discrimination and inequality; child labour.
[19] See Article 2 of the Regulation regarding the procedure for the examination of complaints about Articles 24 and 25 of the ILO Constitution.

international structures and operating rules to support national standards and practices by strengthening them or replacing them.

Our choice to analyse labour rights and their effectiveness from an institutionalist perspective stemmed from our concern for creating conditions of sociological visibility in regards to interactions occurring at the national and transnational level between organisations, individual and collective social actors and norms of the labour sphere. Thus, our reflection on the influence of the ILO on labour regulation in Portugal has been structured according to an analytical procedure based on the aggregation of interactions between the state, civil society, social partners, labour administration and exogenous politico-normative influences.

In what specifically concerns the complaints and representations submitted to the ILO against Portugal, in accordance with the need for innovative political mobilisation in terms of the symbolic extension of workers' rights while also attending to the dimension of human dignity, the potential of the ILO's soft law is evident. Its action, despite not being judicial in nature, is based on instruments that are effective due to their symbolic dimension, that is, they represent mechanisms of legitimisation through the symbolic use of a reference framework based on the fundamental principles of the ILO.

This perspective of action based on soft law mechanisms is the strength of the Organization, as it proves to be more suitable than an inflexible approach that does not take national specificities into account. Thus, paradoxically, the ILO's soft law instruments hold similar, if not more potential for efficacy than hard law, given the status they have acquired and the dissemination of the ILO's legal framework regarding human rights work to the public.

After 1974, the influence of the ILO in the domain of labour in Portugal can be grouped into three periods. The first, associated with the process of the consolidation of democracy, in which the repositioning of the state and civil society through the social partners in the regulation of labour relations was critical. The second period took place between the late 1980s and early 1990s and was marked by an intense mobilisation of the complaints and representations mechanism on the part of trade unions in matters of acquiring rights to organisation and syndicate action. In a third period, mobilisation and demand stabilised by the end of 1990. This may be related with the entry of Portugal into the European Union in 1986 and the subsequent influence of the normative frame of community social law and the implementation of the European employment strategy (1997). Since then, in the context of the deregulation and relaxation of labour law and industrial relations, the mobilisation of the ILO's standards made it an instrument which seeks to preserve labour rights against the disruptive trends that they face.

The analysis of the normative contribution of the ILO on the effectiveness of labour rights has confirmed the hypothesis that the ILO's complaints and representations system constitutes an indicator of the ineffectiveness of human rights work in Portugal, becoming an access route to labour justice as a transnational means of resolving labour conflicts arising within a national space. On the other hand, the importance of resorting to using the system of complaints and representations of the ILO also resides in its symbolic function associated with the effect of embarrassing the state target to complaints and representations from the ILO and other member states.

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Annex 1 - Complaints and representations submitted to the ILO against Portugal

Complaints/Representations	Year
Complaint filed by the Government of Ghana concerning the observance by the Government of Portugal of the Abolition of Forced Labour Convention	1961
Complaint of the *International Confederation of Free Trade Unions*	1961
Complaint of the World Federation of Trade Unions	1962
Complaint of the Trade Unions International of Workers of the Building, Wood and Building Materials Industries	1962
Complaint of the International Union of Mineworkers against Portugal, Spain, South African Republic, Iran, Greece	1962
Complaint of the World Federation of Trade Unions	1963
Complaint of the World Confederation of Labour	1970
Complaint of the International Confederation of Free Trade Unions and the World Federation of Trade Unions	1970
Complaint lodged by the World Confederation of Labour relate to the arrest of several trade union leaders	1971
Complaint of the World Federation of Trade Unions concerning the infringement of trade union rights in Portugal	1980
Representation of the Trade Union of Industry Workers Embroidery, Tapestries and Textiles	1981
Complaint of the National Federation of Public Employees' Trade Unions, a federation belonging to the General Confederation of Portuguese Workers	1981
Complaint of the Trade Union of Workers of the Pharmaceutical Industry and Trade, a union belonging to the General Confederation of Portuguese Workers	1981
Complaint of the General Confederation of Portuguese Workers and the Trade Union Federation of Textile, Wool and Garment Workers	1981
Representation presented by the Union of Workers of the Aviation and Airports	1981
Representation of the National Union of Civil Aviation Flight Professionals	1982
Representation presented by the National Navigation Company	1983
Complaint of the General Confederation of Portuguese Workers – alleges an infringement of the right of free collective bargaining	1983
Representation presented by the Portuguese Association of Bank Employees for Co-operation, alleging non-observance by Portugal of the Declaration concerning the Aims and Purposes of the ILO	1983
Complaint submitted by the National Trade Union of Bank: Executives and Technicians	1983
Complaint of the Committee for the establishment of a state security police trade union association	1983

Complaint of violation of trade union rights in Portugal presented by the Union of Workers in the Manufacturing Establishments of the Armed Force	1984
Representation alleging failure by Portugal to implement a number of international labour Conventions which it had ratified, presented by the General Confederation of Portuguese Workers-National Inter-Union	1984
Complaint of the General Confederation of Portuguese Workers – alleges that the Government has interfered in the trade union movement in order to favour one organisation over another, and considers that it has been discriminated against in connection with workers' participation in a state body	1984
Complaint of the National Federation of Public Employees' Trade Unions – alleges the infringement of trade union rights in Portugal in connection with the bargaining procedure for the review of public service wages	1984
Representation alleging failure by Portugal to implement a number of international labour Conventions which it had ratified presented by the General Confederation of Portuguese Workers-National Inter-Union	1984
Complaint of the National Federation of Public Employees' Trade Unions – allege the infringement of trade union rights in Portugal in connection with the bargaining procedure for the review of public service wages for the year 1986	1986
Complaint submitted by the Union of Workers of the Southern and Islands Insurance Companies – alleges an infringement of the right of collective bargaining by the Government of Portugal	1986
Complaint of the National Federation of Public Service Unions, an organisation affiliated to the General Confederation of Portuguese Workers, which claims to represent the majority of workers in the health sector except physicians and nursing personnel – alleges a violation of the Labour Relations (Public Service) Convention (No. 151)	1986
Complaint of violations of freedom of association against the Government of Portugal presented by the National Trade Union of Civil Aviation Flight Personnel	1986
Representation submitted by the General Confederation of Portuguese Workers	1987
Representation lodged by the Federation of Hotel and Tourism Trade Unions	1988
Complaint of violation of trade union rights in Portugal presented by the General Confederation of Portuguese Workers, concerning measures taken by the authorities on the occasion of a strike organised in public sector transportation enterprises, the Lisbon Railway Company and the Lisbon Underground Railway	1989
Complaint of the Trade Union of Casino Croupiers	1989
Representation submitted by the National Federation of Teachers	1989
Representation submitted by the Union of State Technical Boards	1989
Complaint of violation of freedom of association submitted by the Trade Union of State Technical Managerial Staff	1990
Complaint of violation of freedom of association against the Government	1992

of Portugal submitted by the Trade Union of Officers and Mechanical Engineers of the Merchant Marine and the Federation of Seafarers' Trade Unions	
Representation submitted by the National Federation of Trade Unions of Public Service	1992
Complaint of violation of freedom of association submitted by the Trade Union of State Technical Managerial Staff and the Trade Union Front of the Public Administration	1992
Representation submitted by the National Union of Local Government Employees	1993
Complaint of violations of trade union rights presented by the National Union of Post and Telecommunications Employees	1993
Complaint of the General Union of Workers that alleges that the Portuguese Government has violated Conventions Nos. 87 and 98 as regards the determination of the minimum services to be maintained in the event of a strike	1994
Representation submitted by the Union of State Technical Boards	1994
Representation against the countries of the European Union presented by the Danish Association of Air Transport sector workers	1995
Representation submitted by the Union of Workers of the Municipality of Lisbon	1996
Complaint of the *State Technical Employees' Union concerning g*overnment interference in the collective bargaining process and replacing strikers during a strike	1997
Complaint of the Occupational Association of Professional Police Officers – alleges lack of dialogue with the employer and failure to consult it in the adoption of legislation directly affecting it	1998
Representation submitted by the Union of State Technical Boards	2004
Complainant of the *Union of Independent Trade Unions* objects to its exclusion from the Economic and Social Council and the Permanent Commission for Social Partnership, along with the legislative provisions that mention by name the trade unions which are members of these bodies	2004
Representation submitted by the National Federation of Teachers	2004
Complaint of the General Confederation of Portuguese Workers concerning the adoption of legal provisions that are prejudicial to the exercise of the right to bargain collectively, restrictions on the right to bargain collectively in a postal and telecommunications company	2005
Representation alleging non-observance by Portugal of the Occupational Safety and Health Convention, made by the Occupational Association of Professional Police Officers	2009
Representation alleging non-observance by Portugal of the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Occupational Safety and Health Convention, 1981 (No. 155), made by the Union of Labour Inspectors	2011
Representation of the Union of stevedores, cargo handlers and maritime checking clerks in central and southern Portugal, Union XXI – Trade	2013

union association of administrative staff, technicians and operators at the container cargo terminals in the Port of Sines, Union of dockworkers in the Port of Aveiro, Union of stevedores, cargo handlers and checking clerks at the Port of Caniçal	
Representation alleging non-observance by Portugal of the Forced Labour Convention, 1930 (No. 29), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), made by the National Federation of Unions of Workers in the Public and Social Services	2013
Complaint of the General Confederation of Portuguese Workers – alleges that section 7 of Act No. 23/2012, of 25 June 2012, introduced amendments to the Labour Code that violate the principles of collective bargaining	2014

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