CAPTIVE AUDIENCE SPEECH: ARGENTINA

Jorgelina Alimenti†

"Captive audience speeches" on unionism held by the employers have not incited any special interest or controversy among authors in Argentina. Moreover, the topic has been ignored not only by those specialists in labor law but also by those dedicated to constitutional matters, in spite of the fact that this practice clearly involves two fundamental and strategic rights—freedom of association and freedom of speech. At the same time, judicial labor cases where employers have fired workers for not attending these meetings or, on the other hand, workers have considered themselves dismissed for being obliged to attend one, were not found.

This situation could be interpreted as the result of an entrenched and non-resisted practice on captive audience speech in which workers resignedly attend and listen the employer's speech (or the discourse of someone he pays) aimed to persuade them about why a union is not needed or would not be in the employees' interests.

But the fact is, in Argentina, as far as we found out, employers do not hold these compulsory meetings in which workers are forced to listen to the their arguments for resisting syndicalization. Or, we should say, there is not a widespread enterprise custom in this sense. The strong presence of trade unionism in our system of labor relations makes us think that, besides being unlawful, such practice would not be recommendable for being an important source of conflicts.

Notwithstanding this lack of jurisprudential and doctrinarian opinions about this particular subject, we consider that this sort of campaign against workers' organizations would be considered an unfair practice, that can be defined, as it generally is in Argentina, as the employer's action or omission contrary to the ethics of the labor relationship. In other words, this behavior would violate trade union freedom and, in consequence, would be considered as an anti-syndical act.

† Legal Relator of the Supreme Court of Justice of the Province of Buenos Aires, Argentina.

In order to explain the position we'll make, in first place, a brief but necessary individualization of the main normative sources involucrated and, after that, we'll analyze the facts from that legal perspective.

The National Constitution includes norms related to both rights under analysis. In 1957 the Constitutional Convention incorporated under number 14 bis a new article consecrated to social rights. This article is divided into three paragraphs. The first one, dedicated to workers' rights, enumerates "free and democratic union organisation recognised by a simple inscription in a special register." The second paragraph, relating to trade unions guarantees, states, "arragement of collective labour agreeements; recourse to conciliation and arbitration; the right to strike. The trade union representatives will benefit from the necessary guarantees for the fulfilment of their syndical management and those related to the stability of their job."

According to the last constitutional reform in 1994, dispositions contained in declarations, covenants, and international conventions that, by means of article 75 section 22 of the Constitution "have constitutional hierarchy, do not derogate any article of the First Part of this Constitution and must be understood as complementing the rights and guarantees recognized by it, must be considered also."

Among those international norms with constitutional degree are the American Declaration of Rights and Duties of Man (article XXII), the Universal Declaration of Human Rights (articles 20 and 23), the American Convention on Human Rights (article 16.1.), the International Covenant on Economic, Social and Cultural Rights (article 8), and the International Covenant on Civil and Political Rights (article 22).

Moreover, Argentina has ratified ILO Conventions No. 87, on Freedom of Association and Right to Organize, and No. 98 on Right to Organize and Collective Bargaining Convention, in 1959 and 1956 respectively.

Trade Union Law No. 23.551 (1988) refers to unfair practices in its article 53, which contains an enumeration of them. Among such practices, and particularly related to this research, the article states those that may consist of:

- interfering or intervening in the constitution, operation, or administration of the trade unions (article 53, b); and,
- obstructing or hindering its personnel from joining a trade union (article 53, c).

It can be said that the norm endeavors the preservation of the principle of "syndical purity." In this matter, "to intervene" means to take part in unionization affairs and "to interfere" must be understood as any action directed to dissuade workers' conduct.

According to law 23.551, unfair practices can be committed by the employer, an entity that represents employers or a group of employers.

It must be said, also, that these unlawful practices are sanctioned with the penalty of fines[1] (article 55). The action is deduced by the summary proceeding (article 63, section 2) and the complaint before the labor justice can be promoted by the trade union or by the aggrieved employee, jointly or separately (article 54).

In relation to freedom of speech, we must point out, literally speaking, that the National Constitution does not contemplate a generic freedom of expression, but some species of it, for example, as freedom of the press and printing (articles 14 and 32) are related to the expression of thoughts and ideas by means of the written word. But the dynamic rule of constitutional interpretation leads to the analogical extension of these dispositions to other technical means of communication. Even the authors who did not agree with this opinion, accepted this more ample interpretation of this constitutional right as of the insertion of the international norms above mentioned.

To sum up, at the side of the material differences between the diverse ways of communication, freedom of expression extends and protects every manifestation of ideas and opinions omitting the technical components of the vehicle of its transmission.

Finally, particular attention should be paid on some norms of the Law on Labour Contract, related to the rights and duties of the parties connected by this type of relationship and, also, those referred to the exclusive faculties and hierarchical powers recognized to the employer, which must be exercised within the limits imposed by the legislation.

In such order, the employer has enough faculties to economically and technically organize the enterprise, exploitation, or establishment (article 64, LLC) and, as necessary complement of that attribution, he has the power of direction that, at the same time, is limited when establishing that, "it must be exercised with functional character, regarding the aims of the enterprise and the requirements of

1. At present, these sanctions are regulated in law 25.212 (2000): articles 3.g., 4.a., and 5. Sections 2 and 3 of annex II, and the fines can be elevated up to five times in case of multiple unfair practices or repetition of the offense (law, 23.551, article 55, section 1).

production, but without disregarding the preservation and improvement of the personal and patrimonial rights of the worker" (article 65 LLC). The obligatory consequence of this faculty is that the employee "must observe the orders and instructions that are given to him about the manner of execution of the job" (article 86 LLC).

As we said before, in our opinion, these coercive meetings aimed to dissuade employees from forming or joining a union (it is hard to imagine another purpose for these speeches) would be considered an unfair practice, although the employer, his agent, representative or designee did not promise a benefit for rejecting a union or threaten reprisal for supporting one. If this sort of repression or stimulation existed, the situation should be undoubtedly defined as an unfair practice not only under the law 23.551 that includes, among these practices, the acts of dismissing or laying off personnel or changing the working conditions of the personnel with the purpose of preventing or hindering the exercise of their union rights (article 53, section g) and practicing discriminatory treatment, in any way, by virtue of the exercise of the trade union rights protected by this law (article 53, section j), but under the articles 1 and 2 of ILO Convention No. 98.

Nevertheless, we have been asked for our opinion on the legality of these meetings on the basis that these threats or promises are not made (and, therefore, these kinds of audiences are lawful in the United States).

The situation requires analysis from the perspective of the two fundamental rights involved and the necessity of guaranteeing their effective enjoyment in the context of labor relations within a productive organization.

To begin with, in our opinion, workers' organizing does not concern the employers and, as a consequence, they should remain out of it.

The Committee on Freedom of Association of the ILO has said that article 2 of Convention No. 98 establishes the total independence of workers' organizations from employers in exercising their activities and that respect of principles of freedom of association requires not only that the public authorities exercise great restraint in relation to intervention in the internal affairs of trade unions but that it is even more important that employers exercise restraint in this regard.[2]

2. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. International Labour Office, Geneva, paragraphs 759 and 761.

It is true that most of the doctrinarian contributions and jurisprudency related to fundamental rights and labor relations (which do not have in Argentina a special systematization) have been done from the perspective of the employee's rights and the limits to the employers' powers in order to respect them. The conclusions obtained, nevertheless, are useful in order to explain our position in this case.

The Argentine Supreme Court of Justice has expressed many years ago that the reglamentation and limitation in the exercise of individual rights is a necessity derived from the social coexistence. To regulate a right means to limit it, to make it compatible with the others' rights within the community (*in re* Ercolano vs. Lanteri de Renshaw; Fallos, 136:170).

In the same sense, article XXVIII of the American Declaration of Rights and Duties of Man establishes that the rights of each man are limited by the rights of others, by the security of all and by the just demand of the general welfare and the advancement of democracy.

On the same line, we agree with the opinion that states that fundamental rights have immanent limits that are elements that contribute to delimit the field of their exercise. Each right has, in its content, the pertinent restrictions to preserve other people's rights.

So, we should ask ourselves, which are the immanent limits of the employers' freedom of speech, and if there are any reasons for limitations derived from the existence of a labor contract

Certainly, the employer, as any other person, has the right to freely express his ideas on different matters, including those contrary to unionization or those related to social, economic, or political questions. But the exercise of his free speech needs to be modulated in order to preserve other rights engaged. In the first place, it seems that the employer's freedom of speech requires a parallel "freedom of listening" for the workers who cannot be obliged to attend these meetings since the speech given to them is not "about the manner of execution of the job" (article 86 LLC). Then, from the national legal perspective, employees could abstain from participating in those meetings since their object does not aim to inform or give instructions about the service they render.

On a different hand, when we speak about the conditions of the exercise of the employer's freedom of speech we mean to pay attention to the mode, place, and time of this exercise.

The subordination that every labor relationship implies and the inherent employer's power that allows him to control the employees' action during the working hours cannot reach the point of forcing

them to hear anti-union speeches. The workers must be free to decided whether or not they want to receive information (maybe advice?) concerning these questions.

Nevertheless, because of the way it is developed,[3] workers cannot avoid the discourse and although nobody holds them physically in order to assure their attention, the whole situation is intimidating enough per se, specially in a regime of relative or improper stability as the Argentinean one, which determines the validity and, consequently, the efficaciousness of a dismissal made without invoking any cause.[4]

In addition to what we have said and in relation to the discourse's subject matter, it cannot be ignored that in most cases, it will be very difficult to distinguish unlawful threats from allowed presaging prognostications or anticipations about the future of the enterprise as of the workforce's unionization. On the contrary, it is not hard to imagine that the speech, in many cases professionally prepared, will be carefully structured in order not to cross that delicate limit, notwithstanding the achievement of the undeclared purpose of putting trade unionism farther away from workers. In other words, sheltered by the freedom of speech, and by means of its deviated exercise (maybe even abusive), the employer obtains his objective—although elliptically—of pressuring workers not to join a trade union or to withdraw the support already given to these organizations, undermining the position of the syndicate, thus making it, for example, more difficult to bargain collectively, which is contrary to the principle that collective bargaining should be promoted.

Our position does not intend to deny the employer his right to speak but, the fact is that he has other ways, less detrimental and more compatible with the workers' right of freedom of association, to convey his opinion on self organization.

Finally, about the unions and their entitlement to equal time in the enterprise in order to hold their own speech on the same matters, it is important to know that, strictly speaking and according to law

3. According to what it was described when we were invited to participate in this study, management is allowed to assemble the workforce—as a whole, by shift or department—on paid time, and either by speech or by display of video (usually professionally prepared) communicate to employees opinions contrary to unionization (or even religious or political matters). But, at the same time, employees must attend because failure to do so would be a dismissible offense as "insubordination," and must not leav;, they can be told to be silent, to make no protest during the speech, and to ask no questions on pain of suffering the same fate.

4. The guarantee of protection against arbitrary dismissal set down in article 14 bis of the National Constitution, externalizes by means of the right of the worker dismissed in such conditions to receive and indemnity for seniority or dismissal.

23.551, the trade union action in the enterprise is shown through the "delegates" and the "internal commissions." This law assigns particular importance to this matter dealt with in chapter XI, called "Trade union representation in the enterprise."

Besides defining the syndical character of the staff delegates and the members of the internal commissions, the trade union law adds the employer's obligation "to facilitate a place for the development of the delegates' tasks," to have periodical meetings with those delegates and to concede retributed monthly hours credit according to what is applicable in the collective convention (article 44). The legal regime recognizes trade union immunity to those delegates in the enterprise and those who hold directive or representative positions in the trade unions with union status (article 52).