# CAPTIVE AUDIENCE SPEECH IN THE BRAZILIAN LABOR LAW

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The editor sent an e-mail proposing a theme and asking for a contribution from a Brazilian point of view. But, as we read the e-mail, the paper idea—"captive audience speech"—struck us as something unknown to our labor reality and, because of that, impossible to be accessed through our analysis. As a matter of fact, the subject would hardly be considered an issue in Brazilian labor law. And if we could hardly see a question behind the subject itself, how would we answer the four different queries advanced in a questionnaire style for comparative purposes? A little bit astonished, we reread the problem, as it was presented by the editor: "Under U.S. labor law, an employer is privileged to hold what is called a 'captive audience speech' to resist unionization. Management is allowed to assemble the workforce—as a whole, by shift, or department or the like—on paid time and either by speech or by display of video (usually professionally prepared) argue why a union is not needed or would not be in the employees' interest. So long as the speech does not promise a benefit for rejecting a union, or threaten reprisal for supporting one, the speech is perfectly lawful. Moreover, employees not only must attend—failure to do so would be dismissible as 'insubordination'—and, of course, must not leave, 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. Unions are not entitled to equal time. In recent years, some employers have extended the use of captive audience speeches to include captive speeches on political or social issues."[1] Again, it sounded so unreal.

Then we went back to the questionnaire and took a close look at the questions themselves: "Do employers in Brazil hold such captive

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1. E-mail from Matthew Finkin, *Comparative Labor Law & Policy Journal* (Jan. 17, 2007, 3:10:00 BRT) (on file with author).

audience speeches, in which management argues why a union is not needed or would not be in the employees' interest?" Obviously, the answer had to be a reverberating "no." But the word "obviously" sounded awkward as does everything characterized as such. The second question followed: "If not, why not?" The biggest temptation here was to answer in a father-like way: "Just because"! And, before the foreigner asked again, "Why?," the third question hit: "Is there any decisional law on these or similar facts?" Well, there is no law. And this is very much comprehensible as the idea itself seems so inappropriate, so far away from the Brazilian labor law that the matter has never been presented to the Labor Courts and Tribunals. But that would be to neglect the foreigner acute regard as it poses the fourth and final question: "if there is no decisional law"—because it is just "not done"—what would the legal analysis be if it were to be done by some employer (presumably a U.S. multi-national that knows no better)? If it were to be done, as it is so unknown to Brazilian standards, it would probably be absolutely impossible to predict what the Courts and Tribunals would decide. An easy job, an accommodated scholar would then think: four questions, four straight answers. No hesitation, at all. Actually, for someone who is compelled to deal with a very precarious labor market, it was not just an easy job, but an enormously reassuring one.

But, as we stepped back, the first thought was: it cannot be so easy. There has to be more! The striking question was then what these "more" could be! That's when we realized that our first major task was to translate the "foreign" problem into a "Brazilian" problem, i.e., we had to improve comprehensibility of the problem itself. The easy answers weren't answers at all. Thus, grasping what was at stake was the initial major challenge for us. Some perspective on the matter, finally, came from reading the U.S. Employee Free Choice Act (H.R. 800 and S. 1041), recently approved by the House but still pending in the Senate. Furthermore, a good insight of what could be the "translation" of a captive audience circumstance came from the NGO Human Rights Watch Report "Discounting Rights."[2] As it is explained in the Report, captive audience meetings are used as an anti-union strategy that relies on the absence of a legal required offer of equal time to unions' representatives to present their views. Captive audience speeches could then be perceived as a restrainer on freedom of association, on workers' freedom of choice as to organize.

2. Human Rights Watch, *Discounting Rights. Wal Mart's violation of US workers' right to freedom of association* (2007), http://hrw.org/reports/2007/us0507/us0507web.pdf.

Sure, this is a problem, but as legal comparatism and the international circulation of ideas[3] indicate, there is no text without context, i.e., a problem only gains existence and becomes a juridical one when put into context and examined through lens that relate it to its real circumstances. And, for this matter, the context would hardly be conceivable either because captive audience speeches are much eloigned from Brazilian legal reality or because syndicalism has weakened so much that this kind of action would hardly be necessary. But the context has not always been as it is today. Back in the 1980s, Brazil was undergoing a period of multiple reconstructions. Democracy, unions, freedom of association, and freedom of speech were some of the various aspects involved in this process, values recaptured from the past and facing modern and liberal aspirations for the future. One of the legacies from the past was a "union's tax" all workers are compelled to pay, regardless of their affiliation to a trade union.[4] Such obligation still exits, it is due every March and its value corresponds to the daily remuneration perceived by each and every worker. As one can imagine, the sole existence of such a compulsory payment was sensed by the "new syndicalism" as deterrence for news adherents and for a true workers' representation.

As the "new syndicalism" grew stronger, new leaders step forward and took over trade unions that were at that point, on one side, putting behind old leaders with governmental ties and, on the other side, trying to establish a direct link in the political arena through the recently born *Partido dos Trabalhadores* (Workers' Party). However, changes were not limited to the workforce. National industrial groups as well were induced to deal with a free market. They had to learn to negotiate with workers instead of doing so with governmental officials. This is explained by the decline of federal government's wage policies, which were, due to high inflation, extremely important in the past for salaries values' recovery. As a matter of fact, since it was a period of great inflation—eventually, two digits in a single month—wages had to vary almost every month due to a public policy of salaries' revision conceived just to keep up with its loss of value. At first, in order to keep up wages as close as possible to prices, the government established annual indexes to be applied to all salaries. Much later the delay of time shortened and, finally, it got to a trigger mechanism that was evoked every time

3. *Cf.* P. Bourdieu, *Les conditions sociales de la circulation internationale des idées*. 14-1/2 ROMANISTISCHE ZEITSCHRIFT FUR LITERATURGESCHICHTE 1–10 (1990), *available at* http://www.espacesse.org/bourdieu_conditions_circulation_web.pdf.

4. Article 580, Consolidation of Labor Laws.

inflation rates added up to 20%. Actually, it was hyperinflation that brought such mechanism. But, in the final days of authoritarian rule, by the mid-eighties, a free environment growth started taking place. As the parties were then supposed to negotiate, employers' representatives could no longer use the State's apparatus to refuse raises or to sit back and wait for the governmental policies.

It is in this context that in 1985 a Brazilian major steel group, whose headquarters were in the south of the country, took control over a steel plant in Rio de Janeiro and applied there a salary policy that was well ahead of legal exigencies.[5] Essentially, they reviewed salaries every three months, using figures that were superior to the governmental ones. As the group maintained other internal policies, they placed a bet on the trust of its workers and expected, in return, a kind of fidelity beyond whatever the wages paid could bring. Each and every year employees' representatives held a "wage struggle" in order to reduce the hours worked, seek for other protections and rights, but most of all they demanded a reduction on the annual delay for the use of inflation indexes. In other words, they wanted a salary recovery every six months, if possible with raises that represented an improvement on their salaries. As both representatives—employee and employer—argued, class consciousness and solidarity within steel workers and with others workers gathered in unions' confederations grew stronger and, of course, nurture, adherence to the Workers' Party principles.

In the 1986 strike, the trade union general demand for wages' recovery represented less than what had already been paid by the steel group to their workers. Thus, the possibility of a strike in the plant was very little, almost none. But the trade union promised to hold pickets, blocking the buses that conducted the workers to the plant. Adherence of the steel workers of this plant was very important to the success of the strike as a whole. As employers started to build alternative plans several workers were invited to spend a long period within the plant (three or four days) and others were chosen to act as leaders of the busses through alternative ways following company's instructions. During these buses' rides, workers were submitted to several speeches against the trade union, its organization based on class ideology, and shown what the company already paid without the need of trade union's mediation. There were

5. *Cf.* F.H.C. Vieira, Análise da trajetória de crescimento do grupo Gerdau (unpublished Master's dissertation, Universidade Federal do Rio de Janeiro (UFRJ), Rio de Janeiro, Brazil, 2007), *available at* http://joomla.coppead.ufrj.br/port/index.php?option=com_docman&task=doc_download&gid=1181&Itemid=204.

more than fifty buses in the morning and a little less in other periods of the day. So, more than one thousand workers were "taught" about the "dangers" of trade unions for their lives, families, and jobs. During the hardest period of the strike only three buses were held. A small number had to take alternative itineraries and the plant did not stop. The strategy has proven to be a good one. Although hard times were expected in the future, everything changed in 1987 when a new monetary policy froze prices and salaries, and trade unions lost their strongest speeches for a long time. So did employers.

One can then realize that these captive audience speeches held twenty years ago related to complete different circumstances: they took part on a strategy to lower the effect of a strike that was held in a context of hyperinflation and growing workers' political representation. Two decades later, although they seem displaced for the contemporary work conditions, the problem they raise remains the same: freedom of association. As a matter of fact, captive audience speeches would not be accepted in a Brazilian labor scenario as they represent a major breach of workers' fundamental rights. There is no doubt that they are a major breach of freedom of association rights recognized by the ILO Conventions No. 87 (1948) and No. 98 (1949). They also represent a direct violation of article 8º from the Brazilian Federal Constitution, which grants professional or union-like freedom of association.

In such a scenario, what would then be the limits of employers' actions related to the implementation of anti-union practices? There are no judicial answers as Brazilian Courts and Tribunals have been mostly asked to rule on matters related to the theme such as the rapport established between unions and the Administration (especially on the consequences of their formal registration on governmental agencies); the principle of *unicity* (i.e., an union's representativeness and the interdiction of coexistence of more than one union in the same territorial basis); and the individual relationship established between each worker and its union (especially on what concerns the financial obligations of every worker toward the union that by law carries his/her representation). What about captive audience speech? We just could not find any litigation on the matter.

Even though, a general grasp from Brazilian labor jurisprudence seems to indicate that captive audience speeches would be considered illegal because they interfere with the right to unionize. As one assumes this as the probable answer, it becomes then necessary to explain how it interferes. The answer does not come easily and the focus would have to be dislocated to the real question behind the

problem proposed, which is a very simple and recurrent one: what are the limits of an employer's actions? Can he/she do whatever it pleases him/her as long as it is not forbidden by the law? The interdiction comes from the actions' nature that is far beyond the scope of a labor contract.

As a matter of fact, as the employer buys the work force from any person, he does not buy the possibility to sustain any kind of speech or do whatever pleases him/her. In fact, it is irrelevant if the so-called speech is of an anti-union nature or of a broader character, such as a political one. Sure, employers are entitled to free speech but they cannot stretch their prerogative to impose on workers the burden of listening to whatever they want. They cannot make political proselytism or anything alike. Captive audience speeches must then be related to the workplace and it is not so unusual to have this kind of situation related, for example, to a safer work environment. Thus, professional videos, PowerPoint presentations, scholar discourses connected to a better healthy life, to nutritional circumstances, or to hygiene demands seem to be acceptable. On the other hand, speeches advocating a certain political choice or emphasizing the disastrous consequences of unions' activities seem to be unacceptable.

This is even more true if one looks at the recent caseload from the Labor Courts and Tribunals related to punitive damages. Indeed, recent changes in Brazilian law have transferred the jurisdictional competence to examine such cases to Labor Courts and Tribunals that have been extremely zealous of employers' conducts. Cursing, humiliations, body search, briefly, the imposition of practices that seem to go far beyond what one would expect to be the reasonable exercise of an employers' power of command in a labor contract have been outlawed and severely punished. Even "excessive rigor" (a very subjective formula that can hardly be previously defined) has been forbidden by the Courts and has generated judicial condemnations of important financial value. One can easily conclude that being an employer is no longer an easy task or it is a full-time risky job.

Actually, what was at first perceived as obvious has a great amount of gray areas. The immediate and obvious negative answers do not stand after a more refined analysis. Sure, captive audience anti-union speeches are lawless in the Brazilian context, but it does not mean that all captive audience speeches are illegal. They can be upheld in specific situations where it does not pose a threat to other fundamental values, such as freedom of association or freedom of choice. It is not a matter of free speech, as this is implemented in the public sphere and not in the private arena of a labor contract. It is not

a matter of demonstrating what is in the workers' best interest. He/She has to find it by himself/herself and if he/she wants to do it in a collective way, there can be no restrictions to such an option. At the end, it all comes down to a matter of desire and, as it seems, it is just not present in the Brazilian context. The idea of carrying an anti-discourse seems so unnecessary that the problem is not present in our Courts and Tribunals.