Civil Disobedience: Contracts and Contempt*

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During the first year after establishing my foundation in 2010, five unrelated individuals billed me for services I did not request. The first was a tax accountant who, without my knowledge or permission, undertook to correct a former accountant's mistake rather than return it to him to correct. The second was an architect who sent me an invoice for her detailed cost estimate for the renovation of my building, after I had declined her bid. The third was also an architect who, after I had declined his services as well, sent me a retroactive invoice for services I had not commissioned him to provide. The fourth was the printer company that had failed to repair my printer as requested, but instead made other adjustments and replacements at its own initiative that I had not requested, then pressured me to pay for them.

The fifth was Dr. [redacted], a former director of my archive. She refused to do the project I had assigned her, and declined to inform me of this until the day before she sent me an invoice for irrelevant activity I had not assigned her. I told her that as she had not done the assigned work, she had not earned the money she was demanding, and that I therefore would not pay her. So she sued me in court.

Although she and I had both presented detailed written arguments defending our respective positions,[1] the lower court trial judge at the first hearing, Judge [redacted], did not address the pros and cons of the case. His comments were directed exclusively to the matter of classification, as to whether our work relationship was that of a client to a freelancer, or of an employer to an employee. German labor law disregards the professional agreements, promises and contracts that individuals make among themselves when entering into a work relationship. Rather, according to the *Scheinselbstständigkeit* laws, it is the court's job to determine whether or not the "objective" criteria for an employment relationship, i.e. those created by Germany's politicians, have been met, independently of the intentions, wishes, or self-representations of the contracting parties. If the court concludes that these criteria have been met, it forces the client into all of the financial obligations and responsibilities of an employer, against her will.

Judge [redacted] explained this distinction to me at great length, and described in detail the consequences, should the court classify our relationship as that of employer to employee. Mostly these consequences had to do with how much more I would be required to pay in retrospective pension and benefit costs than I would by simply paying the invoice amount for which Dr. [redacted] sued me. It was later explained to me that if I refused to pay these costs, the court would attempt to confiscate my property, auction it off, and get the money that way. If it could not retrieve these amounts through auction, it would sentence me to prison for contempt of court. Judge [redacted] threatened to classify my relationship with Dr. [redacted] as an employer-employee relationship unless we settled our dispute immediately in his presence.

[1] Adrian Piper, *Widerspruch* (13 Juli 2011); *Stellungnahme* (8 September 2011)

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At that point, Dr. [redacted], who had signed a work contract with APRA certifying her freelance status,[2] disclosed that she was a member of Germany's employees' union. This revelation added warrant to Judge [redacted]'s threat, and also extra pressure on me to pay her invoice, on pain of union prosecution. I told Judge [redacted] that I had recently learned that *all* of my former staff in fact had been members of the employees' union, even though all had represented themselves to me as freelancers and had also signed contracts verifying that they were.[3] They had signed their contracts under false pretenses, and, at the instigation of another former director, [redacted] (also present at the hearing, at Dr. [redacted]'s invitation), had deliberately configured their work environment at the archive to simulate an employees' office workplace. They had claimed that no other jobs were available, and that their only alternative was to go on welfare. But when I advertised their positions after their departure, I found a surfeit of available freelance jobs in their areas of training, of exactly the kind that previous, genuinely freelance APRA staff had also held.

After they had all resigned and threatened to take legal action against me if I did not pay them immediately, I was legally advised that because of the *Scheinselbstständigkeit* laws, this form of work fraud is quite common in Germany. Unemployed workers often pose as freelancers, then create *de facto* employee status by surreptitiously configuring an employee workplace. Courts regularly rule in favor of the worker – even if, as in this case, they have deliberately misrepresented their work status, signed their contracts under false pretenses, and extorted their client using methods that jeopardize the continued existence of the enterprise that hired them. Because the *Scheinselbstständigkeit* laws regard whatever they say or do as irrelevant, unemployed workers can, with legal impunity, say and do whatever they choose in order to obtain work. They can lie, or violate their contracts, or pose as freelancers in order to obtain money to which they would have had no claim if the truth had been known at the outset. My archive staff, five women including Dr. [redacted], did all of these things.

Over time, I learned much about the judicial reasoning behind the *Scheinselbstständigkeit* laws: Ultimately, such workers are excused from liability for fraud and extortion, and exempted from punishment, because they must be protected from large-scale employers who attempt to avoid making contributions to their employees' health and pension social insurance, by requiring them to apply as free-lancers, who must pay their own private insurance. The *Scheinselbstständigkeit* laws thus are intended to ensure that employers are forced to contribute to social insurance, regardless of the rubric under which they hire their workers. The revelation of a purported freelancer's fraudulent behavior obliges her client to take on the role of *de facto* employer, and to pay her social health and pension benefits retroactively to the inception of her *de facto* employment. These were the costs with which Judge [redacted] and Dr. [redacted] were threatening me. I told him that this was fraud; that her threats (and by implication, his) were extortion; that I would not be blackmailed into paying money to Dr. [redacted] that she had not earned; and I walked out of the hearing. Judge [redacted] then carried out his threat.[4]

During this lengthy exchange, there was one brief moment of shocked silence, as though the air had been sucked out of the room, leaving only a pinched, wordless stillness that saturated the space with shame and collapsed its dimensions. That was when I stated that I would not be blackmailed and began to pack up my papers to leave. For that brief moment, it was as though all of them in that room with me were suspended by the realization that they had been caught, discovered in the midst of dishonest and dishonorable mischief that even they themselves could not condone. But the moment passed, and business as usual resumed: while I was preparing to leave, Dr. [redacted] inquired as to the next steps in the procedure, and Judge [redacted] again spelled out in even greater and more vivid detail the consequences of my refusal to negotiate a settlement. I repeated that I accepted those consequences.

Dr. [redacted], like the other four vendors who billed me for unwanted services, demonstrated contempt for her agreement to do the work I assigned her in exchange for the money I would paid her, and contempt for the goals and values that work was intended to further. Both she and Judge [redacted] demonstrated contempt for the due process of law that he, at least, was professionally obligated to uphold, in which a case that comes before the court is decided on its merits rather than on threats of

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[2] Adrian Piper, *Five APRAF Work Contracts*

[3] *ibid.*

[4] Herr [redacted], Richter, Amtsgericht Wedding, *Stellungnahme* (14 Oktober 2011)

extortion. And the *Scheinselbstständigkeit* part of German labor law, however well-intentioned it may be, demonstrates contempt for a human transaction – the practice of promising – that most mainstream political theorists agree is absolutely essential to a healthy and functional society. Collectively, that is really quite a lot of contempt for the process by which mutual trust is built.

The inviolability of voluntary promising stands at the foundation of the Social Contract tradition of law and political theory. In that tradition, human beings are conceived as free, rational and autonomous adults who mutually agree to give up part of the freedom they enjoy in an unregulated natural condition, in order to obtain the benefits of a stable, orderly society governed by laws of private property, contract, freedom of speech and association, and the like. The basic idea is that human beings exercise their power of rationality to recognize the value of a well-ordered society; and they exercise their power of autonomous choice to mutually agree to be bound by its requirements. The legal code that governs a well-ordered society is then justified by the basic principle that its citizens would freely and rationally agree to submit to it. A legal code that could not have been the outcome of its citizens' free and rational agreement cannot be rationally justified at all. Thus in the Social Contract tradition, the concept of a freely chosen contractual relationship expresses the essential core of the relationship between citizen and state. The German constitution – the *Grundgesetz*[5] – was intended to be the most highly evolved expression of this tradition. Founded on the ashes of the Second World War and cognizant of the shortcomings of the American Constitution, Germany's legal code enshrines this conception of the person as a free, rational and autonomous agent, and of the agreements and contracts such a being is therefore naturally entitled to make, in its opening paragraphs. These are the fundamental principles that justify it.

By contrast, those more recent *Scheinselbstständigkeit* statutes of German labor law which deprive me of these rights, and which Judge [redacted] applied, express contempt for these values, and flout the political and legal principles on which the *Grundgesetz* is based. They cheapen the value of honest self-representation, of honesty, of promising, of voluntarily undertaking an obligation to perform, and of honoring one's contractual obligations to others more generally. They deprive workers of the basic human right to freely determine their own contractual relationships with other rationally autonomous adults. Those laws reward and encourage impostors, relieve them of accountability, and protect them from the legal consequences of swindling and blackmailing their clients. In these ways, they infantilize and corrupt German workers and excuse them from the ethical obligations and responsibilities of independent self-determination that adulthood ordinarily confers. They express contempt for the very workers they are putatively designed to protect.

For all of these reasons, I decided to protest against these laws by refusing to obey them under any circumstances, by making my refusal public, and by accepting imprisonment if it came to that – i.e. to commit an act of civil disobedience. By categorically insisting on my right to freely enter into a contract with Dr. [redacted] of our choosing, and by therefore categorically refusing to recognize the court's right to impose an employer/employee classification on our professional relationship, I risked contempt charges. I risked further contempt charges by consequently refusing a court order to pay her retrospective health and pension benefits, had the court insisted on that right. Given the role that contempt has played in this narrative, it would have been poetic justice of a sort, had the court in fact sentenced me to prison for contempt of court. For I did, indeed, feel contempt for that first lower court judge who expressed such contempt for due process, and for my natural human right as a free and rational adult to form a contractual relationship of my choice with another free and rational adult. No human being, no legal code, and no court of law can deprive me of that right, and I will not obey one that tries. Nevertheless I would have accepted and served the sentence handed down by that court, because I accept the terms of the Social Contract that it so contemptuously violated.

As it happened, things did not come to that pass. My second hearing took place in labor court, with a different and more experienced judge. I delivered an oral statement to the court stating my refusal to obey the *Scheinselbstständigkeit* laws, on the grounds that they were both unconstitutional and also directly sabotaged the most centrally important efforts of the postwar German state to rebuild a just and

[5] *Basic Law for the Federal Republic of Germany [Grundgesetz]* (23 May 1949)

stable society grounded in relationships of mutual trust.[6] Following this statement, the judge agreed to withhold application of the offending laws, and to confine investigation to the compensation issue.

A couple of months after this hearing, all of the tour guides for the German Bundestag were discovered to have signed their work contracts under false pretenses, having represented themselves as freelancers when in fact they all met the legal criteria for being employees of the Bundestag. In compliance with the *Scheinselbstständigkeit* laws, the court classified them accordingly, and ordered the Bundestag to pay their retroactive health and pension social insurance benefits. The Bundestag disputed this verdict as unjust, and is, as of this writing, deliberating about repeal or revision of the *Scheinselbstständigkeit* laws. According to my sources, current negotiations are directed towards settling on a more equitable method for ensuring sufficient contributions to social health and pension insurance. In Switzerland, everyone in the work force is required to contribute a percentage of income to social insurance, regardless of work status or job classification. Under this system, interference by the state in the contractual rights and obligations of individuals would be unnecessary.

In my third and final hearing, the same judge as before, accompanied by two lay jurists, allowed me to interrogate Dr. [redacted].[7] On that basis, the court proposed a payment settlement sum equal to less than half the amount she was demanding, [8] on the grounds that she had done *some* work mentioned in her contract, but not the work I had assigned her. Although I did not succeed in getting the case dismissed, I accepted that settlement because the judge's reasoning convinced me that it was fair. I saw that he had studied the case carefully, remembered what he had read, reflected on its implications, and had taken both of our sets of arguments seriously. I was moved and impressed by the court's readiness to resolve the dispute on the basis of legal reasoning rather than coercion; by the judge's insistence on following all of the prescribed steps of juridical procedure; and by his natural, pre-reflective assumption that it was important to deliver a verdict that he could justify to us as well grounded in reason as well as the law. This was the first time I have ever personally experienced a well- functioning legal system.

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Berlin, 03 August 2012

[6] Adrian Piper, *Stellungnahme zu dem Beschluß des Landesgerichts Berlin* (07 February 2012)
[7] Adrian Piper, *Zwei Fragen an Frau Dr.* [redacted] (02 August 2012)
[8] Herr [redacted], Richter, Arbeitsgericht Berlin, *Öffentliche Sitzung des Arbeitsgericht Berlin* (02 August 2012)