"Decision"
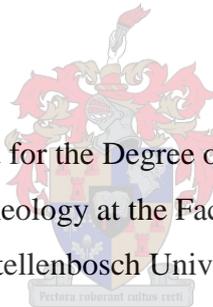
in the thought of Dietrich Bonhoeffer and Carl Schmitt:
A comparative study

By

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<u>Declaration</u>

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Date: December 2019

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<u>Abstract</u>

This thesis investigates the significance of "decision" within Dietrich Bonhoeffer's concept of the church and Carl Schmitt's theory of the state, and their underlying structural differences. Bonhoeffer and Schmitt perceived, respectively, a constitutional and confessional crisis of significance that demanded an urgent decision. In the context of the approach of the National Socialist attempt to synchronize the Protestant Church to the National Socialist state in Germany during the early 20th century, Bonhoeffer insisted on God's decision in Christ. Schmitt, in turn, insisted on *Dezision*, a specific jurisprudential form with regard to jurisdiction and content that is revealed by the exception. Bonhoeffer's and Schmitt's positions on "decision" are compared primarily through a study of their earlier work.

Bonhoeffer's brother-in-law and friend Gerhard Leibholz had a detailed knowledge of Fascism and Schmitt's theories. This most likely provided Bonhoeffer with early insights into jurisprudential thought and the theory of state. Bonhoeffer's and Schmitt's respective concepts of the church and of the state built on the contemporary jurisprudential discourse on the juristic person and the natural person. Bonhoeffer drew upon codified juristic institutional models, modified them, and added a specific Christological center. Schmitt developed a method that used analogies for transferring the systematic structure of theological concepts to the modern theory of state. This thesis analyses their concept of "decision" using the indicators of choices between alternatives, the urgency of resolving the problem, the intended goal, and the active manifestation of their positions.

For Schmitt, a constitutional compromise regarding political leadership had produced a choice between representation and identity which he attempted to solve with abstractions that separated metaphysical content from objective normative evaluation, a theory of linear history with successive ideas and elites, and an elevation of the significance of the self over content and subject in structural analogy to theological dogma and the representation of the idea of Christ through personality. Bonhoeffer discovered a modern version of the Docetic heresy at the root of the paradigm associated with Schmitt's *Dezision* which abstracted idea from appearance. With God's revelation in Christ at the center of the church, history, and human life, he challenged the structural elements of Schmitt's *Dezision*. Bonhoeffer, one can argue, redirected Schmitt's unity of identity to wholeness through reconciliation, Schmitt's

political idea to God's revelation, his synchronization (*gleich-schalten*) to conformation (*gleich-gestalten*), his representation of political ideas to Trinitarian identity, his idea "becoming human" (*Mensch werden*) in the appearance of personality to person "having become human" (*Mensch geworden*) in the once-ness of Christ.

Opsomming

Hierdie proefskrif stel ondersoek in na die belang van "besluitneming" in Dietrich Bonhoeffer se konsep van die kerk en Carl Schmitt se teorie van die staat, en hul onderliggende strukturele verskille. Beide Bonhoeffer en Schmitt het 'n konstitusionele en konfessionele krisis bespeur wat 'n dringende besluit sou vereis. In die konteks van die Nasionaal-Sosialistiese poging in die vroeë 20ste eeu om die Protestantse Kerk met die Nasionaal-Sosialistiese staat gelyk te stel, het Bonhoeffer aangedring op God se besluit in Christus. Schmitt het op sy beurt aangedring op *Dezision*, 'n spesifiek regsfilosofiese vorm wat betrekking het op regspraak en -inhoud wat deur die uitsondering geopenbaar word. Bonhoeffer en Schmitt se opvattings oor "besluitneming" word primêr deur 'n studie van hul vroeë werk vergelyk.

Bonhoeffer se swaer en vriend, Gerhard Leibholz, het omvattende kennis van Fascisme en Schmitt se teorieë gehad. Dit het waarskynlik vir Bonhoeffer insig in regsfilosofiese denke en die staatsteorie gebied. Bonhoeffer en Schmitt se onderskeie begrippe van die kerk en die staat het op die jurisprudensiële diskoers van hul dag oor die regspersoon en die natuurlike persoon voortgebou. Bonhoeffer het van gekodifiseerde regsinstellingsmodelle gebruik gemaak, hierdie modelle aangepas, en hul van 'n spesifieke Christologiese sentrum voorsien. Schmidt het 'n metode ontwikkel wat van analogieë gebruik gemaak het om die sistematiese struktuur van teologiese konsepte na die moderne staatsteorie oor te dra. Hierdie proefskrif ontleed hul begrip van "besluitneming" deur die sleutelaanwysers van keuses tussen alternatiewe, die dringendheid van probleemoplossing, die beoogde doelwit, en die aktiewe manifestasie van hul posisies.

Vir Schmitt het 'n grondwetlike kompromie aangaande politieke leierskap 'n keuse na vore gebring tussen representasie en identifikasie wat hy wou oplos deur abstraksies wat metafisiese inhoud van objektiewe normatiewe evaluering sou skei – 'n teorie van liniêre geskiedenis met opeenvolgende idees en elites, en 'n verheffing van die beduidendheid van die self bo inhoud en subjek in strukturele analogie tot teologiese dogma en die voorstelling van die idee van Christus deur persoonlikheid. Bonhoeffer het ontdek dat 'n moderne weergawe van die Dosetiese dwaalleer, waar idee van voorkoms geskei word, by die bron van die paradigma wat met Schmitt se *Dezision* geassosieer word, te vinde is. Met God se

openbaring in Christus as middelpunt van die kerk, geskiedenis, en menslike lewe het hy die strukturele elemente van Schmitt se *Dezision* uitgedaag. Mens sou kon aanvoer dat Bonhoeffer Schmitt se denke radikaal heroriënteer: van eenheid van identiteit na heelheid deur versoening, van 'n sekere politieke idee na die openbaring van God, van sinkronisasie (*gleichschalten*) na konformasie (*gleich-gestalten*), van sekere voorstellings van politieke idees na Trinitariese identiteit, van 'n verstaan van 'menswording' (*Mensch werden*) in die verskyning van persoonlikheid na 'persoonlikheid wat mens geword het' (*Mensch geworden*) in die eens-heid van Christus.

<u>Acknowledgements</u>

This thesis would not have advanced to completion without the support of many people. Foremost I am indebted to the patience and the friendly criticism of my work by my promotor Robert Vosloo. He helped me clarify my ideas and thoughts in the conceptualization of this thesis. I very much appreciated his encouragement, his suggestions, and the many additional opportunities for learning he provided through enabling access to conferences and lectures at the Faculty of Theology at the University of Stellenbosch and abroad. I also owe many thanks to helpful staff at the theological library at the Stellenbosch Faculty of Theology and staff at various libraries in Germany, foremost the National Library in Frankfurt and the Staatsbibliothek in Berlin.

The best work, however, gets only done with the support of good friends. The greatest appreciation goes to my friends at Red Deer Lake United Church in Calgary, Canada. Their support in caring for my home during my absence and the very special helpers who were shovelling snow while I was working in the heat of a South African summer goes a long way. Many thanks go also to my new friends in Stellenbosch who enriched my various stays there. Their support, encouragement and friendly acceptance will be remembered forever. A particular huge thank you goes to my daughter Meike for inspiring conversations, her unwavering encouragement during difficult times, and for sharing time and wine with me during one of my stays in Stellenbosch over Christmas 2018.

<u>Dedication</u>

to the people
who sent me toward,
and kept me on
my life's path:

Meike Sydney Radler
Heinrich Georg Russ
Anna & August Wienke

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Chapter 1:

Introduction

1.1   Scope of Dissertation

The issue of "decision" runs like a thread through the work of the theologian Dietrich Bonhoeffer (1906-1945) as well as through the theories of the jurist Carl Schmitt (1888-1985). Both responded to the socio-political crisis of the 1920s and 1930s in Germany. For Bonhoeffer 'Christianity entails decision'.[1] Even though he wondered about the amount of personal control over decisions, he realized that there were important things one has to stand up for without compromise.[2] Schmitt's "decisionist type"[3] applies personal decisions in correctly identified political situations which prevents a romantic spirit that suspends decisions,[4] and social power-groups that agree on parliamentary compromises in favour of their own calculated interests.[5] The general problem of "decision" was for Bonhoeffer rooted in modern human subjectivism that demanded entirely new existential decisions in each moment instead of applying an ethics that is entirely concrete.[6] In his understanding, modernity had replaced the question of faith with intellectual honesty in all things and thus had turned against Christ.[7] Schmitt, though, saw the crisis of the modern times mainly in the fictional individual of liberalism and what he called the constitutional pretense-compromises, which prevented decisiveness.

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[1] DBWE 9:451.

[2] DBWE 10:57-58; DBWE 13:285. Bonhoeffer's focus on decision grew so strong that by the 1940s it led him to state that 'compromise hated decision'; DBWE 6:156. He also applauded the strong who take clear positions to the great decisive questions while the weak decided between alternatives that were not their own; DBWE 8:494.

[3] Carl Schmitt, Preface to the Second Edition (1934) to *Political Theology: Four Chapters on the Concept of Sovereignty, trans. Georg Schwab (MIT Press, 1985; Chicago: University of Chicago* Press 2005), 2-3, all subsequent citations refer to the 2005 edition. Carl Schmitt, Vorbemerkung zur zweiten Ausgabe to *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, 8th ed. (Berlin: Duncker & Humblot, 2004), 8.

[4] Carl Schmitt, *Political Romanticism*, trans. Guy Oakes (New Brunswick, NJ: Translation Publishers, 2011), 56.

[5] Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kenney, (Cambridge, MA: MIT Press, 1985; paperback, 1988), 6. All subsequent citations refer to the paperback edition.

[6] cf. DBWE 6:373-74.

[7] cf. DBWE 6:115, 122.

The thesis attempts to show that Bonhoeffer and Schmitt both might have used theological and jurisprudential processes of thought in regards to their respective concepts of decision despite the 1919 Weimar Constitution's first time official separation of the Protestant Church from the state. Although it is well known that Schmitt invoked a theological framework of thought in his *Political Theology* he might have also used it for the underlying structural features of his theory of state that carried his concept of *Dezision*.[8] In Schmitt's *Dezision*, an individual personality decides with finality on the time and the modus of implementing an abstract idea. It is the juristic form (*Gestalt*) over jurisdiction and content revealed by the exception. The fundamental structural elements may be a variation to the theoretical abstraction of intent from guilt which Schmitt had developed in his early work. The premise of this thesis is that, in reverse to Schmitt's use of theology in his theory of the state, Bonhoeffer used the jurisprudential paradigm of thought within his concept of the church and in his theology. It is suggested that Bonhoeffer's exposure to the jurisprudential paradigm led him to use in his theology some particular conceptual associations taken from the private law sector, which had developed in the course of the 19th century's constitutional fights of the bourgeoisie for asserting rights over against the state. It can be argued that in Bonhoeffer studies, for the most part, the jurisprudential connection in his theology has been overlooked. Thus the thesis is concerned with unlocking the specific use Bonhoeffer makes of the jurisprudential paradigm. An indirect comparison of Schmitt's and Bonhoeffer's position on decisions attemps to uncover that in the process of disclosing the structural elements that were foundational to Schmitt's self-justifying abstract *Dezision* within his theory of state, Bonhoeffer might have redirected such elements theologically towards an understanding of responsible concrete decisions within the private and the public realm.

The topic of decision around which this thesis revolves is neither the process of decision-making nor the theory of decisionism. Even though a decision is always in some way interconnected with a certain process of how to reach a decision, the current topic is the decision itself. Heinz Eduard Tödt had connected moral decisions to a six step formative process that includes defining the moral problem, analysing the situation, discerning the option, discovering the norms, judging as deciding according to facts, option and norms, and

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[8] The word *Dezision* is used in the German language as well as in the English translations for describing Schmitt's theory of an individual who decides on jurisdiction and content in the situation of exception. Therefore the term *Dezision* will be used in reference to Schmitt's theory throughout this thesis.

finally reevaluating the result.[9] However, in this decision-making schema the decision itself is only one of the steps. Similarly, in Schmitt's theory of decisionism, which is defined as 'a rightful deviation from law by personal decision-making in concrete circumstances',[10] the *Dezision* is only the central part of the process of decision-making. Decisionism comprises of a deviation from normal law, a decision-making sovereign, a mandate for restoring order, and a time-limitation for actions.[11] Thus neither the process of moral decision-making nor the process of decisionism defines the internal elements of the decision itself. Instead, the structural analysis of "decision" in this thesis is based on research done by Tanja Pritzlaff[12] within the realm of political sciences. The underlying elements of collective and individual rational decisions that were identified in this study can be described with the terms of choice, resolve, and judgement, whereby the latter element intentionally positions the actor in relation to the material facts of the context. Against this backdrop, Schmitt's and Bonhoeffer's thought on "decision" will be compared according to a framework that discusses their perceived choices, the pressure of time that demanded a resolve, their respective intented goal, and the active manifestation of their positions.

Set into a comperative relation will be Schmitt who supported the National Socialist regime of the 1930s and 1940s in Germany and Bonhoeffer who resisted this very regime as a founding supporter of the Confessing Church that distanced itself from the official Lutheran church, and with his involvement in the resistance and *coup d'état* against Adolf Hitler. However, the central attention will not be on Bonhoeffer's personal decision to support the conspiracy to assassinate Hitler over against Schmitt's *Dezision* that focussed on an unbound sovereign in exceptional circumstances. Rather, the focus will be on the underlying structures of their understanding of decision, that is, the structure that played into and carried *all* of their decisions – last but not least, also the one decision that was for both tied to an extreme,

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[9] Heinz Eduard Tödt, "Towards a Theory of Making Ethical Judgements", *The Journal of Religious Ethics* 6 no. 1 (Spring 1978):106-20. Etienne De Villiers, in a concise discussion of Tödt's process of the steps towards moral decision-making, suggests that Tödt was too focussed on individual responsibility which disregards that in today's world many decisions are made on a collective level; Etienne De Villiers, *Revisiting Max Weber's Ethic of Responsibility* (Tübingen: Mohr Siebeck, 2018), 224-225. To this, one can add Tanja Pritzlaff's research within the realm of political sciences, which is used as heuristic framework for this thesis, that in our increasingly individualistic world one could also say that collective decision-making is based on a sum of individual decision-making processes; cf. Tanja Pritzlaff, *Entscheiden als Handeln. Eine begriffliche Rekonstruktion* (Frankfurt/Main: Campus Verlag, 2006), 12-13.

[10] Michael Hoelzl, "Ethics of decisionism: Carl Schmitt's theological blind spot", *Journal for Cultural Research* 20, no. 3 (2016):235.

[11] Hoelzl, "Ethics of decisionism", 236.

[12] Tanja Pritzlaff, *Entscheiden*.

exceptional situation which Schmitt called the *Ausnahme*, the exceptional case, that demanded the *Führer* principle, and Bonhoeffer called the *Grenzfall*, the borderline case, that opposed the *Führer* principle.

Crucial for uncovering the structurally underlying elements of Schmitt's *Dezision* and the objection and redirection Bonhoeffer might have levied with a theological position at Schmitt's form of decision, is their very specific cultural, social, political, and, not least, legal-constitutional context of the 1920s and 1930s in Germany. This context brought them into close spacial and academic proximity and sent their personal life-trajectories towards opposite ends. By birth Schmitt and Bonhoeffer were distanced by one generation and the rigid social classes of imperial Germany. But, as Bonhoeffer noted in 1932, due to the quick succession of the political and socio-economic events around the turn of the century, this time-period amounted to more than one generation[13] and the class boundaries were slowly liquefying after the Great War. Both Schmitt and Bonhoeffer, the former still educated in imperial Germany but the latter during the Weimar Republic, were not only knowledgeable of their contemporary philosophical and sociological discourses, such as Neo-Kantianism, Idealism, Historicism, phenomenology, and ontology, but were also on the cusp of the discourses within their specific professional paradigms of jurisprudence and theology respectively. By the late 1920s Schmitt had succeeded in stretching within academia the limiting class-confines of the so-called small bourgeoisie at exactly the moment at which Bonhoeffer took up his academic career in accordance with his class of the higher educated bourgeoisie. Thus between 1929 and 1935 both participated in the same academic space and political center of power in and around the University of Berlin. Indirectly their paths crossed due to Schmitt's close professional and private connection to the jurist Gerhard Leibholz (1901-1982), Bonhoeffer's brother-in-law and close friend. By 1929 Schmitt had already published the main features of his theory of state; including his *Politische Theologie*[14] that established a sociological model for drawing analogies between theology and political structures and insisted on the need of sovereign decisions. At that point in time Bonhoeffer had already developed a theory of the church in independence of the state that seemed to refer to juristic concepts such as association, cooperative, and community of persons (*Verein*, *Genossenschaft*, und *Personengemeinschaft*) for the purpose of centering the church and

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[13] DBWE 12:268-75.

[14] Carl Schmitt, *Politische Theolgie*; first published in 1922; a revised edition was published in 1934.

human inter-relations on God's revelation in Christ which became subsequently the foundation for theologically defining human life under God's decision.

Overall, the focus of the thesis is the premise that there are strong indications that Bonhoeffer drew upon jurisprudential conceptual thought in his theological position on "decision" which could be read as uncovering, objecting, and redirecting the structural elements of Schmitt's form of decision (known as *Dezision*) that made use of references to theology.

1.2   Motivation and Background

My motivation and interest in researching Schmitt's and Bonhoeffer's use of the theological and jurisprudential paradigms of thought in support of the structure of their concepts of decision as the central notion of their respective theory of state and theory of church is rooted in my own academic background in the jurisprudential as well as theological paradigms of thought. It is also supported by the fact that in Germany the studies of law are geared toward the ability of judging concrete factual cases, that is, towards decisions.

From the moment I picked up an English translation of Bonhoeffer's *Ethics*[15] during my studies for a degree in theology at a Canadian University I became fascinated with his theology. However, as a native German speaker I shortly after read Bonhoeffer in the original German version and I was struck, not only by hearing in his words my grandfather speaking, a Lutheran-Prussian judicial civil servant who was born and raised in the vicinity of Finkenwalde and had practiced civil disobedience over against National Socialist demands. Most of all I heard in Bonhoeffer's theology and use of language an underlying jurisprudential paradigm. As a lawyer with degrees in jurisprudence from a German university, I recognized that Bonhoeffer might have used legal collective structures in support of the argument of his 1927 *Sanctorum Communio*,[16] and that he took recourse in his subsequent theology to legal concepts of civil law, such as *Stellvertretung* and *Schuldübernahme*. My interest was additionally perked by the opposing comments from Germans and Anglo-Americans upon learning of my dual degrees. While Germans saw

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[15] DBWE 6.

[16] DBWE 1.

theology and jurisprudence "kind of connected", Anglo-Americans were astonished about studying such unrelated academic fields.

Although most of the theological topics which Bonhoeffer expanded on throughout his theological development were already visible in his 1928 Barcelona Lectures,[17] they appeared to me foremost grounded in his foundational pronouncements of his doctoral dissertation *Sanctorum Communio*. And his immediately following *Habilitation* thesis *Act and Being*[18] which engaged the theological and philosophical paradigms of thought, mostly through Martin Heidegger's (1889-1976) ontology, seemed to be concerned additionally with a peripheral issue. Bonhoeffer appeared to me to have also wanted to clarify the relationship between the theological and jurisprudential paradigms as the latter claims the place of a legal philosophy that transcends the "technical" application of legal concepts and norms. This was confirmed through my research into the factual circumstances surrounding Bonhoeffer's 1929 *Habilitation* thesis. His own work and the *Habilitation* thesis in jurisprudence of his close friend and relative Leibholz[19] were indeed related in their topic and written simultaniously in 1929 when both resided in Berlin. Both engaged with the question as to the extent of human knowledge − Leibholz from the jurisprudential and Bonhoeffer from the theological perspective. Bonhoeffer's interrelation with the jurisprudential paradigm of thought seemed further confirmed in the correlations between Bonhoeffer's perspective in *Ethics* on the Roman legal principle of *suum cuique* and arbitrariness in regards to equality, and the main aspects of Leibholz's 1924 doctoral thesis[20] on equality before the law.[21]

The definition of equality that Leibholz introduced to the interpretation of the 1949 Basic Law for the Federal Republic of Germany[22] followed the pre-war discourse with Bonhoeffer

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[17] DBWE 10: 325-378.

[18] DBWE 2.

[19] Gerhard Leibholz, *Das Wesen der Repräsentation unter besonderer Berücksichtigung des Repräsentativsystems: Ein Beitrag zur allgemeinen Staats- und Verfassungslehre* (Berlin: de Gruyter, 1929).

[20] Gerhard Leibholz, *Die Gleichheit vor dem Gesetz: Eine Studie auf rechtsvergleichender und rechtsphilosophischer Grundlage* (Munich: C. H. Beck'sche Verlagsbuchhandlung, 1959), first published in 1925 by Otto Liebermann (Berlin).

[21] Karola Radler, "Equality and Human Dignity – substantive foci of enduring significance in Bonhoeffer's and Leibholz' interdisciplinary discourse", in *Christian Humanism and Moral Formation in "A World Come of Age": An Interdisciplinary Look at the Works of Dietrich Bonhoeffer and Marilynne Robinson*, eds. J. Zimmermann, Natalie Boldt (Cambridge: Cambridge Scholars Publishing, 2016).

[22] Gerhard Leibholz was from 1951 until his retirement in 1971 one of the first Judges at the Constitutional Court of the Federal Republic of Germany; Manfred Wiegandt, *Norm und Wirklichkeit: Gerhard Leibholz (1901 – 1982) – Leben, Werk und Richteramt*, (Baden-Baden: Nomos, 1995), 64, 73.

and provided a line to the post-apartheid definition of equality in the 1994 South African constitution, which contains a similar guarantee of equality.[23] Indeed, there are many parallels between the Resistance to the racist persecutions of the National Socialist regime of the first half of the 20th century in Germany and the Anti-Apartheid movement against the racist secregations in South Africa during the second half of the 20th century. In this regard, it is especially the 1934 Barmen Theological Declaration in Germany,[24] written to a large extent by Karl Barth, and the 1986 Belhar Confession in South Africa that the Dutch Reformed Mission Church adopted that stand out. Both proclaimed the essential truths of the Gospel in opposition to the false doctrines of the established Lutheran Church and the Dutch Reformed Church respectively which were supporting the oppressive regimes. While the Barmen Declaration does not explicitly condemn race-based persecution, the Belhar Confession rejected any doctrine that sanctioned 'in the name of the gospel or the will of God the forced separation of people on the grounds of race and colour'[25] which obstructs reconciliation in Christ. While the Barmen Declaration does not explicitly condemn race-based persecution, the Belhar Confession echoes Bonhoeffer's theological demands that the gospel of Jesus Christ is not defined by the state and that race is neither a precondition nor a contradiction to the gospel of Jesus Christ. Bonhoeffer's influence is most visible in the Belhar Confession's adoption of the term *status confessionis*. It followed Bonhoeffer's 1933 assessment[26] that the church needed to confess because the gospel itself was at risk and the state had exceeded its limits over against the church.[27] Additionally, Bonhoeffer has been brought into connection to the 1986 *Kairos Document*[28] that challenged the tyrannical apartheid regime with a "prophetic

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[23] Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (Cape Town: Juta, 2012), 223.

[24] *Theological Declaration of Barmen* (29-31 May 1934). Accessed February 06, 2018. http://www.sacred-texts.com/chr/barmen.htm.

[25] The Belhar Confession as quoted in Piet J. Naudé, *Neither Calendar nor Clock: Perspectives on the Belhar Confession* (Grand Rapids: Wm. B. Eerdmans, 2010), 15.

[26] In his April 1933 essay on "The Church and the Jewish question" Bonhoeffer referred for the first time to a *statu confessionis* in regards to the state's introduction of the Aryan legislation and the attempt to implement the exclusion of pastors of Jewish heritage; DBWE 12:366.

[27] Dirkie Smit, "What does status confessionis mean?", in *A Moment of Truth: The Confession of the Dutch Reformed Mission Church 1982*, ed. G. D. Cloete and D. J. Smit (Grand Rapids: Erdmans, 1984), 9.

[28] The Kairos Document: Challenge to the Church: a theological comment on the political crisis in South Africa (Braamfontein: Skotaville, 1986). Bonganjalo Goba, "The Kairos Document and its implications for liberation in South Africa", *The Journal of Law and Religion* 5, no. 2 (Summer 1987): 313-25, https://www-jastor-org.ez.sun.ac.za/stable/1051239. Peter Beyerhaus, *The Kairos Document: Challenge or Danger to the Church?: a critical theological assessment of South Aprican people's theology* (Cape Town: Gospel Defence League, 1987).

theology" over against the "state theology" and the "church theology".[29] Preceeding and subsequent to the Belhar Confession, Bonhoeffer helped many South African theologians to recognize the evil and heresy in apartheid and that there was a need for Christian resistance towards ending the regime.[30] Beyers Naudé (1915-2004) found inspiration in Bonhoeffer's theology and support of the Confessing Church for his own theology and his vision for the ecumenical Christian Institute as a Confessing Church for South Africa.[31] Allan Boesak (1946) was significantly influenced by Bonhoeffer's choice and actions for justice in recognition that grace was never cheap and that reconciliation calls for sacrifice, even unto death.[32] Bonhoeffer's influence was also visible in Russel Botman's (1953-2014) theology which promoted justice, transformation, and reconciliation based on Bonhoeffer's Christology.[33] For John de Gruchy (1939) Bonhoeffer remained an important conversation partner throughout his critique against the Apartheid legislation[34] as well as during the transition period to democracy.[35] And he continues 'to bring Bonhoeffer's life and work into fruitful conversation with challenges arising from the South African context'.[36]

The connection between Bonhoeffer studies in Germany and South Africa, and possible structural parallels between both situations and perspectives,[37] prompted me to pursue a

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[29] John W. de Gruchy, "The Reception of Bonhoeffer in South Africa", in *Bonhoeffer for a New Day: Theology in a Time of Transition*, ed. John W. de Gruchy (Grand Rapids: Eerdmans, 1997), 359.

[30] John W. de Gruchy, "Bonhoeffer and Public Ethics: South Africa Notes", in *Interpreting Bonhoeffer: Historical Perspectives, Emerging Issues*, ed. Clifford J. Green and Guy C. Carter (Minneapolis: Fortress Press, 2013), 17.

[31] De Gruchy, "Bonhoeffer and Public Ethics", 15.

[32] Allan Boesak, "What Dietrich Bonhoeffer has meant to me", in *Bonhoefer's Ethics: Old Europe and New Frontiers*, ed. Guy Christopher Carter, René van Eyden, Hans-Dirk van Hoogstraten, and Jurjen Wirsma (Kampen: Kok, 1991), 21-29; Allan Boesak, *Running with Horses: Confessions of an Accidental Politician* (Cape Town: Joho Publishers, 2009).

[33] Russel Botman, "Discipleship as Transformation? Towards a Theology of Transformation" (unpublished PhD diss., University of Western Cape, 1994).

[34] John W. de Gruchy discussed the fruitfulness of a dialogue with Dietrich Bonhoeffer during the 1980s in his book *Bonhoeffer and South Africa: Theology in Dialogue* (Grand Rapids: Eerdmans, 1984).

[35] The usefulness and influence of Dietrich Bonhoeffer on the 1989 movement in Germany that led to the fall of the Berlin Wall as well as the connection of that movement and Bonhoeffer as regards the transition to democracy in South Africa, has been discussed by John W. de Gruchy in his essay "Dietrich Bonhoeffer and the Transition to Democracy in the German Democratic Republic and South Africa", *Modern Theology* 12, no.3 (July 1996): 325-66, http://onlinelibrary.wiley.com.ez.sun.ac.za/journal/10.1111/j.1468-0025.1996.tb00094.x.

[36] Robert R. Vosloo, "Interpreting Bonhoeffer in South Africa? The Search for a Historical and Methodological Responsible Hermeneutic", in *Bonhoeffer and Interpretive Theory: Essays on Method and Understanding*, ed. Peter Frick (Frankfurt am Main: Peter Lang, 2013), 126.

[37] Ralf K.Wüstenberg, *Die politische Dimension der Versöhnung: Eine theologische Studie zum Umgang mit Schuld nach den Systemumbrüchen in Südafrika und Deutschland* (Gütersloh: Chr. Kaiser/Gütersloher Verlagshaus, 2003); Ralf K. Wüstenberg, „Philosophische und Theologische Grundprobleme beim Verstehen des Südafrikanischen Versönungsprozesses", *Religion & Theology* 7, no. 2 (2000): 169-92,

doctoral dissertation at the University of Stellenbosch. However, my thesis is concerned with the interplay of the views of a German jurist and Bonhoeffer set within the context of German law, that is, within the constitutional framework of the Weimar Republic. Thus, the South African context and especially South African jurisprudence is outside the scope of the research of this thesis. Research into interrelations between anti-apartheid theology and South African law is a concern that differs from the focus of this thesis and is best left to those who command knowledge over South African law. Additionally, because the German and South African contexts are distanced by time and place and Bonhoeffer influenced the later South African context, this cannot be reversed by applying aspects of the South African theological and jurisprudential context to the theology of Bonhoeffer and Schmitt's jurisprudence within the earlier Germany situation. Instead my thesis is concerned with the interplay of Schmitt's jurisprudenial and Bonhoeffer's theological perspectives as they played out within their early work under the conditions of the 1919 Weimar Constitution, and as they pertain to the structural elements of their respective concepts of "decision" and *Dezision* that might entail a rebuttal on the part of Bonhoeffer to Schmitt's position on form.

The indirect interaction between Bonhoeffer and Schmitt within this thesis concerns the broader field of political theology in general. Post-war political theology is differentiated by attaching the prefix "new" for the purpose of primarily separating theology that is concerned with politics from Schmitt's *Political Theology* which received the prefix "old". This differentiation gains significance in regards to the recent surge of renewed interest in Schmittian theories and rising authoritarianism in many countries around the world. Francis Schüssler Fiorenza[38] has noted that in the United States of America this interest in Schmitt is largely channelled through Schmitt's student Leo Strauss's critique of modernity and liberalism,[39] and appears increasingly in practical matters of decision-making beyond the theoretical. However, the 20th century has shown that authoritarian governments often do not bring order over against violent excesses as the reactionaries to the French Revolution had

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DOI:10.1163/157430100X00036. Ralf K. Wüstenberg, „Reformierte Identität in Südafrikas politischer Transformation: Das Beispiel Christiaan Frederick Beyers Naudés (1915-2004)", in *Reformierte Theologie weltweit: Zwölf Profile aus dem 20. Jahrhundert*, eds. Marco Hofheinz and Matthias Zeindler (Zürich: Theologischer Verlag, 2013).

[38] Francis Schüssler Fiorenza, "Prospects for Political Theology in the Face of Contemporary Challenges", in *Political Theology: Contemporary Challenges and Future Directions*, ed. Francis Schüssler Fiorenza, Klaus Tanner, and Michael Welker (Louisville: Westminster John Knox, 2013), 37-59, specifically 39-42.

[39] Fiorenza, "Prospects", 40-41; also William T. Cavanaugh, *Migrations of the Holy: God, State and the Political Meaning of the Church*, (Grand Rapids: Eerdmans, 2011), 100.

hoped, but instead are those who lead to the worst atrocities against humanity. Although not explicitly mentioning Bonhoeffer's theology, Fiorenza pleads for a mobilization of religious traditions for the purpose of building an awareness of a sinful human nature, concern for and respect of the other, and for undercutting with transcendence the self-interest of nations beyond the friend-enemy dichotomy. And he calls for a commitment to the embodiment of justice within law, specifically for constitutional rights.[40]

Bonhoeffer studies became increasingly immersed over the last two decades in the realm of the "new" political theology especially regarding the anthropological question and the communal dimension. The upsurge of interest in the political dimensions of Bonhoeffer's theology is mirrored in his inclusion into *The Blackwell Companion to Political Theology*, edited by Peter Scott and William T. Cavanaugh,[41] which holds also a contribution on Schmitt. The political aspects of Bonhoeffer's theology resonate especially in South Africa which continues to wrestle in the public discourse with 'symbols, statues, and institutional practices associated with the country's colonial and apartheid past' as is shown in Robert Vosloo's essay "Time Out of Joint and Future-Oriented Memory: Engaging Dietrich Bonhoeffer in the Search for a way to Deal Responsibly with the Ghosts of the Past".[42] Additionally, John W. de Gruchy, in *The Blackwell Companion to Political Theology*, has set the South African experience into the broader context of the involvement of the churches for building democracy.[43] Bonhoeffer's theology is increasingly also set into relations to urgent contemporary problems, such as global warming in the age of the Anthropocene.[44]

My thesis attempts to show that Bonhoeffer's theology differs decisively from Schmittian "old" and the "new" political theologies in a distinct way. Bonhoeffer appears to have used

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[40] cf. Fiorenza, "Prospects", 57-59.

[41] Peter Scott and William T. Cavanaugh, ed., *The Blackwell Companion to Political Theology* (Malden, MA: Blackwell Publishing, 2004).

[42] Robert Vosloo, "Time Out of Joint and Future-Oriented Memory: Engaging Dietrich Bonhoeffer in the Search for a way to Deal Responsibly with the Ghosts of the Past", *Religions* 8, 42 (2017): 7; www.mdpi.com/journal/religions; doi:10.3390/rel8030042.

[43] John W. de Gruchy, "Democracy", in *The Blackwell Companion to Political Theology*, 439-454.

[44] Larry L. Rasmussen, "Bonhoeffer: Ecological Theologian", in *Bonhoeffer and Interpretive Theory: Esseys on Methods and Understanding*, ed. Peter Frick (Frankfurt am Main: Peter Lang, 2013). Larry L. Rasmussen, "The Brothers Bonhoeffer on Science, Morality, and Theology", *Zygon: Journal of Religion and Science* 44, no.1 (March 2009):97-113, DOI:10.1111/j.1467-9744.2009.00988.x; Larry L. Rasmussen, Normand M. Laurendean and Dan Solomon, "Introduction to 'The Energy Transition: Religious and Cultural Perspectives'", *Zygon: Journal of Religion and Science* 46, no. 4 (December 2011):872-89; DOI:10.1111/j.1467-9744.2011.01230.x. Dianne Rayson, "Bonhoeffer's Theology and Anthropogenic Climate Change: In Search of an Ecoethic," (PhD diss., University of Newcastle, 2017), http://hdl.handle.net/1959.134/1349861.

links to jurisprudential concepts of the German private law sector over against the public sector for the purpose of clarifying the separation between church and state. Legal concepts appear to provide the elements for developing a form for the church apart and different from existing legal forms – a form of *sui generis* for 'the empirical church brought about by the spirit'[45] and for establishing Christ at the center of the Protestant Church. In this form he then reintroduced his theological thought back into the public space regarding ethical problems. Therefore I am inclined to call Bonhoeffer's theology a "theology as politics."[46] This may clarify Bonhoeffer's contribution to the realm of politics, and may distinguish it from Schmittian analogies between theology and jurisprudence within the "old" political theology but may also keep Bonhoeffer's theology relevant for any questions of public ethics in any specific political context.

Finally, even though for a German student of law Schmitt's constitutional theories[47] are almost unavoidable, it nonetheless appears a daring task to set Bonhoeffer's views, which resisted the evils of National Socialism, into any kind of comparative relation and even lived personal proximity to the polarizing thought and figure of Schmitt, who has been called the 'theorist for the Reich'[48] and has been judged as characterless evil[49] for his involvement with the National Socialist state.[50] However, a precise investigation into the structures of their

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[45] DBWE 1:263.

[46] Karola Radler, "Theology as Politics versus 'Political Theology'", in *Dem Rad in die Speichen fallen: Das Politische in der Theologie Dietrich Bonhoeffers*, ed. K. Busch Nielson, R. Wüstenberg, and J. Zimmermann, (Gütersloh: Gütersloher Verlagshaus, 2013), 270-86.

[47] Schmitt's analysis of the shortcomings of the 1919 Weimar Constitution and his theory of core elements of a constitution which need special protection, contributed to protecting with a guarantee of perpetuity (*Ewigkeitsguarantie*) in article 79 para 3 of the 1949 German Basic Law the essence of the basic rights (article 1 to 18, 19 para 2), and the essential core principles of social justice (*Sozialstaatsprinzip*), democracy (*Demokratieprinzip*), and the rule of law (*Rechtsstaatsprinzip*) of article 20. Additionally, Schmitt's book *Gesetz und Urteil* is still today an interesting read for a student of jurisprudence in Germany. Because legal studies in Germany are focussed mainly on the work of a judge, Schmitt's book addressed many questions that are still relevant for the position in which a judge is placed, even though one should remain critical of Schmitt's conclusions.

[48] Michael Hollerich, "Carl Schmitt", in *The Blackwell Companion to Political Theology*, 108. Joseph J. Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 2014) describes in detail how Schmitt's transformation unfolded from a scholar in the 1920s to a supporter of the National Socialist regime. Andreas Koenen, *Der Fall Carl Schmitt: Sein Aufstieg zum Kronjuristen des Dritten Reiches* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1995).

[49] Hannah Arendt to Karl Jaspers, September, 29, 1949 in *Briefwechsel 1926-1969*, ed. Lotte Köhler and Hans Saner, (Munich: Piper, 1985), 178; Arendt called Schmitt characterless in the sense that he has none at all, not even a bad one, despite living with a deep passion.

[50] A lot has been speculated as to why Schmitt turned to National Socialism in 1933. Schmitt himself never explained his reasons. A broad overview of possible reasons can be found in Reinhard Mehring, *Carl Schmitt: Aufstieg und Fall - Eine Biographie* (Munich: Beck, 2009), 310-12.

understanding of decision as it was embedded in their contemporary context of the early 20th century should avoid preemptive characterizations that may influence the research, even though, this does not exclude assessing the consequences of their respective attitudes to their polarized reality.

1.3   Research Question and Hypothesis

This thesis takes seriously Bonhoeffer's theology and Schmitt's juristic, jurisprudential realm within the contextual socio-economic and political dynamics of their time and place in the early 20th century. The primary focus is on Bonhoeffer's early theology and Schmitt's early jurisprudential theories. Bonhoeffer's and Schmitt's work will be set into indirect relation for the purpose of contributing further depth to our understanding of Bonhoeffer's theology, his use of language, and his ethics. Reading Bonhoeffer with the jurisprudential paradigm and juristic concepts in mind, and engaging in such a paradigmatic comparison, will open a further dimension from which Bonhoeffer's work can be accessed.

Thus, in a comparative study that indirectly engages Bonhoeffer's theology with Schmitt's theories, this thesis askes in what way possible exposure to the jurisprudential paradigm might have prompted Bonhoeffer to use juristic concepts within his theology and might have entailed uncovering, objecting to, and redirecting with his theological understanding of "decision", the foundational structural elements that underlay Schmitt's jurisprudential concept of *Dezision* in which an individual personality decides with finality over jurisdiction and the implementation of an abstract idea?

Central to this study is thus the question of whether, and if so how, Bonhoeffer engaged with his theological understanding of "decision" Schmitt's concept of *Dezision*. It will seek to establish that Bonhoeffer drew upon juristic concepts in his theology that is focused on a divine decision in Jesus Christ, just as Schmitt turned to theology within his jurisprudence regarding the decisions of a sovereign personality. Because a better knowledge of Schmitt's position will help us with understanding Bonhoeffer's objection, the former's work will be presented in detail. A comparison hopes to show that Bonhoeffer's theology spoke to the underlying structural elements of the paradigm associated with Schmitt's concept, refocused such elements, and thus entailed a challenge to Schmitt's overall claim.

Researching and comparing Bonhoeffer's and Schmitt's reasoning in regards to their oppositional positions on decisions presents a variety of further questions that reveal the particular details concerning the overall research question:

- Was Bonhoeffer exposed to the jurisprudential paradigm of thought in such a way that it enabled him to make use of juristic concepts, informed him on the theory of state, and on Schmitt's theories?
- Was there an overall reason for Bonhoeffer and Schmitt for engaging with the topic of "decision"?
- What did Bonhoeffer and Schmitt perceive as possible choices for bringing an end to their contemporary problems?
- Did Bonhoeffer make use of jurisprudential concepts within his theology?
- Was the topic of decision tied to a particular time-frame?
- Did Bonhoeffer develop a specific method for the application of juristic concepts that corresponded to Schmitt's method of structural analogies?
- What are the underlaying structural elements in Bonhoeffer's understanding of "decision" and Schmitt's theory if *Dezision*?

The above questions lead to the hypothetical assumptions that a comparison of Bonhoeffer's and Schmitt's early work, as it developed during the early 20th century in Germany, will show that

- In some way Bonhoeffer was exposed to the jurisprudential paradigm of thought which enabled him to make use of this intellectual framework within his theology and be at least indirectly informed on the theory of state and Schmitt's theories;
- The circumstances of their place prompted a concern for engaging with the topic of "decision";
- Both, Bonhoeffer and Schmitt, identified alternatives that they perceived as leading towards a decision;
- Bonhoeffer used juristic concepts in his theory of church and theology;
- For both the time-element of urgency was present, a situation which rested on their respective understandings of history;

- Bonhoeffer did not develop a specific method for the application of juristic concepts as, reversely, Schmitt did for the application of theological concepts;
- Bonhoeffer's theology of "decision" entailed an objection and redirection of the form of Schmitt's structure of *Dezision* towards espousing an understanding of responsible concrete decisions within the private and the public realm.

The method employed for proving the hypothetical assumption involves comparisons of different paradigms of thought, as well as academic and cultural linguistic differences which are explained in the following chapter.

1.4   Methodology, Paradigms, and Translation

The method applied in this thesis is that of comparative qualitative research with Bonhoeffer's and Schmitt's original German texts as primary sources for the purpose of discovering in a hermeneutical process the continuity and discontinuity of Bonhoeffer's and Schmitt's understanding of "decision". The hermeneutical process of extracting from the case-data, that is, from Bonhoeffer's and Schmitt's texts, the differences and similarities in structuring their theories regarding decisions must pay attention to their immersion within the cultural context of their kinship group of Germany during the early 20th century, to their language and professional paradigms, and to translations.

Comparing Bonhoeffer's and Schmitt's thought can be seen as a legitimate approach, especially due to the suggested indirect link between both, Bonhoeffer's possible exposure to and use of jurisprudential thought, and because it is in line with many previous comparative projects in Bonhoeffer studies. Such studies can be categorized into three groups. They have either compared Bonhoeffer's theology to that of his teachers for the purpose of assessing their influence on him, or have set Bonhoeffer in relation to the thought, theories or theology of another thinker, or have investigated a particular topic in the thought of Bonhoeffer in comparison to other thinkers. An example of the first category is Martin Rumscheidt's essay on "The formation of Bonhoeffer's theology" which discusses the influence the professors Adolf von Harnack, Karl Holl and Reinhold Seeberg et al had on Bonhoeffer's theology.[51]

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[51] Martin Rumscheidt, "The Formation of Bonhoeffer's Theology", in *The Cambridge Companion to Dietrich Bonhoeffer*, ed. John W. de Gruchy (Cambridge: Cambridge University Press, 1999; reprinted 2005), 50-70.

The anthology *Bonhoeffer's Intellectual Formation*, edited by Peter Frick,[52] exemplifies the second category and contains comparisons of Bonhoeffer's theology to other thinkers such as Augustine, Kant, Hegel, Barth, Heidegger. Additionally, Bonhoeffer has been researched in comparison to Martin Luther[53] and Friedrich Nietzsche.[54] Almost endless examples exist for the third category in which the comparison evolves around a particular theme. Bonhoeffer's Christology and his concepts of the penultimate and discipleship have been set in connection to Søren Kierkegaard.[55] Bonhoeffer's vision of humanity and his understanding of 'togetherness' and of 'revelation as being' have been compared to Martin Heidegger.[56] Christ and revelatory community has been the topic for a comparison between Hegel and Bonhoeffer[57] and the topic of secular spirituality centered on Bonhoeffer and Nietzsche.[58] Moreover, the majority of comparision's set Bonhoeffer in relation to Karl Barth,[59] because of their personal relationship and their cooperation as well as their disagreements on a variety of theological issues, not least regarding the Bethel Confession and Barmen Declaration. This thesis' comparative study between Bonhoeffer and Schmitt regarding the issue of decision fits within the third category.

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[52] Peter Frick, ed. *Bonhoeffer's Intellectual Formation* (Tübingen: Mohr Siebeck, 2008).

[53] Michael DeJonge, "The Ubiquity of Luther in Bonhoeffer, with a Glance at Ecumenical Implications", *Theologia Wratislaviensia* 11 (2016):19-28.

[54] Frits de Lange, "Aristocratic Christendom: On Bonhoeffer and Nietzsche" in *Bonhoeffer and Continental Thought: Cruciform Philosophy*, eds. Brian Gregor and Jens Zimmermann (Bloomington: Indiana University Press, 2009), 73-83.

[55] Philip G.Ziegler, "Christ for us Today – Promeity in the Christologies of Bonhoeffer and Kierkegaard", *International Journal of Systematic Theology* 15, no. 1 (January 2013): 25-41, DOI:10.1111/j.1468-2400.2012.00656X. David R. Law, "Redeeming the penultimate: discipleship and Church in the thought of Søren Kierkegaard and Dietrich Bonhoeffer", *International Journal for the Study of the Christian Church* 11, no.1 (2011):14-26, DOI:10.1080/1474225X.2011.547317.

[56] Jens Zimmermann, "Dietrich Bonhoeffer and Martin Heidegger: Two Different Visions of Humanity", in *Bonhoeffer and Continental Thought: Cruciform Philosophy*, eds. Brian Gregor and Jens Zimmermann, 102-33. Josh de Keijzer, ""Revelation as Being" Bonhoeffer's Appropriation of Heidegger's Ontology", *The Journal of Religion* 98, no. 3 (July 2018): 348-70, DOI:10.1086/697981. See also Charles Marsh, "Bonhoeffer on Heidegger and togetherness", *Modern Theology* 8, no. 3 (July 1992):263-283.

[57] David S. Robinson, *Christ and Revelatory Community in Bonhoeffer's Reception of Hegel* (Tübingen: Mohr Siebeck, 2018).

[58] Peter H. Van Ness, "Bonhoeffer, Nietzsche, and secular spirituality", *Encounter* 52, no.4 (1991):327-41, http://www.cts.edu.

[59] Examples are: Tom Greggs, *Theology against Religion: Constructive Dialogue with Bonhoeffer and Barth* (London: Bloomsbury, 2011); Philip G. Ziegler, "Graciously commanded: Dietrich Bonhoeffer and Karl Barth on the Decalogue", *Scottish Journal of Theology* 17, no. 2 (2018):127-41, https://doi-org.ez.sun.ac.za/10.1017/S0036930618000030; Jordan J. Ballor, "The Aryan Clause, the Confessing Church, and the ecumenical movement: Barth and Bonhoeffer on natural theology", *Scottish Journal of Theology* 59, no. 3 (August 2006):263-80, https://journals.cambridge.org/SJT, IP address: 146.232.129.75; Michael DeJonge, *Bonhoeffer's Theological Formation: Berlin, Barth, and Protestant Theology* (Oxford: Oxford University Press, 2012).

In this study Bonhoeffer's and Schmitt's thought processes of theology and jurisprudence are referred to as paradigms. Because there is not one single definition available for what constitutes a "paradigm", it is necessary to clarify its meaning for the purpose of this thesis. Generally, paradigms are being brought into relation to scientific thinking, knowledge, statements, and tradition and have been described as "disciplinary matrix" and "discursive formations". The former description is meant to denote a common set of techniques, models, and values of members of a scientific community.[60] As connected to a set of characteristic procedures and effects that are accepted within a specific domain and its specific discourse at a given point in time paradigms thus would connect to knowledge.[61] But if described as discursive formations, they are not positivities in the sense of a status of definitive knowledge.[62] Then they are rather concerned with the internal regime that governs statements into scientifically verifyable and falsifyable propositions.[63] However, paradigms have also been understood as historical phenomena that 'constitute and make intelligible a broader historical-problematic context'.[64] This is closer to an understanding that even in the absence of rules, such as matrixes or formations, it is possible to articulate a comprehensible tradition through using an example as paradigm. For the purpose of this thesis, theology and jurisprudence are understood each as a paradigm that displays all three markers. They are disciplinary matrixes which each display discursive formations and are expressions of a broader historical context. Both express a particular set of knowledge in disciplinary languages whose linguistic forms are governed by statements that are in German jurisprudence as well as in Lutheran theology called dogmatics, and which both have developed in the course of the post-Enlightenment scientific age.

A comparitative study that uses as its source to a large extent Bonhoeffer's and Schmitt's original German texts is justified because the connection of Bonhoeffer's theology to German jurisprudence is not easily detectable in the English translation. Thus the comparison of the primary texts attempts to draw out this underlying jurisprudential feature within Bonhoeffer's

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[60] Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970), 182.

[61] cf. Michael Foucault, *The Politics of Truth*, trans. Lysa Hochroth and Catherine Porter (Los Angeles: Semiotexte, 2007), 60-61.

[62] Michael Foucault, *The Archaeology of Knowledge*, trans. A. M. Sheridan Smith (New York: Routledge, 2002), 200.

[63] cf. Michael Foucault, "Truth and Power", in *Power*, vol. 3 of *Essential Works of Foucault 1954-1984*, ed. James D. Faubion, trans. Robert Hurley (New York: New Press, 2000), 3:114.

[64] Giorgio Agamben, *The Signature of all Things: On Method*, trans. Luca D'Isante with Kevin Attell (Brooklyn: Zone Books, 2009), 9.

theology. Because translations are primarily a form of interpretation[65] a translated text is always only an approximation and never a full equivalent to the original text. Therefore it is difficult, and in some instances even impossible, to transfer into a translation the cultural background in which the text originated. Not only have the German and the English language their own special tradition, cultures, and history, but some words and sets of ideas have no exact parallels in the other language which makes comprehending and appropriating difficult.[66] Even facts behind a given text are not easy to discover and to communicate in the translation.[67] Thus the complexities of the German culture of the Weimar period may be difficult to discern in Bonhoeffer's rather complicated academic language. One of Bonhoeffer's translators states that Bonhoeffer owes the phrasing of his texts to the long history of European intellectual development and is often full of allusions from the German culture of his time.[68] Therefore it was necessary to existentially enter into the culture, historical, and theological otherness of Bonhoeffer's time, culture and person. This connection of the editorial team to Bonhoeffer's writings was fascilitated by the belief in a deep unity that rested within the life and resurrection of Jesus Christ.[69] This meant that Bonhoeffer's texts were approached from a perspective strongly centered on the theological paradigm of thought. This becomes visible for example in the translation of the only sentence that the jurist Leibholz quoted from Bonhoeffer in November 1932.[70] The German word *Amt* is translated in Bonhoeffer's text as "ministry" which has a clear theological connotation. However, Bonhoeffer's sentence addressed the functions of the state, which is confirmed in the form of Leibholz's citation, and therefore the word *Amt* refers to the office or official task of the state which has an additional legal-administrational connection. Similarly, the German word *Gesellschaft*, translated as society of purpose, can refer in its original German context to particular structural forms as defined in the 1897 German Commercial Code.[71] Thus by using

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[65] Lisa E. Dahill, "Bringing Voice to Life: Bonhoeffer's Spirituality in Translation*"*, in *Interpreting Bonhoeffer*, 80.

[66] cf. Hans Pfeifer, "Cultural Elements in Theology and Language: Translation as Interpretation", in *Interpreting Bonhoeffer*, 61.

[67] Pfeifer, "Cultural Elements", 62.

[68] Pfeifer, "Cultural Elements", 62.

[69] Pfeifer, "Cultural Elements", 69.

[70] „'Nicht Schöpfung neuen Lebens, sondern Erhaltung gegebenen Lebens" ist das *Amt des Staates*.'; Gerhard Leibholz, *Die Auflösung der Liberalen Demokratie in Deutschland und das autoritäre Staatsbild* (Munich: Duncker & Humblot, 1933), 74-75, emphasis added. 'Not the creation of new life, but preservation of existing life is its *ministry*.'; DBWE 12:293, emphasis added.

[71] *Handelsgesetzbuch (HGB)*. Bundesministerium der Justiz und für Verbraucherschutz. Accessed March 30, 2018. https://www.gesetze-im-internet.de/hgb/HGB.pdf.

this word Bonhoeffer may have used juristically defined forms as possible foundation for the institutional form of the Protestant Church.

The location of a language's origin and its development are reflected in the language's cadence, and the conceptual juristic or constitutional structures that reverberate behind a particular phrase or word can remain hidden in a translation. Therefore the juristic resonance within Bonhoeffer's theology may not easily be recognized by a reader of the English translation, especialy those readers who are unfamiliar with the specific details and background of the historical close connection in Germany between church and state, their close paradigmatic expressions, and their official first-time separation in 1919.

Both Bonhoeffer's and Schmitt's writings make expert and refined use of German cultural references and the German language which is in line with their knowledge of the extensive European intellectual history as well as paradigmatic language. Schmitt's immersion into the Continental legal tradition which differs in method and reasoning from the Anglo-American legal tradition[72] seems to have been often overlooked or not recognized. This appears to be the case in regards to the linguistic arrangement of his *Political Theology*. In this text, which advances the theory of a decisionist sovereign beyond legality, he applied a reflection of the "decision style" in which German judges are trained. Schmitt stated the result of his thoughts in a precise summarizing statement prior to his reasoning; a juristic method he had previously analyzed in *Gesetz und Urteil*.[73] Therefore Schmitt's *Political Theology* may also be understood as a contribution to the controvercies on method and direction that was embedded within the Weimar Republic's discourses on the theory of state.[74]

For their part, Bonhoeffer's writings are translated in a comprehensive series and with a high degree of consistency as to the use of terms. In comparison, Schmitt's main jurisprudential

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[72] The most profound methodological difference is the Anglo-American juristic method of case law over against the German method of grounding the evaluation of a case in a norm, that is, in a promulgated law. A concise comparison can be found in Ernst-Wolfgang Böckenförde, *Vom Ethos der Juristen*, 2nd reviewed ed. (Berlin: Duncker & Humblot, 2011), 20-36.

[73] Carl Schmitt, *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis*, 2nd ed. (Munich: C. H. Beck, 1969, reprint 2009), all subsequent citations refer to the reprint edition.

[74] Regarding the controvercy on method see: Max-Emanuel Geis, „Der Methoden- und Richtungsstreit in der Weimarer Staatslehre", *Juristische Schulung* (C.H.Beck Munich, Frankfurt), no. 2 (1989): 91-96.

writings have a variety of unconnected translators.[75] Thus the translations are not coordinated and uniform in the use of jurisprudential terms. This can be confusing as many of Schmitt's terms are expressions of juristic elements and method specific to German jurisprudence. Without them directly correlating to concepts in the Anglo-American legal system there are no corresponding expressions in the English language. A consistant translation of terms could provide some clarity. For example the word *Eigenbedeutung* within Schmitt's *Political Theology* is translated as 'proper meaning of the subject'[76] instead of using a translation such as "significance of the self". The former translation obscures the connection of the original phrase to the self-elevation of Schmitt's sovereign. The word "meaning" does not reflect the "significance" the sovereign gives to himself by stepping beyond legal boundaries and loses the connection to Schmitt's earlier work on the significance (*Bedeutung*) of the individual.

Additionally, not all of Schmitt's work is yet translated into English; especially some of Schmitt's earliest work which is of high relevance to this thesis. This pertains to Schmitt's 1910 doctoral thesis, published as *Über Schuld und Schuldarten*[77] and the book *Gesetz und Urteil* which he wrote in 1912 during his period of articling at the courts and which addresses the correctness of judgements. Both books are foundational to Schmitt's subsequent many abstractions and are exclusively concerned with German jurisprudence. The former is a discourse on the relationship between intent and guilt within criminal law and the latter analyses jurisprudential method within German law.

Because of its focus on the theological paradigm and despite the consistency in its wording the official Bonhoeffer translation has difficulties with capturing the possible undertone of the jurisprudential paradigm in Bonhoeffer's texts. Within Schmitt's texts the translations

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[75] Schmitt's texts were not translated as part of an overarching project but by interested individuals: George Schwab (political scientist) translated Schmitt's *Political Theology* in 1985 and *The Concept of the Political* in 1976; Carl Schmitt, *The Concept of the Political*, trans. George Schwab, ex. ed. (Chicago: University of Chicago Press, 1995; reprint 2007). Ellen Kennedy (political scientist) translated *The Crisis of Parliamentary Democracy* in 1985. G. L. Ulmen translated *Roman Catholicism and Political Form* in 1996; Carl Schmitt, *Roman Catholicism and Political Form*, ed. and trans. G. L. Ulmen (Westport: Greenwood Press, 1996). Jeffrey Seitzer (political scientist) translated Schmitt's *Verfassungslehre* in 2008; Carl Schmitt, *Verfassungslehre*, 10th ed. (Berlin: Duncker & Humblot, 2010). Guy Oakes (philosopher) translated Schmitt's *Political Romanticism* in 2011. Graham Ward (theologian) and Michael Hoelzl (political philosopher) translated Schmitt's *Die Diktatur* in 2014; Carl Schmitt, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*, 7th ed. (Duncker & Humblot: Berlin, 2006). Interestingly, there is a lack of German jurists among the translators.

[76] Schmitt, *Political Theology*, 35.

[77] Carl Schmitt, *Über Schuld und Schuldarten: Eine terminologische Untersuchung*, Strafrechtliche Abhandlungen 120 (Breslau: Schletter, 1910).

often focus less on the actual words, despite the importance of accuracy of language within German law, and instead often resort to transmitting the sense of a text. This carries the danger of diverging from the intended meaning by the author of the text. Based on these reasons, I proceeded in this thesis from Bonhoeffer's and especially Schmitt's original texts in all areas where it was of high importance. Therefore, the translations are mostly my own. If a particular term was concerned I provided the original German word or phrase in brackets immediately following their English translations. If longer passages needed to be translated I added for reasons of clarity or accuracy the matching original passages of the text in the footnotes. This provides transparency and adds more context and substance to the argument. Where additional translational substance was not needed, I proceeded in regards to Bonhoeffer from the official translations of the Dietrich Bonhoeffer Works. The footnotes always identify exactly whether the German original text or an English translation was used. Wherever a German text was used, the English translation is always entirely my own if not otherwise noted. Also, translations of titles of books that are only available in the German language and translations of legislative acts are my own.

For systematic clarity and for focussing the argument and comparison between the data, between the professional theories of Bonhoeffer and Schmitt, quantitative limitations were applied. Limits are set to the time-frame of their writings and include a prioritization of the sources. Central attention will be directed at Bonhoeffer's and Schmitt's early texts because this permits extracting and comparing the foundations to their conceptual thought. The scope of the research, despite two exceptions, concentrates on Bonhoeffer's and Schmitt's writings within the contextual developments up to 1935. At this point in time Hitler's totalitarianism began to sideline Schmitt within the National Socialist movement. Setting the time-limit to 1935 excludes, on Bonhoeffer's part, his participation in the underground resistance to National Socialism and in the 1940s conspiracy and attempted *coup d'état*. However, included are nonetheless texts written up to Bonhoeffer's incarceration in April 1943 and which were published after his death in 1945 as *Ethics*. These essays provide depth to the features of his previously developed theology. Schmitt re-addressed many of his pre-war and war-time topics in the post-war years, especially the issues of political theology and the friend-enemy dichotomy. But the latter post-war contributions were excluded, especially his

Political Theology II,[78] because Bonhoeffer's early death prevented him from continuing his own post-war thought in response to the developing context and thus prevents a comparison. An exception on Schmitt's part is made regarding the only self-reflective writing he ever published and which dates from the time of his incarceration in the immediate post-war years between 1945 and 1947. These are included.

Although Bonhoeffer's sermons which explore biblical texts and Schmitt's many literary, non-jurisprudential writings from his student years and his early career are interesting parts of their work, they were not analysed given the main thrust of this thesis. The sermons and the literary writings may be used to extract to some degree personal aspects of their inner selves or may bring insights into their spirituality, that is, into how they discerned the Word of God for their own lives. Aspects of personal discernment might even intersect with their understanding of a particular element of decision. Such intersecting underlying aspects between decisions and discernment may regard their personal understanding of what the "truth" of the embodied Word is behind generalizations and abstractions. But discernment, as the other side of the coin to the theme of "decision", reached the surface of Bonhoeffer's attention only in his late writing and 'he never had a chance to reflect systematically on the significance or practice of discernment for his spirituality.'[79] And because Schmitt was a very private person, with the one-time exception during his incarceration, any inquisitive attempt to extract from the early literary writings insights into Schmitt's personal understanding of the Word of God for his own life is questionable and may lead to speculations. But the self-awareness needed for the personal discernment of God's word is not central to this thesis' focus on structural forms.

Certain sub-themes pertaining to Schmitt's Catholic orientation, the correctness of Schmitt's and Bonhoeffer's statements regarding Catholicism, and Schmitt's statements about the Lutheran faith were not addressed in this thesis. A specific Catholic-Lutheran discourse would have distracted from the main focus on the theological and jurisprudential paradigms of thought as they relate to the structural elements of Schmitt's and Bonhoeffer's position on the topic of decision. To include questions such as whether Schmitt's presentation of the

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[78] Carl Schmitt, *Political Theology II: The myth of the closure of any political theology*, ed. And trans. Michael Hoelzl and Graham Ward (Cambridge: Polity Press, 2008).

[79] Lisa E. Dahill, "Probing the Will of God: Bonhoeffer and Discernment", *Dialog: A Journal of Theology* 41, no.1 (Spring 2002):43.

institutionalism of the Catholic Church and the role of the pope, in fact, correspond to the Catholic Church's official position and whether Schmitt's remarks about the Lutheran faith correlate to the Lutheran church's position would have been distracting. Schmitt never claimed to be speaking on behalf of the Catholic Church or to have particular knowledge of Lutheran dogma. Similarly, the many remarks throughout Bonhoeffer's writings that address Catholicism and the Catholic Church were disregarded because a discourse on the correctness of their substance would not have enhanced the argument of the thesis. Nonetheless, the fact that Bonhoeffer as Lutheran theologian and pastor was speaking from and for the Lutheran faith remains an important part of the argument.

1.5   Literature Review

The decades since the end of the Second World War have seen the publication of Dietrich Bonhoeffer's writings, the re-publication of Carl Schmitt's pre-war books as well as new publications and an explosion of secondary literature on both.[80] While often Schmitt's 'self-dramatization'[81] continued to draw attention to his publications, interest in Bonhoeffer's writings emerged only two decades after his death, and has increased steadily ever since. In Schmitt-studies the main attention was, and to a large extend still is, drawn toward Schmitt's involvement with National Socialism, his weight on sovereignty, and the salient friend-enemy concept which served as anthropological principle for exclusion and totalitarianism. Many Bonhoeffer-studies emphasize his participation in the underground resistance and conspiracy around the attempt to assassinate Hitler on 20 July 1944. Schmitt's theory of the sovereign with its state of exception and situation of emergency, which draws easy attention due to its terse arrangement in Schmitt's *Political Theology* and his particular use of theology, seems to have set, for the most part, the agenda for those Bonhoeffer-studies that interact with Schmittian theories. In the present study, however, the topics of sovereignty and exception are peripheral to the disclosure of the underlying structures in their understanding of the issue of decision. The primary focus is on comparing Schmitt's and Bonhoeffer's pre-

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[80] An overview of the Bonhoeffer-scholarship can be found on the official website of the International Bonhoeffer Society – English Language Section, The Bonhoeffer Center, updated December 16, 2018, accessed December 18, 2018, https://thebonhoeffercenter.org/. Extensive information on Schmitt-scholarship is available from the Carl-Schmitt-Gesellschaft e.V., updated January 1, 2019, accessed January 1, 2019, http://www.carl-schmitt.de/. Book reviews on "recent" publications can be found in Harald Seubert, „Eigene Frage als Gestalt: Zu neuerer Literatur zu Carl Schmitt", accessed 15 November 2018, https://www.jstor.org/stable/43642902?seq =1#metadata_info_tab_contents.

[81] Michael Hollerich, "Carl Schmitt", 109.

1935 jurisprudence and theology respectively with a view to Bonhoeffer refuting with his theological position on the topic of "decision" the foundational structural elements that underlay Schmitt's *Dezision*.

1.5.1 Schmitt Studies

Schmitt-studies focus heavily on the state of exception, situation of emergency, and the sovereign leader. This concentration is reflected in the intellectual discourses of Giorgio Agamben[82] and many others.[83] Paul W. Kahn also proceeds from Schmitt's succinct definition of the sovereign and the state of exception in his book *Political Theology: Four New Chapters on the Concept of Sovereignty*.[84] He calls Schmitt's argument in *Political Theology* obscure and based on 'impenetrable considerations of lost German theoreticians' of long-gone European theorists[85] and disregards the larger context of its emergence in the Continental legal tradition. Instead he proceeds from his Anglo-American legal understanding[86] and expert knowledge of US American jurisprudence.[87] For example, Kahn

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[82] Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005); Matthew Calarco and Steven DeCaroli, ed., *Giorgio Agamben: Sovereignty and Life* (Stanford: Stanford University Press, 2007).

[83] One example is Chantal Mouffe, *The Return of the Political* (London: Verso, 1993); *On the Political* (London: Routledge, 2005; reprint 2008).

[84] Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

[85] Kahn, *Political Theology*, 4-5.

[86] One major difference between the two legal traditions is the Anglo-American concept of "Equity". The discourse Kahn discusses under "Equity" was within the Weimar context part of the discourse on "Equality before the law" (Article 109, para 1 Weimar Constitution), especially its definition and connection to arbitrariness. In fact, the 1924 doctoral dissertation of Bonhoeffer's brother-in-law Gerhard Leibholz dealt with the topic of equality and became a foundational work for the post-war constitutional definition of equality. Furthermore, the post-war German constitution, the Basic Law (*Grundgesetz*) - precisely in acknowledging that law and politics are often intertwined - established a Federal Constitutional Court with constitutionally exactly defined competencies (Articles 61, 93, 94, 100 Basic Law). During the Weimar era both, Schmitt and Leibholz were involved in the discourse regarding the need for a keeper of the Constitution; a Constitutional Court was thought of as one option. In 1951 Leibholz became one of the first judges to the Federal Constitutional Court of Germany. This court decisively differs in its function and position from the American Supreme Court within the American legal system which self-assumed some functions similar to a constitutional court.

[87] Not taking into account the difference in the two legal traditions risks falsifying Schmitt's assertions and leads to "discoveries" as for example that Schmitt's reasoning is founded on a philosophy of freedom that can be realized only when the freedom of philosophy is ensured and thus 'draws out philosophical implications of which Schmitt himself may not have been fully aware.'; Dick Howard, foreword to *Political Theology*, by Paul W. Kahn, vii. The wider context of Schmitt's arguments shows that his concern was the freedom and other rights of the individual within liberalism even though he assessed them as a fiction. Also, already in 1963 Schmitt's student Ernst-Wolfgang Böckenförde had stated that the liberal secular state is based on conditions which itself cannot guarantee but has to risk in the name of freedom. Ernst-Wolfgang Böckenförde, *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, 2nd ext. ed. (Frankfurt am Main: Suhrkamp Verlag, 2009), 112. And in 1990 he added that freedom does not exist abstractly but receives its form through legal formation. The historical-political controversies of the 19th and early 20th century

admits that a decision lies between norm and application[88] but rejects Schmitt's argument in *Political Theology* that content alien to the norm enters the judge's decision which lies between norm and its application and connects to Schmitt's earlier analysis of German jurisprudential method in *Gesetz und Urteil.* Furthermore he compares American constitutional theory and law with the contemporary European Union[89] instead of Germany's present post-war constitutional Basic Law, the *Grundgesetz.* A comparison with the Basic Law, would have led to engaging with Schmitt's contextual jurisprudential discourse because the German post-war constitution owes much to Schmitt's analysis of the shortcomings of the Weimar Constitution in his 1928 *Verfassungslehre* which was written between the first and second publication of *Political Theology*.

Somewhat differently to Kahn, William T. Cavanaugh in his *Migration of the Holy*[90] limits his discourse with Schmitt explicitly to the concrete context of the United States' civil religion. He addresses Schmitt's sovereign exception in connection to evangelical Christianity that uses this concept for the purpose of legitimizing America's exceptionalism in the world and for creating a messianic nation which, in Cavanaugh's assessment, displaces the church.[91] And in contrast to Kahn, Ellen Kennedy's *Constitutional Failure: Carl Schmitt in Weimar*[92] sets Schmitt's jurisprudence and theory of state within the developing context in Germany of the early 20th century and is an important source of information.

Hasso Hoffman in his 2001 foreword to the fourth edition of his 1964 *Legitimität gegen Legalität: Der Weg der politischen Philosophie Carl Schmitts*[93] insists that Schmitt's texts are not simply semantic deposits from the epoch of crisis during the transition to an industrial mass-society. Also Schmitt's political and jurisprudential theories cannot be simply reduced to or dissolved in a political theology, despite the increasing interest in debating whether Schmitt's religiosity was genuinely Catholic, Catholic ecclesiastic, a personally defined

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were essentially a fight for developing the right form of freedom; a fight that continues in our present time; Böckenförde, Vorwort to *Recht, Staat, Freiheit*, 8.

[88] Kahn, *Political Theology*, 5.

[89] Kahn, *Political Theology*, 11, 13, 16.

[90] Cavanaugh, *Migrations*, 6.

[91] Cavanaugh, *Migrations*, 90-108

[92] Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004).

[93] Hasso Hofmann, *Legitimität gegen Legalität: Der Weg der politischen Philosophie Carl Schmitts*, 5th unchanged ed. (Berlin: Duncker & Humblot, 2010).

Catholicism, or of an antique-pagan form.[94] Instead, to Hofmann, Schmitt was by profession a professor of law whose most important work was focussed on constitutional theory and international law.[95] Hofmann is astonished that the majority of works on Schmitt are now written by non-jurists such as Heinrich Meier.[96]

In *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy*[97] Meier appeals to Schmitt's context in the sense of a 'foundational context of a thought' that precedes Schmitt's doctrines. To Meier, if a political theologian wishes to remain in accord with himself, he must apply the fundamental demands of his theory to his own activity and grasp his theorizing as historical action that is subject to the commandment of obedience.[98] According to Hofmann's summary of Meier's perspective, Schmitt's political theology stresses obedience to the enmity mentioned in Genesis 3:15 and the story of Cain's animosity toward his brother Abel in Genesis 4:1-16, because Original Sin had brought this conflict to human beings. This finds expression in dichotomies such as good and evil, God and Satan, and obedience and disobedience. This is, according to Meier, the foundational context to the friend-enemy dichotomy behind the concept of the political. Thus to obey God necessitates for Schmitt to insist on this concept of an enemy and to resist the satanic temptation of natural goodness or appeals to humanity. Hoffman observes that if Meier's assessment was correct it must be concluded that Schmitt's anti-Semitism rooted in holding the Jews responsible for this universalistic vision.[99]

However, Meier states that the decisive determinations of the 'political theologian from Plettenberg' are authority, revelation, and obedience[100] and that the real drama of Schmitt's existence is to discover the intentions behind Schmitt's concepts.[101] For this purpose Meier consulted foremost the three editions of the source of Schmitt's friend-enemy distinction, *The Concept of the Political*, as well as *Political Theology* and Schmitt's post-war writings in

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[94] cf. Hofmann, *Legitimität*, IX-X.

[95] Hofmann, *Legitimität*, VI.

[96] Hofmann, *Legitimität*, VII-VIII.

[97] Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy*, trans. Marcus Brainard (Chicago: University of Chicago Press, 1998).

[98] Meier, *The Lesson*, viii.

[99] Hofmann, *Legitimität*, VII-VIII.

[100] Meier, *The Lesson*, xix.

[101] Meier, *The Lesson*, viii.

Glossarium[102] with its Anti-Semitic excesses, as well as Schmitt's last publication *Political Theology II*,[103] and states that he wrote his book on Schmitt while still being influenced by Leo Strauss.[104] Thus Meier's evaluation of Schmitt stretches essentially from the National Socialist experience to the post-war Schmittian texts. Missing from Meier's research are Schmitt's very early publications, *Über Schuld und Schuldarten*, *Gesetz und Urteil*, *Der Wert des Staates und die Bedeutung des Einzelnen*,[105] and, interestingly, also the essay "The visibility of the church".[106] These are exactly the texts that are most relevant to this present thesis.

Schmitt's 1910 doctoral thesis *Über Schuld und Schuldarten* on guilt and the types of guilt, and the 1912 booklet *Gesetz und Urteil* which he published under the impressions of articling at a court in the Rhineland provide for this thesis basic insights into Schmitt's subsequent theories. While the former became relevant regarding Schmitt's intention and abstractions, the latter disclosed the origin of a need for personality in the sovereign, and the quality of his ties to legal norms. Furthermore, Schmitt's 1917 essay on "The Visibility of the Church" in combination with the 1923 booklet on *Roman Catholicism and Political Form* unlocked the most important abstraction when it was read together with *Political Theology* whose first German edition (1922) was written almost simultaneously with the first German language edition of *Roman Catholicism* (1923).

The present thesis takes serious Bonhoeffer's theology and Schmitt's juristic, jurisprudential realm as they were connected to the contextual socio-economic and political dynamics of their time and place. With Hofmann, I understand Schmitt foremost as a jurisprudential scholar, a professor of law who practiced law and was rooted in the Continental legal tradition. This does not exclude religious convictions on Schmitt's part but also does not neglect Schmitt's immersion in the Continental legal tradition that was underlying his theories and political perspectives.

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[102] Carl Schmitt, *Glossarium: Aufzeichungen der Jahre 1947-1951*, ed. Gerd Giesler and Martin Tielke, ex., cor., and commentated 2nd ed. (Berlin: Duncker & Humblot, 2015). First published in 1991.

[103] Carl Schmitt, *Political Theology II*. First published in German in 1970.

[104] Meier, *The Lesson*, xi-xii. Heinrich Meier, *Carl Schmitt, Leo Strauss und "Der Begriff des Politischen": Zu einem Dialog unter Abwesenden*, 3rd ed. (Stuttgart: Metzler, 2013).

[105] Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen*, 3rd cor. ed. (Berlin: Duncker & Humblot, 2015).

[106] Carl Schmitt, "The Visibility of the Church: A Scholastic Consideration", in Schmitt, *Roman Catholicism*.

1.5.2 Bonhoeffer Studies

Bonhoeffer's resistance to National Socialism was the focus of very recent scholarship. Michael DeJonge's *Bonhoeffer on Resistance: The Word Against the Wheel*[107] focussed on Bonhoeffer's resistance and the Jewish Question from a strong Lutheran perspective. Christiane Tietz's concise introductory biography highlighted Bonhoeffer as *Theologian of Resistance.*[108] In the concluding chapter,[109] Tietz states that Bonhoeffer's decisions and his 'radicality and refusal to compromise' cannot simply be adopted for today. But nonetheless his theology retains a 'particular social and political function' for what 'more recently has been described as "public theology"'. Bonhoeffer 'tried to preserve the relationship between faith, theology, and life' in a way that corresponds to reality for the purpose of living responsibly in a modern world that takes serious faith in God as well as a human autonomy that is available "for" others. This thesis may add to this perspective that the structural elements behind Bonhoeffer's understanding of decision and his refusal to compromise on them are of enduring applicability to issues of significance.

Another study that attends to the topic of resistance is Christine Schließer's *Schuld durch rechtes Tun? Verantwortliches Handeln nach Dietrich Bonhoeffer.*[110] Central is here the issue of responsibility as it bears down on Bonhoeffer's specific decision of joining the conspiracy for killing Hitler. Her aim is to establish Bonhoeffer's objective guilt for acting responsibly in this particular borderline case. Responsibility is defined as responding with the own life to Christ's life. Thereby responsibility is marked by a bond to God and other human beings in the form of *Stellvertretung* within concrete reality and by the freedom to risk the act of taking on guilt.[111] It is an act beyond law and in conscious transgression of the law, of an ought, of the normal case, that remains inactive unless an order is endangered.[112] Asserted is that the

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[107] Michel DeJonge, *Bonhoeffer on Resistance: The Word Against the Wheel* (Oxford: Oxford University Press, 2018).

[108] Christiane Tietz, *Theologian of Resistance: The Life and Thought of Dietrich Bonhoeffer*, trans. Victoria J. Barnett (Minneapolis: Fortress Press, 2016).

[109] Tietz, *Theologian of Resistance*, 118-120.

[110] Christine Schließer, *Schuld durch rechtes Tun? Verantwortliches Handeln nach Dietrich Bonhoeffer* (Neukierchen-Vluyn: Neukirchener Verlagshaus, 2006).

[111] Schließer, *Schuld*, 53-54.

[112] Schließer, *Schuld*, 57, 59. In law a normal case, the ought, may be silent as long as a prohibition is not transgressed, but it is nonetheless at all times active, not inactive, because the aim of a prohibition is to at all times prevent a violation of the protected legal value (*Rechtsgut*).

willingness to take on objective guilt is the "innermost part" of Bonhoeffer's decision which is grounded in Christ who had stepped into human guilt as the one who had become human. However, the "objective" guilt is not set into relation to a possible subjective aspect with regards to the innermost part of a decision. It is conceivable that a relation between the objective and the subjective can either prevent or establish responsibility and that responsibility and guilt are not necessarily the same.

Recent research that sets Bonhoeffer's theology into relation to Schmitt's theories mirrors the current concentration within Schmitt studies on sovereignty and exception and fits into Hoffman's observation of a rising interest of non-jurists in studying Schmitt. In "The 'Borderline Case' in Bonhoeffer's Political Theology" Matthew Puffer[113] compares Bonhoeffer's understanding of the *Grenzfall*, defined as an 'uncommon occurrence of a conflict between ethical norms',[114] to Schmitt's definition of the sovereign who defines and solves the problems of the *Ausnahme* (exception), the case beyond the *Normalfall* (normal case). The translation of the *Normalfall* as "routine", "everyday", and "quotidian"[115] removes Schmitt's *Ausnahme* to the moral realm. I would argue that more can be gained by keeping the language in the jurisprudential paradigm because Schmitt had given throught to the relation of the legal and moral realms since his earliest work.[116] Also Petra Brown's doctoral thesis[117] and in her essay "Bonhoeffer, Schmitt, and the state of exception" move Schmitt outside the jurisprudential framework.[118] She sees in Bonhoeffer's as well as Schmitt's writings a "single individual" who is enacting a suspension of "ethical" law.[119]

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[113] Matthew Puffer, "The 'Borderline Case' in Bonhoeffer's Political Theology", in *Dem Rad in die Speichen fallen: Das Politische in der Theologie Dietrich Bonhoeffers*, ed. K. Busch Nielson, R. Wüstenberg and J. Zimmermann (Gütersloh: Gütersloher Verlagshaus, 2013), 257-69.

[114] Puffer, „Borderline Case", 260.

[115] Puffer, „Borderline Case", 258-59.

[116] Schmitt discussed the relation between the juristic and the moral, between the state and God, in his 1914 *Der Wert des Staates und die Bedeutung des Einzelnen.*

[117] Petra Brown, "Bonhoeffer as Kierkegaard's 'Single Individual' in a 'State of Exception'," (PhD diss., Deakin University, Geelong, 2011), library copy.

[118] Petra Brown, "Bonhoeffer, Schmitt, and the state of exception", *Pacifica* 26, no. 3 (2013):246-264. https://doi.org/10.1177/1030570X13502135.

[119] Brown, *Bonhoeffer as Kierkegaard's 'Single Individual'*, 6. Brown limited her research to Bonhoeffer's *Discipleship* (DBWE 4) and *Ethics* (DBWE 6) and to Schmitt's *Political Theology.* For Brown, Schmitt's sovereign and Bonhoeffer's disciple may find themselves acting in an 'extraordinary situation' in a way that leads to 'pure violence' without reference. Furthermore, Bonhoeffer's "exceptional event" radicalizes Schmitt's concept of "exception" because it extends to each disciple or follower of Christ. This is because for Bonhoeffer 'Christ is *both* the exceptional individual (*Discipleship*) and the exceptional event (*Ethics*)'; Brown, *Bonhoeffer as Kierkegaard's 'Single Individual'*, 258, 172, 255, emphasis in original. For Schmitt the sovereign was tied to the norm, that is, he was authorized to act beyond the norm for the purpose of restoring the norm. Schmitt called

This thesis is in line with previous work in which I have compared Bonhoeffer's theology with Schmitt's jurisprudence as immersed in his Continental legal thought and context. Instead of focusing on the sovereign, exception, or the concept of the political, I compared Schmitt's jurisprudential concept of representation and Bonhoeffer's theological concept of *Stellvertretung*,[120] as well as the consequences of their different paradigmatic thought for human freedom.[121] And a comparision between Bonhoeffer's view on equality and that of his brother-in-law, the jurist Leibholz, revealed that both rejected arbitrariness based on their respective positions to the Roman legal principle of *suum cuique*.[122]

This study's comparison between the theological and the jurisprudential paradigm as immersed within the discourses of the early 20th century may add extra validity to Clifford Green's view in *The Sociality of Christ and Humanity: Dietrich Bonhoeffer's Early Theology 1927-1933* that Bonhoeffer developed his theology around a concept of person,[123] and to DeJonge's understanding in *The Fact of the person of Jesus Christ.*[124] In this regard the jurisprudential debate of the early 20th century on the Romanist-Germanist discourse within jurisprudence regarding the juristic person and the natural person might be of interest. This present study on possible interrelations between theology and jurisprudential aspects in Bonhoeffer's theology may also add to Joachim von Joosten's[125] investigation into the interconnection between theology and sociology in Bonhoeffer's *Sanctorum Communio*, especially as it pertains to the relation of person to institutionality.

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this a commissarial dictatorship; Carl Schmitt, *Die Diktatur*; first published in 1921. Only by 1934, with the second edition of *Political Theology* the decision of the "single individual" became the final decision of one particular human judge. Also for Bonhoeffer, an exeptional act is tied to restoring normality. A leader is called to lead to responsible life in existing community and is thus restricted in his authority; DBWE 12:280.

[120] Karola Radler, "… whereas I am trying to think theologically": Dietrich Bonhoeffer's Hidden Dialogue with Carl Schmitt on Representation", (master thesis, University of Alberta - St. Stephen's College, 2011).

[121] Radler, "Theology as Politics".

[122] Radler, „Equality and Human Dignity".

[123] Clifford J. Green, *The Sociality of Christ and Humanity: Dietrich Bonhoeffer's Early Theology 1927*-1933, American Academy of Religion Dissertation Series, ed. H. Ganse Little, Jr. (Missoula: Scholars Press, 1972). See also Clifford J. Green, "Human Sociality and Christian Community", in *The Cambridge Companion to Dietrich Bonhoeffer*, 113-33.

[124] Michael P. DeJonge, *The Fact of the Person of Jesus Christ: Bonhoeffer's Act and Being*, PhD diss., Emory University, 2009 (ProQuest Dissertation Publishing, 2009), https://search.proquest.com/openview/977828e1 c807cfc76428564eb55b129/1?pq-origsite=gscholar&cbl=18750&diss=y.

[125] Joachim von Soosten, *Die Sozialität der Kirche: Theologie und Theorie der Kirche in Dietrich Bonhoeffers "Sanctorum Communio"* (Munich: Kaiser, 1992).

For establishing Bonhoeffer's and Schmitt's lived immersion into the context of the early 20th century two informative biographies fulfill the precondition. Reinhard Mehring's biography *Carl Schmitt: Aufstieg und Fall* is still the only and most comprehensive work which not only details the rise and fall of this jurist, but also interweaves his life and work as it happened within the realm of law and politics. The most comprehensive biography on Bonhoeffer is the one written by his long-term close friend Eberhard Bethge.[126] However, Bonhoeffer's early friendship to the jurist Leibholz is represented only in passing because he did not witness the early Bonhoeffer-Leibholz friendship first-hand. Bethge met Bonhoeffer only by the time the Jewish born Leibholz was forced to emigrate with his family to England. Therefore information regarding the Bonhoeffer-Leibholz-Schmitt line of connection relied on Mehring's references to Leibholz within his Schmitt-biography, a comparison between the forewords to Gerhard Leibholz' 1929[127] and 1960[128] editions of his *Habilitation* thesis, and the very recent publication of Schmitt's diaries from 1925 to 1929 which were edited by Martin Tielke and Gerd Giesler[129] as well as the diaries from 1930 to 1934 edited by Wolfgang Schuller and Gerd Giesler.[130]

In his concise biography on Dietrich Bonhoeffer, Ferdinand Schlingensiepen[131] provided information regarding the interchange of the topic of decision in Bonhoeffer's theology to the historical events of the 1930s and 1940s in Germany. He points to the importance of the issue of decision for Bonhoeffer. He establishes that the theme of decision runs through all of Bonhoeffer's early work, from his first sermon in 1925, through the time of establishing the Confessing Church, until about 1940 when this topic appears to have lost its importance for Bonhoeffer.[132] Schlingensiepen attributes this to Bonhoeffer's decision of joining the underground resistance and Bonhoeffer's assessment of the importance of personal strength

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[126] Eberhard Bethge, *Dietrich Bonhoeffer: A Biography*, ed. Edwin Robertson, trans. Eric Mosbacher, Peter Ross, Betty Ross, Frank Clarke and William Glen-Doepel, rev. and ed. Victorian J. Barnett (Minneapolis: Fortress Press, 2000).

[127] Leibholz, *Das Wesen der Repräsentation unter besonderer Berücksichtigung des Repräsentativsystems.*.

[128] Gerhard Leibholz, *Das Wesen der Repräsentation und der Gestaltwandel der Demokratie im 20. Jahrhundert*, 2nd ed. (Berlin: Walter de Gruyter, 1960).

[129] Carl Schmitt, *Tagebücher 1925 bis 1929*, ed. Martin Tielke and Gerhard Geisler (Berlin: Duncker & Humblot, 2018).

[130] Carl Schmitt, *Tagebücher 1930-1934*, eds. Wolfgang Schuller and Gerd Giesler (Berlin: Akademie Verlag, 2010).

[131] Ferdinand Schlingensiepen, *Dietrich Bonhoeffer* (Munich: C. H. Beck, 2005, paperback Deutscher Taschenbuch Verlag, 2010). All subsequent citations refer to the paperback edition.

[132] Schlingensiepen, *Bonhoeffer*, 52, 207, 299.

over against choices between alternatives that are made by weak people.[133] Additionally Schlingensiepen's reference to Schmitt's legal theory certainly evokes interest. He writes that Bishop Oberheid, a member of the National Socialist Party and the German Christians who supported the official Lutheran church, had learned during his studies in theology through personal contact with Schmitt that the National Socialist revolution's all-embracing, all-pervading idea of a total state had created an order that diametrically differed from the Weimar Consitution's democracy. Therefore following Carl Schmitt, it should be possible to establish by force a Protestant "Reich-church".[134] For a study on a comparison between Schmitt's theory and Bonhoeffer's theology around the issue of decision, Schlingensiepen's presentation raises the question of accuracy regarding Schmitt's position vis-à-vis the Weimar Constitution, his "idea" of a total state, and the use of "force" over against the church.

Bringing Bonhoeffer and Schmitt into conversation, and explicating Bonhoeffer's effective opposition to fundamental elements of Schmittian juristic theory, necessitated foremost to locate both within their realities of the early 20th century's context. For establishing the broader historical context to Bonhoeffer's and Schmitt's intellectual conditioning V. R. Berghahn's *Modern Germany: Society, Economy and Politics in the Twentieth Century*[135] contributed in-depth information which was supplemented, especially in regards to the socio-economic realities, by Gunther Mai's concise book *Die Weimarer Republik*.[136] In regards to constitutional aspects Hans Vorländer's *Die Verfassung: Idee und Geschichte* (The constitution: idea and history) provided specific information to the wider historical facts surrounding the Weimar Constitution. For the position of the Protestant Church as it developed throughout the constitutional fights of the 19th century from the "two persons" of the Prussian King and his division of executive powers into an *iura circa sacra* and *iura in sacra* until the separation of the church from the state in the Weimar Constitution, Axel Freiherr von Campenhausen and Heinrich de Wall delivered insights with their *Staatskirchenrecht: Eine systematische Darstellung des Religionsverfassungsrechts in Deutschland und Europa* (The law of church-state relations: A systematic presentation of the

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[133] Schlingensiepen, *Bonhoeffer*, 299; DBWE 8:551

[134] Schlingensiepen, *Bonhoeffer*, 169-70.

[135] Berghahn, V. R., *Modern Germany: Society, Economy and Politics in the Twentieth Century*, 2nd ed. (Cambridge: Cambridge University Press, 1987; reprint 1996). All subsequent citations refer to the reprint edition.

[136] Gunther Mai, *Die Weimarer Republik* (Munich: Verlag C. H. Beck, 2009).

constitutional law regarding religions in Germany and Europe).[137] Details of Schmitt's contributions to and immersion in public law and Leibholz's contributions to German law were taken from Michael Stolleis' *A History of Public Law in Germany 1914-1945*.[138] However, as regards placing Schmitt's theories within the general jurisprudence and among other jurists of his time, as well as its Romanist-Germanist discourse that was decisive for the theory of the fiction of the juristic person and its relation to the natural person, such deeper insight into German legal history was afforded by Friedrich Ebel's and Georg Thielmann's *Rechtsgeschichte* (History of law).[139]. Helpful in addition to historic aspects of law was the commentary to the Weimar Constitution which was written by the widely influential jurist Gerhard Anschütz.[140] And the *Palandt*,[141] the widely known commentary to the German 1900 Civil Code, provided necessary information on legal institutes of private law in connection to establishing Bonhoeffer's possible use of such legal institutes.

Last but certainly not least, Bonhoeffer's and Schmitt's writings, mostly in their original German versions, were of foremost importance to this study. In the initial chapters of this thesis Bonhoeffer's doctoral thesis *Sanctorum Communio* and his *Habilitation* theses *Act and Being* recived special attention. The former engaged in the discourse of the constitutionally prescribed external form of a juristic person which set the church apart from the juristic person of the state which Schmitt discussed. But while Schmitt retained his constitutional theory in the institutional, Bonhoeffer included the natural person as focus of confession and the church. *Act and Being* made it possible to proceed intellectually beyond thinking within enclosed systems, ultimately also regarding the legal system, but found limits to thinking in transcendence. In a sense, Bonhoeffer's two earliest publications represent Bonhoeffer's grounding for his objections and resistance, even though his theology continued to evolve.

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[137] Axel Freiherr von Campenhausen, and Heinrich de Wall, *Staatskirchenrecht: Eine systematische Darstellung des Religionsverfassungsrechts in Deutschland und Europa*, 4th rev. ed. (Munich: Verlag C. H. Beck, 2006).

[138] Michael Stolleis, *A History of Public Law in Germany 1914-1945*, trans. Thomas Dunlop (Oxford: Oxford University Press, 2004).

[139] Friedrich Ebel, and Georg Thielmann, *Rechtsgeschichte*, 3rd ed. (Heidelberg: C. F. Müller, 2003).

[140] Gerhard Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919: Ein Kommentar für Wissenschaft und Praxis*, 10th ed. (Berlin: Stilke, 1929).

[141] Otto Palandt, *Bürgerliches Gesetzbuch*, 50th rev. ed. (Munich: C. H. Beck, 1991). This commentary to the 1900 Civil Code to which Otto Palandt lent his name is widely known in Germany beyond jurisprudence. Not widely known is that Palandt was a lawyer and a political appointee by the National Socialist regime to the Ministry of Justice. Nonetheless, apart from the introduction to the commentary he never contributed a comment to any of the paragraphs of the Civil Code despite the fact that the commentary was published under his name. „Zur Person Otto Palandt", C. H. Beck, 1995-2019, https://rsw.beck.de/buecher/palandt/otto-palandt.

Thus of further relevance for the topic of decision were especially Bonhoeffer's *Lectures on Christology* and his *Ethics*.

1.6   The Structure of the Thesis

The present research pertains to Bonhoeffer's and Schmitt's perspectives on the importance and content of "decision", which involves legal theory as well as theology within a particular historical context. The investigation of this thesis argues that Bonhoeffer was exposed to the jurisprudential paradigm of thought, which enabled him to make use of juristic concepts in his theology. This familiarized him, at least to some extent, with the theory of the state associated with Schmitt's theories. The dissertation intends to show that Bonhoeffer's theology entails an alternative to the underlying structural elements of Schmitt's understanding of decision as a *Dezision* that is part of his theory of the state and that Bonhoeffer's position refuted this structure with his central focus on Christ as part of his concept of the church. This will be done by considering in Chapters 2-3 their reasons for and the necessity of locating the form of decisions within a concept of state and a concept of church respectively. The contextual facts are placed ahead of the comparison of the two patterns of thought and their distinct sets of concepts. This will contribute to the clarity of this thesis' argument because it will prevent the inter-paradigmatic quality of their engagement and the structural elements of their respective positions from being obscured by the facts of their cultural, political, and socio-economic context. The main part of the thesis will compare in Chapter 4 Bonhoeffer's and Schmitt's thought according to the indicators of "Choices", "Resolve", "Intent", and "Active Manifestation". They are summarized features of an established definition for the concept of decision within the realm of political sciences and are concerned with possible alternatives, a conceivable time factor, an envisioned goal, and the visible active implementation of the goal. The actual engagement with their respective positions will follow the logical pattern of describing Schmitt's position ahead of Bonhoeffer's position because the former, being older, had developed his theories prior of Bonhoeffer. Chapter 5, finally, will summarize the result of the research.

Chapter 2 takes the approach of establishing the political and socio-economic context of Bonhoeffer's and Schmitt's work prior to engaging with the specifics of their writings. Because both Bonhoeffer and Schmitt were deeply engaged with and involved in the

developments of their time, pre-extracting the context from their work is not only meant to situate their work but also to enable a clear focus on the structural elements of decisions in the later part of the thesis, and to prevent impediments due to necessary recourses to the circumstances under which some of the elements arose. After a short recourse to the state-church relations and constitutional developments during the second half of the 19th century, attention will turn to the ecclesiastic and constitutional particularities of the first German republic, the Weimar Republic. The bulk of this chapter is concerned with the socio-economic and political disintegration of the Republic, the rise of National Socialism, and, most importantly, with placing Bonhoeffer and Schmitt within such dynamics as well as with establishing their indirect personal proximity.

Chapter 3 will draw attention to Bonhoeffer's and Schmitt's specific professional assessment of the *Krisis* of their time and place. The focus will be on the issue that each respectively perceived as most pressing and in need of a solution. This chapter will set Schmitt's initial attempts at formulating a theory of state and Bonhoeffer's earliest work on the concept of the church into a preliminary relation. This engages with their contemporary juristic Romanist-Germanist discourse on the difference between a juristic person and a natural person and the relation of multiplicity to unity. For Schmitt the state emerges as the mediator between meta-physical Justice and reality which uses in times of a *Krisis* of mediation the tool of law to enforce an essence onto the individual. On Bonhoeffer's part, the crisis will emerge as one of the magnitude of a *status confessionis* that demanded from 1933 onward a decision of faith because of the state's attempt of replacing the significance of the person of Jesus Christ, the mediator of God's revelation, with the significance of a single human leader and his persecutory legislation.

Chapter 4 will take up the main theme of the de-cision as *Ent-scheidung*. It will be concerned with extracting what a decision entailed for Bonhoeffer as well as for Schmitt. Thus this chapter, drawing on the work of Tanja Pritzlaff, is structured according to the indicators of a decision which relate respectively to the options as they were perceived (choice), the urgency of a solution (resolve), the intended goals (intent), and the factual realizations of their positions as they were flowing from the aforegoing assessments (active manifestation).

The "Choices" Bonhoeffer and Schmitt viewed as possible alternative options for a decision are disclosed in this chapter. For Schmitt, an alternative between identity and representation will emerge that is meant to solve the vagueness of the constitutional pretense-compromises regarding questions of political leadership. The unit of the people, which as the subject prior to the constitution is of equal consistency that exludes the inequal and had decided on the constitutional core of a parliamentary democracy, will have to decide either on parliamentary responsibility or trusting an autoriarian leader. Bonhoeffer's concept of the church, one that takes the constitutional separation from the state seriously, will emerge as an alternative form for life in community parallel to the state, but with nonetheless both being parts of God's one kingdom. His "Christ existing as church community" combines the juristic person and the private person to an institutional-spiritual form of *sui generis* in which God is the subject whose revelation is prior to the community. Apart from this vertical dimension, a horizontal dimension exists among the equally sinful human beings.

The chapter on "Resolve" attends to the urgency of the "moment" that Bonhoeffer and Schmitt perceived in their contemporary situation, and its connection to their respective understandings of history. For Schmitt, a depoliticized and neutralized moment of nothingness had been reached on a trajectory of ever changing domains of central ideas and their connected elites. This demanded in their secularized world, where God and theological concepts had lost their essence, human creativeness *ex nihilo* and objective structural analogies. Bonhoeffer's account which sets Christ at the middle of salvation and of worldly history, separates God's creation *ex nihilo* from the subjective moment of nothingness on the cross. This makes analogies impossible and it will emerge as foundationational for the following elements of Bonhoeffer's view of decision.

The "Intent" as the central and internal part of any decision and the invisible turning point from choice to action, will disclose the difference in Schmitt's understanding of intent as abstraction based on the rejection of a *dolus directus* in contrast to Bonhoeffer's perspective of an *actus directus* that defines God's intentionality for immediacy without interpretation. Schmitt's early-career abstraction between objective intent and subjective guilt became foundational to his theory of state. Christ, the God become human, became the non-conflicted archetype for ideas that could be represented and implemented through formal institutional office for the purpose of shaping the material substance of earthly reality. In Bonhoeffer the

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reality is reconciled to God and the human being returns to wholeness through faith in Christ. As intended by God, the human being will hear and act on God's revelation with obedient non-conflicted simplicity and wisdom. While for Schmitt the human act-of-will (*Willensakt*) is subject to an objective legal decision, Bonhoeffer's human being lives despite human decisions in an act-of-relating (*Aktbezug*) under God's decision.

With regard to the "Active Manifestations", the final step of the decision, Schmitt proceeds with a structural analogy between the Roman juristic rationality of the Catholic Church and the state for the purpose of synchronizing all life to the *Führer*-principle. Bonhoeffer instead proceeded by disclosing an underlaying modern version of the Docetic heresy that separates idea and appearance. On this basis, Bonhoeffer redirected the meaning of Schmitt's *Gestalt* from personality to person, replaces forced identity with reconciled wholeness through *Stellvertretung*, and clarifies that representation was incompatible with the Trinitarian presence in the Church. It is not the process of the "how" to turn an idea into personality that is decisive, but instead it is Christ as the "who", the person. It is the difference of "becoming human" (*Mensch werden*) or "having become human" (*Mensch geworden*). God's vision for humanity and community is not synchronizing (*gleich-schalten*) human beings to one human personality but instead it is con-forming (*gleich-gestalten*) the human beings to Christ's person. God's decision of fulfilling his promise of preserving humanity in the penultimate world ends divisions in the true sense of the word *Ent-scheidung*.

The short Afterword will reflect on self-justification and divine justification as personal consequences, as these relate to Bonhoeffer's and Schmitt's respective positions regarding ending the urgent *Krisis* of their time and place with a "decision".

<u>**Chapter 2:**</u>

The Context: Schmitt and Bonhoeffer in "Weimar"

2.1   Introduction

Decisions depend on context just as context depends on decisions. In other words, context exerts influence on decisions and decisions on context, but this is not to say that such influence is singular and exclusive. Dietrich Bonhoeffer's (1905-1945) and Carl Schmitt's (1888-1986) context was the post-1918 Weimar Republic of Germany.[142] "Weimar", as the Republic was and often still is referred to, was not simply the prelude to the catastrophe of National Socialism. But neither was it an empty space, a vacuum, that resulted from replacing the monarchy with democracy and its concomitant jump from discipline and obedience to co-determination and emancipation that demands debates, majorities and compromises. It was rather a vibrant place filled with many social and economic problems but also hope, creativity, and experimental imagination that was fueled by longings beyond rationalist and positivist constraints. It searched for a new human being (*Mensch*) under the conditions of a technological modernity in which previous certainties had become fluid.

The first German Republic was divided geographically, culturally, socially, economically, and intellectually. It was a product of 19th century Christian ideology, constitutional fights, growing nationalism, industrialization, social movements, economic competition between the European nations, and the Great War. Within the constitutional framework of the 1919 Weimar Constitution social boundaries liquified and uncertainty produced reactionary as well as creative impulses. A "new human being" was meant to turn the post-war disenchantment with technology into a meaningful relationship between human beings and science and a life physically and mentally worth living. Arts, architecture, literature, film, theatre, design, and music all reflected the fears and insecurities set free by the energies of insecurity and

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[142] The Republic was proclaimed on 9 November 1918 and its constitutional foundation, The Weimar Constitution, was added on 11 August 1919. Its end is a point of contention: either it is placed with the National Socialist "legal" conquest in 1933-35 or with Germany's unconditional surrender on 8 May 1945. *Militärische Kapitulationsurkunde vom 8. Mai 1945*, documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed February 12, 2018, http://www.documentarchiv.de/index.html.

change.[143] But a population already desensitized to violence by the devastating Great War also fought over polarizing political convictions which were aggravated by economic instability, widespread unemployment, poverty, and starvation. Thus promises of a strong leader, a new people, and a great future fell on parched but ready ground, even though the so called National Socialist's "legal revolution" – a contradiction in se[144] – was not inevitable. But grasping its chance, it eroded the republican character of so called "Weimar" within the short time span from 1933 to 1935. The Weimar Constitution's mechanism for finding decisions turned into a totalitarian decisionism which reduced the constitutional democracy to an empty shell that reversed the 19th century's separation of powers and the individual's distance from the state. And for the Protestant Church, a fight ensued with the state for keeping the institutional independence of the *iura circa sacra*, and for finally achieving and keeping the full independence as to the theological and liturgical content, the *iura in sacra*.

Bonhoeffer and Schmitt[145] recognized the importance of their contemporary context's emergence from the past and the past's formative influence on the changing present and the future. Thus to fully understand Bonhoeffer's and Schmitt's perspectives requires one to existentially enter into the otherness of their time, culture and person.[146] Therefore this chapter outlines the emergence of so called "Weimar" from the major developments of the 19th century that led from a Christian state ideology to a Protestant institution apart from the state, followed by describing the immediate context of Bonhoeffer and Schmitt as it was defined by the decisions and compromises of the 1919 Weimar Constitution. Summaries of the disintegration of the Weimar Republic, and Bonhoeffer's and Schmitt's life trajectories within this immediate setting, will assist the subsequent comparative discourse on the structures that underlay their respective views on decisions and the resulting implications.

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[143] New art and architectural forms developed such as the *Bauhaus* in the city of Weimar, *Gestalt* theory, cubism, Dadaism, the expressionism of the New Objectivity, and the music form of cabaret. In the area of health, ideas of self-improvement flourished with the *Lebensreform* (Life Reform) that included Pilates, nudist culture, biodynamic agriculture, and homeopathy. Philosophy inquired into the scientific fields of mathematics and physics, advancing ideas such as phenomenology, existentialism, hermeneutics and deconstruction.

[144] Hans Vorländer, *Die Verfassung: Idee und Geschichte*, 3rd ed. (Munich: Verlag C. H. Beck, 2009), 76.

[145] Schmitt, *Political Romanticism*; Mehring, *Schmitt*, 117.

[146] cf. Pfeifer, "Cultural Elements", 68-69.

2.2   From Christian Ideology to Protestant Institution

In the build up to the Weimar Republic of the early 20th century, the inner make-up of the state of Prussia and the subsequent 1871 German Empire moved during the "long" 19th century from a romantic rural tranquility to an urban industrial mechanization with competitive nationalism as well as from a state-imposed Christian unity to a Protestant institution that distanced itself from the state.

The post 1815[147] Prussian façade of peaceful political stability disavowed the facts that press[148] and university[149] were censored, that those demanding republican and liberal reforms[150] were persecuted, and that the previously granted liberation of the peasants was revoked. But Jewish citizens remained legally integrated in the societal three estates of aristocracy, bourgeois citizen, and peasants.[151] A comprehensive administrational reorganization abolished the servants of dukes and established the Prussian civil service[152] with a three-tier hierarchical structure of parallel streams for state-administration, judiciary, military and the Protestant Church.[153] The *Summus Espicopus*, in the legal construct of the "two persons" of the Prussian king,[154] became the final decision making authority for the state and the "Prussian Union" which combined the Calvinist and Lutheran confessions under one common administrational, pastoral and spiritual oversight.[155] Vesting the king with these comprehensive powers, and the manifestation of ruling the constitutional monarchy by God's

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[147] At the end of the Napoleonic Wars the 1815 Vienna Congress had reorganized the power relations between the European Monarchies which provided to Europe for some time a relatively secure political stability.

[148] The *Karlsbad* Resolution of the German Federation (*Deutscher Bund*) repealed in 1819 the previously granted freedom of the press; Vorländer, *Verfassung*, 64.

[149] Among others, the first professor of theology at Berlin University, the liberal theologian Friedrich Schleiermacher, lost his teaching position; Sebastian Haffner, *Preußen ohne Legende,* 3rd ed. (Munich: Goldmann Verlag, 1998), 306, 315.

[150] This targeted mostly the "Friends of Freedom and Equality," the Jacobins, who took their name from the Parisian Dominican monastery of Jacobin. It was the most well-known political group of the French Revolution of 1789. They stood for supporting rights to property and a strong government which was able to deal with economic chaos, internal rebellion, and external war. Under the leadership of Robespierre they established a revolutionary dictatorship which turned into a reign of terror; *The Columbia Encyclopedia*, 6th ed., s. v. "Jacobins", accessed November 25, 2017, http://www.encyclopedia.com/history/modern-europe/french-history/jacobins.

[151] Haffner, *Preußen*, 285, 288.

[152] Jürgen Osterhammel, „Das 19. Jahrhundert", *Informationen zur Politischen Bildung* 315, no. 2 (2012): 7.

[153] This remained ever since the basic administrative structure of Germany; Haffner, *Preußen*, 288-90.

[154] Campenhausen and Wall, *Staatskirchenrecht*, 16, 29.

[155] The Lutherans and the Calvinists kept separate creeds and confessions but were subjected to a common administrational organization, supervision and liturgy which led to constant disputes.

grace and mercy (*Gottesgnadentum*),[156] turned institutionalized Protestant piety into an overall unifying state-ideology.[157] This state-prescribed Christian Pietism[158] of idyllic, romantic "*Biedermeier*" ambience took recourse to the powers of the soul and feeling, the forces of mind and heart, for the purpose of politically undermining the Enlightenment's claims of individual human reason. Among the Protestant population this gradually turned into a perception of a common German cultural connectedness. However, it distanced the mainly Catholic population in the Rhineland/Ruhr area along the French border, and in the post-1870/71 German Reich also in Bavaria around Munich. Then the specifically anti-Catholic politics (*Kulturkampf*)[159] of the Protestant Prussian chancellor Otto von Bismarck (1815-1898) added an atmosphere of "foreignness" which extended to the Jewish population.[160]

Despite the official reactionary piety, the demands of a strengthening bourgeoisie for implementing the 1789 French revolutionary liberal rights of freedom, equality, and democratic participation[161] eventually found public expression in the 1849 Frankfurt *Paulskirchen* Constitution.[162] A group of academic professors added the Basic Rights of freedom of the person, of religion, of assembly and movement, as well as equality before the law, abolishment of different social estates, legal property protection, and the end of the state

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[156] During the 19th century the constitution was celebrated as a "secular Bible". During constitution celebrations, resembling religious processions, two tablets inscribed with the rights of the citizens, similar to the Ten Commandments, and the Bible were paraded side-by-side through the streets; Vorländer, *Verfassung*, 66-67.

[157] Haffner, *Preußen*, 290-91, 314.

[158] In defense to outer and inner aggression and revolution Protestant Prussia (as well as Orthodox Russia and Catholic Austria) used a romantic pietism that revived the idea of the Christian kingdom of the Middle Ages even though Prussia had not existed then. Nonetheless, a genuine unofficial, emotional Pietism in form of a revival movement grew in the 1830s/40s that turned Pomeranian agricultural estates into private prayer centers; Haffner, *Preußen*, 291-93.

[159] To Bismarck the "party spirit" of the *Deutsche Zentrumspartei* (German Centre Party), founded in 1870 and representing Catholic Germany and political Catholicism in Germany, was an undue influence of the "infallible" Pope's "Rome-centered institution" in Protestant Prussia's political matters. A line of repressive laws were meant to reduce the "foreign" influence of this Catholic "state within a state." Among others, the "pulpit paragraph" of the Criminal Code prohibited clerics to use the pulpit for political statements. Civil law marriages became mandatory which ended Catholic interference into mixed marriages in Prussia. Also administrational state supervision of the Catholic Church was introduced, and any state funding was cancelled; Gerhard Czermak, *Religions- und Weltanschauungsrecht: Eine Einführung* (Berlin: Springer Verlag, 2008), 7-8.

[160] Campenhausen and Wall, *Staatskirchenrecht*, 28; Osterhammel, "Das 19. Jahrhundert", 69.

[161] Ebel and Thielmann, *Rechtsgeschichte*, 337, 340-41

[162] The 1848 Constitution is of enormous importance for the history of Constitutional Law in Germany. Its catalogue of basic rights was almost verbatim adopted by the 1949 Basic Law (*Grundgesetz*) for the Federal Republic of Germany; Ebel and Thielmann, *Rechtsgeschichte*, 343, 477.

church.[163] Insisting on the "monarchic principle", of the monarch being the sole bearer of sovereignty and ruling by God's grace from "above," the Prussian king refused the Emperor's crown for a German Reich that was offered to him from "below" by the "people" of the Frankfurt Assembly. [164] Despite choosing a repressive military solution to the constitutional challenge, his 1850 Prussian constitutional reform from "above" granted freedom of religion, press and assembly, and established an independent judiciary. But parliamentary representation remained limited and based on a three-class electoral system that was tied to the amount of tax contributions levied on male-owned property which favored the land owning aristocracy in the east.[165] Using in 1870/71 a crisis–decision dynamic, growing nationalistic tension in relation to France, and a swift war, the Prussian chancellor Bismarck united the German countries and the Prussian king became nonetheless Emperor of the German Reich.[166]

However, regarding the Protestant Church, the 1850 Prussian reforms divided the king's ecclesiastic powers of the *Summus Episcopus* into the *iura circa sacra* and the *iura in sacra*. The former he retained in form of fiduciary, administrative, and, especially, representational powers over the Protestant Church. The latter, the theological dogmatic and liturgical competencies, he transferred to the federal level of the ecclesiastic organizational stream. Thus as head of the state-administration, the king nonetheless kept final decision-powers over the Protestant Church.[167] Yearning for more independence, the Protestant Church responded with developing a Church constitution which, albeit adhering to the state-installed administrative three-tier ecclesiastic hierarchical structure, moved the administrational head offices to the middle, the Provincial level. In effect, this removed the final authority for the *iura in sacra*-decisions out of the Monarch's reach.

Within jurisprudence, the continued struggle of the bourgeoisie for a constitutionally guaranteed legal sphere outside the influence of the monarch's powers led to a private law realm apart from the state's public law. On the sub-constitutional level the 1900 Civil Code

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[163] Ebel and Thielmann, *Rechtsgeschichte*, 339-40.

[164] Vorländer, *Verfassung*, 64, 68-69.

[165] *Creifelds Rechtswörterbuch*, ed. Hans Kaufmann, 11th rev. ed. (1992), s.v. „Dreiklassenwahlrecht".

[166] Haffner, *Preußen*, 357, 395.

[167] Campenhausen and Wall, *Staatskirchenrecht*, 29.

(*Bürgerliches Gesetzbuch*)[168] regulated individual contractual freedom, freedom of attestation of the personal will, and the freedom to own property, especially the means of production, but disregarded the non-propertied social classes. Historically tied to natural law thinking, and to the two foundations of property and association of the 1794 Prussian General Law Code (*Allgemeine Preußische Landrecht*),[169] the 1900 Civil Code provided basic regulations for contractual relationships, including organizational forms, the age of maturity for decision-making (*Mündigkeit*), the delegation and acceptance of responsibilities, including *Stellvertretung*, as well as rules for balancing contractual disruptions and all other property related matters.[170] This development of a differentiation between a public and a private legal realm, combined with the necessity of the element of publicity within political representation, parted the public concept of representation from the private concepts of "standing in for someone else" as e.g. in *Stellvertretung*.[171]

At the the turn from the 19th to the 20th century, domestic and international tensions accelerated. In the western industrial area and the commercial centre of Berlin, the industrialization-induced movement of large parts of the rural population to the cities, which coincided with a large demographic surge,[172] led to social tensions. A fourfold growth of German import and export[173] amplified international competition, nationalist sentiments, and imperialist ideologies with its interest in acquiring export markets or production areas. The tensions accelerated an armament race between the European nations that unloaded with full force in the 1914 Great War. The human suffering that mechanized ferocity unleashed had

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[168] The Civil Code for the whole of Germany was developed during the late 1880s and the 1890s and came into effect on 1 January 1900. Heinrich Lehmann, *Allgemeiner Teil des Bürgerlichen Gesetzbuches*, 6th ed. (Berlin:Walter de Gruyter, 1949), 3-7.

[169] The Civil Code is based on the Prussian General Law Code (*Allgemeines Preußisches Landrecht*) of 1794 which was commissioned under the Prussian king Frederick the Great and drew on the many local legal practices. Although it had no democratic foundation, the king nonetheless had encouraged and included public input. Long before the constitutional fights of the 19th century the code stipulated that in relation to the Prussian subjects, the state's authority and powers, including the King's, were bound to the regulations of the code and that the general rights of the human being were based on the natural, pre-law freedom of the human being to pursue and further his well-being, albeit without offending the rights of others. Freedom of religion and the demand for tolerance among religious communities was also included; Ebel and Thielmann, *Rechtsgeschichte*, 256-58, 260

[170] Such matters regard those of Family Law and Inheritance Law.

[171] Giuseppe Duso, *Die moderne politische Repräsentation: Entstehung und Krise des Begriffs*, trans. Peter Paschke (Berlin: Duncker & Humblot, 2006), 154 with information to further literature, especially from the early 20th century.

[172] The population grew from 41 million in 1871 to 65.3 million by 1913. This added within one generation more than 12 million people to the workforce in Germany; Berghahn, *Modern Germany*, 3-4.

[173] Berghahn, *Modern Germany*, 3-4.

been unforeseeable by any of the involved nations.[174] All sides had been convinced that the new machines of war would make wars short and precise events, but they disregarded the fact that all nations had built up arsenals of equally destructive mechanized weaponry. Finally, by late 1918 physical and material exhaustion at the western front, the Russian revolution in the east, and the mutiny of German sailors in the north[175] led to the end to the hostilities, the abdication of the German Emperor, and the first German Republic.

A problem of legitimacy that arose with a faulty transfer of power from the Monarch to the newly proclaimed German Republic on 9 November 1918 remained a burden throughout the duration of the Republic's existence. The Reich-chancellor had announced prematurely the abdication of the Emperor, had resigned as chancellor, and had appointed the leader of the Social Democratic Party Friedrich Ebert (1871-1925) as his successor.[176] At the same time Ebert's party comrade[177] and the Spartacus league[178] had proclaimed two different versions of a Republic. This confusion had turned Ebert into a Chancellor over a no longer existing Reich and without parliamentary or monarchic legitimacy.[179] Determined to prevent a bolshevist system, Ebert secured military support and negotiated temporary authority with the politically moderate Worker's and Soldier's Council[180] of Berlin which claimed representative powers based on countrywide election-rallies.[181] Subsequently a National Constitutional Assembly developed a parliamentary-representative legal foundation for the new German Republic,[182] the 1919 Weimar Constitution.[183]

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[174] Of the 13.2 million men who were drafted by the German Reich, 2.4 million or 18.5% died and of the 4.75 million injured men 2.7 million were invalids. Left behind were 0.6 million widows and 1.2 million orphans; Mai, *Weimarer Republik*, 32.

[175] Berghahn, *Modern Germany*, 60.

[176] On 9 November 1918 Max von Baden (1867-1929) and Friedrich Ebert met before the Emperor had abdicated.

[177] Philipp Scheidemann (1865-1939) proclaimed the republic from the steps of the parliament building, the *Reichstag*.

[178] The Spartacus League, founded by Karl Liebknecht, Rosa Luxemburg and Clara Zetkin, developed as extreme left revolutionary socialist offshoot from the German Social Democratic Party and proclaimed a far left "free and socialist Republic of Germany"; Marlis Steinert, *Hitler*, trans. Guy Montag and Volker Wieland (Munich: C. H. Beck, 1994), 101.

[179] Steinert, *Hitler*, 102.

[180] The Worker's and Soldier's Councils were not Bolshevik autonomous political factors as in Russia but rather pursued traditional objectives of mainstream Social Democracy based on the 1891 Erfurt Program; Berghahn, *Modern Germany*, 63.

[181] Mai, *Weimarer Republik*, 21-23; Berghahn, *Modern Germany*, 62-63.

[182] Berghahn, *Modern Germany*, 65.

[183] The Constitution was adopted in Third Reading on 31 July 1919 with 262 votes out of 337 votes. The far left and the far right provided the 75 rejecting votes; Steinert, *Hitler*, 103.

In sum, the 19th century was marked by a comprehensive state reorganization, strengthening constitutional demands for the bourgeois liberal rights of the 1789 French Revolution, a weakening Christian state ideology, a beginning distancing of the Protestant Church from the monarchy, and a domestic and international economic and military competition that was induced by the processes of industrialization. The bourgeois, mainly economic, independence from monarchic influence became codified on the sub-constitutional level of private law in separation of the Reich's public laws. The destructive force of the first industrialized warfare, the Great War, led to revolutions and the 1919 Weimar Constitution for Germany.

2.3   The 1919 Weimar Constitution

The 1919 Weimar Constitution for the first German Republic[184] was the contemporary backdrop to Bonhoeffer's and Schmitt's discourse on decision. The Weimar Constitution officially severed the institutional bond of "throne and altar",[185] between the state and the Protestant Church, and attempted to balance the social-economic shifts by combining a consensus-finding parliamentary mechanism for decision-making with a subsidiary authoritative presidential option for decisions, and by tying the separate legislative, executive, and judicative powers of the state to specific authorities, responsibilities, and accountabilities on a collective as well as individual level.

In the pre-democratic German Reich, law was separated from politics and reduced to administrative acts. They were legitimate if civil servants from offices firmly in the hands of the educated bourgeoisie applied in an orderly, legally blameless fashion the rights the monarch had granted.[186] This detached individual rights from political freedoms and made popular decision-making illegitimate. Rights to personal freedom, mainly for bourgeois property owners, were secured on the private law level. Equality was reduced to the realm of taxes, state-services, and access to office (*Ämter*).[187] The Weimar Constitution, for the first time in German history, replaced sovereignty based on the monarchic principle with that based on the popular principle. It introduced the separation of powers and universal suffrage

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[184] The 1919 Weimar Constitution was to a large extent written by the jurist Hugo Preuss (1860-1925)[184] and the jurist Friedrich Naumann (1860-1919), with the support of the sociologist Max Weber (1864-1920) and the theologian Adolf von Harnack (1851-1930).

[185] Campenhausen and Wall, *Staatskirchenrecht*, 32.

[186] Ebel and Tielmann, *Rechtsgeschichte*, 352.

[187] cf. Vorländer, *Verfassung*, 64, 71-72.

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that was independent of property ownership and inclusive of women, and programmatically acknowledged basic liberal and social rights. But in bourgeois distrust of the politically inexperienced "masses" of the now politically emancipated proletarian class the Constitution compromised on authoritarianism and democracy. As a remnant of the 19th century lawgiver from "above" the Constitution provided for times of crisis outside of the collective decision making process according to elected parliamentary representation, the "subsidiary reserve-constitution"[188] of an authoritarian president who was authorized by direct plebiscitary vote to decide individually and to suspend certain liberal rights.

2.3.1 The Ecclesiastic Decision: Church as Juristic Person

The removal of the monarch as the head of the state and the Weimar Constitution's declaration that there was "no state-church"[189] dismantled the position of the *Summus Episcopus*, the "two persons" of the monarch, and transferred comprehensive authority in all internal, external, and institutional matters, including representational and final decision-making powers, the *iura circa sacra*, officially to the Protestant Church. It lastingly replaced the remnants of the 19th century Prussian state-ideology of Christian Protestant piety with the idea of a secular state with independent churches. Legally the churches became juristic persons in the form of a corporation of public law (*Körperschaft[190] des öffentlichen Rechts*) but with civil law regulating its legal competency.[191] Thus as a public collective unit, with a private legal personality, the Church became a carrier of legal rights and duties in fictional similarity to a natural person. Full independence from the state meant for the Protestant Church not only losing its worldly representative but also access to political power and financial security. Threatened thus in its very existence, a comprehensive compromise incorporated guarantees to property and tax income and permitted continued limited cooperation between the church and the state.[192]

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[188] Vorländer, *Verfassung*, 74.

[189] Article 137, para. 1 Weimar Constitution, in *Die deutschen Verfassungen des 19. Und 20. Jahrhunderts*, ed. Horst Hildebrandt, 11th enl. ed. (Paderborn: Ferdinand Schöningh, 1979), 102.

[190] Literally translated the term *Körperschaft* means "embodiment". It is here translated with the juristic term "corporation" that includes the element of collectivity and is rooted in the Latin word "corpus" and its German translation as "Körper".

[191] Article 137, para. 4 and 5 Weimar Constitution, in Hildebrandt, *Verfassungen*, 102.

[192] Articles 135-139; 146, para 2; 149 Weimar Constitution, in Hildebrandt, *Verfassungen*, 101-5.

Even though it was not expressly spelled out in the Constitution, nonetheless, in reverse to the church's independence from the state, the state also became independent from the churches. Consequently, the church and the state could enter as parties into contractual relations (*Staatskirchenverträge*), which the Protestant Church used to secure contractually its freedom to practice its confession publically, a guarantee given in the constitution only to individuals.[193] Although the reciprocity of the independence was not explicitly written into the constitution, it became subsequently captured in the jurisprudential concept of the state's neutrality[194] in all religious and worldview matters that flowed from the general constitutional provisions of freedom of religion, the prohibition of religious and faith-based discrimination,[195] and the prohibition of a state-church. Historically it was grounded in the development since the 16th and 17th century's confessional religious wars.

2.3.2 The Republican Decision: Compromise and Decree

The Weimar Constitution neither fulfilled President Ebert's wish of a constitutionally recognized party system,[196] and an imperative mandate that ties parliamentary representatives to the will of their parties, nor the Council movement's demand that the delegates should be accountable to their constituency. Instead each parliamentary representative was solely accountable to his personal conscience.[197] In the prevailing jurisprudential opinion this meant a 'not simply ethical but legal duty in the dissemination of his parliamentary call (*Beruf*) to determine the interest of the Reich, which is inseparable from the good for the whole of the people, according to his best knowledge and conscience in personal responsibility, from

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[193] Campenhausen and Wall, *Staatskirchenrecht*, 31-34.

[194] The concept of Neutrality means that the state is absent in organized religion and matters of faith which includes an institutional separation (*Trennungsgebot*) and a prohibition of an identity of content or faith between state and church (*inhaltliches Identifikationsverbot*). The neutrality of the state is meant to prevent a return to a *Summus Episcopus* who absorbs the *iura circa sacra* and the *iura in sacra* into one representative. As a consequence to the concept of neutrality, the principle of parity prohibits that a particular confession or religious community is favored. Thus additionally to churches all other religious and worldview communities also are given an equal legal opportunity to attain under certain conditions the position of a society of public law and with it also access to funding. This recognizes the ordering powers of religious and worldview communities within society and at the same time acknowledges the right of the citizen to freedom from ecclesiastic interferences; Article 137, para 5-7 Weimar Constitution, in Hildebrandt, *Verfassungen*, 10; Campenhausen and Wall, *Staatskirchenrecht*, 370.

[195] Articles 135, 141 Weimar Constitution, in Hildebrandt, *Verfassungen*, 101, 103.

[196] For Heinrich Triepel, the supervisor of Gerhard Leibholz's *Habilitation* thesis, political parties were extra-constitutional phenomena. Vorländer, *Verfassung*, 81.

[197] Article 21 Weimar Constitution, in Hildebrandt, *Verfassungen*, 75.

which he cannot be relieved'.[198] Fearing 'parliamentary absolutism'[199] the authors of the Constitution insisted on a President with comprehensive 'dictatorship powers'[200] parallel to the Parliament, the *Reichstag*. Thus the Constitution determined that both the parliamentary representatives[201] and the Reich-president[202] were to be elected by popular vote. The president was to represent to foreign powers the unity of the people,[203] while the parliament, the *Reichstag*, was meant to represent the "numerical" rather than the "true" will[204] of the people as a whole.

The competencies given to the *Reichstag* and the Presidency moved the former collectively, and its representatives individually, into a constant tension and competition with the individual decisions of the latter. Because the President could overrule with very limited checks almost every decision of the *Reichstag*, the parliament held the weakest position within the republican order. Despite the *Reichstag* being the legislative organ,[205] the Reich-president could demand a plebiscitary referendum on any parliamentary approved legislation.[206] The President also appointed and dismissed the Reich-Chancellor and the ministerial cabinet,[207] while the *Reichstag* could only collectively withdraw its confidence from the Chancellor or single members of the executive government who then had to resign.[208] Therefore the Chancellor could be dismissed from his position by the President's individual or the *Reichstag*'s collective decision and was thus accountable to both. However, the President could circumvent a parliamentary collective non-confidence vote by disbanding the *Reichstag* and triggering new elections.[209] But reversely, should a collective parliamentary decision ask for a plebiscitary vote to dismiss the President, the parliament would by exercising this option dissolve itself.[210] Should the President become incapacitated

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[198] Anschütz, *Die Verfassung*, 165; own translation.

[199] Mehring, *Schmitt*, 220; own translation.

[200] Mai, *Weimarer Republik*, 29; own translation.

[201] Article 22 Weimar Constitution, in Hildebrandt, *Verfassungen*, 75.

[202] Article 41, para. 1 Weimar Constitution, in Hildebrandt, *Verfassungen*, 80.

[203] Article 45, Weimar Constitution, in Hildebrandt, *Verfassungen*, 81.

[204] Mai, *Weimarer Republik*, 28.

[205] Article 68-74 Weimar Constitution, in Hildebrandt, *Verfassungen*, 85-87.

[206] Article 73, para. 1 Weimar Constitution, in Hildebrandt, *Verfassungen*, 86.

[207] Article 53, Weimar Constitution, in Hildebrandt, *Verfassungen*, 82.

[208] Article 54, Weimar Constitution, in Hildebrandt, *Verfassungen*, 82.

[209] Article 25, Weimar Constitution, in Hildebrandt, *Verfassungen*, 75-76.

[210] Article 43, para. 2 Weimar Constitution, in Hildebrandt, *Verfassungen*, 80.

the Chancellor would assume his powers[211] which would reduce the chance of the latter's dismissal by the *Reichstag's* collective non-confidence decision because in the process of removing a Chancellor-now-President the *Reichstag* would dismantle itself.

The position of the Chancellor was lodged between the individual political decision-making powers of the President and the collective non-confidence decision of the *Reichstag*, that is, unless the President invoked his emergency decree powers[212] in which case he could direct, appoint, and dismiss the Chancellor according to his individual decision without any accountability to the parliament or his conscience. The Chancellor was for his individual decisions accountable to the President. However, the Constitution made neither the President nor the Chancellor accountable to their conscience for their individual political decisions. This accountability to personal conscience was reserved for the representatives of the *Reichstag*[213] which not only individualized but personalized their collective political decisions. Nonetheless, an individual presidential decision could call into question the parliamentary representative's conscience by asking for a plebiscitary confirmation of their collective, yet individual and personal legislative decisions.

The compromises of the 1919 Weimar Constitution left undecided whether the Republic wanted to be a pluralistic representative or an authoritarian presidential state. "Weimar" had not yet fully embraced replacing the unifying idea of the Protestant ideology with the republican idea of participating individual citizens. The non-binding secondary status of the basic rights here especially reflected the undecided double-character of the constitution. Listed in the Constitution's second section and structured as a combination of classical French revolutionary demands and communal, religious, educational, and economic mandates,[214] the basic rights remained at the level of programmatic pronouncements. The individual citizen had no legal right to appeal to the basic rights and the prevailing

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[211] Article 51, Weimar Constitution, in Hildebrandt, *Verfassungen*, 82. On December 17, 1932 the article 51 was amended to the effect that should the Reich-president become incapacitated the president of the Federal Court (*Reichsgericht*) would assume the duties of the Reich-president. However, with combining upon President Hindenburg's death the Chancellorship and Presidency on August 1, 1934 Hitler both reversed and abolished the 1932 constitutional amendment.

[212] Article 48, para. 2 Weimar Constitution, in Hildebrandt, *Verfassungen*, 81.

[213] Article 2, Weimar Constitution, in Hildebrandt, *Verfassungen*, 75.

[214] The mandates were guided by the idea of social justice (*Gerechtigkeit*) and were meant to enable a dignified existence and to connect ownership of property to communal obligations. They thus reflected the political interests of those who drafted the Constitution; Vorländer, *Verfassung*, 73.

jurisprudential opinion understood them, similar to pre-Weimar times, as binding only for the administrative power. Their observance by the executive and legislative powers of the state was not subject to judicial review.[215] Thus the realization of the basic rights remained dependent on the prevailing political constellations. The strongest confirmation of their ambivalent status was the constitutional presidential permission to suspend the most significant liberal rights in favor of emergency decrees.[216] This most far reaching provision gave the President the power to suspend by emergency decree the rights to privacy of the home, free movement, expression, assembly, property, and to rule beyond the parliamentary legislative process. Although presidential decrees were constitutionally restricted to times of danger to public security and order, their application was with the onset of the effects of the Great Depression in 1930 unofficially extended to include economic dangers.

The decision to adopt the 1919 Weimar Constitution provided for Germany the normative basis for the organizational form of a secular state. In its material content it was meant to legitimize sovereignty, authority, accountability, and a modus of political decision finding. In its attempt to incorporate a wide range of different political demands, the Constitution settled on a mixed system of individual and collective authority and accountability that was only loosely tied to programmatic liberal rights. It built on the personal conscience of some of the decision makers, the parliamentary representatives, but not on the personal conscience of those equipped with the most far reaching powers, the president and the chancellor, and thus restrained the "ethical" behind the "legal". Because the Weimar Constitution remained in the public opinion without widespread continual support, which is imperative for enfolding a normative force over an extended period of time,[217] the onset of severe economic difficulties and the frailness of the part-parliamentarian, part-presidential character provided to extremist-totalitarian political forces a pseudo-legal possibility for dismissing the constitutional liberal rights and dissolving in 1933/34 the republic into a totalitarian dictatorship.[218] The process of this constitutional disintegration was the immediate backdrop to the Schmitt and Bonhoeffer discourse and therefore will be summarized in the following.

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[215] cf. Ebel und Thielmann, *Rechtsgeschichte*, 395.

[216] Article 48 Weimar Constitution, in Hildebrandt, *Verfassungen*, 81.

[217] Vorländer, *Verfassung*, 16-18.

[218] Vorländer, *Verfassung*, 75-76.

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2.4   The Disintegration of the Weimar Republic

The civil war conditions and the Putsches of the early years of the Republic gave way by 1923/24 to a false calmness. With the onset of the Great Depression in Germany in 1930 the radical ideology of National Socialism re-surfaced and proceeded to dismantle the Weimar Republic within the relatively short period between 1933 and 1935. It was not primarily the Weimar Constitution's indecisiveness regarding parliamentary representation and presidential authority that prevented compromises between the parliamentary political parties and created a leadership vacuum. Compromises were not reached because of the economic interests that were represented in the parliament and which reflected "Weimar's" permeating social disunity, the staggering unemployment, huge national debt, and widespread starvation. In order to gain power and to "revolutionize" Germany, Hitler exploited constitutional provisions, used conspiracy theories, scapegoated sectors of society, used the new mass technology of radio and film for propaganda, and channeled disappointed sectors of the population into paramilitary groups for inciting violence on the streets.

Subsequent to interventions by the Reich's army,[219] in the nation-wide unrests of the early years[220] of the Republic, the 1914 state of emergency which had suspended liberal rights and had permitted summary court martial to imprison or execute revolutionary leaders finally ended in 1925.[221] In Munich the extreme right had used the civil war conditions to fuel ideological animosities against the "red" socialist Berlin,[222] and thereafter became a laboratory for putsches, including the 1923 unsuccessful Hitler-Ludendorff "Beer Hall Putsch" with its attempted "march on Berlin".[223] Despite Hitler's short-term imprisonment[224]

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[219] Berghahn, *Modern Germany*, 62-66.

[220] In the industrial Ruhr area, an extended civil war situation ended with the intervention of the Reich-army against left wing militias despite previously having been reluctant to act against right leaning Free Corps units in Berlin; Berghahn, *Modern Germany*, 75. The 1920 right-wing Kapp-Putsch in Berlin was unsuccessful due to the general strike of the working class movement; Mai, *Weimarer Republik*, 40-41. In 1922, right wing militarists assassinated in Berlin the German Foreign Minister Walter Rathenau; Mai, *Weimarer Republik*, 48.

[221] Schiffer, „Die deutschen Kriegsgesetze", *Deutsche Juristenzeitung*, 19 (1914): 1014-1024, http://dlib-zs.mpier.mpg.de/mj/kleioc/0010/exec/bigpage/%222173669_19%2b1914_0547%22.

[222] The first President of the Weimar Republic, Friedrich Ebert, and the first three Chancellors of the Weimar Republic were members of the Social Democratic Party (SPD).

[223] Mai, *Weimarer Republik*, 43. Hitler's attempted "March on Berlin" was fashioned after Mussolini's "March on Rome" in 1922.

[224] For his role in the 1923 unsuccessful "Beer Hall Putsch" Hitler received a lenient prison term; Heribert Ostendorf, "Politische Strafjustiz in Deutschland", *Informationen zur Politischen Bildung* 306 (January 2010): 23, 30.

and the 1922 prohibition of the extreme right wing National Socialist German Workers Party (NSDAP)[225] in German provinces, with the exception of Bavaria, the party expanded nation-wide and absorbed other right-wing radical groups.[226] The Party's general unscrupulousness and uncompromising brutality differentiated it from other nationalist and populist movements.[227] They exploited the socio-economic conditions of the immediate post war era which saw widespread food scarcity.[228] The 1923 hyper-inflation[229] and spiking unemployment[230] were used for the conspiracy narrative that the Social Democrats, supposedly supported by an ambiguous international "Jewry", had "seized" in 1919 the power from the Monarchy, had lost the war,[231] and had been responsible for the harsh terms of the Peace Treaty of Versailles[232] which, by assigning sole moral responsibility for the Great War to Germany, thereby probided legal justification for demanding large reparation payments.[233] The successes of the Weimar middle period from 1923 to 1929, which saw the acceptance of the Republic to the League of Nation, border stability, and a steadying of the economy due to the re-negotiation of the reparation debt,[234] had little impact on extremist methods, especially once the economic effects of the Great Depression gripped Germany.[235]

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[225] *National Sozialistische Deutsche Arbeiter Partei.*

[226] Mai, *Weimarer Republik*, 41, 43.

[227] The methods of the NSDAP combined aggressive propaganda, militaristic uniforms, marches, and armed para-military groups; Mai, *Weimarer Republik*, 43.

[228] By 1915 especially employees in the cities and civil servants lived below the existential minimum and starved; Mai, *Weimarer Republik*, 34. Starvation became a widespread problem especially after the industrial production reached an all-time low and returning soldiers flooded the labor market. Then the real wages fell well below pre-war levels and the cost-of-living index; Berghahn, *Modern Germany*, 68-69.

[229] Until 1920 the rate of inflation was "normal" in comparison to other European nations but then skyrocketed until it reached its zenith at the end of 1923; Mai *Weimarer Republik*, 35-36.

[230] Unemployment, before 1914 at 2-5%, did not drop below 10% after 1923; Mai, *Weimarer Republik*, 74.

[231] This conspiracy theory disregarded the fact that the Monarch and his army had started the Great War and with abdicating the former had refused to take responsibility for the war.

[232] Berghahn, *Modern Germany*, 71-73.

[233] Berghahn, *Modern Germany*, 67. The moral-responsibility clause was written into article 231; *Treaty of Versailles (June 28, 1919)*, Bingham Young University, World War I Primary Document Archive, 2009, accessed February 20, 2018, https://wwi.lib.byu.edu/index.php/Peace_Treaty_of_Versailles.

[234] The Foreign Minister Gustav Stresemann, an economist by profession and leader of the Democratic People Party (DVP), successfully negotiated in the 1924 Dawes Plan and in the 1929 Young Plan revisions to the reparation payments. With the 1925 Locarno Pact he successfully ended the Ruhr occupation by France and stabilized the German borders. In 1926 Stresemann achieved Germany's admittance to the League of Nations; Mai, *Weimarer Republik*, 84-89.

[235] Berghahn, *Modern Germany*, 100.

Then 43% of the population became unemployed[236] and in the winter of 1932/33 about 15 million people went hungry.[237]

The threat of death by starvation increasingly turned for whole sections of society into fears of "social death" when a downward social mobility and cultural marginalization, due to the loss of property, legal privilege and political rule, endangered aristocracy, educated bourgeoisie, agrarian estate owners, and the trade-based middle class. This redistribution of wealth favoured the industrial sector and those with the means of production but levelled the difference between the middle class and proletariat.[238] 93% of the population belonged in 1925 to the lower class comprised of workers, employees, and household servants. About 6% belonged to the educated bourgeoisie of doctors, lawyers, theologians, scientists, and professors and about 1% belonged to the aristocratic class.[239] The aristocracy insisted on the exclusivity of their Estate (*Stand*),[240] their social network, and a strong presence in politically powerful positions within administration, military, parties and associations.[241] Social advancement through education remained limited for the lower classes because the educated bourgeoisie held on to their control over the higher educational institutions despite the severe reduction of their material base and a surplus of unemployed young academics. In response to being removed by the approaching mass culture of cinemas, sport clubs and radio from their position of independent intellectual interpreters of culture they extended their scientific professional expertise. Additionally, they retreated into a local network of personalities, clubs, and places of communication.[242] Overall the economic classes solidified into social-moral milieus of homogeneous value and experience communities. Belonging was determined by status (worker, bourgeois), way of life (living quarter), symbolic practices (cloths, behaviour, celebrations), values (marriage, achievement, education, solidarity, religion), and worldviews.[243] The proletarian class unified around war experience, worker

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[236] M. Rainer Lepsius, "From fragmented party democracy to government by emergency decree and National Socialist take over: Germany", in *The Breakdown of Democratic Regimes: Europe*, ed. Juan J. Linz and Alfred Stepan (Baltimore: John Hopkins University Press, 1978), 52.

[237] Mai, *Weimarer Republik*, 112-13.

[238] Mai, *Weimarer Republik*, 36-37.

[239] Mai, *Weimarer Republik*, 74-76.

[240] Because the 1918 revolution did not lead to a land reform, the estate (*Stand*) of the aristocratic "Junkers" remained attached to the ownership of large parcels of land in eastern Germany.

[241] Mai, *Weimarer Republik*, 62, 75-76.

[242] Mai, *Weimarer Republik*, 74-75, 78-79.

[243] Mai, *Weimarer Republik*, 75, 77.

strikes, and revolutionary demands for equality. Only the catholic milieu stretched across all economic differences, but weakened with increasing mobility, urbanization, and general secularization.[244]

The structural social shifts were interpreted foremost in political and cultural terms as loss of values and order, and loss of national sovereignty.[245] The political parties mirrored the hardened differences between the social groups[246] and proved unable to arbitrate between the classes and economic interests. With their unwillingness to compromise on content that might be detrimental to their voters, the parliament withdrew from its responsibility and created a political vacuum which President Hindenburg[247] increasingly filled by applying his authoritarian decree powers to economic situations and for backing the Chancellors he appointed. This usage went beyond the constitutionally permitted situations and reduced the parliament's options to either collectively tolerating the President's individual decision on economic issues, or facing being dissolved as a consequence to a non-confidence vote.[248] The shift of power from Parliament to President replaced collective decision-making according to legal procedures with autocratic decisions determined by personal relations.[249]

A succession of chancellors, all backed by presidential decree,[250] was unable to stem the onslaught of the economic depression. After three elections between September 1930 and November 1932, and under civil war conditions fanned by the military wing (SA) of the NSDAP[251] which sought to "politicize" the population, a group of conservative and right wing party leaders convinced President Hindenburg in negotiations behind the closed doors of the presidential offices to install on 30 January 1933 a cabinet under Adolf Hitler (1889-

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[244] Mai, *Weimarer Republik*, 77, 79.

[245] Mai, *Weimarer Republik*, 108.

[246] Mai, *Weimarer Republik*, 77.

[247] Paul von Hindenburg (1847-1934) was a general during the Great War and became the second President of the Weimar Republic after Friedrich Ebert's death in 1925. Under his presidential rule above the parties the subsidiary presidential powers surpassed the representational arm of the Weimar Constitution; Mai, *Weimarer Republik*, 57.

[248] Article 54 Weimar Constitution, in Hildebrandt, *Verfassungen*, 82.

[249] Lepsius, "Fragmented party democracy", 48-49. See also Rudy Koshar, introduction to *The Weimar Moment: Liberalism, Political Theology, and Law*, ed. Leonard Kaplan and Rudy Koshar (Lanham: Lexington Books, 2012), xiv.

[250] Mai, *Weimarer Republik*, 134.

[251] Berghahn, *Modern Germany*, 120.

1945) as Chancellor,[252] despite the fact that the NSDAP had passed its height of electoral success already in July 1932. After the November 1932 election in which two thirds of the votes had been cast against Hitler, a left wing compromise based on the combined votes of the Social Democratic and Communist Parties could have prevented a decreed Hitler government.[253] The *Preußenschlag*, the *coup d'état* against the Social Democratic (SPD) Prussian provincial government in Berlin on 20 July 1932, which replaced the Prussian Provincial government with a Reich-Commissioner,[254] and Hitler's ascent to the Chancellorship, not only finally replaced the red "left" with the "right" but also expanded the "Catholic" south and Munich into the "Lutheran" Prussian north and Berlin.

In line with his decision of obtaining power "legally"[255] Hitler immediately proceeded to exploit the parliamentary and plebiscitary parts of the Constitution with a succession of tactical decisions. He revived the parliamentary arm of the Constitution for the sole purpose of obtaining the legislative sanction for the Enabling Act of March 24, 1933 (*Ermächtigungsgesetz*).[256] This mantle of positivist legality, which concealed the abolition of the rule of law,[257] combined unlimited legislative powers with executive powers and thus effectively sidelined the parliament and collective decision-making. It gave Hitler advance blanket-approval for promulgating emergency laws for the purpose of alleviating crisis

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[252] Berghahn, *Modern Germany*, 124; Lepsius, "Fragmented party democracy", 49; Schlingensiepen, *Bonhoeffer*, 132.

[253] The NSDAP competed in elections for the first time in May 1924 and received 32 seats which declined to 14 seats in the subsequent December 1924 election and even further to 12 seats in the Mai 1928 elections. However, the election results for the NSDAP began to spike in September 1930 with 107 seats and peaked in the following election on 31 July 1932 with 230 seats. In the 6 November 1932 election the NSDAP declined to 196 seats. The number of votes cast for the Social Democratic Party remained throughout the 1920s and early 1930s relatively stable. The same applied to the Communist Party, albeit at a lower level. In July 1932 their combined votes translated into 222 seats and to 221 seats in November 1932. This surpassed the NSDAP's result of 196 seats. The increase of votes for the NSDAP between 1928 and 1933 correlated to the increase of unemployment; Berghahn, *Modern Germany*, 301 and Lepsius, "Fragmented Party Democracy", 51.

[254] Koshar, introduction, xv. Mai, *Weimarer Republik*, 97-98. The takeover of democratic Prussia met initially with little resistance from the SPD. The Prussian government chose to retaliate according to the rule of law with a claim at the State Tribunal in Leipzig. In October 1932 the court reinstated the SPD government but left the already adopted measures in place which, in effect, side-lined the Prussian SPD government as political factor; Ebel and Thielmann, *Rechtsgeschichte*, 411-12.

[255] His incarceration in 1923/24 Hitler used for writing his infamous program, *Mein Kampf*, which proclaimed his anti-Semitism and his intention of achieving power by constitutional means; Adolf Hitler, *Mein Kampf,* 417-418th ed. (Munich: Zentralverlag der NSDAP, 1939); Berghahn, *Modern Germany*, 110.

[256] Weimar Republik, Reichstag, *Gesetz zur Behebung der Not von Volk und Reich* [Act to alleviate the emergency crisis off the people and the Reich], documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed January 30, 2018, http://www.documentarchiv.de/index.html.

[257] Mai, *Weimarer Republik*, 122, 124.

situations solely based on his individual decision and without parliamentary participation and presidential signatures. Thus covered, Hitler proceeded to invalidate individual rights, dismantle unions and professional associations, establish a one party system, and reverse the 19th century emancipation of the Jewish citizens.

With the *Reichsstadthaltergesetz*[258] of 31 March 1933 and 7 April 1933, the provinces were synchronized with the Reich to ensure the enforcement of the Reich-Chancellor's decisions in all provinces. Simultaneously, further legislation on 7 April 1933 provided for the dismissal of non-Aryans and other "undesirables" from public service and employment in the state[259] as well as from the legal profession.[260] At the University of Berlin alone a total of 234 professors of Jewish ancestry left by late March 1935.[261] In July 1933 all political parties, save the NSDAP, were declared illegal[262] and shortly thereafter the identity of Party and state proclaimed.[263] After violently eliminating all possible opposition in the *Röhm-Putsch* of 30 June/1 July 1934,[264] Hitler labeled such acts as self-defence of the state because in an hour of

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[258] Weimar Republic, Reichstag, *Vorläufiges Gesetz zur Gleichschaltung der Länder mit dem Reich vom 31. März 1933* [Temporary act to synchronize the provinces and the Reich of 31 March 1933], documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed January 30, 2018, http://www.documentarchiv.de/index.html. Weimar Republic, Reichstag, *Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich: Reichsstatthaltergesez vom 07. April 1933* [Second act to synchronize the provinces and the Reich of 7 April 1933], documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed January 30, 2018, http://www.documentarchiv.de/index.html. The time limit for the applicability of the *Reichsstatthaltergesetz* was subsequently extended twice, on January 30, 1935 and on January 26, 1937. Thereafter it was applied without further official extensions.

[259] Weimar Republic, Reichstag, *Gesetz zur Wiederherstellung des Berufsbeamtentums vom 07. April 1933* [Act to reinstall the professional civil service of 7 April 1933], documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed January 30, 2018, http://www.documentarchiv.de/index.html.

[260] Weimar Republic, Reichstag, *Gesetz über die Zulassung zur Rechtsanwaltschaft vom 07. April 1933* [Act regarding the admission to the legal profession], documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed January 30, 2018, http://www.documentarchiv.de/index.html.

[261] Michael Stolleis, *History of Public Law*, 262.

[262] The National Socialist Workers Party was declared the only legitimate political party and all previously existing parties as well as establishing new parties were prohibited. Weimar Republic, Reichstag, *Gesetz gegen die Neubildung von Parteien* [Act against establishing new parties], documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed January 30, 2018, http://www.documentarchiv.de/index.html.

[263] Weimar Republic, Reichtag, *Gesetz zur Sicherung der Einheit von Partei und Staat vom 01.Dezember 1933* [Act to secure the identity of party and state], documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed January 30, 2018, http://www.documentarchiv.de/index.html.

[264] The Röhm-Putsch eliminated the *Sturm-Abteilung* (SA), the para-military wing of the National Socialist Party under Ernst Röhm, and many supporters of the "conservative revolution" close to Vice-Chancellor Franz von Papen (1879-1969); Mai, *Weimarer Republik*, 126-27. According to the personal referent to the Reich-minister of Justice Hans von Dohnanyi, Bonhoeffer's brother-in-law, 207 people were killed; DBWE 13:216.

crisis he had carried, as the highest judge of the German people and in his personal responsibility, the destiny of the whole nation.[265] Three days after the violent execution of his orders he demanded after-the-fact plebiscitary confirmation and legitimacy.[266] This demand finally destroyed the last remnants of legal formal process. Thus the Act that consolidated on 1 August 1934 the chancellorship with the presidency[267] served only as clarification of his totalitarian leadership. It secured his Chancellorship against a dismissal by the president from above, and beyond the danger of being vetoed by the parliament from below. With his totalitarian powers in place he proceeded to secure the specific National Socialist worldview beyond Fascism that included the anti-Semitic question of race. With the Nuremberg Racial Laws of 15 September 1935[268] he escalated the legal and subsequently physical persecution of Jews and other "undesirable" parts of the population.

Regarding the Protestant Church, the National Socialist regime focused on a de facto return to the pre-1919 state-church situation. Its policy played on the inexperience of the Protestant Church in maintaining an active legal and spiritual self-reliant position over against the state.[269] Almost immediately after the promulgation of the Enabling Act, the process for rewriting the Church Constitution commenced on 25 April 1933. The purpose was to implement the *Führer*-principle and to pursue the election of regime-loyal German Christians

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For more details see Heinz Höhne, *Mordsache Röhm: Hitlers Durchbruch zur Alleinherrschaft, 1933-1934*, Spiegel-Buch 52 (Rheinbek: Rowohlt-Taschenbuch-Verlag, 1984).

[265] Ostendorf, "Politische Strafjustiz", 24.

[266] Weimar Republic, Reichstag, *Gesetz über Maßnahmen der Staatsnotwehr vom 03. July 1934* [Act regarding actions of self-defense of the state], documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed January 30, 2018, http://www.documentarchiv.de/index.html. The *Staatsnotwehr* Act consisted of only one article which read: ‚Die zur Niederschlagung hoch- und landesverräterischer Angriffe am 30. Juni, 1. und 2. Juli 1934 vollzogenen Maßnahmen sind als Staatsnotwehr rechtens' [The measures taken to suppress the attacks of sedition and high treason of June 30, July 1 and 2, 1934 were justified as self-defense of the state].

[267] Weimar Republic, Reichstag, *Gesetz über das Staatsoberhaupt der Deutschen Reiches vom 01. August 1934* [Act concerning the head of state of the German Reich of 1 August 1934], documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed January 30, 2018, http://www.documentarchiv.de/index.html. President Hindenburg died the following day on which the army was sworn in to Hitler as the Commander in Chief who demanded loyalty to his person.

[268] Weimar Republic, Reichstag, *Reichsbürgergesetz vom 15. September 1935* [Reich-citizen act] and the *Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre vom 15. September 1935* [Act for the protection of German blood and German honour of 15 September 1935], documentArchiv.de der historischen Dokumenten- und Quellensammlung zur deutschen Geschichte ab 1800 (2000-2004), accessed January 30, 2018, http://www.documentarchiv.de/index.html.

[269] Campenhausen and Wall, *Staatskirchenrecht*, 35, 37.

into the offices of the Church after the adoption of the changes to the constitution.[270] On 24 August 1933 the Aryan paragraph of 7 April 1933 became extended to apply to church officials. Nonetheless, National Socialism was unsuccessful in repeating the "seizure of power" in the church. It failed in its legalistic attempt of fully synchronizing (*gleichschalten*) the Protestant Church in a manner similar to the synchronization of the provinces to the state. At the basis of the synchronization attempt was the differentiation between a juristic person of public law (*juristische Person des öffentlichen Rechts*) and a juristic person of private law (*juristische Person des Privatrechts*) as it had developed in the course of the 19th century's process of the emancipation of the bourgeois person from the state and the development of law into the two sectors of private law and public law. The "new order" focussed on reversing this process by forcing the Protestant Church out of its constitutionally provided status of a juristic person in the form of a corporation (*Körperschaft*) of public law[271] into that of a private law association (*Verein*),[272] albeit in the form of a non-registered association (*nicht eingetragener Verein*).[273] This latter form would have meant a loss of contractual maturity (*Geschäftsfähigkeit*) which would have severely affected the financial foundations of the institutional organization of the church.[274] It would have made the single members jointly fiscally responsible on a private law level (*Gesamthänder*). Also the legal maturity in general (*Rechtsfähigkeit*) could have been withdrawn and the church's wealth could have been absorbed by the state.[275] By reversing the *Körperschaft*-status and turning the church from a corporate juristic person of public law into a group of many single natural persons the latter, the natural persons, could have been absorbed into the state's identity, albeit only those unaffected by the Aryan paragraph, that is, those of non-Jewish ancestry. Once in place, only a church built on a concept of a private natural person who was also independent of the juristic person of private law could have prevented public control and the absorption into the state identity.

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[270] Deutsches Reich, *Gesetz über die Verfassung der Deutschen Evangelischen Kirche vom 14. 7. 1933* [Act concerning the constitution of the German Evangelical Church of 14 July 1933], Verfassungsgesetze des Deutschen Reichs, 1933-1945 (22 October 2006), accessed February 06, 2018, http://www.verfassungen.de/de/de33-45/evkirche33.htm.

[271] Article 137, para. 5, Weimar Constitution, in Hildebrandt, *Verfassungen*, 102.

[272] Paras. 55, 21 *Bürgerliches Gesetzbuch*; Bundesministerium der Justiz und für Verbraucherschutz, accessed March 30, 2018, https://www.gesetze-im-internet.de/bgb/BGB.pdf.

[273] Paras. 54, 705 *Bürgerliches Gesetzbuch*.

[274] Paras. 104-115 *Bürgerliches Gesetzbuch*.

[275] Article 137, para. 4 Weimar Constitution, in Hildebrandt, *Verfassungen*, 102; as well as para. 43 (*Entziehung der Rechtsfähigkeit*) and paras. 45, 46 *Bürgerliches Gesetzbuch*.
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However, facing Church opposition to the synchronization efforts the state soon tried to de-politicize the church and to de-confessionalize public life by submitting the church to a "shrinking process" that was focussed on influencing their communal life.[276] Wanting to limit the ecclesiastic activity of worship, the state tried to cut off the church's access to the youth by increasing the right to membership in churches to the age of legal maturity and by prohibiting double-membership in churches and in mandatory national-socialist organizations.[277]

The synchronization and de-confessionalization measures of the National Socialist state finally led to a dispute in principle about the Protestant Church's inherited intellectual and spiritual (*geistige*) closeness to the state.[278] To rely, as in pre-Weimar times, on the state for the protection of the Protestant Church and the Christian faith had become dangerous to the church's very existence. The National Socialist political idea endangered the institution and the faith of the Protestant Church. For those who realized this, a serious rethinking of the church's confession began which led to the Theological Declaration of Barmen in 1934,[279] the founding document of the Confessing Church.

The turmoil of civil war, putsches, economic upheavals, unemployment, starvation, and shifts in the social structure within the Weimar context prevented parliamentary compromises which in turn undermined the constitutionally democratic, parliamentary-representational arm and strengthened the presidential, authoritarian-plebiscitary arm of the Weimar Constitution. The unscrupulousness of the NSDAP under Hitler, and their violent "politicization" of the population, exploited the decision mechanisms provided by the Constitution and established a totalitarian dictatorship. But attempts of the state to usurp the Protestant Church through legislation and juristic manipulation initiated an in principle review of the church's relationship to the state and its confessional substance. Schmitt's and Bonhoeffer's respective biographic immersion in these developments and discourses of the German context of the 1920s and early 1930s will be traced in what follows.

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[276] Campenhausen and Wall, *Staatskirchenrecht*, 35-36.

[277] Campenhausen and Wall, *Staatskirchenrecht*, 36, 37.

[278] Campenhausen and Wall, *Staatskirchenrecht*, 30, 37-38.

[279] *Theological Declaration of Barmen* (29-31 May 1934), accessed February 06, 2018, http://www.sacred-texts.com/chr/barmen.htm.

2.5   Lives within Context

Weimar, the home of Johann Wolfgang von Goethe (1749-1832), the 18th and 19th century giant of German literature and liberal arts, reflected the epitome of German culture and symbolizes Bonhoeffer's and Schmitt's dissimilar attitude towards the Weimar context. Goethe's memoirs of his travels to Rome[280] had inspired generations of Protestant educated bourgeois for whom "Rome ranked above all other centers of learning."[281] For Bonhoeffer's great-grandfather, who had been called to his professorship in Jena by Goethe himself,[282] for his parents,[283] and in 1924 for Bonhoeffer himself,[284] Rome was a destination. There Bonhoeffer became enchanted with the structure and universality of the Roman Catholic Church and Italian culture.[285] In contrast, for Schmitt a bourgeois humanist "Goethe-mask"[286] seemed to define an intellectual type which combined the three faces of a preacher, professor, and performer, and imprinted the soul of the youth with an apparent *potestas spiritualis*.[287] And in 1923 he detected in 'whole generations of pious Protestants' an 'anti-Roman temper' due to a 'fear of the incomprehensible political power of Roman Catholicism' that was rooted in the Reformation and was more recently expressed in Bismarck's *Kulturkampf*.[288] Therefore, tracing in the following Schmitt's and Bonhoeffer's childhood, studies, and social network will be conducive to the analysis of their respective approaches to decisions.

2.5.1 Carl Schmitt

The Weimar Republic coincided with the middle years of Schmitt's lifespan and with his pursuit of jurisprudence as a university career. Originally interested in the public law field of criminal law, he turned to constitutional law with a view to politics and increasingly adjusted

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[280] Johann Wolfgang von Goethe, *Italienische Reise* (Munich: Deutscher Taschenbuch Verlag, 1988).

[281] Bethge, *Bonhoeffer*, 57.

[282] Bethge, *Bonhoeffer*, 5.

[283] DBWE 9:82. Bethge, *Bonhoeffer*, 5-6, 56.

[284] Bethge, *Bonhoeffer*, 56-67. Already at an early age Bonhoeffer read books focused on Rome and Weimar, such as Felix Dahn's *Ein Kampf um Rom* (Berlin-Grunewald: Verlagsanstalt H. Klemm) and Wilhelm Bode's *Der weimarische Musenhof* (Berlin: Mittler, 1917); DBWE 9:34, 36. For Bonhoeffer, Rome 'is the fulcrum of European culture and European life'. DBWE 9:100.

[285] Bethge, *Bonhoeffer*, 59, 61.

[286] Carl Schmitt, "1907 Berlin", in *Schmittiana: Beiträge zu Leben und Werk Carl Schmitts*, ed. Piet Tommissen, (Berlin: Duncker & Humblot, 1988), 1:18.

[287] Mehring, *Schmitt*, 48-49.

[288] Carl Schmitt, *Roman Catholicism*, 3.

his attitude to law from a position of a jurisprudential observer and commentator to a politically involved player.

Almost a generation older than Bonhoeffer, Schmitt was born in 1888 into a lower middleclass Catholic family in the western Ruhr area, the Catholic diaspora within Protestant Prussia since 1815. An excellent student, he decided early against his parent's wishes to pursue Catholic theology, but remained undecided between philology and jurisprudence until the last possible moment on the day of his enrolment at the University of Berlin. Settling on jurisprudence, he never regretted it. His schooling and part of his academic studies in Berlin, Munich, and Strasbourg were financed by a stipend provided for by his entire extended family but without their further academic involvement.[289] As an obscure young man with modest economic means, he was in Berlin not courted by any student fraternity or political party which made him feel excluded and his intellectual abilities disrespected – a feeling that would remain with him throughout his life.[290] In 1910, subsequent to his graduation[291] and simultaneous dissertation in criminal law on the topic of guilt,[292] he started at a Regional Court in the Rhineland area in the customarily unpaid articling service, the *Referendariat*.[293] During this time he published as *Gesetz und Urteil* his academic investigation into the "right"-ness of a judge's decision that is placed between norm and legal judgement. Poverty, hunger, desperation about his future, and dependency on the fiduciary goodwill of acquaintances characterized the following years. He lamented that in the hope of receiving a loan or a financial gift he was forced to be the drinking companion of acquaintances with financial means.[294] His work-related contact to aristocratic circles made him especially aware of his socio-economic predicament. While he could not pay his own rent he would be a guest at the castles of clients.[295] To augment his financial situation he published articles on non-jurisprudential, general cultural themes and, starting in 1912, lectured at the University of Strasbourg in law with an integrated perspective on politics; activities that stretched beyond his graduation with the Second State Examination in Jurisprudence (*Assessorexamen*) and his

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[289] Mehring, *Schmitt*, 18-23.

[290] Mehring, *Schmitt*, 24.

[291] *Erstes Juristisches Staatsexamen* (First State Examination in Jurisprudence).

[292] Carl Schmitt, *Über Schuld und Schuldarten*.

[293] Mehring, *Schmitt*, 57.

[294] Carl Schmitt, *Tagebücher: Oktober 1912 bis Februar 1915*, ed. Ernst Hüsmert, 2nd ed. (Berlin: Akademie Verlag, 2005), 238-242.

[295] Mehring, *Schmitt*, 68.

1914 *Habilitation* at the University of Strasbourg on the value of the state and the significance of the individual.[296]

Schmitt's supervisor of his dissertation saved him from the frontlines of the Great War. In 1915 he organized for Schmitt to serve his military time at the Deputy General Command in Munich.[297] Not a friend of the "ideas of 1914",[298] Schmitt experienced compulsory military duty as a slavery which destroys individuality, assessed the war as injustice and international mutual genocide, and wished for peace, not victory.[299] At the Military Command, Schmitt was ordered to develop a legal justification for extending beyond the end of the war the 1914 state of emergency with its suspension of liberal rights.[300] In 1921 this research became a major part of his publication on dictatorship, *Die Diktatur*. With the 1918 re-annexation of Strasbourg by France[301] Schmitt lost his lectureship and moved in 1919 to commence teaching at the College of Commerce in Munich. Among other topics he taught the history of political ideas since the Reformation, including the French Revolution and the jurisprudential developments of the 19th century.[302] Living now full time in Munich and at the same time being transferred to the City Command, the post-war revolutionary unrest came dangerously close to his personal safety.[303]

In Munich, as in previous times of existential distress, Schmitt took recourse to reading Søren Kierkegaard's theology, which convinced him that piousness can also exist within doubt.[304] Reading also other theologians, including Adolf von Harnack (1851-1930),[305] led him to

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[296] Carl Schmitt, *Der Wert des Staates*.

[297] Mehring, *Schmitt*, 27

[298] Mehring, *Schmitt*, 110.

[299] Mehring, *Schmitt*, 76-77.

[300] At first, Schmitt was not ready to argue in the jurisprudential justification of emergency powers against the liberal separation of powers and the rule of law. He nonetheless had a hunch that the future belonged to a transformation into an executive state (*Exekutivstaat*); Reinhard Mehring, *Kriegstechniker des Begriffs: Biographische Studien zu Carl Schmitt* (Tübingen: Mohr Siebeck, 2014), 9.

[301] Previously, at the end of the 1870/71 war, the German Reich had annexed Alsace-Loraine with the city of Strasbourg from France.

[302] Mehring, *Schmitt*, 118-19.

[303] Mehring, *Schmitt*, 106.

[304] Mehring, *Schmitt*, 71, 85, 97. Søren Kierkegaard (1813-1855) was a Danish theologian who differentiated between objective proof of Christianity and a subjective relationship to Jesus Christ, between knowing and doing.

[305] Mehring, *Schmitt*, 97-98.

reflect on the form of the church and the state, and their relation to each other.[306] Despite his post-1945 self-characterization as a 'Catholic layperson of German ethnicity and citizenship',[307] his life's path that included a confessional "mixed" first marriage (1915), a divorce (1924), excommunication, second marriage (1926),[308] and his distancing from political Catholicism as represented by the Centre-Party (*Zentrum Partei*),[309] rather suggests no specific ties to official Catholic dogmatic teachings and interpretations.[310] Even his 1922 book *Political Theology: Four Chapters on the Concept of Sovereignty*,[311] although written while socializing in the Bonner Catholic milieu, was conceived as a response to Max Weber's[312] three types of legitimate rule – of impersonal rational-legal, traditional, and charismatic leadership.

Schmitt's university career, bringing the long wished-for bourgeois relative financial stability – despite despising bourgeois aura and ethos – unfolded exclusively at Prussian Universities.[313] His call in October 1933 to the University of Berlin, Schmitt assessed as the highest honour of his professional career. It was the first specifically National Socialist appointment to the Berlin faculty of law after the dismissal of non-Aryan faculty members in April 1933.[314] Nonetheless, his time in Bonn in the 1920s was the most productive period of his University career. This time saw the publication of many of his major works, including

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[306] Carl Schmitt, "The Visibility of the Church", 47-59.

[307] ,Ich bin ein katholischer Laie deutscher Volks- und Staatszugehörigkeit!'; Carl Schmitt, *Glossarium*, 215; own translation.

[308] Because Schmitt's first wife had posed as an aristocrat the Regional Court of Bonn annulled this marriage based on malicious deceit. However, the Catholic Church's courts refused to grant an ecclesiastic annulment; Mehring, *Schmitt*, 184.

[309] Mehring, *Schmitt*, 145, 331.

[310] Mehring, *Kriegstechniker*, 26-27.

[311] The first three chapters of Schmitt's *Politische Theologie* were written originally for a book in memory of Max Weber; Carl Schmitt, "Soziologie des Souveränitätsbegriffs und Politische Theologie", in *Hauptprobleme der Soziologie: Erinnerungsgabe für Max Weber*, ed. Melchior Palyi (Munich: Dunker & Humblot, 1923; reprint New York: Arno Press, 1975), 2:3-35. The fourth chapter was added specifically written for the book edition of Schmitt's, *Politische Theologie*, Mehring, *Schmitt*, 118.

[312] Maximilian Carl Emil (Max) Weber (1864-1920) was a political economist and the founder of the new academic discipline of sociology. As co-author of the Weimar Constitution he advocated for a strong president who was to be elected directly by popular vote. While in Munich Schmitt heard Weber's famous lectures on *Science as Profession* (7 November 1917), *Politics as Profession* (28 January 1919), and *Synopsis of the universal Social and Economic History*. Schmitt also attended Weber's *seminar for lecturers*, and met him personally; Mehring, *Schmitt*, 118.

[313] The first call came from the small University of Greifswald in 1921. Subsequently he moved on to the University of Bonn (1922-1928), the College of Commerce in Berlin (1928-1932), the University of Cologne (1932-1933; one semester) and finally to the University of Berlin (October 1933-1945); Mehring, *Schmitt*, 129.

[314] Mehring, *Schmitt*, 331-32, 417.

Political Theology, *Roman Catholicism and Political Form*, *The Crisis of Parliamentary Democracy*,[315] and *The Concept of the Political*.[316]

In his 1919 *Political Romanticism*, Schmitt had criticized the 19th century romantics for creating occasions of never-ending discussions without decision and of moving closure to a "higher level". In *Political Theology* (1922), then, he discussed the extent of the authority of a sovereign leader regarding decisions. In support of his argument, and in rejection of liberal de-politicizing indecisiveness, Schmitt used the secularization theory that all theological concepts had turned into concepts of modern thought in order to make available for his theories the Christian themes of Original Sin, miracle, Trinity, Cain and Abel and *creatio ex nihilo*. In *Roman Catholicism and Political Form* (1923) he moved materialism over against rational creativity and humanity, and located the strength of the Roman Church in the institutional which he qualified as being essentially jurisprudential. In *The Crisis of Parliamentary Democracy* (1923) he added his view of an incompatibility of liberalism and democracy. With *The Concept of the Political* (1927) Schmitt defined the "political" as an existential, unity creating friend-enemy antagonism that was necessary for the decision of sacrificing oneself for the cause of the state, a justification which liberalism was unable to provide. And in his 1929 essay *The Age of Neutralizations and De-politicization*,[317] Schmitt added his interpretation of history as a succession of exchanges of elites and central ideas. His purely jurisprudential 1928 book on constitutional theory[318] finally led him to being fully respected and acknowledged among professors of law. He analysed the Weimar Constitution and criticized its built-in self-destructiveness that was rooted in its dual structure and the prevailing opinion that it was not above the legislative power but could be changed and even abolished altogether by a simple legislative act.[319] In October 1932, subsequent to the

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[315] *Political Romanticism* in 1919; Political *Theology* in 1922; *Roman Catholicism and Political Form* in 1923; *The Crisis of Parliamentary Democracy* in 1923; second edition of *Political Romanticism* in 1925; second edition of *The Crisis of Parliamentary Democracy* in 1926; *The Concept of the Political* in 1927; *Constitutional Theory* in 1928.

[316] Schmitt, *Concept*, 39.

[317] Carl Schmitt, "Das Zeitalter der Neutralisierungen und Entpolitisierungen, 1929" [The age of neutralizations and de-politicization, 1929], in *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923-1939*, 3rd ed. (Berlin: Duncker & Humblot, 1994), 138-50.

[318] Schmitt, *Verfassungslehre*. Although written in the summer of 1927 it was published in early 1928. Mehring, *Schmitt*, 204-06.

[319] Vorländer, *Verfassung*, 75.

Preußenschlag, he led the legal team[320] on behalf of the Reich against the Prussian Social Democratic government in the court proceedings "Prussia against the Reich" at the state tribunal in Leipzig. Subsequently, he contributed major parts to the act that synchronized the provinces under the power of the Reich (*Reichsstatthaltergesetz*).

Schmitt, despite not being a particular friend of the Weimar Constitution nonetheless supported all chancellors and the position of the Reich-president and rejected up to April 1933 the "seizure of power" and the 'totalitarian *Führer*-state'.[321] On 15 December 1932 he declined his participation in an NSDAP claim at the Leipzig court.[322] In an open letter on 30 January 1933, the day of Hitler's appointment, Schmitt lent his jurisprudential support to the essence (*Sinn*) of the Constitution based on refusing to relativize the theory of state and to abuse it in a way destructive to state and constitution.[323] In a radio interview on 1 February 1933, he described his role as a theorist, political scientist, and scholar of a meta-positively grounded substantial law for a concrete people.[324] However, since 1929 he had gradually shifted the identity of the keeper or protector of the Weimar Constitution from the Reich-supreme court[325] to the Reich-president, first limited to commissarial powers but subsequently, in light of the mounting economic difficulties, to dictatorial decree powers.[326] But finally he settled on the need of a strong "decisionist" personality.[327]

In late April 1933, he accepted the new ground under his feet[328] and republished with changed forewords *Political Theology* and *The Concept of the Political*. The March 1933 Enabling Act's relegation of parliamentary competencies to obscurity he declared a 'provisional constitution', and the April 1933 *Reichsstatthaltergesetz* became the 'new

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[320] Mehring, *Schmitt*, 289-90. The other lawyers on the legal team of the Reich were Carl Bilfinger (1979-1958) and Erwin Jacobi (1884-1965).

[321] Mehring, *Schmitt*, 301; own translation.

[322] Schmitt, *Tagebücher 1930-1934*, 461.

[323] Ernst Rudolf Huber, „Carl Schmitt in der Reichskrise der Weimarer Endzeit - Aussprache", in: *Complexio Oppositorum: über Carl Schmitt*, ed. Helmut Quaritsch (Berlin: Duncker & Humblot, 1988), 53.

[324] Carl Schmitt, „Ein Rundfunkgespräch vom 1. Februar 1933 mit Veit Rosskpof", in *Over en in zake Carl Schmitt*, ed. Piet Tommissen, Eclectica (Brussels: Economische Hogeschool Sint-Aloysisus, 1975), 114-15.

[325] Carl Schmitt, "Das Reichsgericht als Hüter der Verfassung (1929)", in *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954: Materialien zu einer Verfassungslehre* (Berlin: Dunker & Humblot, 1973), 63-109.

[326] Carl Schmitt, *Der Hüter der Verfassung*, 4th ed. (Berlin: Duncker & Humblot, 1996), first published in 1931 by J.C.B. Mohr (Tübingen).

[327] Mehring, *Schmitt*, 233, 239, 248.

[328] Schmitt, *Tagebücher 1930-1934*, 287; Schmitt registered as member of the NSDAP on 27 April 1933. On 22 April 1933 Martin Heidegger had invited Schmitt in writing to collaborate; Bendersky, *Theorist*, 203.

constitutional law'.[329] With this leap from legality to a higher meta-physical legitimacy[330] he synthesised old and new, cut himself off from the bourgeois idea of the rule of law, and justified this as participating in a common decision in favour of the spirit (*Geist*) of the German National Socialist revolution.[331] But his article written for the first anniversary of the "seizure of power" on 24 January 1934 was greeted with rejection and was partly prohibited because it was considered to be "liberalist" or even adhering to a positivist rule of law. The *Reichsstatthaltergesetz*, which was used to implement the *Führer's* will in the provinces, he had interpreted literally and had extracted the provincial governors (*Statthalter*) from the immediate power under the Reich-chancellor.[332] Nonetheless, shortly after, he was called to the Council of the Prussian state (*Staatsrat*) under the Prussian governor.[333] But imagining its change into a *Führerrat* that would eventually exert influence as the '*Führer* of the *Führer*'[334] he miscalculated the *Führer's* violence and the fierce competition within a *Führer*-state.[335] The June/July 1934 *Röhm-Putsch*, Hitler's violent solution to tensions among leading members of the National Socialist movement, Schmitt survived solely due to the intervention of the Prussian governor.[336] Despite this display of Hitler's murderous attitude, Schmitt did not take leave from National Socialism. Instead, on the very day of the "legal" consolidation of the office of the President with the Chancellor, Schmitt published a paper in which he declared the *Führer* to be the highest Judge of the German people, being beyond jurisdiction, and whose decision and action had dispensed true avenging justice, flowing from the right to life of a people.[337] After this move from protecting to creating law, Schmitt abandoned his previous idea, published in 1934 in *Über die drei Arten des rechtswissenschaftlichen Denkens*,[338] that the National Socialist "revolutionary" idea could be

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[329] Carl Schmitt, *Das Reichsstatthaltergesetz* (Berlin: Heymann, 1933).

[330] In 1932 Schmitt had reflected on the legality of parliamentarian acts and the extraordinary legislators of the Weimar Constitution; Carl Schmitt, *Legalität und Legitimität*, 8th corrected ed. (Berlin: Duncker & Humblot, 2012).

[331] Mehring, *Schmitt*, 313. 324.

[332] Schmitt, *Tagebücher 1930-1934*, 461.

[333] Mehring, *Schmitt*, 320.

[334] Mehring, *Schmitt*, 328, 333, 342.

[335] Mehring, *Schmitt*, 336, 339-40.

[336] Hermann Göring (1893-1946) was the Prussian governor (*Statthalter*) who was in accordance with the *Reichsstatthaltergesetz* appointed by Hitler and was meant to enforce the Reich's power within Prussia in personal responsibility to Hitler.

[337] Carl Schmitt, "Der Führer schützt das Recht (1934)", in *Positionen und Begriffe*, 228.

[338] Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (On the three types of jurisprudential thought), 3rd ed. (Berlin: Duncker & Humblot, 2006).

grounded in the jurisprudential institutional essence (*Sinn*) of a constitution.[339] Instead he turned to justifying the violence from an anti-Semitic attitude.[340]

Schmitt was under no illusion that turning to the National Socialist worldview meant, in difference to Fascism, accepting Hitler's anti-Semitic "problem of race".[341] Thus in early 1933 Schmitt severed contact to many previously close friends of Jewish background.[342] In May 1933, he had publically anticipated punitive expatriations of Jewish scholars due to their missing German spirit (*Geist*) or ties to the German people, in distinction from German intellectuals.[343] By 1935 he praised the Nuremberg Racial Laws as a "constitution of freedom",[344] and organized a conference on *Judaism within Jurisprudence*,[345] because in the jurisprudence of the *Führer*-state, the plan and will of the *Führer* replaces the rule of law (*Rechtsstaat*).[346] This ludicrous polemical attempt of turning anti-Semitism into an academic science would overshadow forthwith his entire work.[347] But this demonstration of his willingness to assimilate without reservation to the regime[348] could not prevent SS-lawyers and emigrants to play *Carl Schmitt against Carl Schmitt*.[349] They reminded him and the public of his previous connection to a "Jew-friendly" political Catholicism and Jewish colleagues, and his support of the presidential system even after the "seizure of power".

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[339] Mehring, *Schmitt*, 352.

[340] Mehring, *Schmitt*, 359.

[341] Mehring, *Schmitt*, 373. In 1936 Schmitt publically differentiated between Fascist and National Socialist jurisprudence; Carl Schmitt, „Faschistisches und nationalsozialistisches Rechtsdenken", *Deutsche Juristenzeitung* 41 (1936): 620.

[342] An example for Schmitt's betrayal of friendships and of disowning his own past is the Eisler family, who were publishers in Hamburg. Their son, Fritz Eisler (1853-1914), was a close friend since University years who died in the Great War. The Eisler family had supported Schmitt financially throughout his lean early years, but Schmitt dropped all contact in 1933; Mehring, *Schmitt*, 29-32.

[343] Carl Schmitt, „Die deutschen Intellektuellen", *Westdeutscher Beobachter* 9 (31. Mai 1933).

[344] Carl Schmitt, "Die Verfassung der Freiheit", *Deutsche Juristen-Zeitung* 40, (1935): 1133-1135. The Nuremberg Racial Laws was a surprise "legislation" for the September 1935 annual Reichs-party-assembly of the NSDAP (*Reichsparteitag*) in Nuremberg which was conducted under the slogan of "Freedom"; Mehring, *Schmitt*, 372.

[345] "Das Judentum in der Rechtswissenschaft, Tagung der Reichsgruppe des NSRB", *Mitteilungsblatt des National-Sozialistischen Rechtswahrerbundes*, 1936, 200-01. Mehring, *Schmitt*, 373-74.

[346] Carl Schmitt, „Die Rechtswissenschaft im Führerstaat", *Zeitschrift der Akademie für Deutsches Recht*, 1935: 435-40.

[347] Mehring, *Schmitt*, 361.

[348] Stolleis, *History of Public Law*, 264.

[349] Waldemar Gurian, "Carl Schmitt gegen Carl Schmitt: 22. Mai 1936", in *Deutsche Briefe 1934-1938: Ein Blatt der Katholischen Emigration*, ed. Heinz Hürten, 2 vols. (Mainz: M. Grünewald, 1969), 2:204-5; Mehring, *Schmitt*, 378.

Publically ridiculed,[350] he lost in disgrace all of his party offices in early 1936.[351] He would be dismissed from his professorship at the University of Berlin at the end of World War Two. Despite being twice interned and interrogated by the American Forces, he was never criminally charged. Post-war, he retreated to his hometown in the Ruhr area and never again received a call to any university but maintained throughout the remaining years of his life a lively correspondence with many students and intellectuals.

2.5.2 Dietrich Bonhoeffer

Choosing theology, Bonhoeffer, similar to Schmitt, decided on his professional path at an early age. During his youth and early adulthood, his decisions were directed towards travelling, accumulating knowledge, and advancing his academic career. Originally focused on developing a theory of church, he turned to the problem of the difference between philosophical knowledge and theological revelation. His engagement in the international ecumenical movement in the interest of peace turned, in late 1932 in close coordination with his brother-in-law and constitutional lawyer Gerhard Leibholz, into theological opposition to the approaching National Socialist state and into support for the Protestant Church's confessional self-determination. His decision to join the underground resistance to the National Socialist state led to his death in April 1945.

Born in 1906 in Breslau as a twin and youngest boy among eight siblings, Bonhoeffer was raised within the economic stability of a Protestant family of the upper-class, the partly aristocratic educated bourgeoisie.[352] During his childhood and youth in Berlin, he was surrounded by academics and intellectuals of the same class and attended a private seminar for select students at the home of Adolf von Harnack.[353] Because of ties to the agricultural estates in the eastern part of Germany, the family's food supply was augmented with fresh produce during economically strained years which kept severe hunger at bay.[354] Valuing the safety of a 'good home' where one could find 'counsel, calm, and clarity' and where 'amid

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[350] Mehring, *Schmitt*, 379-80

[351] Stolleis, *History of Public Law*, 264.

[352] Bonhoeffer's mother Paula von Hase was the daughter of Countess Clara von Kalckreuth whose father, Count Stanislaus Kalckreuth, was director of the Grand Duke's School of Art in Weimar; Bethge, *Bonhoeffer*, 3-4.

[353] Bethge, *Bonhoeffer*, 67

[354] DBWE 8:205. DBWE 9:19.

the general impoverishment of spiritual life … a treasury of spiritual values and a source of inspiration' could be found, the family unit remained central to Bonhoeffer's life.[355] Here he found advice from his mother and learned self-assertiveness and decisiveness towards setting and pursuing self-set goals,[356] as exemplified in 'his father's unimpeachable judgement'.[357] To his brother's not so subtle criticism of his announcement to pursue a career in the church, he responded in brotherly competitiveness that he 'shall reform' the institution they called 'poor, feeble, boring, petty bourgeois.'[358] Driven by a competitive wish for independence and self-realization[359] Bonhoeffer set out to focus on ecclesiology and to develop a theory of church while his brother Klaus and his friends, especially Leibholz,[360] were within the academic stream of jurisprudence engaged with the theory of state. Nonetheless, all were concerned with the human being as part of the collective structure of their respective focus.

After starting university at his father's Alma Mater in Tübingen and joining his father's former fraternity[361] in 1923, the year of the hyper-inflation,[362] Bonhoeffer travelled in 1924 to Rome for an extended study leave. There he approached the Roman Church and Catholicism with the academic interest of gaining knowledge about the institution and concept of church.[363] Thus inspired he reflected on the German situation in which he saw the form of the gospel still tied to the state despite the Protestant Church's official separation from the state. He wondered about the relation of an established church to piety within changing political situations and concluded that the Church's complete separation from the state was desirable[364] − a topic that subsequently would run through his entire theological work.[365] In

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[355] DBWE 8: 385.

[356] cf. Hans Pfeifer, editor's afterword to the German edition in DBWE 9:565.

[357] DBWE 9:567.

[358] Bethge, *Bonhoeffer*, 36.

[359] Bethge, *Bonhoeffer*, 37, 44.

[360] Bonhoeffer and Gerhard Leibholz shared the same circle of friends. At confirmation classes Bonhoeffer's brother Klaus befriended Leibholz and Hans von Dohnanyi. All spent hiking vacations together at least since 1922. In 1924 Leibholz and Bonhoeffer's twin sister Sabine became engaged and they married in 1926; Bethge, *Bonhoeffer*, 18, 29; DBWE 9:51; Sabine Leibholz-Bonhoeffer, *The Bonhoeffers: Portrait of a Family* (London: Sidgwick & Jackson, 1971), 61, 65.

[361] Bethge, *Bonhoeffer*, 46.

[362] The Bonhoeffer family managed to keep four children at university during the hyper-inflation of 1923 when unemployment skyrocketed because his father, a psychiatrist at the renowned Charité hospital in Berlin, was paid by international clients in coveted foreign currencies; Bethge, *Bonhoeffer*, 48.

[363] DBWE 9:89.

[364] While in Rome, Bonhoeffer also experienced a Vatican-celebration on Constitution Day; DBWE 9:106-07. This celebration was similar to the 19th century public celebrations in Germany that connected the Bible and the Constitution by carrying both in a procession through the streets. At the time of Bonhoeffer's visit the "Roman

his 1925 dissertation, *Sanctorum Communio*,[366] which simultaneously qualified as the thesis part of the graduation requirements,[367] Bonhoeffer developed in a half-historical and half-systematic way a theory of church for the Protestant religious community.[368] In a theological dialogue with social philosophy and sociology, he set a Christian concept of person in relation to community for the purpose of articulating with the assertion of 'Christ existing as church community'[369] the essence of the empirical church and of overcoming the contradictions between sociology and revelation. During his immediately following 1928/29 one year licentiate (*Lizensariat*) in a paid position at a German congregation in Barcelona, Bonhoeffer experienced for the first time close contact with people in need and people who were 'difficult to classify socially',[370] as well as those of lower class 'with whom you otherwise would hardly ever have exchanged even a single word.'[371] Missing the intellectual exchanges of ideas customary to his life in Berlin, Bonhoeffer took the initiative to organize a lecture series[372] for the purpose of alleviating his academic drought.[373]

On his return to Berlin in February 1929, he immediately immersed himself in his *Habilitation* thesis, *Act and Being*,[374] which he completed in record time in July 1930. Bonhoeffer had conceived the idea for his *Habilitation* thesis on 'the question of consciousness and conscience in theology',[375] parallel to Leibholz's *Habilitation* thesis.[376]

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question" between the Catholic Church and the Italian kingdom was still undecided. Only by 1929 would the Lateran Contracts separate the Roman Church and the Italian state by creating the Vatican State and guaranteeing its political and territorial sovereignty in exchange to the Pope's recognition of Rome as capital of Italy.

[365] DBWE 6:388-94; DBW 12:349-58; DBW 15:431-60, esp. 445-52; DBWE 16:502-28.

[366] The dissertation was accepted at the University of Berlin already on December 17, 1927 but published only in September 1930; published as DBWE 1.

[367] *Erstes Theologisches Staatsexamen* (First State Examination in Theology).

[368] DBWE 9:148-49.

[369] DBWE 1:121, 189, 199, 211, 231, 260, 280, 288.

[370] DBWE 10:72.

[371] DBWE 10:110.

[372] The full titles of Bonhoeffer's public presentations are "The Tragedy of the Prophetic and Its Lasting Meaning" (13 November 1928), "Jesus Christ and the Essence of Christianity" (11 December 1928), "Basic Questions of a Christian Ethics" (8 February 1929); DBWE 10:325-78.

[373] cf. DBWE 10:116.

[374] The thesis was accepted on July 12, 1930 at the University of Berlin but published more than a year later in September 1931; published as DBWE 2.

[375] DBWE 10:122. Bonhoeffer mentioned an interest in "consciousness" for the first time on 14 June 1928 to Walter Dreβ; DBWE 10:101-02. He discussed this topic with Professor Reinhold Seeberg on 20 July 1928; DBWE 10:119-22, esp. 122 and referred various times to "conscience" in his February 1929 presentation to the Barcelona congregation; DBWE 10:359-378, esp. 374, 377, 378.

Leibholz, the husband to Bonhoeffer's twin-sister Sabine, worked on a phenomenological inquiry into the essence of representation within the Weimar constitutional system[377] which demanded a conscience of its parliamentary decision makers.[378] Leibholz's and Bonhoeffer's topics were related as the former's jurisprudential-philosophical and phenomenological gaze at the representational essence (*Wesensschau*) tried to prove that a priori supra-temporal concepts of state theory are knowable to human beings, and that the parliamentary representative bundled the spiritual essence within the self.[379] Bonhoeffer's investigation into the existence of ideas within transcendental philosophy and ontology in their relationship to systematic theology established that the philosophical concepts of knowledge, of which jurisprudence is one, closes human decision makers in on themselves and prevent access to knowledge revealed by God and openness to neighboring human beings. He then proceeded to focus on theological access to God's revelation through the directness of faith in Jesus Christ at the center of the church.

With his *Habilitation* and his final major theological examinations[380] completed, and his inaugural lecture at the University of Berlin on *The Anthropological Question in Contemporary Philosophy and Theology*[381] read, Bonhoeffer departed for a 1930/31 scholarship year at Union Theological Seminary in New York City. This year stood at the borderline between student life and work life, between accumulating knowledge and disseminating knowledge. His father's efforts during his absence to find, on his behalf, adequate employment[382] in academia paid off a few months after Bonhoeffer's return from America. At the very height of unemployment in the winter of 1931/32, Bonhoeffer began work as student chaplain and in a special academic position, first unpaid but shortly after

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[376] Gerhard Leibholz, *Das Wesen der Repräsentation unter besonderer Berücksichtigung des Repräsentativsystems.*

[377] Leibholz began his work on the essence of representation already in 1926 while both, Bonhoeffer and Leibholz resided in Berlin. Leibholz completed the work on his *Habilitation* thesis in 1928, but published it only by mid-1929; Leibholz, Vorwort to *Wesen der Repräsentation unter besonderer Berücksichtigung des Repräsentativsystems*. At the time also Bonhoeffer worked on his own *Habilitation* and, again, both resided in Berlin.

[378] Article 21 Weimar Constitution: ‚Die Abgeordneten … sind nur ihrem Gewissen unterworfen und an Aufträge nicht gebunden'; Hildebrandt, *Verfassungen*, 75.

[379] Stolleis, *History of Public Law*, 194.

[380] *Zweites Theologisches Staatsexamen* (Second State Examination in Theology).

[381] DBWE 10:389-408. Bonhoeffer also delivered his trial lecture on "The Concept of Dialectic in the So-Called Dialectic Theology"; DBWE 17:68.

[382] DBWE 10: 288-89.

retroactively paid, as teaching assistant at the department of Systematic Theology at the University of Berlin.[383]

Although Bonhoeffer had embarked for America with "semi-pacifist" thoughts[384] that were filled with emotions regarding Germany's experiences in regards to the Great War and the rejection of the Versailles Treaty,[385] especially the moral guilt clause, he returned with a sharpened interpretation of "pacifism." This became determinative for his subsequent involvement in the international ecumenical movement.[386] He also attained an understanding of the 'Negro problem,'[387] mostly through immersing himself in the work of the black community of the Abyssinian Baptist Church in New York City. But he did not draw a connection to any "Jewish problem" in Germany even though he received information from home that Leibholz, who was of Jewish ancestry, feared 'the Nazis as far as his job is concerned'.[388] Bonhoeffer instead concurred with his brother Karl-Friedrich's assessment[389] that fears were exaggerated and the Negro and Jewish situation were not comparable.[390] Nonetheless, he cannot be called 'unpolitical', as a friend did,[391] or be interpreted as remote 'from contemporary political events'[392] because belonging to his social upper class came with an expectancy to be current on political developments[393] and being able to discuss them as well as academic topics with friends and family at any given time. Thus he could in 1922

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[383] Immediately on his return from America but before commencing his work in Berlin, Bonhoeffer traveled to Bonn to meet the theologian Karl Barth and attended two ecumenical conferences in Britain; DBWE 17:70-72.

[384] Reinhard Staats, editor's afterword to the German edition in DBWE 10:609.

[385] DBWE 10:411-18.

[386] The strongest expression of his commitment to peace was his talk at the ecumenical conference of the World Alliance for Life and Work in Fanø on 28 August 1934; DBWE 13:307-10. At the same conference a resolution in support of the Confessing Church was passed under the protest of the German Christians who where represented by Bishop Heckel.

[387] DBWE 10:276.

[388] DBWE 10:289.

[389] DBWE 10:276.

[390] DBWE 10:293. By 1939 Bonhoeffer had made this connection as during his second visit to America he mentioned in his diary the "Negro Question" and immediately after a "great increase in anti-Semitism" in America; DBWE 15:230.

[391] DBWE 10:283. Already in his February1929 lecture in Barcelona Bonhoeffer discussed "political" issues such as the distinction between enemy and neighbor which came close to Carl Schmitt's political distinction between friend and enemy; cf. DBWE 10:370.

[392] Staats, editor's afterword in DBWE 10:610. Regarding the amount of information sent to Bonhoeffer in New York see DBWE 10:289.

[393] Because it was customary to read the newspaper regularly, Bonhoeffer's mother, Paula Bonhoeffer, was worried that Dietrich may not have access to German newspapers in New York. DBWE 10:371.

immediately comment of Walter Rathenau's (1867-1922) assassination[394] and wondered in 1944 what his brother and brothers-in-laws' juridical perspectives to particular topics might be and about the 'differences between theological existence and that of the legal profession.'[395]

With the jurist Leibholz, his friend since the early 1920s, Bonhoeffer enjoyed a particular bond. Their 'old topic of discussion … the doctrine of the *lex naturae*' he still recalled and added to in 1940.[396] And they shared a common fascination with Italy. Leibholz was since 1928 an internationally renowned specialist on the Fascist theory of state as exemplified in its prototype of the Duce's Italy.[397] Leibholz's knowledge of Fascism and his knowledge in Protestant Church Law (*Evangelisches Kirchenrecht*), gained through lecturing on this topic from November 1929 to October 1931 at the University of Greifswald,[398] provided to Bonhoeffer a well informed source for updates on the developments in Germany after his return from America in 1931.

Again exposed to his family and especially Leibholz's insight knowledge, and now no longer a student but an educator, a shift in his attitude towards the political developments in Germany is evident in his work between early and late 1932.[399] His first lecture course upon his return from America in the summer semester of 1932 on *The Nature of the Church*[400] was still inspired by and is an updated version of his dissertation *Sanctorum Communio* with integrated aspects from *Act and Being*. However, in November 1932 Bonhoeffer presented, in

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[394] He wondered after Walter Rathenau's assassination what would become of Germany if its best leaders were killed. This echoed a comment his brother Klaus made to his friend Hans von Dohnanyi about the leadership quality of people who abuse those who support democratic principles; Bethge, *Bonhoeffer*, 33-34.

[395] DBWE 8:304. Bonhoeffer's brother Klaus and the husbands to his sister Ursula, Rüdiger Schleicher, to his sister Christine, Hans von Dohnanyi, and his twin-sister Sabine, Gerhard Leibholz, were all lawyers. Leibholz, a baptized son of Jewish parents, emigrated to Britain in 1938. Klaus, Rüdiger, and Hans were involved with the assassination attempt on Hitler on 20 July 1944 and executed in 1945.

[396] DBWE 15:300-02 and 6:450.

[397] Wiegandt, *Norm und Wirklichkeit*, 22, 24. Starting 1 October 1926 Leibholz worked at the Italian section of the Kaiser Wilhelm Institute for Foreign Public Law and International Law. On 30 June 1928 he presented his inaugural lecture; Gerhard Leibholz, *Zu den Problemen der fascistischen Verfassungsrechts* (Berlin: de Gruyter, 1928). In Italy this publication became known as full introduction to the Fascist form of rule.

[398] Wiegandt, *Norm und Wirklichkeit*, 27.

[399] Karola Radler, "The Leibholz-Schmitt connection's formative influence on Bonhoeffer's 1932-33 entry into public theology", *Stellenbosch Theological Journal* 4, no 2 (December 2018): 683-702.

[400] DBWE 11:269-332; 17:73.

coordination with Leibholz,[401] the paper *Thy Kingdom Come!*, [402] at the same time with Leibholz speaking on *The Disintegration of Liberal Democracy and the Authoritarian Theory of State*.[403] Both published their papers in January 1933. For both these presentations were, from their respective theological and jurisprudential perspectives, revisions of their earlier 1928/29 positions on German political developments, even though both did not yet refer to or connect "racial" anti-Semitism to the National Socialist wave in Germany. Bonhoeffer centered this initial theological public opposition on the separation between the Fascist theory of state and the Protestant Church, as well as problems of *Führer*-ship.[404] Leibholz's paper which quotes Bonhoeffer in support of his own objection[405] is an insider criticism of Fascism and it warns the Protestant Church about the approaching collectivism.

In line with their general context both, Bonhoeffer and Leibholz had still been leaning in 1928/29 toward authoritarian political ideas and visions of *Volk* and Vitalism. In his 1929 Barcelona lecture on the *Basic Question of a Christian Ethics*, Bonhoeffer had referred to 'my own people'[406] who are similar to individuals full of strength, power, youth, and victoriousness, because 'God creates youth in the individual as well as nations' and because he 'himself is eternally young and strong and victorious.' Therefore God would call every people 'to create its history, to enter into the struggle that is the life of nations.' The human being who surrendered the 'own selfish will to the divine will that guides world history' would determine the moment of action.[407] Slightly earlier, in his 1928 inaugural lecture [408] at

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[401] Bonhoeffer's partly recovered library holds two of Gerhard Leibholz's books: Leibholz, *Die Gleichheit vor dem Gesetz* and *Die Auflösung der Liberalen Demokratie in Deutschland*; Christoph Strohm, *Theologische Ethik im Kampf gegen den Nationalsozialismus: Der Weg Dietrich Bonhoeffer's mit den Juristen Hans von Dohnanyi und Gerhard Leibholz in den Widerstand*, (Munich: Chr. Kaiser, 1989), 89. However, it can be assumed that Bonhoeffer had also read Leibholz's *Habilitation* thesis *Das Wesen der Representation unter besonderer Berücksichtigung des Repräsentativsystems*, as well as Leibholz's connected inaugural lecture published as *Zu den Problemen des faschistischen Verfassungsrechts* (Berlin: de Gruyter, 1928), especially, as the latter became widely recognized as fundamental jurisprudential publications and the basis of Leibholz's academic successes in the late 1920s and early 1930s. Also, in a letter from Barcelona, dated July 3rd, 1928, Bonhoeffer had congratulated Leibholz on the successful completion of his post-doctoral degree, the *Habilitation*; DBWE 10:109. Leibholz had presented his inaugural lecture only a few days prior, on June 30th 1928; Wiegandt, *Norm und Wirklichkeit*, 22. This suggests a constant flow of information to Bonhoeffer.

[402] The lecture "Thy Kingdom Come" Bonhoeffer presented on 19 November 1932; DBWE 12: 285-97. It was published in January 1933 in the summarized version of *What is Church*; DBWE 12:262-66.

[403] Leibholz presented his paper *Auflösung* also in November 1932. Leibholz, foreword to *Auflösung;* own translation of the title.

[404] The radio version of this lecture "The *Führer* and the Individual in the Younger Generation" was delivered on 1 February 1933; DBWE 12:268-82.

[405] Leibholz, *Auflösung*, 75 and footnote 196.

[406] DBWE 10:370, 372.

[407] DBWE 10:373.

the University of Berlin, Leibholz had analysed in depth the Fascist system as implemented in Italy since 1924. He had described how this system permeated all aspects of the state with new life, leaving no spheres such as law, economy, or religion outside the influence of the state. His analysis had determined that one of the central characteristics of Fascism was revising the essence of the constitution[409] for the purpose of creating community. This would be done by infusing the mechanized society with "new life" which the dynamic decisions (*Dezisionen*) of the *Duce* continually actualized.[410] Such personal decisions of this creative charismatic personality replaced the state's law and strengthend the executive beyond the separation of power. This political ideal unit (*ideele Einheit*) combined the plurality of wills and brought dynamic vitality which was legitimized by a national myth.[411] He had ended his presentation with the somewhat enthusiastic statement that Fascism liberated the individual because 'Fascism wants to be life, wants to create life.'[412]

However, in November 1932 Leibholz's essay on the disintegration of the liberal democracy in Germany almost climaxed in the revision of his previous positive assessment of the Fascist idea of creating new life.[413] He warned about the 'new political faith movement' in which correct faith (*Rechtgläubigkeit*) would give access to the ruling minority.[414] He criticized the young generation's focus on a new human being who was willing to sacrifice the own life in faith to one holy authoritative personality.[415] In this collectivization under the leader principle, hierarchy would destroy the natural authority of office and legitimize obedience, devotion, and command.[416] Leibholz specifically warned the Lutheran church that the idea of a new Reich meant a comprehensive mythical ideology which would absorb all eternal, earthly, and religious life.[417] Spiritual content would be absorbed and the constitutionally given form of a society of public law would be remodeled which would lead to losing spiritual and

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[408] Gerhard Leibholz, *Zu den Problemen des faschistischen Verfassungsrechts*. This lecture was presented on 30 June 1928; Wiegandt, *Norm und Wirklichkeit*, 22.

[409] Leibholz, *Zu den Problemen*, 8.

[410] Leibholz, *Zu den Problemen*, 41.

[411] cf. Leibholz, *Zu den Problemen*, 22-24, 37-40.

[412] Own translation; ‚Der Fascismus will Leben sein, will Leben spenden.'; Leibholz, *Zu den Problemen*, 41.

[413] Radler, "Leibholz-Schmitt connection", 690.

[414] Leibholz, *Auflösung*, 56, 57, 70, own translation.

[415] Leibholz, *Auflösung*, 57, 66.

[416] cf. Leibholz, *Auflösung*, 60-61, 64.

[417] Leibholz, *Auflösung*, 56.

institutional independence.[418] Because the state was 'not the only "holy place"' he demanded that just as the state limits the church so it reversely finds its own limits in the God-given church which teaches and proclaims God's revealed word and that the state must respect the naturally given orders.[419] And quoting Bonhoeffer,[420] he stated that '"not creation of new life, but preservation of the given life" is the office of the state.'[421]

And Bonhoeffer, in November 1932, turned the final words of 'your kingdom come'[422] of his last 1929 Barcelona lecture into the title of *Thy Kingdom Come*,[423] which inaugurated the revision of his earlier position and the start of a series of essays[424] as well as the university lectures on *Creation and Sin*,[425] the *Lectures on Christology*,[426] and the *Review and Discussion of New Publications in Systematic Theology*.[427] In the first Bonhoeffer presented God's word and message to humanity and the topics of Original Sin, creation ex nihilo, and Cain and Abel as of primary relevance for 'our earth and humankind'.[428] The second focussed on Christ's person, work, presence, humanity and past issues of heresy. With the third lecture, Bonhoeffer introduced his students to contemporary ethical and theological perspectives on politics as well as the boundaries and laws of the state by way of reading recent publications.[429]

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[418] cf. Leibholz, *Auflösung*, 75.

[419] Own translation; ‚Daher ist nach evangelischer Staatsgesinnung auch der Staat nicht der alleinige „Ort der Heiligkeit", ... Der protestantische Staat ist vielmehr der grenzbewuβte Staat, der die Kirche ebenso begrenzt wie er selbst an der von Gott gestifteten, Gottes Word lehrenden und verkündenden Kirche seine Grenze findet, und der darüber hinaus auch die natürlich gegebenden Ordnungen wie vor allem den geschichtlich gebundenen Beruf und Stand, die Familie ... respektiert.'; Leibholz, *Auflösung*, 74.

[420] ‚Nicht Schöpfung neuen Lebens, sondern Erhaltung des gegebenen Lebens ist sein Amt.'; DBW 12:273.

[421] Own translation; ‚„Nicht Schöpfung neuen Lebens, sondern Erhaltung gegebenen Lebens" ist das Amt des Staates.'; Leibholz, *Auflösung*, 74-75.

[422] DBWE 10:378.

[423] DBWE 12:285-97.

[424] *What is Church?*, DBWE 12:262-66; *The Younger Generation's Altered View of the Concept of Führer*, DBWE 12: 266-68; *The Führer and the Individual in the Younger Generation*, DBWE 12:268-82.

[425] This lecture was pubished later under the title *Creation and Fall*, DBWE 3.

[426] DBWE 12:299-360.

[427] DBWE 12:191-213. This lecture took place from November 8, 1932 to February 21, 1933; DBWE 12:191, note 1.

[428] DBWE 3:74.

[429] The publications Bonhoeffer reviewed in his lectures during the Wintersemester 1932 to 1933 were Karl Heim's *Glaube und Denken* (Berlin: Fuchs, 1931), Paul Schütz's *Säkulare Religion* (Tübingen: Mohr, 1932), Karl Barth's *Fides quaerens intellectum* (Munich: Kaiser, 1931), Friedrich Gogarten's *Politische Ethik* (Jena: Deiderichs, 1932), Hinrich Knittermeyer's *Grenzen des Staates* (Berlin: Runge, 1932), Alfred de Quervain,'s *Das Gesetz des Staates* (Berlin: Fuchse 1932), Wilhelm Stapel's *Der christliche Staatsmann: Eine Theologie des Nationalismus* (Hamburg: Hanseatische Verlagsanstalt, 1932), Emil Brunner's *Das Gebot und die Ordnungen* (Tübingen: Mohr, 1932); DBWE 12:191. Also included in the readings was the the text ‚Wort und

In his paper *Thy Kingdom Come* Bonhoeffer stated as regards the main points of his revisions to his 1929 perspectives and in correspondence to Leibholz's view that 'the church limits the state, just as the state limits the church'[430] because 'the church is the limit of politics.'[431] God's kingdom was not a new kind of 'visible, powerful empire', but as miracle and order the church and the state were two forms within God's kingdom on earth.[432] It was the state's office to prevent the destruction of life through recognizing and maintaining the order of preservation of life.[433] In this new 'political-messianic idea'[434] of the *Reich*, the chosen leader's authority was not given *qua* office but depended on the leader's personality to which the led, especially the young generation, abdicated with unconditional obedience their own rights and responsibility.[435] In this collective extreme individualism[436] the leader will fail because he ignores his penultimate responsibility before God and God's ultimate authority.[437] He transgresses the eternal limitations, that is, the boundaries to human possibilities.[438]

Although at the turn of the year 1932 to 1933 Leibholz thought that within the German circumstances a Fascist style radical collectivization of the individual and a mass-absorption of the intellect was improbable[439] this changed with the 7 April 1933 legislated dismissal of all non-Aryans from public service. Bonhoeffer, however, preferred to listen to his superiors who advised him not to officiate at the funeral of Leibholz's father who had died a few days earlier on April 11th. Although he wrote an essay on *The Church and the Jewish Question*, he did not publish it until June 1933. During this 1933 period from April to June, Leibholz, by then professor of constitutional law at the University of Göttingen, began to experience, due to his Jewish ancestry, acute discrimination and the rejection by many collegues, including and foremost by Schmitt.

Bekenntnis Altonaer Pastors' which was an early (January 11, 1933) theological protest by Protestant clergy against German Christians; DBWE 12:192 note 3.

[430] DBWE 12:294.

[431] DBWE 12:265.

[432] DBWE 12:295, 292.

[433] DBWE 12:293.

[434] DBWE 12:276, 278.

[435] cf. DBWE 12:277.

[436] DBWE 12:277.

[437] DBWE 12:280-81.

[438] cf. DBWE 12:264-65.

[439] Leibholz, *Auflösung*, 72.

Since 1926 Leibholz had been in close professional-personal contact with Schmitt and they had met frequently.[440] Schmitt had proof-read his 1928 *Habilitation* thesis[441] and Leibholz had even delayed its publication until 1929 in order to integrate Schmitt's 'valuable' and 'exceptional' presentation of the problems of representation in his just published 1928 *Verfassungslehre*. Leibholz also had stated that Schmitt's position 'largely corresponds to my own fundamental statement.'[442] In return for Schmitt's interest in his *Habilitation* thesis, Leibholz had read the galley-proof of Schmitt's Beckerath recension in which Schmitt had highlighted Leibholz's excellent publication 'on the problems of the Fascist constitutional law'.[443] And in the published version of his inaugural lecture on Italian fascism Leibholz had referred only to Schmitt within the body of the text and had praised Schmitt's convincing presentation that the concept of dictatorship necessitates identifying an enemy.[444] Thereafter, at least until September 1932, they had continued their friendship which had included Leibholz's wife Sabine Bonhoeffer, Dietrich Bonhoeffer's twin sister.[445] And according to three of his students, Bonhoeffer referred in his 1932/33 lecture to Carl Schmitt while reviewing and discussing in Stapel's publication[446] the position that the friend and enemy contrast follows from God's kingdom being faced by that of Lucifer.[447] This indicates that Bonhoeffer was aware of the person of Carl Schmitt and of at least some of his theories.

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[440] Mehring, *Schmitt*, 234, 241.

[441] Mehring, *Schmitt*, 232.

[442] Leibholz, foreword to *Das Wesen der Repräsentation unter besonderer Berücksichtigung des Repräsentativsystems.* In the 2nd edition, published in 1960, the foreword to the 1st edition is only partly re-published, which omitted the reference to Schmitt; Leibholz, foreword to *Wesen der Repräsentation und der Gestaltwandel*, 8.

[443] Carl Schmitt, "Wesen und Werden des Faschistischen Staates (1929)", in *Positionen und Begriffe*, 124-30.

[444] Leibholz, *Zu den Problemen*, 24.

[445] Sabine Bonhoeffer knew Schmitt personally at least since 31 May 1929. Carl Schmitt, *Tagebücher 1925 bis 1929*, 301, The last recorded meeting between Leibholz, Sabine and Schmitt was on 20 September 1932 at Schmitt's home when Schmitt handed Leibholz a copy of his recently completed (10 July 1932) book *Legalität und Legitimität*; Carl Schmitt, *Tagebücher 1930-1934*, 217.

[446] DBWE 12:206-209.

[447] The content of Bonhoeffer's 1932/33 lecture *Review and Discussion of New Publications in Systematic Theology* was reconstructed from notes that were obtained from some of Bonhoeffer's former students; DBWE 12:191 note 1. According to the students Hanns Rüppel, Wolf-Dieter Zimmermann, and Ferenc Lehel Bonhoeffer mentioned Carl Schmitt in regards to the author Stapel's positive assessment of the contrast between friend and enemy as the nature of the political; DBWE 12:207 note 92 which also quotes a sentence from Schmitt and incorrectly declares it as the opening statement to Schmitt's *Concept of the Political*. Instead, Schmitt opened by stating that 'The concept of the state presupposes the concept of the political'. A few pages later he provides as a 'definition of the political' that 'The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.'; Schmitt, *Concept*, 19, 20, 26.

However, in April 1933 Schmitt changed publishers because he no longer wished his books to appear in the same series with Jewish authors such as Leibholz.[448] In May 1933 Schmitt differentiated between Jewish scholars and German intellectuals and anticipated the former's expatriation from Germany,[449] and at the start of the summer semester of 1933 members of the National Socialist SA-storm troopers[450] enforced a boycott of Leibholz's lectures at the University of Göttingen.[451] Then Bonhoeffer finally realized that the National Socialist ideology and theory of state was intrinsically connected to a hatred of Jews, defined as race, not as religion. In the June 1933 publication on the Jewish question, Bonhoeffer calls any attempt of the state for an 'obligatory exclusion of baptized Jews from our Christian congregations' an attack on the nature of the church which would 'find itself in *statu confessionis.*'[452] In November 1933, with a reference to 'all that happened during the past months,' Bonhoeffer apologized to Leibholz[453] for his fears[454] and earlier behavior.[455]

Thus primed by Leibholz' knowledge and experience, Bonhoeffer engaged in 1933 in opposing the National Socialist's attempt to synchronize the church to the state by way of rewriting the Church Constitution and enforcing the Aryan paragraph. Implementing the *Führer*-principle into the Church constitution and adopting the state's Aryan legislation into the church amounted for Bonhoeffer not only to a transgression by the state of the boundaries between church and state, but it also endangered the Christian faith as such, that is, it amounted to a *statu confessioni*s.[456] Thus in June 1933 he spoke up against the changes to the church constitution at a student assembly at the University in Berlin[457] to demand a doctrinal

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[448] Carl Schmitt and Ludwig Feuchtwanger, *Briefwechsel 1918-1935*, ed. Rolf Rieβ (Berlin: Duncker & Humblot, 2007), 393; Mehring, *Schmitt*, 316.

[449] Carl Schmitt, "Die deutschen Intellektuellen".

[450] The *Sturm Abteilung* (SA) under Ernst Röhm.

[451] Wiegandt, *Norm und Wirklichkeit*, 33.

[452] DBWE 12:366.

[453] DBWE 13:42.

[454] The literary fragment that is attributed to around 1932 speaks of not only of doubts and fear when the intention to study theology became public, but also of the conviction to be triumphant in a way that will astonish enemies. This may have been an indirect reflection on his own fears and inner turmoil in regards to his beginning public opposition; DBWE 11:394-96.

[455] On the Schmitt-Leibholz-Bonhoeffer connection, see Radler, "Leibholz-Schmitt connection".

[456] In his essay on *The Church and the Jewish Question* Bonhoeffer recognized the close connection between the National Socialist state's legislation and central questions of faith. The question of faith was for him condensed in the church's response to the Jewish Question; DBWE 12:364.

[457] DBWE 12:123-131.

statement and subsequently, in August, engaged in writing a draft for the Bethel confession.[458] But he disagreed with the watered down compromises of the later editorial draft and refused to work on its final edition.[459] For him, the Bethel confession had been stuck in its opposition to the changes to the church constitution, while the central question of 'Germanism or Christianity' had not been sufficiently addressed.[460] An engagement in the Pastor's Emergency League which formed in September 1933 was more promising because it addressed the immediate plight of the pastor's that were affected by the state's demand that clergy had to unconditionally support the National Socialist state and the German Protestant Church and were of the Aryan descent.[461] However, his plea to pastors for a widespread resignation remained unresponded to, and even Barth, although agreeing that a *status confessionis* existed, recommended to wait for a 'more principled attitude' than that of a racial conformity to the Civil Service law.[462]

Following his father's advice to 'save oneself for the right moment'[463] Bonhoeffer withdrew in mid-October 1933 to a Lutheran pastorate in London, albeit clarifying to the Reich bishop that he would not represent the National Socialist infused perspectives of the German Christians.[464] His continued involvement in the ecumenical movement on behalf of the opposition within the Lutheran church led in May 1934 to a pastoral statement by the Bishop of Chichester George Bell (1883-1958) which spelled out the grievances regarding the *Führer* principle, a violent regime, and radical discrimination incompatible with the Christian principle.[465] Encouraged by the Bishop's letter, the Barmen synod condemned in May 1934 the "false teachings" of the German Christians. The Barmen Declaration, the founding document for the Confessing Church in Germany, was for Bonhoeffer an anti-heresy declaration[466] which meant that the false teachings of the German Christians had no place in the one true church of Jesus Christ, the Confessing Church, from which the Reich church had

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[458] Bethge, *Bonhoeffer*, 300.

[459] The draft had compromised on the wording to include formulations such as "joyful collaboration" with the state's aim and that the church would share "in the glory and guilt of her people" instead of sharing responsibility for the country's guilt; Bethge, *Bonhoeffer*, 303.

[460] DBWE 12:159; cf. Bethge, *Bonhoeffer*, 302-03.

[461] Bethge, *Bonhoeffer*, 307.

[462] DBWE 12:167-68; Bethge, *Bonhoeffer*, 309, 325.

[463] DBWE 13:62.

[464] DBWE 12:184-85.

[465] Bethge, *Bonhoeffer*, 370.

[466] Bethge, *Bonhoeffer*, 375.

separated itself.[467] Bonhoeffer intended to bring the Barmen Declaration without compromise to the youth programs of the ecumenical movement.[468] However, his demand for decisive action towards peace at the Fanø conference[469] and his push for an ecumenical confessional statement failed.[470] His continued insistence on a confession and the repudiation of heresy rather isolated him.[471]

Assuming in 1935 the task of organizing and directing the preacher's seminary of the Confessing Church led him to return from London.[472] After the seminary was prohibited and forcefully closed in 1937, he continued for some time with underground collective pastorates which in turn were forcefully closed in 1940. The work at the seminary inspired his books *Life together*[473] and his interpretation of the Sermon on the Mount in *Discipleship.*[474] With his right to teach at universities revoked on 5 August 1936,[475] the Confessing Church's seminary closed in 1937, banned from Berlin since 1938, and in light of the Leibholz family's emigration in 1938, he agreed to embark for a lecture series in America which his friends had initiated. But within a fortnight, only two months prior to the start of the Second World War on 1 September 1939, he decided to return to Germany because he could not separate himself from the impending catastrophe in his homeland.[476] To save him from military service at the front-lines, family members arranged a position with the Intelligence Services (*Abwehr*) where he utilized, as a double agent, his international contacts in support of the secret resistance organization's effort. His theological writings of the post-1940 period, published post-humously as collection under the title *Ethics*,[477] returned to many theological topics already raised in the years 1932 and 1933. His arrest in 1943 and the resistance's failed assassination of Hitler on 20 July 1944 led to his execution on 9 April 1945, only a few days shy of the end of the war on 8 May 1945.

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[467] DBWE 14:667.

[468] Bethge, *Bonhoeffer*, 375.

[469] DBWE 13:302-10.

[470] 'For Germany today it is the confession, as it is the confession for the ecumenical movement today'; DBWE 13:127.

[471] Bethge, *Bonhoeffer*, 372.

[472] The Seminary's first location at Zingsthof opened on 26 April 1935 and relocated in June 1935 to Finkenwalde, near Stettin; Bethge, *Bonhoeffer*, 417, 425.

[473] DBWE 5

[474] DBWE 4.

[475] Bonhoeffer held his last lecture on14 February 1936; DBWE 17:86; Bethge, *Bonhoeffer*, 516.

[476] DBWE 15:229.

[477] DBWE 6.

2.6   Conclusion: Ideology or Confession?

The 19th century's constitutional fights, resulting in an emancipation of a private sphere free from the interference of the state and public law, brought in motion questions of the relation between the church and the state, between ideological and confessional content of constitutional institutions. The period of industrialization, the Great War, and the following complexity of socio-economic disunity pulled the Weimar Republic apart geographically, intellectually, and politically and endangered the free space of the private over against the public sphere. Both, the ecclesiastic and republican decisions and compromises of the Weimar Constitution proved insufficient for solving the many problems of the first German Republic. Jurisprudential and theological discourse, wrestling with finding the most central essence and substance for the form and content that is needed to overcome the frailness of the situation and for devising a new structure for society and community, glanced at interdisciplinary perspectives, and solutions found in neighboring countries such as in Italy. But in the competition between extreme right wing nationalism and National Socialism on one side, and extreme left wing communism and moderate socialism on the other side, the democratic option of finding compromises lost out to an exploitation of the Weimar Constitution, to violence, and to the call for a *status quo ante* of a monarchic style figure; eventually in the extreme version of a decisionist totalitarian dictator. Those within the Lutheran church who insisted on the independence of the church resisted the domination by the National Socialist state by starting a discourse on confessional clarity free from state-ideology.

Almost one generation apart and originating from different socio-economic, geographic and confessional backgrounds, the aspired university career was for Schmitt a steep arduous social climb compared to the relative ease of Bonhoeffer. They also experienced differences which mirror the overall tensions of the Weimar Republic. At the time of the National Socialist "seizure" of power, Schmitt was at the height of his jurisprudential career and Bonhoeffer was just beginning to establish himself in the theological academic, ecumenical, and ecclesiastical spheres. Schmitt fully assimilated himself to National Socialist ideology, including expelling Jewish acquaintances from his private life, accepting Hitler as source of law and final judge, and embracing anti-Semitism in jurisprudential scholarship. But fierce competition in this *Führer*-state sidelined his career and instead of revolutionizing the

Constitution and public life with "new meaning", his own life was largely expelled from the official public realm of the National Socialist state. Bonhoeffer's early drive to independence and self-realization over against his peers, who were immersed in jurisprudential studies and theories of state, led him to formulate a theory of church and to position revelation over against philosophical, including jurisprudential, conscience and consciousness. Through his close friendship to the Jewish born Leibholz, his brother-in-law and a close acquaintance to Schmitt, Bonhoeffer had access to insight information on the Fascist theory of state. Together with Leibholz's experience of discrimination, not least by Schmitt, he was well prepared for opposing the National Socialist state's attempts of synchronizing the Protestant Church to the *Führer*-principle and to the Aryan state legislation. Recognizing this as a heresy and a *status confessionis*, he pressured the church opposition and the ecumenical movement for a confessional statement. He welcomed the 1934 Barmen Theological Declaration and the Confessing Church as its consequence to the schism with the German Christians, but his insistence on heresy isolated him within the ecumenical movement.

Schmitt's jurisprudential and Bonhoeffer's theological response to a crisis and decision dynamic within the Weimar context and the interconnected questions of urgency, form, and figure, as well as their glances at each other's academic disciplines is the focus of the following chapters.

Chapter 3:

The *Krisis*: Locating the Problem

3.1   Introduction

During the Weimar Republic the so called "age of crisis" that started in the mid-1800s peeked in a crisis and decision dynamic. A crisis conceals a need, an essential want, and also a solution which lends the term "crisis" a quality that is useful to different groups for advancing decisions that match their political goals. The *Berliner Tagesblatt* diagnosed in January 1931 that the crisis-psychosis was exceeding even the war-psychosis, and made people in their 'holy simplicity' susceptible to the National Socialist 'doctrine of salvation' and dubious pseudo-religious practices.[478] The change from monarchy to democracy, from Christian state-ideology to the separation of state and church, had replaced a previously perceived unity with a questionable continuity of personal and communal life. For theorists of state, the jurisprudential caesura meant a discontinuity of established governmental power structures and the church lost contact to power and influence on communal life. This brought a process of mourning, uncertainty, and insecurity. External forces, such as industrialization, technology, capitalist mass culture, social movements, war-loss and revolution enfolded causal powers which were blamed for having destabilized, even destroyed, social orders, and having replaced formerly secure expectations with an indeterminate, instable future. Held responsible were, either in singularity or in combination, liberalism, relativism, historicism, rationalism, idealist optimistic progress, democracy, secularization, dissolution of Christian values, Enlightenment's scientific methodology, and many other points of reference. Overall, the Weimar crisis was understood either as a pessimistic downward spiraling decay or as an optimistic positive development to a new, different and better life. Thus despite, or because of, the difficulty of locating the exact problem, the change to the National Socialist government in early 1933 was variably greeted with excessive hope or as a massive crisis exceeding any of the previous crises. Therefore the following will define the term "crisis" prior to identifying the issue Bonhoeffer and Schmitt saw as the most pressing one of their time in Germany of the Weimar period.

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[478] Rüdiger Graf, "Either-Or: The narrative of „crisis" in Weimar Germany and in historiography", *Central European History* 43 (2010): 598, doi: 10.1017/S0008938910000725.

3.2   The Concept of *Krisis* and its Kierkegaardian Link

The word "crisis" originated etymologically from the Greek term *Krisis* which means divide, select, evaluate, compete, dispute, fight and is related to decision, but it is not yet the decision. It depicts the build up to a particular point at which from options a definitive direction appears. As a political concept it meant also the process of dividing and disputing and to find the regulative political order that ends the conflict.[479] Its roots are steeped in the medical, jurisprudential, and theological fields of antiquity were it depicted the respective harsh and life-relevant alternatives between life and death, just and unjust, and salvation or damnation. The inescapable pressures of objective crisis together with subjective criticism reduced the scope of action to the dilemma of a choice between exclusive alternatives.[480]

Objective observations, the scientific discussion, and evaluation (*judicium*) of the current state in comparison to a state of normal during a phase decisive for life or death were the elements of the medical use of *Krisis*.[481] The jurisprudential use originally did not differentiate between process, legal findings, and judgement but was of constitutional significance because its intrinsic pro and contra considerations defined justice, the order of rule by governmental resolutions, and the decisions on war, peace, and death sentences, and bound the single citizen to the political order of the community.[482] Within theology, *Krisis* received an eschatological component by referring to the time of theological tension before the anticipated final cosmic decision; the period at which the grace of God was already present and eternal life in the future was promised, that is, at which a transformation process from an old life through death into a new life of faith in Jesus Christ takes place.[483]

The three classical usages of *Krisis* became in the modern era increasingly metaphorically combined. The French and American Revolutions of the late 18th century turned *Krisis* into an epochal historical-philosophical concept. It expressed that not the divine but the human

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[479] *Historisches Wörterbuch der Philosophie*, s.v. „Krise", fully rev. ed. *Wörterbuch der Philosophischen Begriffe*, (1976).

[480] Reinhart Koselleck, "Krise", in *Geschichtliche Grundbegriffe: historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, eds. Otto Brunner et al. (Stuttgart: Klett-Cotta, 1982), 617, 626.

[481] *Historisches Wörterbuch der Philosophie*, s.v. „Krise", fully rev. ed. of *Wörterbuch der Philosophischen Begriffe*, (1976).

[482] Koselleck, *Geschichtliche Grundbegriffe*, 618.

[483] Koselleck, *Geschichtliche Grundbegriffe*, 618-19.

acceptance of moral responsibility and the either-or decision for a constitution with a new species of government had brought about a transformative salvation for life in the here and now.[484] In Germany *Krisis* acquired during the "age of crisis", as this began with the 1848 revolutionary activities, an organic and humanistic-individualistic characteristic that mirrored in its semantic usage the unfolding political dynamics. The structural changes in society were associated with human nature and life that constantly pushed for change and a new humanity, i. e. an internally changed human being.[485] This was connected by the early 20th century to a transitional gap in solving socio-economic and political problems with decisions between the either-or alternatives of peaceful reforms or unlawful but eschatologically enriched hope for revolutionary transformation.[486]

In the search for the content of reforms on one side, or revolutionary results on the other side, it was under the modern conditions of fact-based science that the theories of phenomenology[487] and ontology[488] as well as the empirical disciplines of sociology[489] and psychology developed.[490] In jurisprudence topics on methodology, positivism, and conceptualization of form and essence dominated the discourses. It was especially the problem of the relation between normativity and facticity that provoked a controversy on method, and called into doubt jurisprudence's very foundation by questioning if it was a scientific discipline (*Wissenschaft*) or rather a political forum. Theology in turn asked if science, rooted in evidenced facts, may have severed Christian truth and the real from traditional myths. "Demythologizing" the biblical text in a critical process could expose the true core of the New Testament's teachings and make it accessible to the modern mind.[491] Similarly jurisprudential positivism stripped legal concepts (*Rechtssätze*) of any presumably

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[484] Thomas Paine interpreted the events of the American Revolution in this particular way. The Irish Edmund Burke expressed fears of social upheavals and civil wars, and of disturbances to European traditional institutions due to the dangers new friend-enemy lines would bring to the social fabric. Koselleck, *Geschichtliche Grundbegriffe*, 625-30.

[485] Koselleck, *Geschichtliche Grundbegriffe*, 638-42.

[486] Koselleck, *Geschichtliche Grundbegriffe*, 643-48.

[487] Joseph J. Kockelmans, ed. *Phenomenology: the philosophy of Edmund Husserl and its interpretation* (Garden City, NY: Doubleday, 1967).

[488] Martin Heidegger, *Sein und Zeit* (Frankfurt am Main: Klostermann, 1977).

[489] Karl Jaspers, *Max Weber: Politiker, Forscher, Philosoph*, Piper Bücherei 121 (Munich: Piper, 1958); Reinhard Bendix, *Max Weber, an intellectual portrait* (Berkeley: University of California press, 1977).

[490] Sigmund Freud, *The major works of Sigmund Freud*, Great Books of the Western world 54, (Chicago: Encyclopaedia Britannica, 1952).

[491] Rudolf Bultmann, *The New Testament and mythology and other basic writings*, ed. Schubert Miles Odgen (London: SCM Press, 1985); see also Karl Jaspers and Rudolf Bultmann, *Myth and Christianity: An inquiry into the possibility of religion without myth* (New York: Noonday Press, 1958).

distractive content of metaphysical, ethical, or political nature. In search for their precise core-meaning, they were dissected into the smallest conceivable elements of thought for the purpose of using such particles as factors in the logical calculation of a decision (*Begriffsjurisprudence*).[492]

Under the words "crisis" and "questionable" many Weimar theologians perceived the dissolution of moral foundations. They blamed the destructiveness of a limitless individualism with its optimism and faith in progress and the self-assurance of reason[493] and called for a cultural innovation that was carried by a new theological orientation.[494] The lost direct influence on the state was diagnosed as causal to the crisis of the Protestant Church and the wide-spread theological opposition to the Weimar Republic found common ground in a German idea of state that was carried by a consciousness of the importance of the Lutheran Reformation.[495] For Friedrich Gogarten (1887-1967) and Karl Barth (1886-1968) the thought of a permanent *Krisis* between time and eternity was at the heart of the general consciousness of crisis. Their dialectic theology gathered followers around the publication *Between the Times (Zwischen den Zeiten)*.[496] In Gogarten's widely influential theology,[497] it was not the 1918/19 revolutions but the growing mistrust in a world directed by human will and human wisdom that had abandoned the human being in the middle, in an empty space. Here the autonomous human being was forced to press toward progress and was mistaken for the divine.[498] The cultural decay was the result of modern scientific methods which had achieved the standing of being the sole legitimate instance for defining the world. But instead the break-down of all authority, historical norms, and values had proven the particularity and transience of all products of human work. It was a theological task to redefine the normative basis for political action because with God as the first and decisive standard theology was the

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[492] Ebel and Thielmann, *Rechtsgeschichte*, 356.

[493] Hermann Sasse, "Kirchliche Zeitlage: Zur inneren Lage des deutschen Protestantismus: Die Wiederentdeckung der Reformation", *Kirchliches Jahrbuch* 58 (1931):10.

[494] Klaus Tanner, *Die fromme Verstaatlichung des Gewissens: Zur Auseinandersetzung um die Legitimität der Weimarer Reichsverfassung in Staatsrechtswissenschaft und Theologie der zwanziger Jahre* (Göttingen: Vandenhoeck & Ruprecht, 1989), 61-62, 65.

[495] Tanner, *Die fromme Verstaatlichung*, XVIII.

[496] Main contributors to this publication were apart from Friedrich Gogarten and Karl Barth also Eduard Thurneysen and Albert Lempp; Tanner, *Die fromme Verstaatlichung*, 60

[497] For example the jurist Leibholz quoted Gogarten in his essay of the dissolution of democracy in Germany on the pages ahead of citing Bonhoeffer; Leibholz, *Auflösung*, 73-75.

[498] Friedrich Gogarten, "Zwischen den Zeiten", *Die Christliche Welt* (1920):375.

science that was able to provide the true and final norms of a political ethics.[499] For Barth, the existential struggle within history for the advantage of power of men over other men was hypocritically described by 19th century's liberalism as a struggle for justice and freedom.[500] In his "theology of crisis", a radical chasm separates the divine's transcendent reality from humanity and the truth of divine revelation becomes manifest in the human experience of inadequacy. Therefore, 'in the light of ultimate and all-embracing KRISIS God is known to be God, and His sovereignty is seen.'[501]

Within jurisprudence and theology Kierkegaard's existentialism became a point of reference because his work, which was written in the 19th century Danish context of industrialization and its accompanying cultural and social upheavals, appeared to be speaking to a similar situation in the early 20th century in Germany.[502] Kierkegaard thought that the approaching depersonalized, anonymous "mass", the mass society, "the crowd", threatened passionate true Christian faith,[503] and he rejected the closeness of church and state, of "Christendom", which he considered a phenomenon of cultural history.[504] To him this demanded speaking up and intervening in contemporary politics. Kierkegaard had dismissed the "system" of Georg Wilhelm Friedrich Hegel (1770-1831) that had claimed logical science could access the absolute knowledge and mind of God.[505] To Kierkegaard this was a misguided hubristic attempt to ascend to the divine and heaven with the help of a human-made dialectic ladder of thesis, anti-thesis, and synthesis. In a play on *Either-Or*[506] he juxtaposed the aesthetical with the ethical for the purpose of exposing the missing element of novelty, or rather the

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[499] Tanner, *Die fromme Verstaatlichung*, 64.

[500] According to Tanner, Barth criticized political liberalism and the trust in the ability of the reasonable human being to insights, decisions, and democratic compromise. Thus he stood in opposition to the Weimar Constitution. In this hostility to Enlightenment reason and emancipation, the 1933 political change to National Socialism evidenced to Barth the falsity of the liberalism of the 1789 French revolution. Focused on rejecting liberalism prevented him from recognizing that National Socialism's discrimination against Jews injured the humanity of the state and society; Tanner, *Die fromme Verstaatlichung*, 65-66.

[501] Karl Barth, *The Epistle to the Romans*, trans. Edwyn C. Hoskyns, 7th ed. (London: Oxford University Press, 1965), 91, emphasis in original.

[502] Burkhard Conrad, *Der Augenblick der Entscheidung. Zur Geschichte eines politischen Begriffs*, (Baden-Baden: Nomos, 2008), 28.

[503] Frederick Sontag, *A Kierkegaard Handbook* (Atlanta: John Knox Press, 1979), 57.

[504] Søren Kierkegaard, *Attack on "Christendom"*, trans. with introduction Walter Lowrie (Princeton, N.J.: Princeton University Press: 1968; 10th reprint 1991).

[505] See Georg Wilhelm Friedrich Hegel, *The Phenomenology of Mind*, ed. James Black Baillie, Dover Philosophical Classics (Mineola, N.Y.: Dover Publications, 2003).

[506] See Søren Kierkegaard, *Either/Or*, 2 vols. (Garden City, N.Y.: Doubleday, 1959).

"movement", in the Hegelian synthesis that would elevate it over the thesis and anti-thesis.[507] But the aesthetic remains caught in possibility without actuality, in imagination and sensation, in which the occasion presents an event for romantic reflection for the purpose of avoiding boredom, presenting pleasures, and celebrating life from a spectator's perspective. However, over against the aesthete, the judge, who chooses ethical commitment, communication, and procedures, recognizes the limitations of the self but nonetheless remains trapped in claims of eternal values and civic duty to others. Thus while the aesthete's desire turns him into a creator-god of unconstrained possibility, and the ethicist judge perceives his love for others as dialectic advancement over against aesthetic selfishness, both nonetheless remain stuck in the choice between the aesthetic and the ethical without advancing to the higher religious phase of existence, the paradoxical Christian faith. The "movement" to the beyond of aesthetical possibility and of ethical social mores remains absent.

Kierkegaard assessed that the missing ingredient was faith in the "absurd idea" of transcendent origin that the eternal, infinite God could be incarnated as a human being who would die on the cross; the absurdity of faith in the God-man Jesus Christ. This paradox of the simultaneity of transcendence and immanence, this instant at which time and eternity intersect,[508] is an offence to Hegelian reason and logical systems which incorporate the whole of reality. Instead, the paradox makes apparent the gap, the hole, the disconnection between God and human being, and the human's complete dependence on the divine's gracious gift of faith.[509] In being confronted with this gap the human being's fascination, fear, anxiety, despair, and sin-consciousness is confronted with the need to choose, to act freely, and to "leap" from unbelief to the relationship of faith.[510] The human being is faced with failing to find the self in the synthesis of finite and infinite, and of instead remaining in self-enclosed narcissism without relations to others. Even though existence is prior to the Christian essence,[511] reaching the latter demands the teleological suspension of socially prescribed

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[507] Søren Kierkegaard, *The Book on Adler*, ed. and trans. Howard V. Hong and Edna H. Hong (Princeton, NJ: Princeton University Press, 2009).

[508] Arnold B. Come, *Kierkegaard as Theologian: Recovering My Self* (Montreal & Kingston: McGill-Queen's University Press, 1997), 4, 20.

[509] Come, *Kierkegaard*, 266.

[510] Come, *Kierkegaard*, 320-21.

[511] Sontag, *Kierkegaard*, 40.

decision procedures and replacing them with free obedience to the divine command.[512] This crisis requires existential choices between good and evil in the instant of the paradox of faith, in this moment of decision, of leaping in faith across the divide between finite and infinite, between existence and transcendence.

Just as in the etymological and semantic development of the term crisis so also for Kierkegaard the *Krisis* of the divide was not yet the decision. *Krisis* only pointed to choices which would consolidate to alternatives and lead when the right moment appeared to a decision. The following will turn to disclosing the crisis that Bonhoeffer and Schmitt, who were also inspired by Kierkegaard, the "father of existentialism", perceived as the most pressing need, the hole, the gap, or as in Gogarten's thought the empty space in the middle, of their time and place.

3.3   Schmitt's Crisis of Insignificance (*Bedeutungslosigkeit*)

Schmitt identified several crises which each sidelined the human being in its specific position to a gap, a divide. He first located a disconnection in judicial decision-making, followed by a gap in the state's application of meta-physical Justice and then a gaping discord within liberal democracy. An intellectual line reaches from his early discovery of arbitrariness within legal positivism, to ascertaining the individual human being and ethics as insignificant (*bedeutungslos*) to the state's function of mediating meta-physical Justice to empirical facticity, and to exposing an only fictional free individual of liberalism who stood in disconnect to bourgeois parliamentary democracy.

While lecturing in 1912 at Kierkegaard's Alma Mater, the University of Strasbourg, Schmitt located a gap between a judgement (*Urteil*) and the parliamentary statutes (*Gesetz*) which the judge is bound to use as foundation of a decision.[513] To him neither methodological formation nor legal reasoning was sufficient for filling the gap and establishing the required legal correctness of a judgement, and for delivering legal certainty (*Rechtssicherheit*). This was the case despite of Hans Kelsen's (1881-1973) "pure positivist theory of law"[514] which claimed

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[512] cf. Come, *Kierkegaard*, 280-82.

[513] In Continental jurisprudencial method every legal evaluation begins with a norm, that is, a promulgated law.

[514] Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992). Ebel and Thielmann, *Rechtsgeschichte*, 354.

that parliamentary statutes could command obedience to the legal essence of their words simply because of having been promulgated according to due process. This positivist theory of law insisted that the empirical world could be correctly evaluated by applying abstract concepts, categories, and Weberian typologies[515] independent of social reality, politics, sociological and historical analysis, and most decisively without supra-jurisprudential metaphysical speculative content.[516] In methodological self-restriction the boundaries between normativity and facticity, i.e. between legal compulsion (*Zwang*) and ethical obligation were not to be blurred.[517]

Despite the "Goethe of jurisprudence's",[518] Friedrich Carl von Savigny's (1779-1861) objection to codifying law, the 19th century's struggle between the mainly Berlin-based educated bourgeoisie and the Prussian monarchic powers[519] as regards securing their economic and property interests had resulted in codexed statute law.[520] For Savigny abstract rights that were independent of duties, such as they were found in the Roman *Corpus Iuris* of the Middle Ages, prevented an "organic" growth of customary law. As the latter's elementary source, he had identified the ethically bound natural person, i.e. the lawyer, who was cooperating with others within a collective juristic person (*Juristische Person*), the peoples. In this sphere of legal relations (*Rechtsverhältnisse*) the subjective right of the autonomous personality to will and act on legal transactions existed parallel to that of others.[521] However, growing late 19th century nationalist sentiment increasingly insisted on stating cultural interpretations of law in German codifications[522] which led to the positivist interpretations of their "black letters".

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[515] '… Kelsen shared with Weber a neo-Kantian methodology and epistemology, which emphasized the formulation of highly refined, abstract categories with which the empirical world could be evaluated.'; John P. McCormick, "Legal Theory and the Weimar Crisis of Law and Social Change", in *Weimar Thought: A contested Legacy*, eds. Peter Gordon and John P. McCormick (Princeton: Princeton University Press, 2013), 56.

[516] Ebel and Thielmann, *Rechtsgeschichte*, 354. Main supporters of positivism were Hugo Preuβ, one of the authors of the Weimar Constitution, Gerhard Anschütz and Richard Thoma. The latter two had been the supervisors of Gerhard Leibholz's philosophical dissertation on *Fichte und der demokratische Gedanke: Ein Beitrag zur Staatslehre* (Freiburg i.B.: Julius Boltze, 1921).

[517] Klaus Tanner, *Die fromme Verstaatlichung*, 41.

[518] Ebel and Thielmann, *Rechtsgeschichte*, 328.

[519] Ebel and Thielmann, *Rechtsgeschichte*, 333-35.

[520] The legal struggle resulted in the 1897 Commercial Code (*Handelsgesetzbuch*) and in the 1900 Civil Code (*Bürgerliches Gesetzbuch*).

[521] Ebel and Thielmann, *Rechtsgeschichte*, 329.

[522] Ebel and Thielmann, *Rechtsgeschichte*, 354.

But by the early 20th century, positivism became seen as an expression of neo-Kantian rationalism and was accused of having lost guiding ideals and standing in unethical distance to the reality of the chaos of life-experiences.[523] Thus it was unable to integrate the substantial obligations that came with the changes to a pluralistic and antagonistic class society.[524] This one-dimensional rationalism of objective legal formalism was accused of replacing values and ideals with empty concepts apart from reality and in false analogy to a mathematical logic.[525] Thus, the missing substance turned law (*Recht*) into an open form available for random content. In this context a methodological controversy on the Romanist formalism versus Germanist substance, with ties to the earlier codification debate, resurfaced in regards to the concept of person.[526] Otto Friedrich von Gierke[527] had alleged that in the Romanist absolute concept of person a natural person's essence becomes irrelevant once it was constituted as juristic person. He instead preferred the Germanist concept of person which allowed a multiplicity within unity, that is, that the juristic person's common personality (*Gesamtpersönlichkeit*) is grounded in the ethically interconnected "organic" relations of the wills of natural persons which are inherent to a totality of persons (*Personengesamtheit*). The Strasbourg professor Paul Laband (1838-1918) had contested this position with a radical formalism in which the essence of a person in the juristic sense was exhausted in the independent juristic subject without recourse to ethics or freedom. For him law turned the sum of single existences into a new basic unit, a collective person, which becomes an independent bearer of rights and duties without internal multiplicity.[528]

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[523] While all criticized liberalism, they differed in their position towards democracy and the Weimar Constitution. See Manfred Friedrich, „Der Methoden- und Richtungsstreit: Zur Grundlagendiskussion der Weimarer Staatsrechtslehre", *Archiv des öffentlichen Rechts* (AöR) 102, no. 2 (1977): 168, 173, 175, http://www.jstor.org/stable/44305769.

[524] cf. Tanner, *Die fromme Verstaatlichung*, 40-42.

[525] Hermann Heller, „Die Krisis der Staatslehre", *Archiv für Sozialwisenschaft und Sozialpolitik* 55 (1926): 305.

[526] For a short summary of the famous methodological controversy of the Romanist versus the Germanist concept of person between Otto Friedrich von Gierke and Paul Laband see Heller, „Die Krisis der Staatslehre", 295.

[527] Otto Friedrich von Gierke, *Das deutsche Genossenschaftrecht*, vol. 1: Rechtsgeschichte der deutschen Genossenschaft, vol 2: Geschichte des deutschen Körperschaftsbegriffs, vol. 3: Die Staats- und Korporationslehre des Altertums und des Mittelalters und ihre Aufnahme in Deutschland, vol 4: Die Staats- und Korporationslehre der Neuzeit (Berlin: Weidmannsche Buchhandlung, 1868, 1873, 1881, 1913).

[528] ‚Das Recht mache ‚aus der Summe von Sonderexistenzen eine neue Grundeinheit, innerhalb deren es keine Vielheit gibt.'; Laband quoted in Heller, "Krisis", 295. Hermann Heller, though, insisted that although the collective unit stands independently above the concept of person, the collective unit nonetheless remains in relation to the multiplicity of its parts a "unity in multiplicity" precisely because of the cooperative Germanist essence; Heller, "Krisis", 315.

It was into the discourse on logical formalism and anti-positivist openness to material reality that Schmitt inserted the missing link between abstract statute-law and concrete application to a case. He introduced the moment of arbitrariness (*Willkür*)[529] which he found in the gap between a correct interpretation of the written, formal statute-law on one side, and the "rightness" (*Richtigkeit*) of a legal judgement on the other side.[530] According to him, in applying the statute-law to a concrete case the act of interpreting and deciding changes the statute's function and abstract content.[531] This gap could neither be closed with the help of the criteria of lawfulness (*Gesetzmäßigkeit*)[532] or legal accuracy (*Rechtsbestimmtheit*),[533] as they had been developed by the judicial praxis, nor with interpretive methods, psychology, extra-positive meta-norms, or teleological perspectives. Rather the 'persisting living force'[534] of the statute was controlled by the principle of collegiality according to which a judgement is correct (*richtig*) if another judge would have decided likewise.[535] The judge is here understood as an empirical normal type, not an ideal type, of the whole body of modern jurists who are educated in the legal profession.[536] The written reasons for a judgement are paramount for satisfying this methodological circle of collegiality, independent of their significance for the parties of the case. Designed to create calculable correctness and predictability, the principle not only excludes subjective personal, moral, cultural and political elements[537] but also discharges the judge from personal legal responsibility for his judgement even if it was objectively *contra legem*.[538] The legal concord of collegiality precludes subjective intent and negligence of the judge.[539] Nonetheless the gap, the 'moment' of arbitrariness, remains tied to the personality[540] of the judge who is independent of orders

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[529] ,Ein solches Moment inhaltlicher Willkür ist in allem Recht enthalten …'; Schmitt, *Gesetz*, 46.

[530] ,… auf jeden Fall fehlt die Verbindung des abstract und unberührt von dem wirklichen Leben geltenden Rechtssatzes mit der konkreten Anwendung auf den Einzelfall, sobald die Richtigkeit der Interpretation ... und die Richtigkeit der konkreten Entscheidung für ein und dasselbe erklärt werden.'; Schmitt, *Gesetz*, 28.

[531] ,Der als geltend anzunehmende Inhalt des Gesetzes tritt dadurch, daβ der Richter ihn anwendet, in eine andere Sphäre, seine Funktion wird eine andere, wie denn auch tatsächlich der abstrakt geltende Gesetzesinhalt durch die Bezugnahme auf einen konkreten Fall sofort ein anderer wird.'; Schmitt, *Gesetz*, 28.

[532] Schmitt, *Gesetz*, 37-38, 40.

[533] Schmitt, *Gesetz*, 44-67.

[534] ,Das Gesetz ist kein unabänderlich feststehender Inhalt, sondern eine „konstante lebendige Kraft" (Wach).'; Schmitt, *Gesetz*, 26, own translation.

[535] ,Eine richterliche Entscheidung ist heute dann richtig, wenn anzunehmen ist, daβ ein anderer Richter ebenso entschieden hätte'; Schmitt, *Gesetz*, 68.

[536] Schmitt, *Gesetz*, 68, 75, 111.

[537] cf. Schmitt, *Gesetz*, 70, 75, 92-96.

[538] Schmitt, *Gesetz*, 107.

[539] Schmitt, *Gesetz*, 114.

[540] Schmitt, *Gesetz*, 94.

and protected by the legitimacy the statute-law provides. But because a judgement cannot set precedent the judge cannot replace the legislator.[541] Overall, for Schmitt, the principle of collegiality, which turns the multiplicity of the voices of single judges into one united single juristic voice, not only separates the office of the judge, the official juristic type, from the person of the judge but also protects the latter from personal responsibility while it sidelines the individual parties of a case.

Turning his interest in 1914 toward the theory of state[542] Schmitt now replaced the judge as mediator between statute-law and empirical case with the state that uses statute-law to mediate between the normativity of meta-physical Justice and the facticity of the empirical world. In this the individual human being remains incidental to the state's activity, in similarity to the position of the parties to a legal case. The missing link is now located between Justice and its application in the empirical world, between "ought" and being - the "is" - between normativity and facticity, and with consequences for the relations between the collective unit of the state to the single person, the individual. Schmitt's point of entry was the prevalent thesis that Justice (*Recht*) was the result of the factual circumstances of power (*Macht*) and force (*Gewalt*).[543] This not only engaged with Kelsen's resistance to hypostasizing the state to a subject *sui generis*, in separation from and metaphysically above law (*Recht*), one which would permit using law for enforcing political interests.[544] It also addressed the Romanist Georg Jellinek's (1851-1911) legal fiction[545] of the "normative power of the factual."[546] Jellinek's fiction contributed to the earlier Gierke-Laband controversy in which for Gierke the law had provided the continuity of the multiplicity within the unity. The latter's "organic" theory of state stated that insisting on an exclusive reality of the individual and denying a common personality, a juristic person, would be the demise of the state. The pluralistic element, the cooperative element, needs to be balanced with the

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[541] cf. Schmitt, *Gesetz*, 98-99, 103-04.

[542] Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen.*

[543] Schmitt, *Wert*, 22.

[544] Tanner, *Die fromme Verstaatlichung*, 42.

[545] According to Schmitt a legal fiction turns interpretative results into a will which tends to treat a thought as reality. Assuming reality is meant to remove the tension which appears with the arbitrary and wrong assumption of the fiction. Thus the fiction turns into dogma, the 'as if' turns into 'therefore'. Carl Schmitt, "Juristische Fiktionen", *Deutsche Juristen-Zeitung* 12 (15. June 1913): 805.

[546] This theory became instrumental for the fragile acceptance of the Weimar Constitution by the "republicans by reason" such as the lawyers Gerhard Anschütz and Richard Thoma; see Anschütz, *Die Verfassung*, 6. Ebel and Thielmann, *Rechtsgeschichte*, 389. For a short concise discussion of this legal fiction see Ellen Kennedy, introduction to *The Crisis of Parliamentary Democracy* by Carl Schmitt, xxxv-xxxvi.

dominant role (*Herrschaft*) of the state and its laws. Within the state, law established the connection to the multiplicity while human societal existence was the product of the forces of individual interaction as expressed in sociology, teleology, jurisprudence, and ethics.[547] Laband's theory of state differed insofar as for him the state was exhausted in a closed legal system, solely comprised of logical-jurisprudential "objective" absolute concepts, which excluded any social or individual values, or political relative purpose.[548] To this Jellinek added that the normative force, the law, as the ethical minimum of society integrates the social reality into the one juristic person, the state. For him the state was a unit of resident human beings, equipped with original power to rule which binds itself to its own law in normative self-obligation of the will. [549] For Schmitt, however, the state, which knows Justice, uses law to mediate to the empirical world this Justice, the ought, the norm, which is not derived from but is indifferent to the facts of reality (*Tatsachen*).[550] The state is the mediator (*Mittler*) between Justice and empirical reality. The law is the means of the state to implement Justice. In difference to Kelsen, Schmitt differentiated between Justice and law[551] and placed Justice before and above the might of the state and its law. The state is a legal construction whose sole essence, purpose, and task (*Zweck*) is the realization of Justice within reality.[552] Thus it also differs from Laband's closed system of human concepts. The state mediates normativity, Justice, from the middle of reality to the facticity of the world, the being.

According to Schmitt, the state enforces an extra-empirical legal idea by drawing it into temporality[553] but, in difference to Jellineck, the state does not integrate Justice and ethics.

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[547] cf. Otto Friedrich von Gierke, Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien (Tübingen, Mohr, 1915), 79, 88, 96-97, 114.

[548] See Heller, „Krisis", 297-98.

[549] Georg Jellinek, *Allgemeine Staatslehre*, vol. 1: Das Recht des modernen Staates, 2nd rev. and ext. ed. (Berlin: O. Häring Verlag, 1905). See also Hofmann, *Legitimität*, 18, 18n85; Jens Kersten, "Georg Jellinek", in *Enzyklopaedie Rechtsphilosophie*, accessed April 05, 2018, http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/102-jellinek-georg?tmpl=component&print=1&page=

[550] Schmitt, *Wert*, 42.

[551] Because Schmitt used repeatedly the German word *Recht* for both, meta-physical Justice as well as law/statutes his theory is at times confusing. However, a close reading reveals that Schmitt was differentiating between *Recht* in the sense of *Gerechtigkeit*, i.e. Justice, and *Recht*, in the sense of statute-law and promulgated acts; see e.g. Schmitt, *Wert*, 75. In regards to the relationship of the state to the individual he used the term *Recht* in the sense of legal system; see e.g. Schmitt, *Wert*, 86, 101.

[552] Schmitt, *Wert*, 56.

[553] Schmitt, *Wert*, 76.

For Schmitt, 'Justice is not will but norm, not order but command'.[554] The concept of the state stands in relation to Justice analogous to the position the concept of God takes toward ethics and the necessity of realizing moral within the real world.[555] The essence of the juristic subject, the state, is the task of connecting the 'two kingdoms' (*Reiche*)[556] of Justice (*Recht*) and might (*Macht*), of normativity and facticity. Although Schmitt recognized ethics, it is, in difference to Gierke, an independent task separate from that of the state.[557] Just as it is impossible to capture within one concept outer and inner freedom, the visible and the invisible, the temporal and eternal, so neither law nor state end in the individual; this is, because both do not know fulfillment in a single holy one.[558] Thus Schmitt claimed that metaphysical Justice, the normativity, is command but not God, and that the state, the facticity, and God do not intersect in the ethics of Jesus Christ. After stating that 'there is a holy one, but not a just one in the desert',[559] Schmitt points to Luther's word in his call that lawyers should not interfere within the kingdom of God just as ethicists should respect the 'methodological autochthony' of the kingdom of the world.[560] Nonetheless, because of the difference between theory and praxis and despite the state's rational self-binding to Justice, at the "moment" the state mediates normativity to facticity, Justice to reality, an empirical element infiltrates the norm of Justice and transforms it into a proclaimed legal norm. The act of mediating, which draws the idea into the temporal, moves the state into the empirical mechanism of means and ends. It introduces empirical will and legal enforceability which are unknown to the norm of Justice.[561] This stands in similarity to the character-qualities of the "personality" of a judge which infiltrates the statute-law at the moment of transforming it into a judgement, a decision.[562] In executing their office in abstraction to their person, the

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[554] ,... Recht ist nicht Wille, sondern Norm, nicht Befehl, sondern Gebot, ...'; Schmitt, *Wert*, 42, own translation.

[555] Schmitt, *Wert*, 59.

[556] Schmitt, *Wert*, 43.

[557] ,… daβ das Recht der Ethik gegenüber selbständig wird, ...Die Konsequenz, daβ das Recht nicht aus der Ethik abgeleitet werden kann, ...'; Schmitt, *Wert*, 18.

[558] ,Die Forderung einer Trennung … müßte sich schon aus der Unterscheidung von äuβerer und innerer Freiheit und der Unmöglichkeit, das Sichtbare mit dem Unsichtbaren, Zeitliches und Ewiges unter einen Begriff zu bringen, leicht schliessen lasse. Weder das Recht noch der Staat enden im Individuum: sie kennen nicht die Vollendung in einem Einzelnen, nicht den Heiligen.'; Schmitt, *Wert*, 18.

[559] Schmitt, *Wert*, 18; own translation.

[560] ,Wenn, nach Luthers Wort, die Juristen »sich in das Reich Christi nicht mengen« sollen, so sollen auch die reinen Ethiker wenigstens die methodische Autochthonie des Reiches der Welt gelten lassen.'; Schmitt, *Wert*, 18-19, own translation.

[561] Schmitt, *Wert*, 75-76.

[562] Schmitt, *Wert*, 75.

"personality" of the state and of the judge edge and infiltrate the "moment" of transforming Justice into law and law into decision.

The significance of the individual in relation to this mediating state is dependent on executing tasks for the state[563] and is not connected to values central to 'a certain theory of state'.[564] 'Just as Justice provides continuity to the state, it is the state that provides continuity to the individual who lives within the state.'[565] Therefore the state constructs the human being and not the reverse.[566] It is unthinkable that an extraneous essence can jump into the world of Justice, into the state that knows Justice, and claim the self's value by "nature"[567] and bring to it a dignity of empirical form (*Gestalt*), uniqueness and individuality.[568] Rather the worth of the single person in its physical, biological concreteness as a coincidental cluster of atoms and dust[569] does not go beyond the state's sphere of tasks and their execution. Within the mediating state of Justice, the human's worth depends on the norms of law and not on criteria 'endogenous' to the single person.[570] Instead, dignity comes from office which is abstracted[571] from the single concrete person because the individual is only incidental to the state's task of realizing Justice.[572] And the abstraction of office from empirical embodiment constitutes the prototype for personality within law. 'Respect is not owed to the human being simply by existing but is due to the human being who is worthy of respect.'[573] To provide

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[563] ‚Aus dem Begriffe des Staates als einer Aufgabe folgt, daβ die Bedeutung des Individuums innerhalb des Staates sich gleichfalls nur nach einer Aufgabe bemessen kann.' ‚Für den Staat ist das Individuum als solches der zufällige Träger der allein wesentlichen Aufgabe, der bestimmten Funktion, die es zu erfüllen hat.'; Schmitt, *Wert*, 87.

[564] Schmitt, *Wert*, 98, own translation. Schmitt uses this wording to paraphrase the liberal theory of state.

[565] ‚... wie sich die Kontinuität des Staates nur aus dem Rechte ergibt, so flieβt die Kontinuität des Individuums, das im Staate lebt, nur aus dem Staat.'; Schmitt, *Wert*, 86, own translation.

[566] ‚Somit ist nicht der Staat eine Konstruktion, die Menschen sich gemacht haben, er macht im Gegenteil aus dem Menschen eine Konstruktion.'; Schmitt, *Wert*, 93.

[567] ‚..., denn von »Natur« hat nichts einen Wert ...'; Schmitt, *Wert*, 98.

[568] cf. Schmitt, *Wert*, 101.

[569] ‚Das leibliche konkrete Individuum ist, wenn die Betrachtung sich nicht über die materielle Körperlichkeit erhebt, eine gänzlich zufällige Einheit, ein zusammengewehter Haufen con Atomen, dessen Gestalt, Individualität und Einzigartigkeit keine andere sind, wie die des Staubes, der vom Wirbelwind zu einer Säule gefügt wird.'; Schmitt, *Wert*, 101.

[570] ‚Der Wert im Recht und dem Mittler des Rechts, im Staat, bemiβt sich demnach nur nach den Normen des Rechts, nicht nach Dingen, die dem Einzelnen endogen sind.'; Schmitt, *Wert*, 101.

[571] Schmitt, *Wert*, 91.

[572] cf. Schmitt, *Wert*, 87.

[573] ‚Nicht der Mensch, weil er Mensch ist, sondern der Mensch, der gut und achtungswürdig ist, verdient Achtung.'; Schmitt, *Wert*, 106, own translation.

'methodological clarity'[574] Schmitt points to the infallible pope who is not a person but as governor of Christ on earth is his instrument of Justice. Thus the jurisprudential teaching of the Roman Catholic's *charisma veritatis* bases office (*Amt*) not on charisma, but granting office constitutes charisma.[575] Accordingly a god-like absolute monarch is not a human being but 'living law' (*Gesetz*) within the bounds of Justice, which corresponds to the omnipotent God of the theologians who cannot want anything bad or unreasonable apart from Justice.[576]

Only the extra-individual state is equipped with original authority[577] and is the bearer of autonomy,[578] not the individual.[579] For executing state-functions the biological specimen does not require Kantian rational autonomy. Therefore the demand that the human being always has to remain an end in itself and should never become a means does not apply.[580] 'Autonomy of the individual in the state differs from autonomy in ethics where the individual is its bearer.'[581] To advance to the truth of the state as the highest moral order in a Hegelian sense, the steps require at times more and at times less state in the relation between Justice and the empirical reality of the single human being. Individual autonomy fits only to the kind of power-complexity in which the individual, as a bearer of political material demands, opposes the arbitrariness of might.[582] This had met the concrete historical time of immediacy (*Unmittelbarkeit*) when Justice was self-evident to the human being but this did not earn the human being respect from other human beings by virtue of birth.[583] In times of mediation (*Mittelbarkeit*) when the means of the state require imparting Justice to the essence of the human being,[584] the freedom of the individual does not limit the state because the state does

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[574] Schmitt, *Wert*, 95.

[575] ,... liefert auch hier die römisch-katholische Lehre mit ihrer Konstituierung des charisma veritatis durch bloβe Verleihung des Amtes, womit das Amt nicht mehr auf dem charisma beruht, sondern die Verleihung konstitutiv für das charisma wird.'; Schmitt, *Wert*, 102.

[576] cf. Schmitt, *Wert*, 95-96.

[577] Schmitt, *Wert*, 86.

[578] ,Es gibt eine Autonomie im Recht, aber ihr Träger ist nur der Staat als das einzige Subjekt des »Ethos im Recht«, ...'; Schmitt, *Wert*, 100-01, emphasis in original.

[579] ,Kein Individuum hat im Staate Autonomie.'; Schmitt, *Wert*, 100-01.

[580] Schmitt, *Wert*, 89.

[581] ,Die Autonomie bedeutet im Recht etwas anderes wie in der Ethik, wo das Individuum als ihr Inhaber angesehen wird.'; Schmitt, *Wert*, 100-01, own translation.

[582] cf. Schmitt, *Wert*, 99, 106.

[583] cf. Schmitt, *Wert*, 106-07.

[584] cf. Schmitt, *Wert*, 107-08.

not interfere as a *deus ex machina* into the sphere of the individual.[585] In the supra-individual state, the decisive relation is not that between Justice and individual, but between Justice and state.[586] Thus Schmitt had established that the concept of the individual was for the state insignificant and remained isolated from the state.

After separating law and ethics and siding in his theory of state with a Hegelian-type idealist system that ends in the state as the highest order of Justice, Schmitt approached also, in an arguable analogy to Kierkegaard, aesthetic considerations and German romanticism. With a view to politics, he framed romanticism as a critique of the bourgeoisie with roots in the Reformation as well as the French and 19th century German revolutions. As 'subjectified occasionalism',[587] romanticism appeals to 'aesthetic sensitivity' but never 'forges ahead to a concept.'[588] Consequently liberal individualism preferred compromises over decisions. Its basic 'principle of unclarity' employed 'historical events as the occasion for a distinctive literary productivity instead of apprehending them in a matter-of-fact way.'[589] It draws all intellectual productivity, 'religion, the Church, the nation, and the state' into the new aesthetic center of 'irresponsible private feeling' and the 'intimacy of the emotions'.[590] Substantive oppositions and differences such as 'good and evil, friend and enemy, Christ and Antichrist,' become means of intrigues based on the *occasio* in negation of calculable *causa* and binding norm. [591] Located at the decisive point, dualisms are shifted 'into a comprehensive third sphere', an authoritative action of God. A *deus ex machina* slips the interest to a "higher" and "true" unity, the higher organism of the state, the people, or Church, in which the opposition between body and soul or between individuals becomes suspended.[592] The power to employ the opposition as occasion identifies the higher reality.[593]

However, since the process of secularization has replaced God with mundane and worldly metaphysics, such as humanity, nation, individual, historical development, life as life for its

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[585] ,Von einer Freiheit des Individuums zu sprechen, an der der Staat eine Grenze habe, ist miβverständlich. Der Staat greift nicht von auβen wie ein *deus ex machina* in die Sphäre des Individuums ein,'; Schmitt, *Wert*, 98-99.

[586] Schmitt, *Wert*, 86.

[587] Schmitt, *Romanticism*, 17, 18.

[588] Schmitt, *Romanticism*, 8

[589] Schmitt, *Romanticism*, 7.

[590] Schmitt, *Romanticism*, 15.

[591] Schmitt, *Romanticism*, 16.

[592] cf. Schmitt, *Romanticism*, 87.

[593] Schmitt, *Romanticism*, 88.

own sake, or thought and feeling, so also the final authority has shifted from God to the genius of the "ego." For this isolated and emancipated individual the world arises ever new from ever new opportunities, chances, or intrigues of one reality against another ego, people, idea, state, history, or church, but without substance, fixed direction, consistency, that is, without decision.[594] This makes the romantic susceptible to becoming subservient to alien power and alien decision.[595] Schmitt insisted that only in a bourgeois, individualistically disintegrated society the intellectual center could shift into itself. Although the ultimate roots of this shift lay in the Reformation's private priesthood, it is the word "individualism" that captures the ideas of the French Revolution.[596] Despite the 'sovereignty of the ego' and its feature of being non-committal, the romantic heralded the new realities of community and history but discovered that this meant to have to give up subjectivism.[597]

After having exposed in sequence the individual's insignificance, isolation, and indecision Schmitt turned his attention to disclosing an only fictional quality of the free individual of liberalism which was hidden within the liberal-democratic theory of state of the Weimar parliamentary system. According to Schmitt, the Weimar state suffers from a triple *Krisis*: the general *Krisis* of the modern state, a *Krisis* of democracy and a *Krisis* of parliamentarism.[598] This system contained 'the inescapable contradiction of liberal individualism and democratic homogeneity'.[599] It concerned a crisis of identity between those governed and the governing and of substantial equality.[600] The liberal-democratic model of representative parliamentarism did not deliver on the demand of freedom from oppression through a balanced equilibrium between the powers of the state[601] and on equality for all humankind. With parliamentary representatives partaking in government[602] not only the separation of powers was broken. But also the democratic demand of selecting the most able political leaders and of decision-

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[594] cf. Schmitt, *Romanticism*, 17-19, 92.

[595] Schmitt, *Romanticism*, 162.

[596] cf. Schmitt, *Romanticism*, 20, 29.

[597] According to Schmitt, the romantics valued the Catholic Church community and its world-historical tradition. They believed it was possible to become an inwardly pious Catholic without having to make a decision, but they discovered that it meant having to let go of subjectivism; Schmitt, *Romanticism*, 64-65.

[598] ,Man kann heute drei Krisen unterscheiden: die Krisis der Demokratie ...; ferner eine Krisis des modernen Staates (Alfred Weber) und endlich eine Krises des Parlamentarismus.'; Carl Schmitt, "Der Gegensatz von Parlamentarismus und moderner Massendemokratie", in *Positionen und Begriffe*, 73.

[599] Carl Schmitt, preface to the second edition (1926) to *Crisis*, 17.

[600] Schmitt, Preface to *Crisis*, 15.

[601] Schmitt, *Crisis*, 36.

[602] cf. Schmitt, *Crisis*, 49.

making in public forum was rescinded. And the party system prevented the members of parliament from representing the people as a whole, independent of instructions, and answerable only to their personal conscience.[603] Thus ran empty the liberal constitutional guarantees of freedom of speech, press, assembly, and discussion[604] in the sense of a public exchange of persuading opinions.[605] The representational indirectness of parliamentarism and the praxis of a few party leaders making the most important decisions in secret committee meetings behind closed doors, not only precluded the parliament's function as mediator between the rulers and the ruled, the people, but also violated the democratic requirement of identity between both. The latter could only be provided with homogeneity (*Gleichartigkeit*)[606] between both as is found in the modern myth of nationality.[607] By distinguishing between citizens and foreigners[608] only those who belong to the equals are included. Because of equality's logical counterpart of inequality,[609] the former term's substance must be defined as meaning that 'not only are equals equal but unequals will not be treated equally'[610] which requires 'elimination or eradication of heterogeneity'.[611] Thus universal equality of humanity could not solve the problem of democracy's necessity of substantial equality and homogeneity.[612] The need of identity as homogeneous equality at the core of modern democracy was irreconcilable with the liberal notion of absolute equality of all humankind. Therefore for Schmitt, even though liberalism and democracy appeared compatible the nation-state of modern parliamentary mass-democracy exposed that the liberal idea of individual equality is an elusive liberal extra-empirical fictive idea which is irreconcilable with democracy's need of identity and with an outdated parliamentarism.[613]

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[603] cf. Schmitt, introduction to the first edition (1923) to *Crisis*, 20; Schmitt, *Verfassungslehre*, 206-07. Article 21 Weimar Constitution states: ‚Die Abgeordneten sind Vertreter des gesamten Volkes. Sie sind nur ihrem Gewissen unterworfen und an Aufträge nicht gebunden.'; in Hildebrandt, *Verfassungen*, 75, own translation.

[604] Schmitt, *Crisis*, 39.

[605] cf. Schmitt, preface to *Crisis*, 4-5.

[606] For Schmitt 'the "general will" in Rousseau's *Contrat social* demonstrates that a true state only exists where people are so homogeneous that there is essentially unanimity. … According to the *Contrat social*, the state therefore rests not on a contract but essentially on homogeneity … The democratic identity of governed and governing arises from that.'; Schmitt, preface to *Crisis*, 13-14. ‚Der Staat beruht also nicht auf Vertrag, sondern auf Homogenität und Identität des Volkes mit sich selbst.'; Schmitt, *Verfassungslehre*, 229-30.

[607] Schmitt, *Crisis*, 75.

[608] Schmitt, preface to *Crisis*, 10-11.

[609] Schmitt, *Verfassungslehre*, 227, 230; Schmitt, „Gegensatz", 69.

[610] Schmitt, preface to *Crisis*, 9.

[611] Schmitt, preface to *Crisis*, 9.

[612] ‚... weil mit der allgemeinen Menschengleichheit das Problem der zu einer Demokratie notwendigen substantiellen Gleichheit und Homogenität nicht gelöst werden kann.'; Schmitt, "Gegensatz", 72.

[613] Schmitt, "Gegensatz", 72.

In sum, inspired by Kierkegaardian thought, Schmitt dismissed ethics and romantic aesthetics to find in the state the knower, mediator, and enforcer of the meta-physical normativity of Justice. Picking a jurisprudential position between Kelsen, Gierke, Laband and Jellineck, Schmitt rejected positivism but nonetheless excluded ethics based on distinguishing absolutely between the two kingdoms of Justice and the might of the world, and moreover pointed to a variety of dichotomies such as norm and law, ethics and state, the holy and the just. Along with anthropological pessimism,[614] he assessed the state as indifferent to the concrete individual, which is simply a biological category and an objective for the state's mediation of the "ought" to the being. Worthiness and dignity of personality can be found only in the office of being a servant of the state, here in abstraction from the person. Dignity does not miraculously appear from outside by 'nature'. The empirical type of the modern human being, imagined in the bourgeois liberal idea of being free and critical of authority, is a legal fiction from the time of the French Revolution,[615] which in the age of technology, natural sciences, money economy, mechanical process, and codification with positivist application was stuck without content in absurdity.[616] From Romanticism this empirical type inherited the propensity of remaining in possibility and occasion without advancing to a concrete reality and therefore celebrates balance, equilibrium, and compromises, without engaging in what is most human, in actions and decisions. This led within the Weimar context of liberal-democratic parliamentarism to an indirect representational governmental system removed from the people in regards to public leadership-selection and decision-making. The missing identity between the rulers and the people, in combination with the requirement of homogeneity within the modern myth of nation, disclosed the incompatibility of democracy with the demand of equality among free individuals of the liberal theory of law. Overall, the identified disconnections between law and judgement, normative Justice and empirical facticity, between occasion and reality, and between liberalism and democracy revealed a crisis of Modern individualism and the Weimar theory of state. Democracy only pretends an identity of rulers and ruled and just as the "normative power of the factual" is a fiction so is the freedom and equality of the individual of individualism a fiction. And the individual is, at any rate, profoundly insignificant, isolated, and indecisive.

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[614] Mehring, *Schmitt*, 61.

[615] Schmitt, *Wert*, 104.

[616] Schmitt, *Wert*, 12-14.

3.4   Bonhoeffer's Crisis of Independence

For Bonhoeffer the most pressing crisis of his time was that of interferences of the state in the independence of the church despite the prescribed prohibition of a state-church in the 1919 Weimar Constitution. In line with his prediction in response to his brother's teasing that he would reform the institution church, and his early 1924 assessment in Rome that it was best if the church and state were separated,[617] he developed a theory of church in his 1925 dissertation. In 1928/29 he detected a 'crisis of contemporary intellectual movements' that are characterized by 'unclear political ideology'[618] and which involve 'the most profound matters we are facing, namely concerning our own lives and the life of our people (*Volk*)'.[619] However, the events that amounted to a *Krisis* whose underlying structural heresy needed to be exposed and solved became for Bonhoeffer in 1933/34 the implementation of the *Führer*-principle into the church constitution and the adoption of the state's Aryan legislation for the church.

Bonhoeffer picked up those clues from his Weimar context that indicated a search for a new human being. He meant to solve the problem of the isolated Modern individual and the issue of 'cultural confidence and idolization of creatures'.[620] The contemporary crisis was a time that was 'getting out of joint'[621] because an 'unprecedented crisis' had brought a huge sense of instability which perplexes, produces suffering and searching, but also hope.[622] From the revolutionary masses and the subsequent masses of unemployed people, he perceived the widespread 'impression of the insignificance and loneliness of the individual and the stifling power of the masses'.[623] Technology and war had destoyed the individual and the community. There was a serious desire of moving from 'the individual to the collective, from lack of attachment to interdependence, from lack of authority to a new authority.'[624] Consequently the form of life together in community and the human being as part of such community

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[617] DBWE 6:106.

[618] DBWE 10:325, 326.

[619] DBWE 10:342.

[620] DBWE 10:356.

[621] DBWE 10:341.

[622] cf. DBWE 10:326.

[623] Robert Vosloo, "Bonhoeffer, Leadership and a Call for New Authority: A South African Theological Perspective", in *Dietrich Bonhoeffer's Theology Today: A Way between Fundamentalism and Secularism?* eds. John de Gruchy, Stephen Plant, and Christiane Tietz, 354-368 (Gütersloh: Gütersloher Verlagshaus, 2009).

[624] DBWE 12:272.

became for Bonhoeffer a matter for the concept of church. Therefore he started his theological investigation 'not with the doctrine of God but with the doctrine of church', and he intended to show the 'inner connection between the reality of the church and the entire reality of revelation'[625] which sets the concept of the church apart from other concepts that are 'derived from the social sphere',[626] such as the jurisprudential theory of state his brothers, and especially Leibholz, were concerned with. For this purpose he searched among jurisprudential concepts of juristic persons and their relation to natural persons and differentiated between society (*Gesellschaft*), community (*Gemeinschaft*) and association (*Verein*), i.e. between collective, communal, and purely legal concepts.[627]

Although, inspired by Kierkegaard's schism between the divine and the human being, the eternal and temporal, he sidelined the Kierkegaardian criticism of the idealist system that moved the aesthetical into a dialectic relation to the ethical. He criticised him for remaining within the idealist system and thus laying 'the foundation for an extreme sort of individualism in which the significance of the other for the single person is no longer absolute but only relative'.[628] Instead Bonhoeffer focussed on a relational dialectic that involved the ethical and the religious person over against the other person within community and on the single human being in relation to humanity. Thus he injected his theological voice into the Romanist versus Germanist discourse regarding "organic" community, its position to the multiplicity within the unity, and regarding its distinctiveness from positivist "objective" logical concepts. In tune with the constitutionally prescribed legal difference between church and state, he consigned Gierke's concept of cooperative (*Genossenschaft*) to the legal sphere,[629] even though he, in similarity to Gierke, included sociological and ethical considerations and agreed with his horizontal and vertical cooperative approach. The legal equality among the multiplicity which Gierke's concept included is, according to Bonhoeffer, untenable within

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[625] DBWE 1:134.

[626] DBWE 1:131-32.

[627] For Clifford Green the person is the central concept for Bonhoeffer's argument in both his dissertation and his *Habilitation* theses; Clifford J. Green, *Bonhoeffer: a theology of sociality* (Grand Rapids: W. B. Erdmans, 1999), 29. According to Green, Bonhoeffer, in difference to Hegel, 'interprets *Geist* by means of person, he does so in corporate as well as individual life.' Clifford J. Green, *The Sociality of Christ and Humanity*, 61. Green, however, does not discuss the connection to the jurisprudential paradigm of thought in Bonhoeffer's concept of person which goes back to the 19th century discourse on the single person within community, the concept of juristic person, and the natural person in relation to and within juristic persons.

[628] DBWE 1:57 note 12.

[629] DBWE 1:91.

sociology. This is because in a social form there was 'no pure balance of power',[630] but rather, among the dynamic coordination of wills, there exists an 'unequal relation of strength', that is, 'a relation of subordination'. 'The idea of equality before the law, but also the rule of God, includes the coordination of those who are ruled'.[631]

However, when discussing the empirical institutional form (*Gestalt*) of the church he nonetheless took recourse to Gierke's discourse on the differentiations between forms,[632] which also lay behind the legal structures of commercial and private law. But regarding a 'community life according to the laws of organic life',[633] Bonhoeffer disagreed with Gierke. After a lengthy discussion of Paul's assertion that 'you are the body of Christ'[634] he rejected as misleading the application of the 'idea of organism to the church'[635] because among human beings 'there are no organic communities in the sense of purely vegetative growth'.[636] 'It is not the empirical church as such that is an organism',[637] but rather it is in the church-community of God, that is, in the body of Christ 'under the gathering and unifying work of the Holy Spirit', that the single parts (*Glieder*) belong to the unity (*Einheit*) in Christ's body.[638]

Theologically, Bonhoeffer's study hinged on the crisis of the Fall, as described in the biblical story of Genesis and the doctrine of original sin. Fall and sin are the Christian concepts that define the human being of this world and its social relationships as either before Christ or as in faith as regards Christ's redemptive work on the cross, that is, in his *Stellvertretung*[639] for

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[630] Early into the 20th century it had become clear that contrary to the assumption of the bourgeois writers of the Civil Code "no balance of power" existed between parties within contractual relations. Thus, although the Civil Code assumed legal equality it did not exist in social reality.

[631] DBWE 1:92.

[632] DBWE 1:253 note 121.

[633] DBWE 1:138.

[634] 1 Cor. 3:16; 6:19; 12:2; 2 Cor. 6:16; Eph. 5:30.

[635] DBWE 1:141.

[636] DBWE 1:258 ‚...- es gibt keine ‚organischen' Gemeinschaften im Sinne rein vegetativen Wachstums, die als menschliche bezeichnet werden können -, ...'; DBW 1:178, emphasis in original.

[637] DBWE 1:139 note 29.

[638] DBWE 1:138 note 29.

[639] The term *Stellvertretung* is translated in the DBWE as "vicarious representative action". The private law concept of *Stellvertretung* differs from "representation" as a concept of constitutional and public law. Because Bonhoeffer separates the church from concepts of public law and the English language does not know a translation of the term *Stellvertretung* without taking recourse to the word "representation" in one form or another, I will use throughout the German term which Bonhoeffer used, that is, *Stellvertretung*. This will

all humanity. Setting out from the assertion that person, community, and God are inseparable,[640] Bonhoeffer investigated the Christian understanding of social-basic relations and the community that is marked by the human being's *status corruptionis*, the world of "Adam", the old humanity. The Adam-community is the place of selfishness and of structural legal order in which morality and religion are only formally visible.[641] Adam's sin is that 'of the human race and of the individual'.[642] Adam's sin has spread through all of humanity,[643] that is, into a comprehensive community that embraces all communities and taking part in communal life demonstrates that this person of humankind (*Menschheitsperson*) exists.[644] The sinful humanity-in-Adam is the precondition for the miracle of the church as 'Christ existing as church-community',[645] in which faith in the divine revelation in the form of the historical person of Jesus Christ is central. Faith in being reconciled with God through Christ includes that this reconciling mediator (*Mittler*) represents the gift of reconciling with divine love, as well as the humanity that is to be reconciled, that is, the Adam-humanity.[646] In this *Sanctorum Communio* human beings are open to hearing the Holy Spirit and to submitting obediently to God's revelation of His love in Christ and for other human beings. Through God's Grace, the Adam-community is superseded by the Christ-community, the church as 'Christ existing as church-community.'[647]

In 1928/29 an utmost crisis meant for Bonhoeffer a situation of war between peoples (*Völker*), in which the human being has to submit in conscience the 'own selfish will to the divine will'.[648] In line with other Weimar theologians and from a *völkisch* perspective Bonhoeffer declared that 'all that seemed self-evident has become questionable – politically, literally, philosophically, ethically',[649] and that an 'unclear political ideology'[650] had

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emphasize Bonhoeffer's recognition of the difference between private and public legal concepts and the separation of the church from the state.

[640] DBWE 1:34.

[641] DBWE 1:107.

[642] DBWE 1:108.

[643] DBWE 1:109.

[644] cf. DBWE 1:120-21.

[645] DBWE 1: 121, 189, 199, 211, 231, 260, 280, 288.

[646] cf. DBWE 1:142.

[647] DBWE 1:121.

[648] DBWE 10:373.

[649] DBWE 10:361.

[650] DBWE 10:325, 326.

appeared that involved 'our own lives and the life of our people (*Volk*)'.[651] He stressed God's absolute sovereignty, his utter superiority, transcendence and total difference, which stood as the eternally other in an unbridgeable chasm over against human beings and human nature.[652] For him Jesus demanded from the human being a 'direct, uncompromising decision' for or against God's will which would lead 'to participation in God's kingdom'.[653] Although posing a Kierkegaardian either-or question, taking Christ seriously could not mean explaining him according to aesthetic categories, as a religious genius, an author like Goethe, or as a great ethicist who sacrificed himself for his idea. In distinction from this, it rather meant 'taking serious his absolute claim on human decisions'[654] and his 'crucial claim on our entire lives'.[655] This 'essence of Christianity' the human being could not find through human knowledge, which would always remain 'human, limited, relative, anthropomorphic knowledge'. Thus 'Christ … speaks only and exclusively of the line from God to human beings'[656] and to those of faith in Jesus, the bearer of God's revelation on the cross.[657] For Jesus not his individual personality as person but only the 'urgent issue, the decision for God's dominion' was of importance.[658] Confronted with an ethical dilemma leads the human being into a profound solitude which knows no law with a specific content but only the law of freedom and one's sole responsibility before God.[659]

In the problem of conscious control over decisions, Bonhoeffer perceived a deeper problem of consciousness and conscience. Starting now not from a concept of church but from a concept of God, he confronted in *Act and Being* God – defined as reality, before and beyond all thinking – with the philosophical presupposition that thinking in itself could give access to ultimate truth.[660] This asked for a methodology that connected theological and philosophical traditions with the modern dynamics of power in which the human being desired to create

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[651] DBWE 10:342.

[652] cf. DBWE 10:352-53.

[653] cf. DBWE 10: 347-48.

[654] cf. DBWE 10:343.

[655] DBWE 10:342.

[656] DBWE 10:354.

[657] DBWE 10:356-57.

[658] '… anything involving his own person as an individual personality, …, is infinitely insignificant to Jesus compared to the main issue, which is the decision for God's will.' 'Jesus consistently turns attention away from his person and back to the only important and urgent issue, the decision for God's dominion.'; DBWE 10:348-49.

[659] cf. DBWE 10:366-67.

[660] cf. DBWE 10:452-53.

itself in its own image and resisted otherness, one that was perceived as threatening the sovereign position of the human subject's "I".[661] He endeavoured to find in the concept of revelation a theological 'epistemology of its own'[662] which could mediate between the God-reality and the human being's philosophical thinking that was stuck with the possibility of the ego at the center of a closed circle.[663] Proceeding from the Reformation insight of *cor curvum in se* (the heart turned in on itself)[664] of the sinful human being, the central problem was how God's message could penetrate the modern human being's ego which stood since the Fall in self-enclosed distance from encounters with the other, the neighbor, the stranger.[665] Using the framework of act to being, of faith to revelation, Bonhoeffer endeavoured to find in philosophical concepts implications for the epistemological paradigm of the subject-object, the God-human, relation. Agreeing with Karl Barth that God is transcendent subject, he nonetheless criticised him for confining God to a prolegomenon of theology.[666] The dichotomy Barth placed in his theology of crisis between revelation as God's free act alone and history as merely a crisis, Bonhoeffer closed with the mutual suspending (*aufheben*) of act and being, in each other, and through the person of Jesus Christ.[667] The revelation in the historical natural person of Jesus Christ interconnects the act of faith with the being of the congregation of Christ,[668] which is the continuity of God's word in history in form of the church, that is, in the form of a juristic person.

Bonhoeffer extended in *Act and Being* his previous work in *Sanctorum Communio*, namely, to build a theological anthropology that elaborated further on the concept of being-in-Adam as distinct from being-in-Christ. Jesus as a factual natural person within history, standing at the center between the concept of God and the sinful human being after the Fall, breaks open with God's revelation in Christ the egocentric circle of sin of the human being. The eternal crisis of man is brought upon him by God's direct act of bringing in the fact of the person of

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[661] cf. Wayne Whitson Floyd, Jr, editor's introduction to the English edition to DBWE 2:7-8.

[662] DBWE 2:31.

[663] 'Thinking does violence to reality, pulling it into the circle of the ego, …'. Thinking 'remains in the category of possibility.' 'But there is no bridge between possibility and reality.'; DBWE 10:452, 453.

[664] DBWE 2:41, 80, 89, 137, 150.

[665] cf. DBWE 10:472-73.

[666] DBWE 1:293.

[667] According to Michael DeJonge, 'Person is for Bonhoeffer something other than both subject and object'. 'The entire argument of *Act and Being* unfolds by unpacking the implications of the concept of person, defined as the unity of act and being and therefore as a third option beyond subject and object.' Michael DeJonge, *Bonhoeffer's Theological Formation*, 71.

[668] cf. DBWE 2:31.

Jesus Christ His word from outside of the world into historical reality.[669] This stands opposed to philosophy's own crisis[670] of always knowing the human self, and knowing God only in reflection and interpretation, because '*all* philosophy *is* interpretation'[671]. For Bonhoeffer there was no bridge between philosophical system-thinking and the historical fact of the Christ-revelation.

With the approach of the 'crisis of 1933'[672], that is, with the state's attempt at synchronizing the church to the state through rewriting the church constitution and implementing the Aryan paragraph, it appears Bonhoeffer's *völkisch* attitude vanished, due to contact with Leibholz's expert insight into Fascism and his personal experience of persecution. Bonhoeffer's academic engagement with the concept of church, as well as the concept of God, situated him well in recognizing the organizational and confessional dangers to the constitutionally prescribed independence of the church. Endangered became the fundamental changes the Weimar Constitution had brought for the Protestant Church through interconnecting the *iura circa sacra* and the *iura in sacra* and abolishing the *Summus Episcopus*.

From the jurisprudential end, the state played on the fact that the Protestant Church had remained as a corporation of public law (*Körperschaft des öffentlichen Rechts*) a federation (*Verband*) without sovereign power and subject to and limited by the public law of the state. Thus despite the limitation of the competencies of the state, the ecclesiastic institutional independence remained a derivative of that of the state. It remained questionable if the church's status as public-law-corporation lifted the execution of its determinative will (*Willensbetätigung*) which was subject to private law,[673] nonetheless into the public legal sphere. Questionable was, moreover, if in this case, correlating to the Church's elevated position the supervisory powers of the state went beyond the general supervision of the state over private law associations (*Verein*).[674] A widespread legal opinion was that because the state had constitutionally vested the Protestant Church with legislative, disciplinary, and fiduciary powers, the correct application of such powers was subject to state-supervision and

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[669] DBWE 10:457.

[670] DBWE 10: 472.

[671] DBWE 10:470, emphasis in original.

[672] 'Then came the crisis of 1933'; DBWE 14:134.

[673] Article 137, para. 4 Weimar Constitution, in Hildebrandt, *Verfassungen*, 102.

[674] Anschütz, *Verfassung*, 550-51.

that the church's inner organization, that is, its constitutional and administrational norms, and their application to its members was ruled by public law.[675] Thus, although the characteristics of an independent status as public-law-corporation were guaranteed, this did not include every legal detail that could possibly be deducted from the principle of the separation of church and state.[676] However, interferences from the state into nominating for and filling of ecclesiastic positions and offices were excluded. Such internal affairs were understood as the sole right of the church and outside any legal or spiritual supervision from the state, and not superseded by state law. This included non-interference in questions of faith and dogma.[677]

However, for Bonhoeffer the real danger was not primarily the institutional, constitutional independance, but the spiritual independence, even though the institutional form of church was a bodily prerequisite for faith in Christ. The legalistic intrusions contested the continuity of God's word in the church, as revealed in the historical person of Jesus at the center between God and the world, at the cross. Thus he asserted that the church is the limit of all political action[678] because the church and the state were two dual, but different, forms within the one kingdom of God in which the 'church limits the state; state limits the church.'[679] A superficial schematization of individualism, liberalism, and personality concealed the sincere will to be led from isolation (*Vereinzelung*) to the community (*Gemeinschaft*). The call for new authority, ties, and community (*Gemeinschaft*) had led to the desire of overcoming an unreal individualism with an equally unreal collectivism,[680] in which the individualistic personality of a human leader claimed for himself not only absolute, but totalitarian unconditional allegiance to his person. The form (*Gestalt*) of the leader was 'imagined in terms of a new human being', who was grounded in 'a new idea of life'[681] and attached to reality.

For Bonhoeffer the crisis of 1933, the idea of the *Führer*-principle and the myth of homogeneous Aryan identity, constituted a *status confessionis* because they directly

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[675] Anschütz, *Verfassung*, 556.

[676] Anschütz, *Verfassung*, 557.

[677] cf. *Creifelds Rechtswörterbuch*, ed. Hans Kaufmann, 11th rev. ed. (1992), s.v. „iura circa sacra"; „Staatskirchenrecht".

[678] DBWE 12:264-65.

[679] DBWE 12:265.

[680] DBWE 12:272.

[681] DBWE 12:272-273.

threatened the Church's proclamation of God's revelation in Christ and his redemptive work towards establishing true community. He insisted that in this *status confessionis* one should be prepared to differentiate between 'the pure and true teaching of the gospel of Jesus Christ' and the 'human teachings, human laws, false doctrines, and idolatry.'[682] Because the 'truth of the gospel and Christian freedom are at stake',[683] the crisis of 1933 reminded Bonhoeffer of the intra-Lutheran period of the 16th century when the *Formula of Concord* settled a dispute *in casu confessionis* regarding interferences of the state authority into matters under church authority. While matters of the gospel such as preaching, confession of faith, and theology always belong to the church's authority, the external, usually indifferent matters of *adiaphora*, such as the order and practice of the church, permit no compromises only in times of persecution.[684] Then, in times of persecution, the *adiaphora* become more than just *adiaphora*. The state's Aryan legislation that demanded the dismissal from office of all pastors of Jewish descent was the specific issue of persecution that turned the state's interferances of the two-fold synchronization into an *adiaphora* of a magnitude that mattered to the faith of the Christian church. When the spiritual authority and the temporal authority collided, when the two kingdoms are concerned, that is, when the state dictated legal terms to the church due to political reasons,[685] then 'too much' law and order was applied. Then, contrary to 'too little law', which deprives groups of people of its rights, the state robs by force the 'Christian faith of its right to proclaim its message'.[686] Then, when the state oversteps the limits of its actions, then, for the sake of the gospel the church's confessional status must not deviate from the orders and practices of the church.[687] Then it was the church's task as a human institution within earthly boundaries to confess to the destruction and obliteration of worldly orders, from outside the boundary of human possibility, from the proclamation of the commandments and the grace of God,[688] that is, to acknowledge the sinful transgressions and ask for redemption by faith in God's grace.

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[682] DBWE 12:434.

[683] DBWE 12:434; Luther, Martin, Formula of Concord, Epitome, Article X/6, *Book of Concord*, 516, quoted in DBWE 12:366 note 14.

[684] Michael P. DeJonge, *Resistance*, 91.

[685] DeJonge, *Resistance*, 92.

[686] DBWE 12:364-65.

[687] cf. DBWE 14:703-05.

[688] cf. DBWE 12:264-65.

Overall, the constitutionally prescribed relative independence of the Protestant Church steered Bonhoeffer to assess in a concept of church and a concept of God the institutional and the spiritual independence of the Protestant Church from the Weimar state. Through recourse to the jurisprudential discourse on forms for juristic persons and the difference to natural persons, Bonhoeffer assessed the form of the institutional church around faith in the natural person of Jesus Christ. Even though Bonhoeffer rejected the adjective "organic" for communal relations, he nonetheless built on the Germanist thought of the single person within multiplicity. In setting the concept of a natural person in the historical form (*Gestalt*) of Jesus Christ as God's revelation at the center of his characterization of the church as juristic person, Bonhoeffer modified the Kierkegaardian divide and leap as well as the Bartian human's absolute subject-object distance of the human being to the divine, and claimed to have found a way beyond the philosophical self-centered ego. His combination of a spiritual-institutional concept of church, centered on the transformation from humanity-in-Adam to that in-Christ, and grounded in the person-concept, prepared him for confronting the crisis of 1933. The demand of total allegiance to a human leader and the persecution of members of the church presented a crisis of the magnitude of a *status confessionis* that endangered the spiritual independence of the church.

3.5   Conclusion: *Krisis* of Significance (*Bedeutung*)

Bonhoeffer and Schmitt used the term crisis with the organic and humanistic-individualistic characteristics of *Krisis* as it was typical in their contemporary surrounding since the start of the "age of crisis" during the 1848 German revolutions. Both inspired by the Kierkegaardian divide between the eternal and temporal, took the contemporary discourse on juristic and natural person as their point of departure. For Schmitt, the analysis of jurisprudential method, the assessment of a theory of state, as well as the investigation into liberal democracy led to a crisis of insignificance (*Bedeutungslosigkeit*) for the individual. Schmitt assessed the individual as peripheral to legal judgements, as of no value to the state except in state office, and as a fiction of liberalism. For him the individual was too insignificant to be able to be violated in its essence with the law which the mediating state (*Mittler*) used to impart Justice in the times of *Krisis*, in "times of mediation" (*Mittelbarkeit*). However, for Bonhoeffer the societal reaction to the widespread impression of the insignificance and loneliness of the individual had turned into the demand for new authority in the life of an absolute leader and

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into extreme individulism. The implementation of the *Führer*-principle that demanded allegiance to the totalitarian leader as the only one of significance (*Bedeutung*), combined with the persecution embedded in the Aryan legislation, amounted to a *status confessionis*. "Too much law"of the state violated the significance of the person of Jesus Christ, the mediator (*Mittler*) between God and human being as well as the essence of human beings within the church. The demand of one single human being for significance (*Bedeutung*) that had absorbed the widely perceived insignificance (*Bedeutungslosigkeit*) of the individual of the "age of crisis", had turned for Bonhoeffer in the "crisis of 1933" into a *status confessionis*, that is, into a *Krisis* of significant (*bedeutende*) magnitude that called for clarifying the Protestant Church's independence from the state by way of a confessional decision of faith.

<u>**Chapter 4:**</u>

The Decision: Structural Analysis

4.1   Introduction

Bonhoeffer and Schmitt preferred decisions over compromise. Both decisions and compromises end a particular situation of discord between different parties. Over against a decision, a compromise is an agreement or settlement between single persons or groups in which each side makes concessions that accommodate the other's demands or wishes for the purpose of ending a dispute. However, Schmitt rejected the never ending conversations of the German romantics and the delaying attitudes they imparted. He admired the counterrevolutionaries of the 18th and 19th century, who, conscious of their time and age, insisted on decisions. Bonhoeffer criticised his own abeyance regarding dilemmas connected to his 1928 trip to Barcelona, wondered about the role one's consciousness played in decisions,[689] and called in the 1933 crisis for an uncompromising decision in all ecclesiastic matters.

Generally a decision is defined as an active response to a problem that at a particular time combines, in an external expression, a choice with an intended will for the purpose of ending a separation or terminating a division. For Kierkegaard, decision is not idealism's reflexion but the individualized subjectivity that enables a responsible life within reality and according to demands on human existence.[690] Within philosophy it denotes an intentional act in which an act of will prior to an action performs a reason-based choice between at least two given options for action or reaction.[691] Etymologically a decision is connected to a meaning in the sense of coming to an end or as a display of an attribute of strength. The prefix *Ent-* to the German word for decision, *Entscheidung*, clarifies that the meaning of the second part of the word, *Scheidung*, with its sense of separation, division, or even conflict, is to be abolished, removed, or ended. This can either be done through a choice that prefers one alternative over another. Or it can be an active turn toward an opposing other. The de-cision, the *Ent-*

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[689] DBWE 10:58.

[690] Søren Kierkegaard, *Kierkegaard's Concluding Unscientific Postscript*, trans. David F. Swenson and Walter Lowrie (Princeton: Princeton University Press, 1944), 173, 175-76.

[691] Brockhaus, *Enzeklopädie*, 21st rev ed. (Leipzig: F.A. Brockhaus, 2006), s.v. „Entscheidung".

scheidung is usually understood in the sense of a resolution connected to the characteristics of determination or strength of will in the actor and may contain an element of time insofar as it points to a specific event of actualization.[692]

The study by Pritzlaff[693] into the concept of rational decisions within the academic discipline of political sciences indicated that in the increasingly individualistic modern society the concept of decision has become a central factor of incertitude as each person is progressively abandoned to the self without supportive communal structures.[694] Thus the concept of decision coincides with the concept of freedom,[695] and decisions made in social contexts, either within common groups or individualistically, are usually unconnected to specific formal process. And collective decisions remain in general at the individual level. This is the case where decisions are synonymous with a vote and therefore the decisions of single members are either absorbed, analogously, through an individual decision into one collective decision, or a collective decision is based on the mathematical sum of those of individual members.[696] Additionally, the study discovered that the three central features, which can be summarized as choice, resolve, and judgement, underlaying the rational concept of an individual decision, are repeated on the collective level in a parallel way to their interplay on the individual level. Therefore collective decisions can be treated in the same way as individual decisions within a common group.[697] Because this thesis involves collective and individual decisions within Schmitt's theory of state and Bonhoeffer's concept of church, it will follow Pritzlaff's structural design for rational decisions.

4.2   *Ent-scheidung* – De-cision

The core elements of the concept of individual and collective rational decisions - choice, resolve, and judgement, i.e. intent, and active manifestation - which concern material options, a time-structure, and the positioning of the actor are interconnected and overlap in their

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[692] Gerhard Treiber, *Philosophie der Existenz. Das Entscheidungsproblem bei Kierkegaard, Jaspers, Heidegger, Sartre, Camus*, Frankfurt/Main: Peter Lang, 2000), 9-10.

[693] Pritzlaff, *Entscheiden.*

[694] cf. Pritzlaff, *Entscheiden*, 8-9.

[695] Pritzlaff, *Entscheiden*, 14.

[696] cf. Pritzlaff, *Entscheiden*, 12-13

[697] Pritzlaff, *Entscheiden*, 208.

contexts.[698] Factors such as the distribution of power, specific regulations of formal process, and the development of preferences are often regarded as influential for a decision, but concern only the specific material circumstances of facts and can be disregarded for defining a general concept.[699] The first central element of "choice" structures the context of a decision into options and alternatives on a material, factual level. The characteristic of "resolve" adds the structural dimension of compressing the choices into a specific time-frame, while the feature of "judgement" intentionally positions the actor in relation to the material facts of the context.[700] Thus at a more concrete level, Pritzlaff's study discovered that a rational decision is comprised of a combination of the "choice" between external, contextual options and alternatives, plus a temporal structuring by way of a time-sensitive "resolve", plus an internal, invisible "intent" that concerns questions of focus, ideas, and will, plus an external material structuring that is expressed in an "active manifestation" of the previous steps of the decision. Located at the interface between the external options and alternatives, and the temporal structuring of the resolve, that is, between choice and time, are factors such as subjective reflection, compassion, aesthetic views, locus in the world, as well as questions of authority and objective distance. These features precondition the "intent" which is the central, most inner step of the decision.

The "intent" is located between the externality of the "choice" and the part-internal, part-external "resolve" on one side, and the external action and its manifestation on the other side. This "intent" at the middle between these two sides could be understood in Kierkegaardian terms as the centre of a "gap", divide, or need, or more generally of a *Krisis*, that confronts the human being and must be overcome by a "leap", or a "solution". In other paradigms then, such as political sciences, in jurisprudence and theology, this step of "intent" is also the place of, for example, ideas of rightness, Justice, as well as of faith in God's revelation in Jesus, that is, in the cross. The "intent" is the location of the essence of the decision, and thus the most central place for faith, beliefs, convictions, and meaning.

With *Krisis* defined as the existence and identification of the problem that calls for a decision, an *Ent-scheidung*, in which particularly structured steps bring a solution, the following

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[698] Pritzlaff, *Entscheiden*, 15.

[699] Pritzlaff, *Entscheiden*, 11.

[700] Pritzlaff, *Entscheiden*, 15.

will in a first step analyse and compare how and toward which options and alternatives Schmitt and Bonhoeffer sorted and structured their respective understanding of their contemporary Weimar crisis.

4.3   Choices: Options and Alternatives

A "Choice" is generally understood as an election of an act that is based on a will and connects cause and effect. To avoid a tautology between the definitions for choice and decision, the criteria of alternative is added, which reduces the complexity of the world to a limited number of variations or rather options. An alternative, then, confronts an option with another option under the condition that only one of them can be realized.[701] The choice of one compels to renounce the other, which requires that both sides are identifiable and attainable.[702] Bonhoeffer and Schmitt used sociological, philosophical, and jurisprudential tools taken from their academic context to structure and sort the particularities of the Weimar realities for devising a concept of church with a structure *sui generis*, centered on God's purposive meaning for human beings, and a concept of state in the form of a constitution for a national unit, which for both presented particular alternatives. Their respective structuring towards alternatives is the focus of the following.

4.3.1 Schmitt: Identity or Representation

For Schmitt, the Weimar Constitution provided, apart from a core structure for the most important matters of bourgeois democracy, only false decisions in the form of pretense-compromises. Such compromises regarding the separation of powers, the guarantee of basic rights and, most of all leadership, could not solve the Weimar *Krisis* but kept it open for a final decision within the political realm, that is, for a new theory of state with adequate leadership provisions. It was especially the four alternative constitutional types of rule that were unable to form a substantial compromise of a harmonious as-well-as (*sowohl-als-auch*), which could replace the unavoidable either-or question between the monarchic and the democratic principle.[703]

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[701] Niklas Luhmann, *Organisation und Entscheidung* (Wiesbaden: Westdeutscher Verlag, 2000), 125.

[702] Luhmann, *Organisation*, 133.

[703] Schmitt, *Verfassungslehre*, 66.

According to Schmitt's *Verfassungslehre*, the pre-existing political unit of the German Peoples had willed for itself, with the 1919 Weimar Constitution, a political and legal foundational form for their state. This unit was one of equals, that is, of substantial homogeneous sameness (*Gleichartigkeit*) and of national consciousness.[704] Because homogeneous sameness is a political concept, it differs from the universal equality of humanity which belongs to the theory of liberal individualism.[705] Instead, the equality that mattered as a part of the nature of democracy is focused inwardly on the equality of all citizens[706] over against external groups. 'A democracy knows only equality of equals and the wills of those who belong to the equals',[707] because mass-democracy and democracy of humankind cannot ground a state.[708] The substantially equal unit of the German peoples had developed in the course of the historical process of 19th century bourgeois opposition to monarchic rule and through a number of contractual and political alliances.[709] In this process, a strengthening bourgeois social class had demanded legal protection for private property and personal freedom and thus had extracted a private sphere from the monarch's and the state's control.[710] As the subject of the constitution-giving power,[711] the national unit of the German people existed prior to the Weimar Constitution and with its unmediated will[712] had decided on the form of their collective political existence. It is a unity that had existed already during the previous 1871 German Reich and continued to exist in its identity but in the new form of the Weimar Constitution.[713] The act of the constitution-giving power was a one-time conscious political decision on the form and type of the already existing political unit.[714] The Weimar Constitution was not a contract because that would presume some differentiations

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[704] cf. Schmitt, *Verfassungslehre*, 65.

[705] cf. Schmitt, *Verfassungslehre*, 226.

[706] ‚Die Gleichheit, die zum Wesen der Demokratie gehört, richtet sich deshalb nur *nach innen* und nicht nach auβen ...'; Schmitt, *Verfassungslehre*, 227, emphasis in original.

[707] ‚In der Demokratie gibt es nur die Gleichheit der Gleichen und den Willen derer, die zu den Gleichen gehören.'; Schmitt, „Gegensatz", 73, own translation.

[708] ‚Die Krisis des modernen Staates beruht darauf, daβ eine Massen- und Menschheitsdemokratie keine Staatsform, auch keinen demokratischen Staat zu realisieren vermag.'; Schmitt, „Gegensatz", 73.

[709] cf. Schmitt, *Verfassungslehre*, 330-38; 363-79.

[710] cf. Schmitt, *Verfassungslehre*, 41, 149.

[711] Schmitt, *Verfassungslehre*, 238.

[712] Schmitt, *Verfassungslehre*, 84.

[713] Schmitt, *Verfassungslehre*, 97. The German people *willed* not to negate, with the Weimar Constitution, its identity with the German people of the 1871 constitution. It wills to renew its Reich, but not to found a new Reich.

[714] cf. Schmitt, *Verfassungslehre*, 21.

and oppositional sides[715] within the prior substantially equal unit. Rather, for Schmitt, the peoples as a unit create their state as their political status and form, and as documented in the constitution.

The Weimar Constitution differed from previous constitutions of the 19th century which had needed at least two subjects with political status,[716] e.g. the monarch and the dukes. They incorporated in a status-contract the contractual parties' entire relational life into a common order (*Gesamtordnung*) that could not be severed through termination or renunciation.[717] Such contracts were meant to bring into existence the very political unit of the peoples. This differs from a political unit that exists as constitution-giving power already prior to the constitution.[718] Therefore, in the Weimar state the constitution cannot be the status, that is, the state's 'soul', its concrete life and individual existence.[719] On the contrary, the 'state is the political status of the peoples'. The state is the type and form (*Gestaltung*) of the peoples.[720] The constitution was grounded in something existentially beyond itself, in the will of the German peoples, in the will of a political unit.[721] As grounded in the concrete decision of a will – an existential, actual being and source of ought, a constitution-giving power and authority –[722] it could neither be construed as collecting single wills into a combined will (*Gesamtwillen*) that unites the living parts (*Glieder*) into a state organism,[723] nor as a social, societal, or state contract. Because this unit had no internal opposite a constitution also differs

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[715] Schmitt, "Gegensatz", 71.

[716] Schmitt, *Verfassungslehre*, 62, 66.

[717] For Schmitt, contrasting status and contract, community and contract, as F. Tönnies does in his work on the development from community to society, is misleading because both societal relations as well as status relations can be founded on contract. Because no systematic investigation into the concept of contract yet exists, different versions of contract are used parallel to each other without recognizing the fundamental changes in this concept since the Middle Ages. Also Otto Gierke's book *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien. Zugleich ein Beitrag zur Geschichte der Rechtssystematik,* 4th ed. (Breslau: M. & H. Marcus, 1929) suffers from this and therefore compares Althusius's ideas from the Middle Ages with Hobbes and Rousseau; Schmitt, *Verfassungslehre*, 68.

[718] ‚Das Volk muβ als politische Einheit vorhanden sein und vorausgesetzt weren, wenn es Subjekt einer verfassungsgebenden Gewalt sein soll. Dagegen sollen die Konstruktionen eines Sozial-, Gesellschafts-, oder Staatsvertrages ... dazu dienen, die politische Einheit des Volkes überhaupt erst zu begründen.'; Schmitt, *Verfassungslehre*, 61.

[719] Schmitt, *Verfassungslehre*, 4.

[720] Schmitt, *Verfassungslehre*, 90, 205.

[721] Schmitt, *Verfassungslehre*, 10.

[722] cf. Schmitt, *Verfassungslehre*, 9.

[723] Schmitt, *Verfassungslehre*, 6.

from contracts or agreements of private and civil law[724] in which single individuals are connected through legal relations of measurable, limited content. Such contracts can be terminated and dissolved by the single person and can never involve the single person in its entirety (*Gesamtheit*) which was considered unethical.[725]

A constitution, based on a united will and grounding a legal order (*Rechtsordnung*), was derived of "political" existence and not of normative legality.[726] This differs from Laband's method[727] and from a normative system as in Kelsen's positivist unity of legal norms which both had been fitting to the developing bourgeois state of legality (*Rechtsstaat*) and to the bygone time of codification, with its faith in metaphysical individual rational and natural law.[728] Such a system, this 'norm of norms',[729] had replaced political being and becoming of state-unity and order with simple functionality.[730] Positivism had substituted the human being with norms and thus had personified the written law. In this absolute state of legality the norm is sovereign,[731] even though, correctly, sovereign can only be something of concrete existence.[732] A norm cannot legitimize itself but depends on the existential will of the one who crafts it.[733] Because the constitution did not come into existence by itself, it can neither be absolute nor claim normative correctness or systematic completeness. With an argument that parallels his earlier discourses on the rightness of legal judgements and the worth of the state, Schmitt declared that rightness or usefulness of norms cannot ground the worth of the political unit. Rather the constitution's worth is found in its "right to existence." 'What exists with *political* greatness, is, from a jurisprudential perspective, of value and should exist.'

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[724] During the 1920s *Krisis* of the state, which threatened to dissolve all essential characteristics of the state as a political body, such as juristic person, sovereignty and representation, the theorists of state insisted on delimiting legal institutes of public law from those of the private law. Duso, *Die moderne politische Repräsentation*, 149; for an interesting comparative discussion of Schmitt and Leibholz on „representation" see: 148-76.

[725] Schmitt refers to para 624 of the German Civil Code (*Bürgerliches Gesetzbuch*) which declares that contracts for services involving the whole life span of a person can be terminated after 5 years; Schmitt, *Verfassungslehre*, 67.

[726] ‚Die Einheit und Ordnung liegt in der politischen Existenz des Staates, nicht in Gesetzen, Regeln und irgendwelchen Normativitäten.'; Schmitt, *Verfassungslehre*, 10.

[727] Schmitt, *Verfassungslehre*, 6.

[728] cf. Schmitt, *Verfassungslehre*, 11

[729] Schmitt, *Verfassungslehre*, 7.

[730] cf. Schmitt, *Verfassungslehre*, 8.

[731] cf. Schmitt, *Verfassungslehre*, 131.

[732] ‚Deshalb ist es möglich, die Verfassung in diesem Sinne als „souverän" zu bezeichnen, obwohl das an sich eine unklare Redensart ist. Denn richtigerweise kann nur etwas konkret Existierendes, nicht eine bloβ geltende Norm souverän sein.'; Schmitt, *Verfassungslehre*, 7, emphasis in original.

[733] Schmitt, *Verfassungslehre*, 90.

Thus the unit's 'right to preservation' focusses on "'its *existence*, its *integrity*, its *security* and its *constitution*" – all existential values.'[734]

With its one-time decision, the constitution-giving unit of the German peoples had determined, according to Schmitt, the substance of the constitution as well as further constitutional statute-laws. The untouchable core substance, the constitutional essence, contained the concrete political decision on the political form of being (*Daseinsform*), fundamental rights that protect human freedoms from encroachment by the state, and the separation of powers that defuse the might of the state and prevent state arbitrariness.[735] This core substance of the Weimar state of legality (*Rechtsstaat*) was foundational for the remainder of the constitution. With the German peoples' choice for a constitutional democracy they kept in essence the *status quo* of a bourgeois order over against the either-or alternative of a proletarian Soviet type class-society.[736] They also retained in the statute-laws of the constitution aristocratic and monarchic elements. At the same time, it was a decision against a pure democracy that would entail direct plebiscitary discussions and unmediated selection of leadership. The German peoples had cast themselves in the political form of a democratic republic with a federal-state structure and a parliamentary-representative form of legislative authority and government.[737] This core decision, willed by the existential unit of the German people, Schmitt declared would stand removed from the parliamentary powers of amending the constitution.[738] This was meant to prevent changing majorities, political parties, fractions, and coalitions of the legislative power from overriding the pre-existing will and decision of the German people as a whole, from adding compromises, and from even dissolving the very existence of the state.[739]

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[734] Schmitt, *Verfassungslehre*, 22; emphasis in original.

[735] Schmitt called the sphere of the basic freedoms the principle of distribution (*Verteilungsprinzip*) while the separation of powers concerned the principle of organization (*Organisationsprinzip*) whose purpose was to serve the former principle, Schmitt, *Verfassungslehre*, 126-27.

[736] Schmitt, *Verfassungslehre*, 30-31.

[737] For Schmitt this substantial decision is contained in Articles 1, 2, and 17 of the Weimar Constitution; Schmitt, *Verfassungslehre*, 23-24.

[738] Schmitt, *Verfassungslehre*, 26.

[739] cf. Schmitt, *Verfassungslehre*, 24.

Nonetheless, the remainder of the constitution, the constitutional statute-laws, including the section on basic rights remained open to parliamentary amendments.[740] Furthermore, in times of exception such constitutional statute-laws could be suspended in support of the existential core decision [741] by way of a presidential commissarial dictatorship.[742] The constitutional statute-laws included, according to Schmitt, a long line of genuine social compromises and pretense-compromises (*Scheinkompromisse*) which reflected the circumstances of the year 1919. The former are predominantly shown in organizational details and in the mixed character of the basic rights and duties of the second part of the Constitution.[743] The latter pretend to reach a substantive decision by way of reciprocal concessions for accommodating the other's demands or wishes but instead their sole intention lays in postponing a decision.[744] They contain no decision at all, not even a compromise decision.[745] The most prominent examples for pretense-compromises were for Schmitt the relations between the state and the church and the four parallel possible forms (*Gestalten*) of governance.

Schmitt assessed that as long as the church remained as a public-law-corporation a publically recognized concern of public life, the state could not be radically separated.[746] Not turning the church into a private society and not treating religion as a private matter but instead keeping the church a public corporation meant retaining the *status quo*.[747] The question that was left undecided was whether the public life in Germany should retain its specifically Christian character.[748] This ambivalence was most visible in the 'dilatory formal compromise'[749]

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[740] The Article 76 Weimar Constitution which demanded for amending the Constitution a two-thirds majority from those representatives who were present at the parliamentary vote, was highly contested during the ideological parliamentary infighting of the late 1920s; Article 76 Weimar Constitution, in Hildebrandt, *Verfassungen*, 97.

[741] Article 48, para 2 Weimar Constitution, in Hildebrandt, *Verfassungen*, 81.

[742] Schmitt, *Verfassungslehre*, 27. The idea of the commissarial dictatorship connects to Schmitt's theory of the keeper of the constitution. The identity of this keeper changed between 1928 to 1933 from the supreme court to the Reich-president, originally with commissarial powers, later with dictatorial decree-powers, and finally to a call for a strong decisionist personality and sovereign dictator; Carl Schmitt, "Das Reichsgericht als Hüter der Verfassung (1929)", in *Verfassungsrechtliche Aufsätze*, 63-109; Schmitt, *Der Hüter der Verfassung*.

[743] Schmitt, *Verfassungslehre*, 30.

[744] ‚... unechten Kompromisse. Man könnte sie Scheinkompromisse nenne, weil sie keine durch beiderseitiges Nachgeben gewonnene sachliche Entscheidung treffen, sondern ihr Wesen gerade darin besteht, diese Entscheidung hinauszuschieben und zu vertagen.'; Schmitt, *Verfassungslehre*, 31.

[745] Schmitt, *Verfassungslehre*, 34.

[746] ‚Der Staat kann sich von einer als öffentlich anerkannten Angelegenheit des öffentlichen Lebens nicht radical trennen.'; Schmitt, *Verfassungslehre*, 33.

[747] cf. Schmitt, *Verfassungslehre*, 32-33.

[748] ‚Die Frage, ob die Öffentlichkeit des Lebens in Deutschland wie bisher einen speziefisch christlichen Charakter behalten soll, wird nicht klar verneint.'; Schmitt, *Verfassungslehre*, 33.

regarding taxation and education in public schools.[750] Thus the Weimar Constitution distanced the state from the church and robbed it of its influence on the church but reversely the church was not removed from the state.[751]

Regarding governance, Schmitt identified an unstable system[752] of four options of leadership with none taking priority over the other - Parliament, Reich-chancellor, Minister-cabinet, and Reich-president. Although they balanced each other, their reciprocal relationship was the central problem of the Weimar parliamentary system.[753] They compromised on the contradictory objectives of retaining the democratic ideal of a political leader, of recognizing the mistrust of parliamentary representatives and organized parties against institutions of unmediated democracy, of satisfying the liberal aim of balancing powers, and of maintaining in the influential president residues of the constitutional monarchy.[754] Intended was a strong connection between parliament and executive government, but the executive had turned into a committee of the parliament, with a chancellor who was meant as a political leader but who remained removed from the executing administration. And at the same time, a president was to counterweight the power of the parliament through retaining the ideal of an unmediated democratic leader who was elected by plebiscitary vote.[755]

Any of the four leadership options of the pretense-compromise could gain prominence over the others in times of changing political realities without needing amandments to the constitutional text or even a reinterpretation.[756] The most decisive contradiction was in the democratic versus the monarchic leadership principle: a chancellor who leads but does not

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[749] ‚dilatorischer Formelkompromiβ‘; Schmitt, *Verfassungslehre*, 34, own translation.

[750] Schmitt, *Verfassungslehre*, 33.

[751] ‚Im ganzen kann man sagen, daβ nach den Bestimmungen der Weimarer Verfassung zwar der Staat von der Kirche getrennt und ferngehalten, also seines Einflusses beraubt ist, nicht aber umgekehrt die Kirche vom Staat getrennt wurde.‘; Schmitt, *Verfassungslehre*, 34.

[752] ‚Alle diese Bestimmungen ergänzen sich vielmehr zu einem labilen System, welches die verschiedensten Möglichkeiten offenläβt.‘; Schmitt, *Verfassungslehre*, 258.

[753] ‚… sind alle vier in Betracht kommenden Untersysteme des parlamentarischen Systems der Weimarer Verfassung potentiell anerkannt. Das gegenseitige Verhältnis der verschiedenen Möglichkeiten ist das eigentliche Problem der parlamentarischen Regierung.‘; Schmitt, *Verfassungslehre*, 341. ‚...die verfassungsgesetzlichen Bestimmungen der Weimarer Verfassung haben keinen anderen positiven Inhalt als den, eine labile Balancierung jener vier Untersysteme zu ermöglichen.‘; Schmitt, *Verfassungslehre*, 349.

[754] Schmitt, *Verfassungslehre*, 347.

[755] cf. Schmitt, *Verfassungslehre*, 341.

[756] ‚Alle diese Tendenzen können in der politischen Wirklichkeit, zu verschiedenen Zeiten verschieden stark, zur Geltung kommen und ohne Änderung des Verfassungstextes den Wortlaut in einem ganz neuen Licht erscheinen lassen.‘; Schmitt, *Verfassungslehre*, 347.

command and is responsible over against the parliament,[757] versus a president who can command and who focusses the peoples' trust on his person.[758] The alternative possibilities were reflected in the words "responsibility" and "trust".[759] In Schmitt's assessment, the various chancellors of the Weimar Republic had refused to accept the risks of political action which was part of any true political leadership.[760] Therefore, this dualism could lead to dangerous conflicts. It could lead to bypassing parliamentary majorities and to incessant plebiscitary calls on the peoples due to the presidential powers to dissolve the parliament and appoint a chancellor.[761] Although governmental programs and political guidelines were meant to be developed between the fractions of the political parties prior to the appointment of a chancellor, it was constitutionally permissible to sideline the parties and appoint a chancellor with a set political program. If the chancellor was unable to gather a parliamentary majority for his program the president could dissolve the parliament and let the peoples decide on a new majority for the chancellor's program.[762] Because the state was not meant to be a neutral umpire but to render political decisions,[763] Schmitt insisted that the pretense-compromises, especially the contradiction between the democratic and monarchic principle, eventually would be decided in the realm of the political.

The constitution as 'form of forms'[764] required, according to Schmitt, a final decision on the ruling order, on the issue of superiority and subordination (*Über- und Unterordnung*), on ruling from above or from below. Even if the state's constitution rises from below to the above by providing the peoples' will to a state, the state's organisation nonetheless operates from above to below and demands obedience.[765] Nonetheless, the alternative between the monarchic or democratic principle was at its center the choice between the two competing

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[757] ‚Der Reichskanzler bestimmt die Richtlinien der Politik und trägt dafür gegenüber der Reichstag die Verantwortung.‘; Article 56, para 1 Weimar Constitution; in Hildebrandt, *Verfassungen*, 83.

[758] cf. Schmitt, *Verfassungslehre*, 346, 347, 350.

[759] ‚Die bisherige Übersicht hat gezeigt, welche verschiedenen Möglichkeiten in den gleichen Worten wie „Verantwortung" oder „Vertrauen" liegen können.‘; Schmitt, *Verfassungslehre*, 348.

[760] cf. Schmitt, *Verfassungslehre*, 347, 349-50.

[761] cf. Schmitt, *Verfassungslehre*, 63, 211, 351, 358.

[762] cf. Schmitt, *Verfassungslehre*, 349, 358. Schmitt thus described in 1928 the embedded constitutional problems that were exploited in early 1933 with Hitler's appointment as Chancellor: the immediate dissolution of the parliament, new elections, and the emergency powers of the Enabling Act.

[763] Schmitt, *Verfassungslehre*, 134.

[764] Schmitt, *Verfassungslehre*, 5. As the three forms of state Schmitt identified monarchy, democracy, and aristocracy which found expression in the bourgeois idea of the division of powers, especially in the legislative and executive; Schmitt, *Verfassungslehre*, 200.

[765] cf. Schmitt, *Verfassungslehre*, 5-6.

political form-principles of representation and identity. The monarch was grounded in an unmediated religious idea of representing divine essence, the image of God, and in the authority and power of the father of the family, the *patria potestas* of an emperor.[766] As Caesarist monarch, he was a dictator based on the democratic will of the peoples.[767] In the democratic idea a peoples of homogeneous substance form a politically existing identity that is determined according to the criteria of differentiating between friend and enemy,[768] and thereafter identifies with a directly chosen leader. Democracy needs identity between ruler and the ruled. At the leadership level, the pretense-compromise left undecided the question of sovereign political leadership either as representation or identity.

The open question that demanded a final decision on leadership led Schmitt to view other models of democracy apart from Weimar parliamentarism, such as various types of dictatorship, the ideologies of Bolshevism and Marxism, and Italian Fascism. He assessed, that in a direct democracy the people could express the public will through acclamation. In a dictatorial and Caesaristic method democratic substance and power could be expressed directly.[769] The dictatorships of Bolshevism and Fascism, despite being anti-liberal, were not necessarily anti-democratic.[770] But in the rationalism of the Marxist and Bolshevist dictatorship of the proletariat, Schmitt discerned and criticized a will to eliminate and not just to educate the bourgeoisie in the sense of Fichte's "educational dictatorship".[771] This he assessed as clearly differing from Hegelian contemplative advancement. But he was fascinated by the Fascist use of the irrational power of a national myth[772] which stood opposed to bourgeois intellectualism.[773] Recognizing political myth as 'the most powerful symptom of the decline of the relative rationalism of parliamentary thought',[774] he assessed in the irrational powerful emotion of nationalism a great abstract danger to the class conscious

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[766] ,Die Monarchie wird religiös begründet.' , Die Autorität und Macht des Vaters in der Familie, die patria potestas, wird auf den Staat übertragen ...'; Schmitt, *Verfassungslehre*, 282, 283.

[767] ,In der cäsaristischen Monarchie, ..., ist der Monarch nur Diktator auf demokratischer Grundlage.'; Schmitt, *Verfassungslehre*, 284.

[768] cf. Schmitt, *Verfassungslehre*, 169, 247.

[769] cf. Schmitt, preface to *Crisis*, 16-17.

[770] Carl Schmitt, "Gegensatz", 73.

[771] 'The kind of force to which it [the new rationalism] must resort cannot any longer be Fichte's naïve schoolmasterly "educational dictatorship." The bourgeois is not to be educated, but eliminated.'; Schmitt, *Crisis*, 64, emphasis in original.

[772] Schmitt, Crisis, 75-76.

[773] cf. Schmitt, *Crisis*, 69.

[774] Schmitt, *Crisis*, 76.

myth of 'democracy of mankind and parliamentarism'. He understood national myth as a 'naturalistic conception of race and descent', a 'shared culture', and an 'awareness of belonging to a community with a common fate or destiny, a sensibility of being different from other nations.'[775] For expressing this myth within the political realm, Schmitt turned to using secularized versions of theological structures provided in Christian dogma.[776]

In sum, according to Schmitt, the closed positivist system had personified the written word of the law for the purpose of protecting a private sphere of freedom over against the state and for repressing a political realm.[777] Schmitt defined the constitution not as contract but as a foundational decision, as the will of the historically grown existing unit of the German peoples, the state, which was of homogeneous, but not of universally equal nature. This turned 'equality before the law' into a pre-constitutional formative category for the existential unit of the peoples. He thus separated the concept of equality from the bourgeois liberal right to freedom that were part of the non-substantial genuine compromises of the amendable constitutional statute-laws. This meant that Schmitt assigned worth to an existential unit of political equals and to an untouchable constitutional substance but, similar to his previous position in *Der Wert des Staates und die Bedeutung des Einzelnen*, he rejected an untouchable essence of worth and dignity that was centered in natural persons, in the individuals.

The pre-constitutional united will had decided in its power and authority to give itself the form (*Daseinsform*) of a constitutional democracy which defined the untouchable essence and form of the Weimar Constitution. The 'dilatory formal compromises' of the Constitution were still in need of being decided in the political realm. This included the need of a full expulsion of the Protestant Church from the political public realm of the state and a decision regarding the pretense-compromises of political leadership in the form of either a democratic or a monarchic type; between the alternative of the office of the Reich-Chancellor or of the person of the Reich-President. This concerned a choice between either responsibility or trust, between either representation or identity.

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[775] Schmitt, *Crisis*, 75.

[776] 'All significant concepts of the modern theory of state are secularized theological concepts.'; Schmitt, *Political Theology*, 36. 'The juristic formulas of the omnipotence of the state are, in fact, only superficial secularizations of theological formulas of the omnipotence of God.'; Schmitt, *Concept*, 42.

[777] Schmitt, *Verfassungslehre*, 41.

4.3.2 Bonhoeffer: The Alternative *sui generis*

For Bonhoeffer 'compromise hates decision'.[778] Compromise, he declared was an extreme solution just as was radicalism.[779] The latter hates what exists, calls reconciliation a betrayal of Christ,[780] and knows no distinctions (*Unter-scheidungen*) but only one division (*Scheidung*), that is, to be for or against Christ.[781] Compromise absolutizes what exists,[782] manages the world by worldly means, accuses the Christian freedom from the world as unnatural and hostile to humanity, but declares that accommodation to the world is genuine Christian love for the world.[783] It was the contradictions and Kierkegaardian either-or constellations between divine and human, between faith and revelation, that Bonhoeffer tried to overcome with concepts of church and God which he thought as true alternatives to the concept of state within the factual, empirical reality of the one kingdom of God. To Bonhoeffer, Christian life was neither a matter of radicalism nor of compromise.[784] He insisted that the relations between community and human being were not, as in Enlightenment thought, an either-or alternative that was unable to recognize the as-well-as (*sowohl-als-auch*) that was intrinsic to this dialectic relational movement.[785] In the church-community that assembled its members in congregations,[786] relations between God and His community intersected and, at the same time, it was situated between God and the world.[787] By God's divine will the purpose (*Zweck*) of the church-community is directed toward the church itself, that is, it is an end in itself.[788] At the same time the church is the means to the end of realizing God's rule.[789] In this God makes use of human wills, which are thus means to

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[778] DBWE 6:156.

[779] DBWE 6:153

[780] DBWE 6:155.

[781] ‚Hier gibt es keine Unterscheidungen, es muβ alles ins Gericht; es gibt nur noch eine Scheidung: für Christus oder gegen ihn.‘; DBW 6:144; DBWE 6: 153.

[782] DBWE 6:154.

[783] DBWE 6:156.

[784] DBWE 6:154.

[785] cf. DBWE 1:76 note 46.

[786] DBWE 1:208.

[787] 'The public assembly is thus both God's will and act of the church-community, and therefore not only something that takes place between God and the church-community, but also something between the church-community and the world.'; DBWE 1:231.

[788] DBWE 1:261.

[789] cf. DBWE 1:191 note 193.

an end but nonetheless remain ends in themselves.[790] But neither personal being nor the social communal being has priority over the other.[791] Instead they are held in equilibrium,[792] in a church defined by form, will, and meaning. In his quest for a concept of church he found in "Christ existing as church community" the form (*Gestalt*) of church *sui generis*, a form with similarities to, but nonetheless apart and different from, existing legal, sociological, and philosophical structures because the church was the sustained existence of God's revelation in this world.

Church and form:

For developing a modern, contemporary form for the empirical church, Bonhoeffer took serious the constitutionally prescribed legal parameter of a public law cooperation with private law personality.[793] Because, according to Bonhoeffer, God wills a historical church, this empirical institution of salvation needed a legal body with an organizational structure that included vertical and horizontal relational directions. Dismissing the Catholic Church as a fitting institutional concept for the Protestant Church, he examined sociologically grounded forms of legal structures that had become codified during the 19th century. All but one of the organizational forms Bonhoeffer investigated are organizational frameworks regulated within law: the cooperative (*Genossenschaftsverband*), compulsory organization (*Anstalt*), community of persons (*Personengemeinschaft*), society of purpose (*Zweckgesellschaft*), foundation (*Stiftung*), and association (*Verein*). Only the federation of authentic rule, the *Herrschaftsverband*,[794] is a Weberian sociological rather than a jurisprudential form. An association, a *Verein*, can either take the form of a registered (*eingetragen*) form or a non-registered (*nicht eingetragen*) form.[795] These legal forms vary in their strength of self-governance and the intensity of their focus on a purpose or fulfillment of a task. At their

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[790] DBWE 1:279.

[791] DBWE 1:75.

[792] cf. DBWE 1:76 note 46.

[793] Article 137, para. 4 and 5 Weimar Constitution, in Hildebrandt, *Verfassungen*, 102.

[794] DBWE 1:89, 91, 92, 129, 174, 175, 181, 253, 255, 257, 261. The DBWE translates *Genossenschaftsverband* with „cooperative association", *Herrschaftsverband* with „association of authentic rule", and *Verein* with "voluntary association. However, legally a *Verband* and a *Verein* differ decisively. Only the latter, the *Verein*, is a legally defined concept within the Civil Code (Paras. 54-79 *Bürgerliches Gesetzbuch*). Bonhoeffer appears to have recognized the difference when stating that *Verbände* have "grown" and "previously existed" while the others are "made" and "willed"; DBWE 1:89; DBW 1:57. For clarity reasons, I have therefore used the term "association" exclusively for the *Verein* and have translated the words *Genossenschaftsverband* with "cooperative" and *Herrschaftsverband* with "federation of authentic rule".

[795] Paras. 21, 54 *Bürgerliches Gesetzbuch*.

essence are questions of authority, obedience, freedom[796] and the bearer of the office.[797] The forms of the association (*Verein*) he discarded because they are oriented towards a human goal which contravenes the symbolism and tradition of the church such as sin, grace, Christ, and the Holy Spirit.[798] Bonhoeffer insisted that in a church the mutual relation of the three realities of unity, community, and singleness (*Einzelheit*), all established by the spirit, contribute to the theory of the form (*Gestaltslehre*) of the church.[799] As community of spirit, but not a community of souls, the church's nature is of transcendent foundation. It combines the elements of superiority and subordination found in a federation of authentic rule (*Herrschaftsverband*) with the purpose and meaning of achieving the certain end of God's will.[800] God's self is the means to God's own purpose.[801]

However, the private law concept that is constitutionally prescribed to the church's personality is that of the "common community" (*Gesamthandsgemeinschaft*).[802] In this legal structural framework, the natural single person is preserved as carrier of rights and duties who are gathered around a purpose as their groups's particular essence.[803] Thus within the church as a juristic person of public law (*Körperschaft*) with a private law personality its members remain single persons in difference to a juristic person in which the organization as such has a collective personality which is the carrier of rights and duties, as this is the case for the associations (*Verein*), compulsory organizations (*Anstalten*) and foundations (*Stiftungen*).[804] Such differentiating thought clearly resonated within Bonhoeffer's concept of church when he declared that the human being remains a single person without being

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[796] DBWE 1:250-52.

[797] DBWE 1:231-36, 256.

[798] DBWE 1:254-55.

[799] DBWE 1:208.

[800] DBWE 1:261.

[801] DBWE 1:262.

[802] Article 137, para 4 Weimar Constitution, in Hildebrandt, *Verfassungen*, 102; and Helmut Heinrichs, „Para 21", in *Bürgerliches Gesetzbuch*, ed. Otto Palandt, 22.

[803] The *Gesamthandsgemeinschaft*, which is the strongest connection between persons next to the juristic persons, is gathered around a pupose that is focused on a particular wealth (*Vermögen*). The wealth, which forms the essence of the community (*Gesamthand*), can either be property or a monetary demand (*Forderungen*). According to the "individualistic *Gesamthand*-theory" of Bonhoeffer's time, the *Gesamthandsgemeinschaft* in the form of a society of civil law (*Gesellschaft des bürgerlichen Rechts*, para 705 Civil Code) had no collective legal standing. Only the individual members were carriers of legal rights and duties. Wolfgang Fikentscher and Andreas Heinemann, *Schuldrecht*, 10th ed. (Berlin: De Gruyter Recht, 2006), 381, 651.

[804] Heinrichs, „BGB §§ 1-432", in *Bürgerliches Gesetzbuch*, 20.

absorbed by the church-community as a whole.[805] Nonetheless, to him the starting point for assessing the empirical form of the church could not be individuality because it was impossible to move from multiplicity to unity.[806] Engaging from a theological perspective with the jurisprudential Romanist-Germanist debate, Bonhoeffer clarified that 'the person comes into being only when embedded in sociality and the collective person comes into being together with the single person.'[807] The single person can be understood in his entirety only if the social interactions with the collectivity are taken into account.[808] Because the collective person is experienced as concrete communal center of activities (*Aktzentrum*) with a specific will and goal, albeit in the form (*Gestalt*) of the will of all of its members, it is possible only were all single persons belong to the essence of concrete community.[809] Paralleling the jurisprudential discourse on natural persons and juristic persons, that is, individual and collective persons, Bonhoeffer stated that because community is a concrete unity, and the collective person is only where there are single persons, the social communal person "is", after all, also an individual person.[810]

Even though this collective person and the individual person, in the eyes of the universal person (*Allperson*) God, were of the same structural type (*gleichgeartet*),[811] this sameness of type (*Gleichartigkeit*) does not say anything about interpersonal relations in the sense of equal value. Because 'God does not want a community that absorbs the single human being into itself, but a community of human beings',[812] they are not indifferently absorbed into a single unit. Within this unity, the plurality with all its concrete dissimilarities remains and each human being as a person is equal before God who declares the same judgement and

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[805] DBWE 1:80.

[806] DBWE 1:78.

[807] DBWE 1:78.

[808] cf. DBWE 1:75.

[809] ‚Die soziale Einheit wird als Aktzentrum erlebt, ... sie hat ihren eigenen Willen, freilich nur in der Gestalt ihrer Glieder.‘ ‚... nicht in jedem Glied, sondern nur in allen zusammen liegt das Aktzentrum.‘ ‚Da aber Kollektivperson als Aktzentrum nur möglich ist als konkrete Gemeinschaft mit inhaltlichen Zielen, so wird sie nur dort möglich sein, wo zum Wesen der konkreten Gemeinschaft die Einzelperson gehört.‘; DBW 1:49.

[810] ‚Wir behaupten, daβ die Gemeinschaft als Kollektivperson aufgefasst werden kann, mit derselben Struktur wie die Einzelperson‘; DBW 1:48; ‚Eine Gemeinschaft ist konkrete Einheit.‘ ‚..., daβ die Kollektivperson nur ist, wo Einzelpersonen sind.‘; DBW 1:49; , Denn auch die Kollektivperson ist ja Individualperson.‘ DBW 1:50.

[811] ‚... vor den Augen der Allperson Gottes ist dieselbe strukturelle Art von Kollektivperson und Einzelperson auszusagen‘; DBW 1:50; ‚Die Struktur der Kollektiv- und der Individualeinheit ist vor Gottes Augen gleichgeartet.‘; DBW 1:51.

[812] DBWE 1:80, translation altered.

grace on all.[813] The dialectical relation between plurality and unity includes the concrete dissimilarity (*Ungleichartigkeit*) of all people.[814] Christian equality means equal sinfulness that places everybody before God's eye at the same separating and absolute distance.[815] Universal sinfulness and the need for redemption gives all human beings, existing and preserved as single persons within the whole,[816] an equal share in God's grace.[817]

Despite the identical structural typology of communal and single persons, the applicability of collective types to the concept of church depended, for Bonhoeffer, on the question whether ethical categories are transferrable to a communal person (*Gesamtperson*) in the sense of an ethical personhood.[818] However, due to the uniqueness of the church, the church of God in which meaning and revelation is brought about by the spirit, he argued that the empirical church reaches beyond all community that is humanly possible, even beyond the ethical.[819] Here the sociological-jurisprudential forms are connected to the divine self's will and purpose, in the unique way that the Christ-person decisively indicates a theological direction beyond merely a human ethical sphere. Thus collective forms are applicable to the church but in a uniquely theological way which Bonhoeffer expressed by substituting "collective" for "communal" (*gesamt*) in regards to the church.

The uniqueness of his concept of the church as *Sanctorum Communio*, the 'Christ existing as church-community', over against other social concepts of community, was highlighted by him in his usage of particular linguistic terms such as "single person" (*Einzelner*) and *Gesamtperson*, the latter in the sense of total, entire, or communal person. Only a few times does the term "individual person" (*einzelne Person* or *Einzelperson*) appear, but never the term "individual" (*Individuum*) in itself. Thus, he made a clear distinction over against the

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[813] cf. DBWE 1:205-06.

[814] DBWE 1:206.

[815] ‚So besagt auch die christliche Gleichheitsidee nichts über interpersonale Beziehungen, sondern stellt ausschlieβlich alle Menschen vor das Auge Gottes, indem zunächst der absolute Abstand statuiert wird, der das Geschöpf vom Schöpfer ... trennt: ...'; DBW 1:137; DBWE 1:204, 207.

[816] DBWE 1:76 note 45.

[817] DBWE 1:204.

[818] ‚...Frage, wie weit auf eine Gesamtperson ethische Kategorien anwendbar seien, im Sinne einer ethischen Personenhaftigkeit, ...'; DBW 1:50; DBWE 1:79.

[819] '… sociologists will have definitive proof that the church is a community when they consider that, like any other genuine community, it is an ethical collective person.' 'Its uniqueness becomes apparent, however, only where it is understood as the community and church of God that is based upon and brought about by the Spirit,…'; DBWE 1:260.

state, specifically regarding the "individual" of liberal political theory. Another clear distinction runs through the use of the terms *Kollekivperson* and *Gesamtperson*.[820] The former term, the collective person, he attached only to communities, groupings, and juristic persons other than the church, or those that may or may not in general also include the church. However, when exclusively speaking about the concept of church in the sense of 'Christ existing as church-community', he used the term *Gesamt* in various combinations, such as communal person (*Gesamtperson*), communal unity (*Gesamtgemeinschaft*), communal personality (*Gesamtpersönlichkeit*) etc.[821] In this way Bonhoeffer clarified the church's distinctiveness over against any theories of state as a collective person and the ambivalence of the applicability of private and public law that is contained in the constitutional classification of the Protestant Church as corporation of public law (*Körperschaft des öffentlichen Rechts*), whose legal personality as "common community" (*Gesamthandsgemeinschaft*) is nonetheless determined by the private law of the civil code.[822]

Church and will:

The empirical church could not be a society of purpose with a set goal (*Zweckgesellschaft*), whose parallel wills are focused on a particular goal.[823] Rather, communal social ties necessitate acts of will which must go beyond the parallel existence of personal wills. Will Bonhoeffer defined as the 'unified activation of self-determination and self-consciousness'

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[820] The English translation of the DBW states that 'There is no conceptual difference for Bonhoeffer between *Kollektivperson* and *Gesamtperson'*; DBWE 1:79 note 58. However, reading the original German version with the jurisprudential concepts in mind leads to accepting that the two terms function for Bonhoeffer as a clarification for the decisive differences between his concept of the church in the sense of *Sanctorum Communio* and other organizational forms, such as the concept of the juristic person and *Verein*. That Bonhoeffer makes a distinction between collective and communal becomes apparent in his statement that 'Nur eine Gemeinschaft, nicht eine Gesellschaft, vermag Kinder zu tragen' because 'Kindertaufe ist in einem Verein sinnwidrig.'; DBW 1:177. The Civil Code makes a fundamental differentiation between the legal form of an informal society of civil law (*Gesellschaft des bürgerlichen Rechts*) as a basic communal form and the *Verein* as basis for collective forms such as the societies (*Gesellschaften*) of the Commercial Code. Therefore, within such a collective juristic person as a society that is based on the concept of association the 'Infant baptism … is an internal contradiction.' DBWE 1:257. However, the difference in the concepts of *Gemeinschaft* and *Gesellschaft* is for Bonhoeffer not identical to the difference between *Verband* and *Verein* because a *Verband* is "grown" while a *Gemeinschaft* is "willed"; DBWE 1:89; DBW 1:57. Even though the *Verein* is also "willed" its form is inappropriate for a church because it is compulsory and oriented toward a goal; DBWE 1:255.

[821] DBWE 1:193, 120, 137 note 29. The term *Gesamt* is also used regarding congregation (*Gesamtgemeinde*), debt or guilt (*Gesamtschuld*), church (*Gesamtkirche*) as well as regarding totality (*Gesamtheit*); DBWE 1:224, 135 note 29, 119.

[822] ,Religionsgesellschaften erwerben die Rechtsfähigkeit nach den allgemeinen Vorschriften des bürgerlichen Rechts.' and ,Die Religionsgesellschaften bleiben Körperschaften des öffentlichen Rechts, soweit sie solche bisher waren.'; Article 137, para 4 and 5 Weimar Constitution, in Hildebrandt, *Verfassungen*, 102.

[823] cf. DBWE 1: 83 and 83 note 74.

which is present when purposeful acts are initiated.[824] In an apparent analogy to the basic structure of a goods and services contract within private law,[825] he stated that if such wills of separate persons are mutually directed with reciprocal attitude toward the person of the other, an agreement is reached that constitutes the essence of a community.[826] "Unity" of will thus signifies an identity regarding the intended and willed content despite 'inner separateness of I and you.'[827] Bonhoeffer summarized that 'community is community of wills, built upon the separateness and difference of persons, constituted by reciprocal acts of will, finding its unity in what is willed, and counting among its basic laws the inner conflict of individual wills.'[828] Alternative wills of either willing 'together', or 'beside' or 'against' each other are despite their inherent strife, conflict, and relation of strength[829] sanctified by God who created them by willing difference in human beings.[830] But only the willing "together" can lead to the relevant empirical formation of being-with and willing-for one-another (*Mit- und Füreinander*) that is willed as an end in itself. The being-with-one-another can additionally be a means to an end.[831] The option of "willing-for" expresses a will toward a meaning that recognizes the value of community; the option of "being-with" regards a rational will directed toward a purpose.[832] However, structures of meaning cannot be focused on, nor interpreted with, a reference to a purpose.[833] Even the institutional church's purpose of collecting church-taxes in a regulated public law manner[834] could not, according to Bonhoeffer, turn the church into a society because such activity was that of the private sphere on the level of a family unit's will to sustain itself and make its life possible.[835]

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[824] DBWE 1:70. f

[825] A basic Goods and Service Contract (*Kaufvertrag*; para. 433 Civil Code) demands a reciprocal will of the parties regarding its content of product and price.

[826] cf. DBWE 1:83.

[827] DBWE 1:83-4.

[828] DBWE 1:86.

[829] According to Bonhoeffer, the strength of wills connects to the unequal relations of strength in a federation of authentic rule (*Herrschaftsverband*) which corresponds to the equilibrium in a cooperative (*Genossenschafts-verband*). Gierke's famous distinction clarifies that the concept of community differs from the concept of cooperative in that the legal term of cooperative only expresses the legal, not the social, equality among members; cf. DBWE 1:92.

[830] cf. DBWE 1: 84-87.

[831] DBWE 1:88.

[832] DBWE 1:88.

[833] DBWE 1:88-89.

[834] Article 137, para 6 Weimar Constitution; in Hildebrandt, *Verfassungen*, 102.

[835] DBWE 1:260.

Church and meaning:

The church is a community of meaning in which the 'humanity-in-Adam' becomes superseded by the 'humanity-in-Christ'.[836] God's specific social relations to humanity transform the sinful humanity after the Fall which consists of nothing but infinitely fragmented single sinful persons who have sinned as collective whole into the new unity of the new humanity under grace in Christ. [837] This reconciliation to the new humanity as a whole is concentrated in the one single historical point, Jesus Christ. In establishing Christ as reconciler Bonhoeffer takes recourse to further legal institutes of contractual civil law, to *Stellvertretung*,[838] a form of agency, and *Schuldübernahme*,[839] the issue of taking on debt. Christ, the Lord of the new humanity, functions as the intentional *Stellvertreter* who on the cross took on humanity's sin before God and in place of humanity and thus returned humanity to community with God. It reestablished life that abides in love and in responsible service to the other and one's own community. He broke and continues to break the continual cycle of the historical process of egocentricity and falling into sin ever anew.[840]

Bonhoeffer was determined to find in God's revelation of Christ's work on the cross an adequate theological epistemology,[841] one that connects the human act of faith in God's revelation with the divine being of God in Jesus Christ. Thus he searched for a theological concept that could be a de-cision as regards the mutually excluding alternatives of God's revelation and the perceiving spiritual act,[842] His substance (*essentia*) and existence (*existentia*), between actively 'being given' revelation or 'being' in revelation.[843] With "act" never explained but only understood and "being" never proven but always presented,[844] Bonhoeffer asserted that the problem lay in the intentionality of the human being of either outwardly directed consciousness (*actus directus*) or a reflecting consciousness (*actus*

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[836] '… humanity-in-Adam is transformed into humanity-in-Christ.'; DBWE 1:147.

[837] cf. DBWE 1:120-21.

[838] Para. 164 and following *Bürgerliches Gesetzbuch*

[839] Para. 414 *Bügerliches Gesetzbuch*.

[840] cf. DBWE 1:146.

[841] DBWE 2:31.

[842] cf. DBWE 2:22, 23,

[843] ,... ob ihm je nur im Aktvollzug Offenbarung „gegeben" sei oder ob es für ihn ein „Sein" in the Offenbarung gäbe.'; DBW 2:23, emphasis in original.

[844] cf. DBWE 2:29.

reflexus) that attends to the own as its object.[845] Thus, in the last consequence, the meaning of the theory of knowing was anthropology.[846]

Because the human being is capable by its own power to "justify" the self and the world,[847] the issue was that of either thinking within a philosophical system or beyond, of staying within the choice among possibilities or reaching beyond to the transcendent as the limit, to God's will.[848] In his inquiry into modern philosophical transcendental, phenomenological, and ontological attempts of explaining knowing, he found that Heidegger's '*Dasein'*, the human substance's temporal existence in historicity,[849] was the only concept that was successful in forcing act and being together. In a concept of 'real decision',[850] it made *existentia* the *essentia* of *esse*[851] in a way that collapsed in the being (*Dasein*) the decision and the already-being-decided into each other. The non-decision is already decided.[852] In the overall 'will to system' as the goal of philosophical inquiry, the viewing "I" determined God's existence over against which stands the "I" in freedom of vision.[853] System was only possible with an immanent idea of God, that is, by excluding the God-idea and instead usurping the viewing of the divine by claiming divinity for the human "I". The being that transcends what exists thus had been lost to sight, resulting in a system of pure immanence.[854] However, Bonhoeffer countered that the theological concept of revelation understands the dialectic of act and being as the dialectic of faith and the congregation of Christ, that is, within the concreteness of the conception of the church. For him, it is in the church where act and being meet and are drawn together into one. [855] The church is the ongoing revelation of God in history to those with faith in Jesus Christ, in the church as the social communal person which "is" also a single person.

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[845] cf. DBWE 2:28.

[846] DBWE 2:30.

[847] DBWE 2:66.

[848] DBWE 6:313

[849] DBWE 2:69.

[850] DBWE 2:68

[851] DBWE 2:67.

[852] ‚Entscheidung und schon Entschiedensein des Daseins fällt hier zusammen. In der Nichtentscheidung ist schon entschieden.‘; DBW 2:65. The English translation is here unclear as it uses the two verbs 'to decide' and 'to determine' and their respective nouns for the German terms ‚*entscheiden'* and '*Entscheidung'*; DBWE 2:71.

[853] DBWE 2:67.

[854] DBWE 2:67.

[855] DBWE 2:31.

Overall, based on an evaluation of juristic forms as they were defined in the codes of private law, Bonhoeffer merged an intertwined combination of the legally grounded forms of community (*Gemeinschaft*), society (*Gesellschaft*), and a federation of authentic rule with hierarchical structure (*Herrschaftsverband*)[856] into the structural form of *sui generis* for the empirical church. Its structural type does not absorb the single person indifferently into a single unit. In it the communal person and the single person exist in sociality, and the single persons share equally in sin and grace. The communal person of the church is centered on the divine meaning of God's revelation beyond the human ethical sphere. This communal person differs from collective structural forms, because it comes into being only through the spirit of God's will to rule in love.[857] In this community of spirit, the divine will is directed toward the relations of persons to each other, of being-with and willing-for each other. At the same time it is as a purposive society, a means to God's end and an end in itself.[858] God seeks to implement his own self into the human heart but makes use of human wills to actualize the church of spirit and faith.[859] The objective spirit of the church community is both representative (*darstellend*) and purposive, precisely because it obeys (*unterwerfen*) God's will to rule.[860] But the relations of persons to each other are those of members willing a community of spirit, not a society.[861] The meaning of the concrete historical framework of the empirical church points to 'Christ existing as church-community', to Christ's presence in the world with God's Spirit at work in it. Receiving revelation in faith, which marks the difference between either remaining in-Adam or being reconciled to God in-Christ, depends for the human being on the alternative of outwardly directed consciousness (*actus directus*) to a reflecting consciousness (*actus reflexus*). Either the human being remains stuck within a philosophical system of possibilities in which the "I" usurps the God-idea. Or the human being is open to the church of God's ongoing revelation in history, that is, to the message of the church of the reconciliation of humanity to God through the one person of Jesus Christ.

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[856] DBWE 1:264, 266. Also Clifford J. Green has noticed that 'ultimately Bonhoeffer argues that the structural, sociological distinctiveness of the church consists in the fact that it *combines* characteristics of *Gemeinschaft*, *Gesellschaft*, and *Herrschaftsverband*.'; Clifford J. Green, *The Sociality of Christ*, 94 note 46.

[857] DBWE 1:264.

[858] DBWE 1:261.

[859] cf. DBWE 1:261-62, 279

[860] DBWE 1:266-67.

[861] ‚Die Beziehung der Personen untereinander ist geistesgemeinschaftlich, nicht gesellschaftlich.'; DBW 1:185.

4.3.3 Collectivity or Community?

With his theory of church in the form of *sui generis*, which differs from all known legal structures, Bonhoeffer developed an alternative concept for life to Schmitt's concept of state as documented in the constitution's "form of forms". In doing so, both engaged in the contemporary discourse on juristic and natural persons and Bonhoeffer addressed and redefined answers to questions raised by Schmitt, such as the relations of the multiplicity to unity and of defining equality. Their differences are grounded in the alternative between collective form over against communal (*Gesamt*) form, between collective person and communal person, even though both agreed on hierarchical elements. For Bonhoeffer, God's revelation exists prior to community while for Schmitt the collective unit of the people is pre-existing to the constitution. Thus in the subject-object problem, Bonhoeffer identified God as subject in difference to Schmitt's subject, the unit of the people. But for both the word either as constitution or revelation is central in that it has a core or an essence of superior importance. For Bonhoeffer this essence is God's message of reconciliation in Jesus Christ's *Stellvertretung* and taking on humanity's guilt (*Schuldübernahme*) on the cross. Bonhoeffer's reference to legal institutes of civil law that had developed during the constitutional fights of the bourgeoisie over against the state are confirmed by Schmitt's assessment of the content of the constitution's core as representative liberal democracy and fundamental rights and the separation of powers as protection of the citizens from the state. Thus in the Weimar context's separation of church and state Bonhoeffer's reference to private law built on the 19th centuy's movement of separating a space of freedom from the state and public law. Schmitt, however, by turning equality into a determinative element for the pre-constitutional existing unit used it as reason for either-or exclusions of inequal parts from the multiplicity and detached it from the constitutional basic right to freedom. In contrast, Bonhoeffer's comm-unity preserved the single within a multiplicity that is open to human dissimilarities because of equal participation in humanity's sinfulness and need for God's grace. For Bonhoeffer the essence, God in Christ, was flawless, that is, was decisively, without compromise, the human being without sin.[862] Schmitt's constitutional core was defective in that it was indecisive in the leadership structure of the pretense-compromises that presented an either-or alternative between parliamentary representation and ruler-ruled identity, that is,

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[862] ,Jesus war Mensch "ohne Sünde" (Hebr 4[,15]); das ist das Entscheidende.'; DBW 6:149, emphasis in original.

between responsibility and trust. In the either-or option between being-in-Adam or being-in-Christ, Bonhoeffer's alternative *sui generis* provided reconciliation in faith that frees from the collective idea to communal life in the church as well as the state within the one kingdom of God.

4.4   Resolve: Inescapable Pressures

In Weimar's time of *Krisis*, the time-element of the decision, the time of resolve, became for many, so also for Bonhoeffer and Schmitt, a Kierkegaardian "moment". Kierkegaard had named the time-element of the decision the *Øieblikket* which, literally translated, means the "blink of the eye". This is for him the instance, the moment of transfiguring vision, at which the immanent and transcendent, time and eternity, intersected and the man appeared. [863] But in modern organizational theory, the nature of time is seen as impossible to define.[864] Time is characterized as the movement or process that separates the past and the future with the present.[865] The present time by itself is undefined and burdened with having to define itself anew out of its own nothing.[866] The present time is new in every moment, that is, every moment is the beginning of a new story (*Geschichte*). Thus the present time defines itself always in the middle of time (*mitten in der Zeit*).[867] Every present is confronted anew with having to redefine its past and projecting its future. Memory assists in identifying from the past the problems, alternatives and resources that are relevant aspects of the present time.[868] That is, the past provides resources for the present time[869] and by designating its past and future it defines the own form.[870]

Time was for Schmitt a linear trajectory of history filled with a succession of ages, domains, ideas, and elites that changed at intermittant stages of vanishing legitimacy. For Bonhoeffer, time held a boundary in its middle that promised and provided transformation to new life.

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[863] Søren Kierkegaard, *The Moment and late writings*, ed. and trans. Howard V. Hong and Edna H. Hong (Princeton, NJ: Princeton University Press, 1998), 338.

[864] Luhmann, *Organisation*, 152.

[865] Luhmann, *Organisation*, 142.

[866] ‚Als reine Differenz ist die Gegenwart aus sich selbst heraus undeterminiert.' ‚...Notwendigkeit, aus ihrem eigenen Nichts heraus alles neu bestimmen zu müssen.'; Luhmann, *Organisation*, 156, 165.

[867] Luhmann, *Organisation*, 156-57.

[868] Luhmann, *Organisation*, 142.

[869] Luhmann, *Organisation*, 143.

[870] Luhmann, *Organisation*, 156.

Despite their difference, both tied time to something concrete, a situation that compressed the alternatives they had identified into the need for an urgent choice.

4.4.1 Schmitt: Exchange of Domains and Elites

In the decision-style[871] of a German jurist which starts with a short summary-statement, followed by an explanatory part, Schmitt succinctly stated in the opening of his *Political Theology* that 'Sovereign is he who decides on the exception'.[872] Using this style highlights that for Schmitt at that urgent moment in time a genuine decision 'in the true sense of the word'[873] is a 'pure decision' and not a 'degenerate decisionism'.[874] A pure decision is without discussion or self-justification[875] 'independent of argumentative substantiation and receives an autonomous value'[876] outside the normal situation.[877] The time element of the decision heightens the gravity of the situation to the 'decisive point in the political'.[878] In the 'concrete situation'[879] the criteria of the "political" provided for an urgency that turns the decision into a "genuine" one. It is the moment when 'the most extreme point' of 'concrete antagonism' is approached,[880] which happens in 'the extreme case' that 'exposes the core of the matter', the conflict, the 'exception'.[881] It is a borderline moment when in the 'outermost sphere' 'the power of real life breaks through the crust of a mechanism'.[882] Every part of this line of descriptive characteristics Schmitt based on a particular concept of history and a critical

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[871] The decision style is used within a legal judgement as opposed to the opinion-style which argumentatively evaluates a case first before coming to a concluding result. The decision-style is the shortened reverse of the opinion-style. The former can appear more "judgmental" and "opinionated" than the latter but is always based on the latter.

[872] Schmitt, *Political Theology*, 5.

[873] Schmitt, *Political Theology*, 6.

[874] Schmitt, *Political Theology*, 3.

[875] Schmitt, *Political Theology*, 66.

[876] Schmitt, *Political Theology*, 31.

[877] cf. Schmitt, *Political Theology*, 12.

[878] Schmitt, *Concept*, 39.

[879] Schmitt, *Political Theology*, 10.

[880] Schmitt, *Concept*, 29, 30.

[881] Schmitt, *Concept*, 35.

[882] Schmitt, *Political Theology*, 5, 15.

theory of the secularization of existence. This awareness of the present historical situation[883] runs as undercurrent through his whole work.

The element of the present situation is for Schmitt the core of modern European history. 'All historical knowledge is knowledge of the present', 'obtains its light and intensity from the present', and only serves the present, 'because all spirit is only spirit of the present'.[884] The history of the previous centuries and the concept of secularization proved to Schmitt that the political has not been banished from the life of the present time. A decision on whether something is unpolitical is always already a political decision as becomes obvious in the supposedly "unpolitical" Protestant doctrine of God as the wholly other, that parallels "political" liberalism's understanding of the state and politics as the wholly other. [885] Past history that defines the present is for Schmitt a succession of ages of time (*Zeitalter*). Every intellectual domain of immediate human existence, represented by an active elite's intellectual life, changed at the decisive moment at which the legitimizing foreground vanished.[886] Even though always a plurality of diverse stages coexisted, only the intellectual vanguard would change because it was their interests and convictions that were able to impress the masses.[887] Schmitt identified four main domains which roughly coincided with the centuries since the Reformation. The Metaphysical domain of the 17th century had replaced the theological domain of the 16th century with a "natural system" based on new scientific insights. The humanitarian-moral domain with its deistic philosophy, enlightenment, rationalism, and a mythical pathos of virtue took over in the 18th century. After a transitional stage of moralism followed by romanticism, the 19th century economic domain, characterized by 'technicism' and industrialism, became dominant only to be replaced by the age of technology.[888] These successive stages reflect the neutralizing effect of avoiding conflict with agreements and exchanges of opinion. A controversial central domain was first neutralized then replaced with a new central domain but only to create out of the neutral situation another increasingly tense struggle between the interests of men. Thus peace

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[883] 'Thus we must first be aware of our own historical situation'; Carl Schmitt, "The Age of Neutralizations and Depoliticizations (1929)", trans. Matthias Konzen and John P. McCormick, in Schmitt, *The Concept of the Political*, 81.

[884] Schmitt, "Neutralizations", 80.

[885] cf. Schmitt, *Political Theology*, 2.

[886] cf. Schmitt, "Neutralizations", 81-82.

[887] Schmitt, "Neutralizations", 83.

[888] cf. Schmitt, "Neutralizations", 82-85.

remained elusive and wars moved from the religious kind to national wars and finally to economic wars.[889] The more recent spirit of technicity and developing technology with its accompanying belief in the unlimited power of man over nature and even human nature[890] brought hope for neutral ground and peace. But precisely because technology can be used by every culture, peoples and religion,[891] new struggles arise. In accordance with the changes of the central domains, the *cleric* as a type also changes, that is, 'the typical representative of intellect and publicity' whose characteristics are always determined by the central domain. The *cleric* of the 16th century, a theologian and preacher, was replaced in the 17th century with the scholarly systemiser, in the 18th century with the aristocratic author of Enlightenment, and, after an intermezzo of the romantic genius, with the late 19th century's economic expert.[892]

Parallel to the domains, elites, and the centers of intellectual life, all concepts and words also shifted, because 'all essential concepts are not normative but existential.'[893] Therefore 'all concepts such as God, freedom, progress, anthropological conceptions, and finally the concepts of nature and culture itself derive their concrete historical content from the situation of the central domains'.[894] Thus the concept of progress turned in the 19th century into a religion of technical progress in which belief in miracles and an afterlife became a religion of technical miracles, human achievement, and the domination of nature – 'a magical religiosity became an equally magical technicity'.[895] Theological concepts became uninteresting; God was removed from the world and was turned into a merely private matter. Reduced to a 'neutral instance vis-à-vis the struggles and antagonisms of real life', God 'became a concept and ceased to be an essence.'[896]

'But intellectual concepts could not simply be moved between the intellectual domains of different time-periods. Then egregious misunderstandings'[897] would happen, as can be seen

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[889] cf. Schmitt, "Neutralizations", 89-90.

[890] Schmitt, "Neutralizations", 94.

[891] Schmitt, "Neutralizations", 91.

[892] Schmitt, "Neutralizations", 86-87.

[893] Schmitt, "Neutralizations", 85.

[894] Schmitt, "Neutralizations", 87.

[895] Schmitt, "Neutralizations", 85.

[896] Schmitt, "Neutralizations", 90.

[897] Schmitt, "Neutralizations", 85.

among the supporters as well as the rejecters of the concept of the state as a juristic person who accuse each other of theologizing. They polemically compare collective juristic persons and theories of collective personality, such as Gierke's organic doctrine of the state with the dogma of the Trinity. Others used in their polemics references to "Christ or Barabbas", 'Cain, the fratricide', 'Abel, the bourgeois', and 'God and sin' as justification for domination and power.[898]

Instead, Schmitt asserted, of the theological concepts only the "systematic structure" was transferrable to the modern theory of state. Again, using the decision-style, he declared therefore that 'all significant concepts of the modern theory of state are secularized theological concepts'.[899] A variety of structural analogies could be drawn between theology and the jurisprudential theory of state. A sociology of concepts which transcends juridical conceptualizations enabled such analogies. This sociological method discovers basic, radically systematic structures and compares them with the conceptual social structures of the same epoch. Therefore, it is sociology when the juristic construction of a historical-political reality can find a conceptual structure that corresponds to the general state of consciousness that was characteristic for the same time-period.[900] Because in Schmitt's understanding this radical conceptualization pushed into metaphysics and theology, he concluded that the metaphysical image that a particular epoch has of the world is of the same structure as that which is immediately understood to be an appropriate form for the political organization of that age.[901] Even Kelsen, Schmitt asserted, stressed 'the methodical relationship of theology and jurisprudence'.[902]

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[898] Schmitt, *Political Theology*, 62, 64.

[899] Schmitt, *Political Theology*, 36.

[900] Schmitt explained his "sociology of concepts" at length: 'This sociology of concepts transcends judicial conceptualization oriented to immediate practical interest. It aims to discover the basic, radically systematic structure and to compare this conceptual structure with the conceptually represented social structure of a certain epoch.' '…this sociology of concepts is concerned with establishing proof of two spiritual but at the same time substantial identities.' '…it is a sociology of the concept of sovereignty when the historical-political status of the monarchy of that epoch is shown to correspond to the general state of consciousness that was characteristic of western Europeans at that time, and when the juristic construction of the historical-political reality can find a concept whose structure is in accord with the structure of metaphysical concepts. Monarchy thus becomes as self-evident in the consciousness of that period as democracy does in a later epoch.'; Schmitt, *Political Theology*, 45-46.

[901] Schmitt, *Political Theology*, 46.

[902] Schmitt, *Political Theology*, 40.

A systematic structural analogy between theology and jurisprudence was obvious in the theory of state of the 17th century, which had identified the monarch with the Cartesian God by transposing the latter to the political world and giving the former an exactly analogous position in the state that even included continual creation. There is a complete identity 'that postulate[s] the sovereign as a personal unit and primeval creator'.[903] Similarly, structural metaphysical, political, and sociological parallels between the idea of God and the idea of sovereignty could be traced through the various historical ages until by the 19th century 'conceptions of imminence' could be seen in the 'democratic thesis of the identity of the ruler and the ruled', and 'Kelsen's theory of the identity of the state and the legal order'.[904] In the latter's positive jurisprudence the state intervenes, as some invisibly existing identity, e. g. as the invisible person of the lawgiver, whose omnipotence 'is not only linguistically derived from theology'.[905] And Laband's and Jellinek's concept of sovereignty and the sole supremacy of the state make the state an 'abstract quasi-individual' with a mystically produced monopoly on power, which is a juristic disguise of ruling by god's grace and mercy (*Gottesgnadentum*). Here the juristic fiction replaces the religious fiction.[906] He concluded that to contemporary people 'conceptions of transcendence will no longer be credible'. Immanence philosophies, especially Hegel's, have drawn the concept of God into the world and even proclaim 'that mankind had to be substituted for God'.[907] Immanence is also behind Schmitt's assertion that 'the exception in jurisprudence is analogous to the miracle in theology'.[908] In a structural analogy between the modern constitutional state and deism Schmitt argues that the former had banished the miracle from the world because both rejected interventions; the constitutional state banned direct intrusions into the legal order and deism objected to interferences into the law of nature. And again referring to Kelsen's positivism, Schmitt' pointed to the former's 'entirely natural-scientific' orientation that, 'liberated from miracles and dogmas', based democracy 'on human understanding and critical doubt'.[909]

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[903] Schmitt, *Political Theology*, 47.

[904] Schmitt, *Political Theology*, 49-50.

[905] Schmitt, *Political Theology*, 36, 38. A few years later Schmitt writes that 'the juristic formulas of the omnipotence of the state are, in fact, only superficial secularizations of theological formulas of the omnipotent God.' Schmitt, *Concept*, 42.

[906] Schmitt called Laband's and Jellinek's abstract quasi-individual (*abstraktes Quasi-Individuum*) polemically a '*unicum sui generis*'; Schmitt, *Politische Theologie*, 45.

[907] Schmitt, *Political Theology*, 50, 51.

[908] Schmitt, *Political Theology*, 36.

[909] Schmitt, *Political Theology*, 42.

Conversely, though, the counterrevolutionaries supported the personal sovereignty of the monarch with analogies from theistic theology.[910]

Motivated to find for his present age a theory of state that corresponded to the secularized intellectual consciousness of the early 20th century and, more precisely, to the confusing reality of the Weimar Republic, Schmitt declared that 'nothing is more modern than the onslaught against the political'.[911] Here connecting to his dissection of history into domains, he asserted that the 19th century economic age had arrived at an entire system of demilitarized and depoliticized concepts.[912] Where only economic interests and advantages count, the political vanishes into the economic, into the technical-organizational,[913] and thus into perpetual discussions that make the state a compromise.[914] The negation of the political that is inherent in the liberalism of free individuals turns into 'competition in the domain of economics and discussion in the intellectual realm'.[915] But after disposing its enemy, the 'absolute state and feudal aristocracy' the 'coalition of economy, freedom, technology, ethics, and parliamentarism' had lost its meaning. Mass consumers and the culturally interested public had become anxious over the economy not being *eo ipso* freedom any longer, technology not only serving comforts, and progress no longer bringing humanitarian and moral perfection.[916] The accompanying stages of abstraction from religion, theology, metaphysics, and state now threaten culture itself, ending in the neutrality of cultural death.[917] Alongside technology, intellectual neutrality had become intellectually meaningless.[918]

But Schmitt predicted that in this stage of neutralized meaning, definitions and constructions of ethics and economics will not depoliticize the world. Thinly masked, he criticized the Republic's leadership by voicing that the remaining non-political means evade political responsibility and visibility. Economic antagonisms become political[919] by using investments

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[910] cf. Schmitt, *Political Theology*, 36-37.

[911] Schmitt, *Political Theology*, 63.

[912] Schmitt, *Concept*, 71.

[913] Schmitt, *Political Theology*, 65.

[914] Schmitt, *Concept*, 70.

[915] Schmitt, *Concept*, 71.

[916] cf. Schmitt, *Concept*, 72, 76.

[917] Schmitt, "Neutralizations", 93.

[918] Schmitt, *Concept*, 93.

[919] cf. Schmitt, *Concept*, 77-78.

of capital and intelligence for producing means of annihilation.[920] New pacifist vocabulary condemns war and the adversary is designated an outlaw of humanity instead of enemy. But this cannot escape the logic of the political[921] which is 'the utmost degree of intensity of a union or separation, of an association or dissociation.'[922]

Schmitt argued that already in the 19th century, at exactly the moment when the democratic notion of legitimacy had replaced the monarchical,[923] the counterrevolutionaries[924] had heightened the moment of the decision to such an extent that the notion of legitimacy became dissolved.[925] The state was reduced to the moment that called for an absolute decision created out of nothingness.[926] When the legitimacy of the state disappeared into nothingness, the situation had reached the moment of the urgency of the borderline case that demands a decision out of nothing beyond the 'normative power of the factual'[927] - a phrase used as argument of reason by some supporters of the Weimar Constitution and which alluded also to Schmitt's earlier work on the value of the state.[928] Also alluding to his work on *Gesetz und Urteil*, Schmitt recalled that this is the moment of indifference that is contained in any juristic decision; it is the independently determining moment.[929] Captured now with an existential addition in the formula of 'friend and enemy', it is for Schmitt the existentially extreme case, the exceptional case that exposes the core of the matter.[930] For his present time, Schmitt assessed that with the threat to the cultural and social *status quo*, there appeared the anxiety-ridden fear of nothingness. Despite calls for a rebirth of some original principle,[931] in the present age of technology a conflict arises not between life and death. Instead, from the threat

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[920] As further antagonistic methods of economic imperialism Schmitt named economic sanctions and severance of food supply from the civilian population. He criticized the "peacefulness" of such means of economic power. Schmitt, *Concept*, 78-79.

[921] Schmitt, *Concept*, 79.

[922] Schmitt, *Concept*, 26.

[923] Schmitt, *Political Theology*, 51.

[924] Donoso Cortés (1809-1853) and Joseph de Maistre (1753-1821) were the counterrevolutionaries Schmitt referred to for this argument.

[925] Schmitt, *Political Theology*, 65.

[926] Schmitt, *Political Theology*, 66.

[927] Schmitt, *Political Theology*, 3.

[928] Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen*.

[929] Schmitt, *Political Theology*, 30.

[930] Schmitt, *Concept*, 35.

[931] Schmitt, *Concept*, 94.

to physical destruction of one's own way of life arises a struggle of spirit with spirit and life with life. [932]

Overall, Schmitt's understanding of time is a concept of epochal history that is divided in a series of ages, domains and elites, as well as an attached secularization theory. His sociology of juristic concepts structurally paralleled legal theories of state with the predominant consciousness of the same time-period for the purpose of showing that the image of the world of a particular era is structurally mirrored in the political form of that same historical era. This provided to Schmitt the evidence of a transfer of the systematic structures of theological concepts to the structures of jurisprudential concepts, such as God to the political leader, miracle to exception, and it connected a loss of legitimacy to a situation *ex nihilo*. In his contemporary age, in his present time, the preceding process of secularization that had moved the intellectual sphere from transcendence to immanence had dismissed theology from the public space. Liberalism's and technology's neutralising and depoliticizing effect had resulted in a situation of nothingness in which economic imperialism was providing for new conflicts. The vanishing cultural and social *status quo*, and the vanished legitimacy of the liberal state, had heightened to such an urgent situation that it called for an immediate transformative political decision out of the nothingness of the present time and towards a new domain and its corresponding *cleric*. Distinguishing friend from enemy would provide the existential criteria needed for this political decision of life against life. In applying his theory of structural analogy to his secularized age, Schmitt declared that this political decision is not the rebirth of an outdated life-death principle.

4.4.2 Bonhoeffer: The Eternal and Temporal Middle

Bonhoeffer's view of time, which underlay his entire theology, combined transcendence with matter-of-factness, that is, insofar as this was characterized foremost by a "situation". Harnack's fear that without historical critical study theological existence was endangered by 'unscholarly theologies',[933] Bonhoeffer diverted by declaring that theology's status as a science was safe as long as the method of theological exposition adhered to objectivity, to matter-of-factness (*Sachlichkeit*), and proceeded from the viewpoint that God is the one and

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[932] cf. Schmitt, *Concept*, 49, 96.

[933] DBWE 10:197.

only God.[934] With Barth, Bonhoeffer agreed that God, understood as the wholly other, connected to God's freedom for creation. In line with the anxieties of the *Krisis* of his context, he agreed that the Kierkegaardian "moment" was the determinative point in time.

In his 1929 Barcelona presentation on *Basic Questions of a Christian Ethics*, Bonhoeffer referred thirteen times to the "moment".[935] Relevant was 'each particular', 'present', 'decisive', 'single' moment that was 'the moment itself', 'the moment of divine call'.[936] Moral action could not be influenced by yesterday but always needed to be established anew in immediate relationship with God's will.[937] Understanding this moment as an instance of importance and urgency, he connected it to the criterion of a "concrete situation", which he mentioned nine times,[938] and linked both to the need of a decision in historical time. Even though in this period of his work the 'situation' suspended the unit of the peoples (*Volk*), from loving the other in times of conflict with other nations,[939] the situation is nonetheless bound to God[940] and free from ties to positive law.[941] But with the approach of the events that would in his assessment amount to a *status confessionis*, the quality of the "moment" changed to what he would call later in his *Ethics* the ambiguity of a situation that determines the opportunity for a genuine decision.[942] Thus in his 1932/33 account of the Genesis story of the Fall, he concretized with theological depth what time meant in regards to boundaries, heritage and human life. Determinative in his account of salvation history and human history, for eternity and immanence, and for the reconciliation by God's grace in Christ who 'is the beginning, the new, the end of our whole world',[943] is the beginning *ex nihilo* and the nothingness resulting from the Fall. Returning a decade later to the issue of time, he commented that the new nothingness of the European secular reality, which urgently awaited the divine miracle of resurrected life, was rooted in the past developments of Roman and Greek antiquity, and Catholic and Reformation history.

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[934] DBWE 3:22-23.

[935] Bethge called this phase in Bonhoeffer the 'ethics of the immediate moment'; Bethge, *Bonhoeffer*, 119.

[936] DBWE 10:365, 360, 365, 368, 371, 377.

[937] DBWE 10:366.

[938] Additionally Bonhoeffer refers 38-times to the 'situation'; DBWE 10:360-378.

[939] DBWE 10:371.

[940] DBWE 10:377.

[941] cf. DBWE 10:372.

[942] cf. DBWE 6:248.

[943] DBWE 3:22.

"Time", counted in days, nights, years, and epochs, connected for Bonhoeffer to numbers as well as law, because both have become for humankind autonomous and are thought to hold self-contained knowledge of truth. Although time is in human knowledge understood in terms of periods of time which are counted according to the rotation of the earth, it is, in fact, created by God from beyond time as a natural dialectic of the rhythm of rest and movement, and points to God's giving and taking.[944] God's created day 'determines the essence of the world and of human existence'[945] while numbers, although upheld by God's word and command, are not the truth of God itself. Numbers are only 'the language of an eternal law of the world that rests in itself, language that is silent about the Creator and sounds forth about the glory of the creature'.[946] That which is fixed, law and numbers, 'relies on itself and snatches its own power away from the Creator.' Critical of his contemporary context, Bonhoeffer added that 'in this age, that which is fixed boasts of its own being in opposition to God'.[947] Humankind has become incapable of seeing God's original way of rule over the world.

To Bonhoeffer, humankind was disregarding the limit God has set in his grace to philosophical explanations and humankind's possibilities for the purpose of saving humanity from nothingness. The biblical account of a beginning *ex nihilo* set for humanity a limit to philosophical explanations of the primeval beginning. The beginning as described in Genesis is 'utterly unique',[948] because it is formless, empty, deep dark,[949] obedient to nothing outside temporal terms, not to substance, nor to primal possibility. The nothing waits on God and exists only in God's action.[950] It is the moment, the instance (*Augenblick*), in which God is thinking[951] in complete freedom.[952] Therefore theological beginning has no beginning.[953] In his omnipotence, in 'utter supremacy', God's word summons that which comes to be out of

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[944] 'The rhythm that is both rest and movement, that gives and takes and gives again and takes again and so points forever to God's giving and taking, to God's freedom beyond rest and movement – that is what the day is.'; DBWE 3:48.

[945] DBWE 3:48.

[946] DBWE 3:53.

[947] DBWE 3:54.

[948] DBWE 3:34.

[949] DBWE 3:37.

[950] DBWE 3:34.

[951] DBWE 3:38.

[952] DBWE 3:26.

[953] '… freedom does not allow itself to be repeated. Otherwise freedom would have freedom as its own precondition, that is, freedom would be unfree, and no longer the beginning.'; DBWE 3:32.

nonbeing.[954] In this moment of becoming, God sees his creation as good and prevents it from falling back into nothingness by willing to uphold and preserve it.[955] Therefore the reality of every moment is from God.[956] Fallen, sinful humankind is unable to think beyond this beginning, is unable to think into nothingness. Nothingness constitutes the end of humankind's thinking, because fallen humankind lives in the middle between beginning and end, knowing neither the end nor the beginning. Humankind knows only 'that it comes from the beginning and must move on toward the end'.[957] However, fallen humankind mistakes in an ultimate attempt at explanation its circular philosophical thinking as a beginning of a creative nothingness.[958] Stuck in the 'anxiety-causing middle',[959] humankind has lost the beginning and the end with God and knows God only as beginning beyond the middle, as the Creator.[960] Thus to Bonhoeffer, humankind which has set the creator-God at an immense transcendent distance has lost the insight that with creating *ex nihilo*, God has saved humanity from nothingness, the human attempt of explaining the nothing.

The relevant moment for telling the earthly historical heritage of the anxiety-causing middle is the Fall as told in the biblical story of Genesis. The Fall tells 'about the history of humanity with God', it tells about humankind-for-God and also reversely about what God does for humankind.[961] It is the primeval history of every human being, of all of humankind, of humanity. It is every person's beginning, destiny, guilt, and end. It is 'an event at the beginning of history, before history, beyond history, and yet in history.'[962] At the event of the Fall, which foreshadows the Christ event, the tree of life and the tree of knowledge[963] at the middle (*Mitte*) of the paradise of the Garden of Eden, are transposed to the middle (*Mitte*)[964]

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[954] DBWE 3:42-43, 76.

[955] DBWE 3:45.

[956] Bonhoeffer opposed the concept of *creatio continua*, of a continual creation from nothingness because it deprived God of freedom and uniqueness and ignored the reality of the fallen world. cf. DBWE 3:46-47.

[957] DBWE 3:28.

[958] 'Nothingness, as humankind in the middle conceives it without knowing about the beginning, is the ultimate attempt at explanation.'; DBWE 3:33.

[959] DBWE 3:30.

[960] '… for us God as the beginning is no other than the one who in the beginning created the world and creates us, and because we can know nothing at all of *this* God except as the Creator of our world.'; DBWE 3:31.

[961] DBWE 3:72.

[962] DBWE 3:82

[963] 'The tree of knowledge is the *tree of death*. It stands immediately next to the tree of life, and *the tree of life is endangered only by this tree of death*.'; DBWE 3:89; emphasis in original.

[964] The DBWE translates *Mitte* as "center" in the sense of location whenever Bonhoeffer talks about the trees in the Garden of Eden and the crucified Christ. Instead, I have used throughout the direct translation of "middle"

within the reality of time on earth, into this world. This middle is both, curse and promise.[965] God's prohibition of not eating the fruit from the tree of knowledge, which turned out to be the tree of death, addressed the free person. After the transgression of the prohibition and the Fall, God's promise of the nothingness of death placed Him as a boundary into the middle of the human condition, of human existence in time, in reality, and as a limit to possibilities.[966]

Subsequent to transgressing God's prohibition and being expelled from the presence and obedient unity with God and now living in the twilight of humankind's existence (*Dasein*), thinking is restricted[967] and life is understood as preserved only until death. The Fall is the moment when Adam's dominion over the Garden Eden[968] transformed to earthly dominion. Through the Fall, humankind has become *sicut deus*. Humankind, now "like God", knows of itself about good and evil, has no limits, and acts out of its own resources, [969] out of its own ego.[970] But humankind now is in a 'state of death',[971] and grasps at life again. God in His grace promises, 'that the promise of the death of death never means nothingness, but only life.' It is the promise of peace 'in the world of the resurrection'.[972] It is the promise of Easter, the world-transcending event of God's intervention from eternity.[973]

God's intervention at Easter ends Adam's history, and the history through Christ starts with Christ as the new middle (*Mitte*), which by faith sets the human being free from final death.[974] 'But whoever grasps at life must die.'[975] The history of earthly death, in which Cain usurps the Creator's right over life and death,[976] ends at Christ's cross in the middle (*Mitte*) of time, in the middle of the fallen world that is upheld and preserved by God. The cross of

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for *Mitte* because it permits for a spatial as well as a temporal meaning in the sense of "in the middle of time" as well as "the middle of a place", and it also relates to the term *Mittler* (mediator) for Christ.

[965] DBWE 3:131-38.

[966] cf. DBWE 3:86.

[967] DBWE 3:140.

[968] DBWE 3:83.

[969] DBWE 3"113.

[970] In the early 1940s Bonhoeffer returned to this topic in regards to conscience, i.e. the conscience of the natural human being who knows about good and evil, which is the ego's attempt to justify itself to God; DBWE 6:277.

[971] DBWE 3:112.

[972] DBWE 3:136.

[973] DBWE 10:487.

[974] DBWE 3:92.

[975] DBWE 3:89.

[976] DBWE 3:145.

Christ is the decisive moment in time; it is the moment at which 'God gives new life'.[977] In the event of the desolation of human life, on the cross, every claim that history might make is finished, condemned, and destroyed.[978] With love and omnipotence, God calls a new creation into life. It is a one-time event, a new event every time.[979] This is the time, the moment, when the reality of God encounters the reality of the world.[980] In his *Ethics*, Bonhoeffer also called this the moment, when the ultimate God addresses the penultimate reality, the history of this world. It is the moment when grace enters to address that which is never something present, but always something already past.[981] Then, the relationship between the ultimate and the penultimate is resolved in Christ.[982] Then, Christ becomes the middle of human existence, history, and nature, as Bonhoeffer stated in his 1933 *Lectures on Christology*.[983] Thus for Bonhoeffer it is here, in Christ, where transcendence meets immanence and God's promise of new life saves humanity from human nothingness.

'With God's yes and God's no to history',[984] with Jesus Christ's incarnation and crucifixion, a lasting irremovable tension had entered every historical moment, which Bonhoeffer attempted to account for in *Ethics* with a concept of historical heritage. Because through Jesus Christ's life and death history became thoroughly temporal and not just a transient bearer of eternally valid values of the past 'human beings, placed in history, must give an accounting to themselves about the present time.'[985] To him the contemporary situation of secularization was the result of a process that began when God's time came to fulfillment with Jesus Christ's appearance in Roman and Greek antiquity.[986] In a sweeping account, Bonhoeffer moved through history, from antiquity through the Reformation and Modern revolutions to the presence of his time and place. By linking the Roman heritage to the Roman Catholic Church and the papacy, and the Greek heritage to the German history of the Reformation he contributed further to the Romanist-Germanist discourse.

[977] DBWE 6:158.
[978] DBWE 12:325-26.
[979] DBWE 12:316.
[980] DBWE 6:158-59.
[981] DBWE 6:159, 163.
[982] DBWE 6:157.
[983] DBWE 12:324-27.
[984] DBWE 6:104.
[985] DBWE 6:104.
[986] cf. DBWE 6:104-05.

The major and most lasting difference between the Roman and the Greek heritage Bonhoeffer found in their respective foci on either Christ's humanity or on Christ's passion on the cross.[987] The former stresses reconciliation whereas the latter is aware of the contradiction of not only between Christianity and antiquity but also between the natural and grace.[988] This divide between stressing either reconnection or difference influenced, according to Bonhoeffer, on the Protestant side through the Lutheran Reformation and on the Catholic side through the 18th century's French uprising, a process which brought on both sides the same result, the process of secularization.[989] This secularization focussed on the natural and the rational, and led in the final consequence to nothingness.[990] Luther's misunderstood doctrine of the two kingdoms destroyed the faith in God's word as the forgiving of sins and instead sanctified the world and the natural order, liberated the human being, and led to a rationalized and mechanical world.[991] Bonhoeffer sees this result as standing in peculiar contrast to the Reformation's rejection of replacing the Roman historical heritage with the German pre-Christian naturally grown ethnic (*völkisch*), that is, with its indigenous past.[992] As the recent efforts within the National Socialist present prove, this only led to a mythologizing of history.[993] The French Revolution brought about the similar result as regards the divination of nature and a cult of ratio that discovered eternal and naturally given human rights, and, finally, a liberated humanity that was focussed on nationalism and anti-clericalism. Liberated 'from the tutelage of church and state', the human beings saw others only as a friend or enemy of human rights.[994] In an atmosphere of truthfulness, technology rose and became an end in itself.[995] And with this, the revolutionary concept of nation rebelled against governing

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[987] DBWE 6:107.

[988] In the German Reformation, 'the contradiction between the natural and grace is starkly opposed to the reconciliation of nature with grace in the Roman heritage.'; DBWE 6:107.

[989] 'The great process of secularization very quickly set in all along the line, at the end of which we stand today.' DBWE 6:113

[990] DBWE 6:127.

[991] cf. DBWE 6:114.

[992] German customary law in relation to Greek and Roman law is discussed by Otto Gierke in *Das deutsche Genossenschaftrecht*, vol. 3 which Bonhoeffer had quoted in *Sanctorum Communio*. Schmitt, in his *Verfassungslehre*, drew also strongly on Gierke but used mainly his later writing *Johannes Althusius*.

[993] DBWE 6:108. It was especially Hermann Göring (1893-1946) who was a follower of indigenous Germanic mythical tales. Hitler however distanced himself from "new-paganism" because he regarded this *völkisch* religiosity as incompatible with modernity. He thought that National Socialism was strictly a teaching of reality (*Wirklichkeitslehre*). Reiner Bucher, *Hitlers Theologie* (Würzburg: Echter, 2008), 63, 65.

[994] DBWE 6:118.

[995] cf. DBWE 6:115-16.

authority, the organic against the institutional, and becoming against being. This led to thinking from below instead of above and to the people themselves claiming sovereignty.[996]

The French Revolution replaced the historical unity based on Jesus Christ with the new intellectual unity of the West.[997] In its enmity toward God, whether 'nationalist, socialist, rationalist or mythical', its 'God is the new human being'.[998] Luther's freedom of the Christian, combined with the Catholic heresy of the essential goodness of human beings, had resulted in deifying humanity.[999] Now unbridled vitalism that absorbed all values in the self, confronted deified humanity with nothing (*Nichts*).[1000] But once this revolution had succeeded technology, mass movements, and nationalism became deadly enemies.[1001] In creating the illusion of new life, a rebellious, violent, anti-God, and antihuman nothingness unfolded.[1002] Bonhoeffer sensed this as the 'uniqueness of the moment'[1003] in which 'there is no future and no past, but only the present moment'.[1004] This amnesia of past and future is 'in essence the extraordinary situation' of the borderline case. As 'ultima ratio', it lies beyond the laws of reason, the normal and regular, and, in fact, any possible regulation by law,[1005] including the positive and intrinsic laws of the state.[1006] In the fear of nothingness, only 'the miracle of a new awakening of faith' can prevent 'the final fall into the abyss.'[1007]

Not only in his *Ethics*, but already in 1932/33 Bonhoeffer had stated that the miracle of Jesus Christ's resurrection could affirm the earth and hail God as lord of the earth. This event annuls the curse and promises the new earth.[1008] And in his *Lectures on Christology* he had affirmed that history's boundary is the cross of Christ. Christ is the limit and middle of

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[996] DBWE 6:120.

[997] DBWE 6:109, 122.

[998] DBWE 6:122.

[999] DBWE 6:123.

[1000] DBWE 6:127.

[1001] DBWE 6:121.

[1002] DBWE 6:128.

[1003] DBWE 6:127.

[1004] DBWE 6:128.

[1005] In the early 1940s the borderline case was for Bonhoeffer the *ultima ratio* in relation to the primordial facts of life, such as the basic necessities of human life (*Lebensnotwendigkeiten*); cf. DBWE 6:273-74.

[1006] DBWE 6:272

[1007] DBWE 6:131.

[1008] DBWE 12:291.

history's being.[1009] Christ is the mediator (*Mittler*) of history,[1010] the miracle that would create new life out of nothingness.[1011] The church, the protector of the heritage of antiquity and Reformation, the witness to the miracle of Jesus Christ yesterday, today, and forever, and the hidden, invisible middle of the state,[1012] 'forces the custodian of power to listen and change their ways.'[1013] This borderline situation of nothingness presented, additionally, the option of a decisive 'free venture' and of surrendering one's 'own decision and action to the divine guidance of history'.[1014] It is the risky moment of an action in the presence of time at which a genuine encounter with life, with actual people, touches, transforms, and forces the whole person toward a decision that makes oneself stronger and more mature.[1015] Reminiscent of Kierkegaard, Bonhoeffer stated that this is the hour in which God reveals himself as creator, before whom we can only live as creature. It is the moment that calls for action in accordance with Christ 'the origin, essence, and goal of all reality'.[1016]\

Summarizing, it can be said that Bonhoeffer's account of history is not linear but circular. In the penultimate time after the Fall, in the middle of the physical life of the human being, God fulfills with the Christ event his promise of preserving the human being. He replaces death with life, with new life. In Bonhoeffer's account of salvation history and historical heritage, the Adam-event of the Fall and the Christ-event of the cross both reach a heightened tension in a situation of nothingness, in an emptiness. It is a human situation which completely differs from God's situation of *ex nihilo* at the absolute beginning of theology, beyond which human beings cannot venture. For human beings the important moment of nothingness is the moment of the present time between past and future in which unity, dominion, and the identity of the ruler over the earth is altered. The situation of the nihilism of the Fall is marked by the deification of the human being who has become *sicut deus* and has absorbed God's right over life and death. However, the Fall has been caught by the fulfillment of

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[1009] 'Christ is at the center of history by being both its boundary and the center, that is, history lives between promise and fulfillment.'; DBWE 12:325.

[1010] Bonhoeffer explained further: 'History with all its promises, has reached its boundary here. By its nature it has come to an end. But with that the boundary is simultaneously once again the middle (*Mitte*). … In the place where history should also stand, Christ stands before God. Thus he is also the mediator (*Mittler*) of history.'; DBWE 12:326.

[1011] cf. DBWE 6:131-32.

[1012] DBWE 6:132; cf. DBWE 12:326.

[1013] DBWE 6:133.

[1014] cf. DBWE 6:274.

[1015] cf. DBWE 6:248.

[1016] DBWE 6:263.

God's promise of preserving humanity from the abyss, through the God-man Jesus Christ in the moment of the nothingness at the cross. This moment in time is a standing promise also for the contemporary situation of humanity's continuous secular fall from faith. This demands patiently awaiting God's miracle of resurrection, taking the penultimate world seriously, and free human venturing at the risky moment of extraordinary pressure.

4.4.3   Human Creativeness, God's Promise and Urgency

For Schmitt, history is a linear movement from a beginning to an end with a line of events and changes on the trajectory. For Bonhoeffer, the history of humanity is circular from the Fall to salvation, from God to God. In the middle is the penultimate reality of this world and of the human being in which Christ is its middle as the fulfillment of God's promise of preserving and giving life. The contemporary situation of secularization is for Schmitt the result of a process that stretched over centuries on the trajectory of history. For Bonhoeffer secularization has an ancient foundation in the Roman-Greek difference of understanding Christ either according to reconciliation or as a contradiction and is the result of subsequent wrong interpretations that led to a focus on the natural and rational. For Schmitt, the Roman-Greek controversy is a jurisprudential discourse on the juristic and natural person and the relation of unity in multiplicity. However, both agree that the process of secularization ended in liberalism, a rationalized and mechanical world, and the positivist system-thinking such as Kelson's self-contained legalism for Schmitt, and languages such as numbers and law for Bonhoeffer. For both the present "concrete situation" had consolidated in an extraordinary urgent moment of nothingness at the edge of the normal and of law. This nothingness of the moment is for Bonhoeffer a human situation that is separated from God's situation of *ex nihilo*, which belongs exclusively to God the creator at the beginning of theology, beyond which the human mind cannot venture. For Schmitt, in this situation of the moment of nothingness the human being creates out of nothing, that is, out of *ex nihilo*. Schmitt's *ex nihilo*-nothingness of the human being is for Bonhoeffer the deification of the *sicut deus*, the human being having become like God.

Nonetheless, Bonhoeffer's account that earthly history holds a tension, which disappeared through secularization but immediately led to new conflict, has similarities to Schmitt's steps on the trajectory of history in which tensions lead to neutralizations which immediately turn

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also into new conflicts. But tensions are for Schmitt multiple human intellectual and political events which are solved by the exchanges of human elites. Thus they are a line of domains and steps that are objectively evaluated at a moment of urgency. This makes it possible to compare them and to draw analogies between them, as well as dismissing those particular facts that may hold normative power. For Bonhoeffer, there is only one tension. It is the tension that was brought about by God in His incarnation and in the crucifixtion of Christ, which can only be solved through faith in Christ. It is solved on the cross. The nothingness of the present moment, in the moment of nothingness on the cross at which there is no future and no past, this extraordinary moment of amnesia, is thus for Bonhoeffer a moment that ignores the presence and is one of utter subjectivity. With Christ at the middle of life and his permanent presence in the middle of history, analogies are impossible. Christ is the fact of God's promise that cannot be dismissed with human creativeness.

Overall, the time element of the decision discloses not only an immense urgency but also the diverging substance in Bonhoeffer's and Schmitt's thought. While Schmitt declared that in their contemporary modern time God had ceased to be an essence, Bonhoeffer countered this with the claim that God's essence in Christ was there at any moment in time and in the middle of the present time. Similarly, Bonhoeffer refuted, by insisting on God's miracle in Christ in the present age, Schmitt's banishing of miracles from the technological age. Nonetheless, for Bonhoeffer and for Schmitt, the historical developments had reached a moment of nothingness that added to their concrete situation a heightened and even unbearable pressure of urgency. This demanded from both a clarification as regards their respective intent.

4.5 Intent: Idea, Interpretation, and Simplicity

"Intent" highlights the anthropological nature of decision. As the essence of decision, "intent" is generally understood in the sense of aim, plan, or a state of mind that envisions a solution to a problem, a situation, a *Krisis*. More than motivation or an interest, it is will. In the centrality of the intent's place within the formation of a decision, in this innermost essence of the presence of time, person, and location, the choices and urgency become released towards a human activity. As a question of knowledge and will, "intent" determines subsequent actions that become manifest in the reality of the world. Within jurisprudential decisions,

normative concepts of "ought" and a methodological technic help to project allocations that attach to meaning.[1017] In theology, ecclesiastic dogma and the preaching of the gospel are pivotal for meaning and faith. Schmitt never expressly declared his intention apart from wanting to advance socially through using his abilities and linguistic talents.[1018] His intent must be drawn out of his writings for which his early work on questions of will and guilt lends itself as a foremost source, as well as his 1934 preface to the second edition of *Political Theology*. Contrary to this, Bonhoeffer announced even before starting his career that he would reform the church and soon set out to devise a concept of church. Since 1933 he demanded protecting the church with a declaration that condemned the political heresy behind the *status confessionis*. For both Schmitt and Bonhoeffer, "directness", understood in the sense of immediacy, was a prominent feature for determining the will and the act that was captured in "intent".

4.5.1 Schmitt: *Dolus Directus*?

Schmitt, who was motivated by the possibility of making a formative contribution to the theory of state in a time of urgent historic momentum and contextual *Krisis*, determined that the political fragmentation and insecurity of his time was in need of a unifying idea and "personality". Liberalism, bourgeois democracy and parliamentarism had failed to provide the normative standard for life in the reality of politics due to an only fictional quality of the individual, the never-ending discussions, and the many constitutional genuine and pretense compromises. Instead, could a new metaphysical thought provide the intent, the will for action, to move history into its next domain with its new elite?

In his 1910 methodological study on criminal guilt and types of guilt (*Über Schuld und Schuldarten*),[1019] Schmitt had indirectly defined intent (*Vorsatz*) when he questioned the systematic location of the element of guilt within the legal assessment of an accused's infringement of a criminal prohibition. He questioned if, in fact, intent and negligence were

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[1017] cf. Hans-Martin Pawlowski, *Einführung in die Juristische Methodenlehre: Ein Studienbuch zu den Grundlagenfächern Rechtsphilosopie und Rechtsoziologie*, 2nd ed. (Heidelberg: C.F. Müller, 2000), 206.

[1018] Mehring, *Schmitt*, 23.

[1019] During his university studies, and due to his foremost interest in Criminal Law, Schmitt wrote his dissertation on criminal guilt and types of guilt, such as intent and negligence, which addressed the, at that time, still unresolved systematic relationship between the intent of the accused and his guilt.

types of guilt at all.[1020] Schmitt objected to the nominal theory's insistence that intent as a type of guilt instantaneously establishes guilt (*dolus directus*), that is, if the accused knew that the action taken would lead to the success of violating the criminal prohibition. He disagreed that the will and want of success would immediately transfer guilt. For Schmitt, this directness in the relationship between intent and guilt necessitated a clarification in regards to the question if intent was a type of guilt or rather independent of guilt. As a matter of criminal illicitness (*Rechtswidrigkeit*), this concerned the accused's will and want of the factual success, that is, the violation of the negative value (*Unwert*) of the criminal statute.[1021] This meant for Schmitt that the criminal evaluation had a two-fold objective. It had to be established, firstly, whether the accused factually contravened the behavioural "ought" that the negative value of the legal norm had set as a benchmark,[1022] and, secondly, whether the accused willed and wanted the factual change of the present "is" into a new and diferent "is". Regarding the second requirement, Schmitt concluded that formal and material guilt, the objective and subjective will and want of successfully violating the negative value of the criminal norm, had to be separated in the process of establishing illicitness. For him, a precondition for the illicitness of the success of an action was that, from an objective perspective, a human being of sound mind had embraced with an act-of-will (*Willensakt*) and its actualization (*Willensbetätigung*),[1023] with idea and conduct, the factual success of violating the legal standard of the norm (*objektive Tatbestandsverwirklichung*). However, even though an objective consciousness of the prohibition is needed, a subjective consciousness, the concretely accused's idea and conduct of infringing the legal prohibition, was not required.

For Schmitt, thus, simply proving a discrepancy between the accused's purpose and the state's purpose was not a compelling reason for establishing subjective guilt.[1024] Rather, due to the meta-legal quality of its material content, subjective will and want, the guilt, was not a

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[1020] The methodological difficulties that arise for the systematic evaluation of a criminal case due to negligence (*Fahrlässigkeit*) and due to omissions over against actions are of no consequence for the discourse on "intent" within this thesis and therefore will be disregarded despite their inclusion in Schmitt's analysis.

[1021] From the concept of guilt Schmitt separated matters of causality between the accused's action and its success. He considered causality a matter outside of the concept of guilt and a precondition for the ascription of guilt (*Schuldzurechnung*); Schmitt, *Schuld*, 33.

[1022] cf. Schmitt, *Schuld*,16, 50, 54-55.

[1023] ‚Die vom Rechte gewünschte Vorstellung wird also als Maßstab benutzt, an dem die wirklich vorhandene Vorstellung, und damit der Willensakt und die Willensbetätigung, gemessen wird.'; Schmitt, *Schuld*, 55.

[1024] ‚Schuld ist die den Zwecken des Staates nicht entsprechende Zwecksetzung, ergibt sich ebenfalls noch kein zwingender Grund, in der subjektiven Stellungnahme des Täters zur Norm das die Schuld konstituierende Moment zu sehen.'; Schmitt, *Schuld*, 75.

matter of positive law[1025] but belonged outside of the value-judgement of the state. Guilt belonged to the realm of consequences, of penalty-ascription (*Strafzumessung*),[1026] which becomes relevant only once the facts and objective intent, and thus objective illicitness, had been established. Consequently, Schmitt did not divide guilt into an objective and subjective part, but dismissed guilt completely from the objective to the subjective realm. He separated objective and subjective responsibility for an act-of-will and its actualization. However, in this process of repudiating a *dolus directus*, Schmitt had indirectly defined intent as being an objectively present idea and conduct, an objectively present act-of-will and its actualization, whose success is measured over against a legal "ought", a legal standard of the legal order of the state. Objective intent was independent of subjective guilt which freed subjective thoughts and ideas from the state's evaluation and moved them to a personal meta-legal position.

Abstracting the subjective from the objective, thoughts and ideas from facts, and identifying the former as a meta-legal element, reappeared in various ways throughout his subsequent work, as for example within judgements, his theory of state, and the relation of office to person. The "principle of collegiality" was the meta-legal element regarding the correctness of a judgement, and Justice stood in a meta-physical connection to the statute-law of the state. Although the subjective will and personality of the judge or the law-giver, whoever is identified as such by a political system, may enter a judgement or the statute law respectively in the process of interpreting, reasoning, or promulgating, this subjective element remained abstracted from the system and inconsequential for the judge or lawmaker.

Just as criminal law provisions defined the negative value (*Unwert*) as a behavioral standard for the single person, Schmitt had determined in *Der Wert des Staates und die Bedeutung des Einzelnen* that law was the tool that provided Justice as the standard, the behavioural "ought" within the state. But in the contextual factual reality of the Weimar Republic, the constitutional "ought" had proven to be an insufficient normative standard; that is, the will of the German people was unclear. Despite its core substance, the Weimar Constitution fell short of being the standard for providing Justice, due to its many compromises as well as the

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[1025] ‚Die Frage nach dem materiellen Inhalte der Schuld ist eine metagesetzliche'; Schmitt, *Schuld*, 16. ‚…, daβ der Begriff der Schuld nicht ins positive Strafrecht, sicher aber nicht in die Lehre von Vorsatz und Fahrlässigkeit gehört. ... Die Frage nach der Schuld ist in jeder Hinsicht eine meta gesetzliche.'; Schmitt, *Schuld*, 155 note 1.

[1026] Schmitt, *Schuld*, 36.

failure of the bourgeois ideas of parliamentary democracy and individualism. In the Weimar context, the "ought" was missing, that is, missing was the standard that expressed the exact intent of the unit of the people. The subjective will of the unit of the people could not be provided by the objective factuality of the constitution, because the unit of the people was outside the Constitution's power. However, a unifying abstract idea, such as the national myth Italian Fascism used, could provide stability and security to the unit. This national will, then, needed to be represented and actualized, that is, it needed to be objectively transformed into the "is". But the Constitution fell short in providing a process of "how" to implement the political idea. The leadership was unclear because of the indecisive pretense-compromises regarding the executive branch of the bourgeois division of powers. Consequently, the will of the German people was still undecided and suspended between the "ought" and the empirical, factual "is", between a yet to be concretized abstract idea and a concrete legal reality. Thus, for Schmitt, in the Weimar context, the focus of the objective will mutated from violating an existing legal standard to establishing, that is, to creating this standard.

Schmitt opted against the *status quo* of the vulnerable and unsatisfactory relative stability and artificial legality of the present Weimar context. Instead, he was determined to find an effective intellectual principle of legitimacy,[1027] which became a topic of high relevancy by late 1932.[1028] For solving the problem of the absence of an abstract unifying idea, and of how to transform legitimacy into legality, Schmitt regarded as fruitless a flight into a "social technic" such as Kelsen's pure methodology and abstract normativity,[1029] or defining the "political" in the sense of the 'Machiavellian concept of politics' as a 'pure technic'.[1030] Ideologies such as Bolshevism he dismissed as an "economic technic" that was hostile to ideas, because ideas suggest the possibility of a pre-existing, transcendent authority,[1031] such as the unit of the people. But no political system could survive even for one single generation

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[1027] Hofmann, *Legitimität*, 87-88.

[1028] Schmitt, *Legalität und Legitimität*.

[1029] cf. Hofmann, Legitimität, 87.

[1030] Carl Schmitt, *Römischer Katholizismus und politische Form*, 5th ed. (Stuttgart: Klett-Cotta, 2008), 27; own translation.

[1031] ‚Imponierend ist die geistige Konsequnz des Anti-Geistigen, mit der in der Springflut des Sozialismus junge Bolschewisten aus dem Kampf für das ökonomisch-technische Denken einen Kampf gegen die Idee machten, gegen jede Idee überhaupt. Solange nämlich ein Rest von Idee besteht, herrscht auch die Vorstellung, daβ vor der gegebenen Wirklichkeit des Materiellen etwas präexistent ist, transzendent, und das bedeutet immer eine Autorität von oben.'; Schmitt, *Katholizismus*, 45.

on a technic of power alone.[1032] Therefore his concept of history and the method of structural analogies served as guiding criteria for finding a new "normality", that is, for finding an idea for a new domain with the accompanying exchange of the intellectual elite. A structure of a political organization was needed that matched the structure of the metaphysical image of modern secularity in analogy to the transfer of theological images to political structures in previous centuries, ages, and domains.

Concretely, in an effort at turning the urgency of the Weimar *Krisis* into a new stable "normality", Schmitt wrote almost simultaneously the books *The Crisis of Parliamentary Democracy* (1923), *Political Theology* (1922), and *Roman Catholicism and Political Form* (1923). Respectively, he simultaneously analyzed the situation of bourgeois failure and ideological need, devised the methodological principle of analogy for the structural transfer of idea to order, and concretized this methodological-structural analogy in relation to theology. The latter two publications picked up and elaborated on the theme of Schmitt's 1919 work on "The Visibility of the Church". In this essay, he had discussed the possibility of an opposition between concrete-factual reality and the idea within the church, even though according to Schmitt this was inadmissible in Christ in whom the human being and the divine cannot be brought into conflict.[1033] 'Although God became man and man heard his Word in human speech, the dualism that came into the world through the sin of man' turned divine thought into a means for earthly aims.[1034] Because every political idea needs to take a position towards the goodness or evilness of the nature of the human being,[1035] Schmitt clarified that he understood the Trinitarian Dogma as not presenting a clear yes or no answer to this for political theory's decisive question. In distinction from the Protestant teaching of the human being's complete corruption, the Catholic dogma speaks about an only wounded, weakened, or marred human nature which permits gradations and adjustments. Most notably, this also permits merging opposites.[1036] And in *Politische Theologie*, he claimed that, in distinction to the Lutheran position of non-dignity (*Nichtswürdigkeit*) of the human being, the Catholic

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[1032] Schmitt, *Katholizismus*, 28, and similarly also 46.

[1033] cf. Schmitt, "Visibility", 54.

[1034] Schmitt, "Visibility", 53.

[1035] Schmitt, *Politische Theologie*, 61.

[1036] Schmitt, "Visibility", 13.

position keeps open the possibility of the naturally good.[1037] However, the subsequent absolute naturalism that dismissed theological sin altogether, had to be rejected, because it banned any external authority and even demanded the abolition of fatherly authority in the family. In dismissing theology, political ideas also disappear, and this paralyses political decisions.[1038] Instead, holding on to the idea of sin, he declared in *Roman Catholicism and Political Form* that the idea belongs to the political because there is no politics without authority.[1039]

With both, theology and earthly conflict remaining, the essential task to mediate fell upon the Catholic Church. Through descending from above, Christ the mediator had turned the invisible into the visible, into the Church.[1040] Following his own earlier argument in "The Visibility of the Church", he declared in *Roman Catholicism* that the Catholic Church appears to be able to unify as a *complexio oppositorum*[1041] almost any contradictory idea, and prides itself in unifying all forms of state and government within its autocratic monarchy.[1042] This unifying ability stretched even as far as theologically accepting the Old and the New Testament side-by-side,[1043] and was able to answer to Marcion's either-or with an as-well-as. However, most ingenious of the Catholic Church was turning priesthood into an office.[1044] The office of the priests and the Pope represent the idea of God,[1045] and the pope is personally authorized by Christ,[1046] the God who "became human" in historical reality.[1047] The question as to the legitimacy of the pope's concrete person can remain undecided.[1048] The Church

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[1037] Schmitt, *Politische Theologie*, 62; own translation; *Nichtwürdigkeit* is here translated literally because it clarifies its relation to human dignity and connects to Schmitt's prior assessment of the insignificance of the individual. He appears to blame the Lutherans for the "fact" of individual insignificance.

[1038] Schmitt follows here an argument of Donoso Cortes that Schmitt involves in an argument with Mikhail Bakunin (1814-1876); Schmitt, *Politische Theologie*, 68.

[1039] Schmitt, *Katholizismus*, 28.

[1040] cf. Schmitt, "Visibility", 50, 52, 53.

[1041] Schmitt, *Katholizismus*, 11-12.

[1042] ‚Es scheint keinen Gegensatz zu geben, den sie nicht umfaßt. Seit langem rühmt sie sich, alle Staats- und Regierungsformen in sich zu vereinigen, eine autokratische Monarchie zu sein, ...'; Schmitt, *Katholizismus*, 11.

[1043] ‚Aber auch theologisch herrscht überall die complexio oppositorum. Altes und Neues Testament gelten nebeneinander, ...'; Schmitt, *Katholizismus*, 12.

[1044] ‚... seine große Leistung besteht darin, daß er das Priestertum zu einem Amte macht, ...'; Schmitt, *Katholizismus*, 23.

[1045] Schmitt, *Katholizismus*, 36.

[1046] ‚... sein Amt geht, in ununterbrochener Kette, auf den persönlichen Auftrag und die Person Christi zurück.'; Schmitt, *Katholizismus*, 24.

[1047] ‚Christus ... den in geschichtlicher Wirklichkeit Mensch gewordenen Gott.'; Schmitt, *Katholizismus*, 32.

[1048] 'But whether the given pope was in fact the legitimate pope could not be decided with reference to his infallibility. Among several rival popes, there can be only one legitimate pope.'; Schmitt, „Visibility", 55.

transforms spiritual tasks and functions into public office. For this, it is essential that the office is separated from the person who happens to occupy it.[1049] To Schmitt, it is this rationality of the Roman-Catholic Church that captures the human nature in distinction to the domination and utilization of matter within the capitalist economic-technical materialism of modernity.[1050] The formal superiority over the matters of human life is the essence of the political idea of the Roman-Catholic's *complexio oppositorum*. The Church successfully formed the substance (*substantielle Gestaltung*) of the historical and social reality, despite the *complexio*'s formal character remaining in concrete existence.[1051] Subsequently, in his 1927 *The Concept of the Political*, Schmitt added to the unifying effect of the *complexio oppositorum* the criteria of friend and enemy. Through determining 'the utmost degree of intensity of a union or separation, of an association or disassociation'[1052] this principle was meant to "unify" the unit of the people. However, it amended Schmitt's theory of the *complexio oppositorum* insofar as it "unified" not by inclusion but by exclusion.

For Schmitt, the formal abstraction of office from person as part of the unifying character of a *complexio oppositorum* is to the highest degree rational and based on the strict implementation of the principle of representation.[1053] The church is thus a concrete personal representation of a concrete personality, the carrier of juristic spirit, and the heir of Roman jurisprudence.[1054] Because the Church's rationality was grounded in the institutional, it is essentially juristic[1055] and provides, according to Schmitt, a fitting jurisprudential model for the state. As proof of the jurisprudential connection and to secular modernity, Schmitt insisted that within the privatized economic mechanized reality the same abstraction of office

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[1049] 'The visible Church is always the official Church, which means that, as far as it is concerned, the transformation of spiritual tasks and functions into [public] offices, the separation of the office from whomever happens to occupy it, is essential.'; Schmitt, "Visibility", 53.

[1050] ‚Der Reationalismus der römischen Kirche erfaβt moralisch die psychologische und soziologische Natur des Menschen und betrifft nicht, wie Industrie und Technik, die Beherrschung und Nutzbarmachung der Materie.'; Schmitt, *Katholizismus*, 23.

[1051] ‚Von der politischen Idee des Katholizismus aus betrachtet, liegt das Wesen der römisch-katholischen complexio oppositorum in einer speziefisch formalen Überlegenheit über die Materie des menschlichen Lebens, wie sie bisher kein Imperium gekannt hat. Hier ist eine substantielle Gestaltung der historischen und sozialen Wirklichkeit gelungen, die trotz ihres formalen Charakters in der konkreten Existenz bleibt, ...'; Schmitt, *Katholizismus*, 14.

[1052] Schmitt, *Concept*, 26-27.

[1053] Schmitt, *Katholizismus*, 14.

[1054] ‚... die Kirche aber eine konkrete, persönliche Representation konkreter Persönlichkeit. Daβ sie im gröβten Stil die Trägerin juristischen Geistes und die wahre Erbin der römischen Jurisprudenz ist, ...'; Schmitt, *Katholizismus*, 31.

[1055] ‚Dieser Rationalismus liegt im Institutionellen und ist wesentlich juristisch.'; Schmitt, *Katholizismus*, 23.

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from person can be found in judges on international courts.[1056] In both cases, in the Church and at the courts, the matter concerned was sovereignty,[1057] a topic he attended to in his *Political Theology*.

Elucidating the relationship of idea to will, as well as its execution, Schmitt determined in his 1928/29 *Constitutional Theory*[1058] that the pretense-compromises gave two options: either a party or a party-coalition could develop and implement a political program subsequent to winning the electoral popular vote, or a leader could develop a political idea prior to an election, campaign on it, and realize his idea subsequent to electoral success. Parallel to an increasingly fragmented parliamentary representation, due to economic interests, Schmitt's original support for safeguarding the core of the republican idea of the Weimar Constitution changed. The identity of the keeper of the Constitution, the Supreme Court, the *Reichsgericht*,[1059] transformed in 1931 to the Reich-president[1060] with restricted commissarial decree powers.[1061] But parallel to the rapid turn-over in the position of the Reich-Chancellor, Schmitt switched to call for authoritarian decree powers. Observing the increasing "success" of Hitler's preconceived idea of National Socialism on the streets and in German elections, Schmitt accepted in 1933 the new reality of a strong leader who "wills" his idea. He republished his *Political Theology*, and implied in its new foreword his agreement with the German Christians,[1062] and thus indirectly suggested the exchange of the republican idea with the National Socialist idea, as well as an analogical transfer of the structural-institutional and theological form of representation into the juristic form of the office of the sovereign.

Overall, Schmitt's rejection of the theory of *dolus directus* that is, his early abstraction of the subjective will from an objective assessment of the intended will of factually violating the negative value of a legal standard, became decisive for his entire work. He abstracted subjective guilt from objective intent. A metaphysical objective collegiality became decisive for the correctness of a judgement in abstraction from the subjective resposibility of a judge.

[1056] cf. Schmitt, *Katholizismus*, 51.

[1057] ‚Der Papst besteht darauf, der Souverain des Kirchenstaates zu sein, ...‘, [Bedenken gegen einen solchen Gerichtshof] ‚entspringen alle dem Begriff der Souveränität.‘; Schmitt, *Katholizismus*, 31, 51.

[1058] Carl Schmitt, *Constitutional Theory*, trans and ed. Jeffrey Seitzer (Durham: Duke University Press, 2008).

[1059] Carl Schmitt, "Das Reichsgericht als Hüter der Verfassung (1929)", 63-109.

[1060] Carl Schmitt, *Der Hüter der Verfassung*.

[1061] Article 48, para 2 Weimar Constitution, in Hildebrandt, *Verfassungen*, 81.

[1062] Schmitt, preface to *Political Theology*, 2nd ed. (Munich: Duncker & Humblot, 1934), 1-4; Mehring, *Schmitt*, 338.

In the state, the factual law did not automatically enfold a normative force; instead, a meta-legal Justice was needed. Subsequently, the idea of Christ grounded the political idea of the Church to authorize the office of the Catholic pope in abstraction from the person holding this position. Because of the Catholic Church's capacity of unifying oppositional ideas and the principle of personal representation of concrete personality, Schmitt considered the Church's institution and theological form of representation a fitting analogical, jurisprudential model for the state. The added criteria of distinguishing friend from enemy within a concept of the political was meant to unify the people, but excluded those who did not fit the meta-physical myth of equality. Although attempting to save, until at least late 1932, the republican idea of the Weimar Constitution under an increasingly authoritarian president, Schmitt accepted in 1933 the replacement of the failed bourgeois idea of parliamentary democracy and fictional individualism with the idea of National Socialism. He then turned to ending the suspension of the peoples' will between abstract idea and concrete reality.

4.5.2 Bonhoeffer: *Actus Directus*

For Bonhoeffer "intentionality", in the sense of "directed immediacy", occupied the most central part of a decision. Bonhoeffer's early work on a concept of church and subsequently on a concept of God turned, with the "crisis of 1933", into a faith-centered Christology of confessional magnitude. "Decision" became to denote God's intentionality and the human being's willingness of hearing and doing the will of God, as revealed in the person of Jesus Christ. Bonhoeffer rejected the interpretative self-reflective consciousness (*actus reflexus*) of the self-enclosed idealist system that stood opposed to an outwardly directed consciousness of hearing God's revelation and direct application of God's will (*actus directus*).[1063] In the phenomenological language of his early work, the central problem was that 'act should be thought of as pure intentionality, alien to being.'[1064] Theologically speaking, he meant that there is no method for human beings to place themselves into God's truth,[1065] and God cannot

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[1063] ‚Daβ er [der Akt] sich bewuβt vollzieht nötigt zur Unterscheidung zwischen direktem Bewuβtsein (actus directus) und dem Bewuβtsein der Reflexion (actus reflexus); in jenem ist das Bewuβtsein reines „gerichtet auf", in diesem vermag es sich selbst gegenständlich, sich seiner selbst in der Reflexion bewuβt zu werden.'; DBW 2:23; DBWE 2:28; emphasis in original.

[1064] ‚Akt soll seinsfremd als die reine Intentionalität gedacht werden.'; DBW 2:23; DBWE 2:28.

[1065] 'There is, therefore, no method for the knowledge of God; … for they are not able to place themselves into the truth.'; DBWE 2:92. '… there is in fact no "method", no way of reaching the ultimate.'; DBWE 6:167.

be reached through an idea of God.[1066] Rather, 'God alone can speak of God',[1067] thus knowing God is always an act of faith in the revelation in Christ.

Sinful humanity, from which the single human being cannot be abstracted,[1068] has through the Fall into Original Sin died to hearing and doing God's will. In *Creation and Fall*, Bonhoeffer insisted that based on Adam's and Eve's Original Sin of listening to and acting on the snake's temptation, the center of the human condition becomes the inter-connectedness of the tree of knowledge and the tree of life of the Garden of Eden. Instead of directly hearing God's voice the human being interprets, discusses, reasons, and reflects in philosophical thought about the transcendent as its object. But reflection displaces 'the intentionality that is characteristic of the act'.[1069] Furthermore, reflection that rationalizes reality through the category of possibility disrupts the immediacy, the act-of-relating (*Aktbezug*), to God and prevents the human being from understanding the true self.[1070] In his *Act and Being*, and further in his *Inaugural Lecture*, Bonhoeffer explained that in questioning the self, the self cannot 'appear as an object' and 'capture itself' because 'it views itself as something transcendent to itself' and thereby 'encounters the boundary of transcendence'.[1071] Finding the self, transcended within the self, it now encounters the two possibilities of either misappropriating transcendence and drawing it into the self, or reaching beyond the self in an ever-renewed relation to transcendence.[1072] The self can either stay enclosed within the self or acknowledge its limits and knowledge from outside the self. Nonetheless, as he writes in *Act and Being*, the human cognition which draws anything objective into itself cannot turn the transcendent 'into an object of knowledge' because the transcendent is 'the basis of the very possibility of all knowledge'.[1073] Therefore, Bonhoeffer asserted 'God always remains subject' and evades human cognition. With the objective position already taken in cognition, revelation takes the

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[1066] 'It is certain that when we speak of God, this idea of God comes naturally to mind; but it is equally certain that God as such is not reached through it'; DBWE 2:92.

[1067] DBWE 2:92.

[1068] For Bonhoeffer the single person cannot be divorced from humanity through abstraction; DBW 2:117-18. DBWE 10:404.

[1069] DBWE 2:28.

[1070] DBWE 10:405.

[1071] DBWE 10:390.

[1072] cf. DBWE 10:390-91.

[1073] DBWE 2:91.

non-objective position.[1074] Because revelation is able of tearing the human being out of the self-imposed boundary of thinking that is 'characterized by the possibility of being transcended', out of self-focused reflection, no room remains for a concept of possibility in theology.[1075] Instead of speaking about God which keeps thinking self-enclosed outside the truth,[1076] the question about the human being is answered from and before God, from beyond existence,[1077] from the transcendent. True self-understanding lies in the *actus directus*, because the human being's 'unity is grounded in God's word directed towards him'.[1078] For Bonhoeffer, the essence of the *actus directus* lies 'in its intentionality towards Christ which is freely given by God' in the way in which 'Christ touches upon existence in its historical, temporal reality'.[1079] This is because 'faith rests in itself as *actus directus*',[1080] in pure intentionality.

The truly self-understanding human being knows itself placed into the truth by Christ in judgement and in grace and thus stands in the decision; that is, this human being of unity, of self-understanding, stands in God's decision "for" the human being. At the same time, the human being exists and decides, that is, exercises its human will, under God's realm.[1081] In the re-creation of the unity of the human self that is presupposed in salvation history with Christ's mediation between the old and the new life,[1082] the human being is through the cross reconciled to the tree of life in the penultimate time and 'no longer know(s) good and evil'.[1083] For the pardoned sinner, the interpreted world of the ego dies. Instead, being of oneness means knowing that 'existence is founded alone in God's Word',[1084] in direct, immediate relation to the Word, that is, without interpretation.[1085] In his *Ethics*, Bonhoeffer explained

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[1074] 'Epistemologically speaking, only the nonobjective position leaves room for revelation, since the objective position is drawn by the I into itself, which leaves free the being of what is, although it cannot become objective. But if revelation is nonobjective, it follows theologically that God always remains subject and always evades humanity's cognitive clutches.' DBWE 2:91.

[1075] DBWE 10:403.

[1076] '… as long as they speak 'about' God, their thinking will remain self-enclosed outside the truth.'; DBWE 2:92, emphasis in original.

[1077] DBWE 10:403.

[1078] DBWE 10:405.

[1079] DBWE 2:100.

[1080] DBWE 2:128.

[1081] DBWE 2:96.

[1082] DBWE 12:327.

[1083] DBWE 6:316.

[1084] DBWE 2:102.

[1085] DBWE 10:406-07,

that this human being hears and at once does the will of God in simplicity (*Einfalt*) and 'without conflicting thought'.[1086] Renewed in their mind and in con-formation (*Gleichgestaltung*) with the child of God,[1087] to Jesus Christ in whom God "became human" (*Menschgewordene*),[1088] the single-minded (*einfältig*) discernment of God's will is no longer a choice between various possibilities, no intuition, feeling, natural impression upon the human heart, or a system of rules, but it is heart, intellect, observation, and the experience of working together while nonetheless depending entirely on God's grace.[1089]

However, despite the need for immediate simplicity, only the person who combines simplicity with wisdom keeps the single truth of God in sight and at the same time recognizes that which is significant within the factual.[1090] Such a person, Bonhoeffer clarifies in *Ethics*, looks beyond principles at the essence of things. With a fresh vision, this person observes and selects the essential instead of being blinded by limiting principles. Simplicity and wisdom are united because 'there is no true simplicity without wisdom, and no wisdom without simplicity.' But Bonhoeffer insists further, that as an idea the unity of simplicity and wisdom is doomed to failure. This unity does not lay 'somewhere beyond reality in the realm of ideas'.[1091] They are reconciled in Jesus Christ, the only place where God and the reality of the world, were wisdom and simplicity, are reconciled. 'The name of Jesus Christ is not an abstract concept'[1092] that is 'primarily concerned with formation (*Gestaltung*) of the world by planning and programs'.[1093] The figure (*Gestalt*) of the God-man Jesus Christ, the 'once-ness

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[1086] DBWE 6:318.

[1087] DBWE 6:321; Bonhoeffer was fascinated with 'the problem of the child in theology'; DBWE 10:128. His book *Act and Being* climaxes in a reference to the classical Protestant dogma of *fides directa* that describes' the act of faith which, even though completed within a person's consciousness, could not be reflected in it.' He connects this to a child's openness to an eschatological future; DBWE 2:158-59. In his Inaugural Lecture Bonhoeffer connects the *actus directus* to 'the relaxed disposition of a child toward its father'; DBWE 10:407. And in *Ethics* Bonhoeffer added a discourse between a child and his teacher on telling the truth; DBWE 16:602-03. Even though it was suggested that the interest in the child was inspired by Nietzsche (Hans-Richard Reuter, editor's afterword to the German edition to DBWE 2:177) it does remind one of the connection Kierkegaard drew between the child and decision: 'The child's receptivity is so completely without decision …'; Kierkegaard, *Concluding Unscientific Postscript*, 532.

[1088] DBWE 12:353.

[1089] cf. DBWE 6:320.

[1090] Robert Vosloo, "'Neither Defiant nor Despairing, but Humble and Confident': In Conversation with Dietrich Bonhoeffer and Beyers Naudé on Christian Discernment." Paper presented at the American Academy of Religion, Philadelphia 2005.

[1091] DBWE 6:82.

[1092] DBWE 6:335.

[1093] DBWE 6:93.

of historical personality',[1094] the divine miracle, discloses the mystery of the world in the "center" between God and the world and reconciles God and the world in the midst of history – Ecce homo.[1095]

Combining his criticism of idealistic system-enclosed reflection (*actus reflexus*) with his rejection of abstract ideas of God, Bonhoeffer explained in the 1932 article *Concerning the Christian Idea of God*[1096] that ideas do not challenge human beings in their existence. Ideas fit into man-made systems. In idealist philosophy, history is conceived as the realization of ideas consisting of general single historical facts. Thereby the fact of Jesus becomes a symbol of God, a transient bearer of eternal values and ideas that are 'taught by him according to the will of God.'[1097] In the context of explaining in his *Lectures on Christology*[1098] the *Docetic* heresy of early Christianity, Bonhoeffer stated the recurrence of a similar separation of flesh and mind in modernity.[1099] The modern concept of history as a carrier of religious ideas turned Christ into the representative (*Vertreter*) of such ideas which brought about a distinction that is similar to the *Docetic* separation of idea from appearance. God's appearance as human being is his personality and the idea of the human being is his human nature. Jesus's appearance as human being is incidental, as opposed to the substance, the idea, that is God.[1100] In abstracting idea from appearance, the historical person of Jesus is reduced to the embodiment of a particular preconceived religious idea above and beyond history which suppresses Jesus's humanity in favour of an image (*Bild*) of the human being and turns his "becoming human" (*Menschwerdung*) into a means to an end.[1101] Instead, Bonhoeffer asserted that in Christianity 'history is not interpretive' and 'does not enter our system of ideas and values' but 'sets for us our limitations'.[1102] It is the place of decision in its most inward sense of refusing or acknowledging, of deciding for or against God, while facing

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[1094] DBWE 10:182.

[1095] DBWE 6:82-83.

[1096] Dietrich Bonhoeffer, "Concerning the Christian Idea of God", *The Journal of Religion* 12, no. 2 (April 1932):177-85, http://www.jstor.org/stable/1197000; this article is based on a paper written during his academic studies in Berlin and is published in this prior version in DBWE 10: 451-61. All subsequent citations refer to the DBWE edition.

[1097] DBWE 10:457.

[1098] DBWE 12:331-60.

[1099] Bonhoeffer's theological criticism of Modern thought focused on the liberal theology and Hegelian philosophy. The latter he regarded as especially dangerous because it turned the nature of God into the necessity of God's appearance in the incarnation; DBWE 12:337.

[1100] DBWE 12:335.

[1101] cf. DBWE 12:336.

[1102] DBWE 10:458.

Christ. Similar to his earlier claims in *Act and Being*, he stated that the person of Christ, in whom God and human being are 'in the most complete communion',[1103] challenges human existence by leading into the situation of personal decision.[1104]

To the human being who is standing in God's decision and is being lead into personal decision, God's revelation in the historical fact of Jesus Christ is God's self-witness in reality that discloses the will of God. In its intentionality, this will of God is meant to be immediately heard and acted on by human beings in immediate simplicity of faith. Furthermore, as Bonhoeffer stated in *Ethics*, in faith the decision of God has become known to the human being as the ultimate reality.[1105] Through 'participating in God's reality revealed in Christ' who became real (*Wirklichwerden*), the antithesis of worldly ethics 'between ought and is, idea and realization, motive and work, is occupied in Christian ethics by the relation between reality and becoming real, between past and present, between history and event (faith)'.[1106] Worldly opposites that are portrayed as mutually exclusive exist within the Christ-reality in their original unity, as accepted in faith in God's ultimate reality.[1107] The person and the work are 'originally and essentially one' because 'human beings are indivisible wholes'.[1108] United in one, they can only together be either good or bad. [1109] With God's revelatory word already been spoken, the human being lives from this true reality, regardless of any human decisions.[1110] As long as faith knows God as ultimate reality, all laws and norms are abstractions in separation from origin and goal.[1111] Therefore, motives and consequences of actions must not be measured over against ready-made ethical standards because 'an ethic of disposition or intention is just as superficial as an ethic of consequences.'[1112]

In the indivisible whole of the God-reality which is under His decision, the given and revealed word in Christ is proclaimed from the office of preaching to the human beings who

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[1103] Formula of Concord, Epitome VIII, 5 (*Book of Concord*, 510) as cited in DBWE 12:345.

[1104] DBWE 10:458.

[1105] cf. DBWE 6:47-48.

[1106] DBWE 6:50.

[1107] DBWE 6:59.

[1108] DBWE 6:53.

[1109] DBWE 6:51.

[1110] DBWE 6:49.

[1111] cf. DBWE 6:48-49.

[1112] DBWE 6:52.

are drawn into the life of the created church-community of Christ. Bonhoeffer insisted that human beings participate as members of the human and created community in the indivisible whole of God's reality from creation to goal, from origin to the kingdom of God.[1113] They are drawn into the life of the church-community in which Christ exists among human beings. In the mystery of Christ existing as church-community, in the hiddenness of historicity, the single human being in Christ exists through the church-community that brings Christ. This guarantees the continuity of that human being in Christ and a self-understanding 'no longer from within himself but rather from within the Christ'.[1114] There Christ lets himself be proclaimed as the subject of the spoken word. He is proclaimed by the preachers who must be theologians.[1115] Theological thinking is 'not existential or speculative knowing' but obedient thinking and functions as the memory of the church. Theological thought belongs in its entirety solely to the church,[1116] the *sanctorum communio*. While theologians speak the Words of the past, the already spoken Word, the preacher speaks the past Word to the present, to the now, but not as existential confession or theological doctrine.[1117] Preaching is done in remembrance,[1118] and speaking such words can only be done as ecclesiastic thinking and knowledge.[1119] Truly existential Words of the past can only be spoken where the living person Christ is himself present and speaks words about God. Here 'everything depends on the office.'[1120] Preachers who know that Christ seeks to speak through them to the church-community 'proclaim the gospel by the full power of the authority of the community of faith'. Then this word is for the hearers 'a word of decision'.[1121]

Overall, in Bonhoeffer's theology God's intentionality places the human being into His decision of revealing himself in Christ. God intends direct faith. In faith, the human being hears and acts on the disclosed will of God in the immediate simplicity of *actus directus*, that is, without the possibility of interpretation in *actus reflexus*. Immediate simplicity, combined with the wisdom of intellect and experience, connects God's truth to significant facts of

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[1113] cf. DBWE 6:53.

[1114] DBWE 10:407.

[1115] DBWE 2:133.

[1116] DBWE 10:407.

[1117] cf. DBWE 2:132-33.

[1118] DBWE 2:130.

[1119] DBWE 2:131-32.

[1120] DBWE 2:133.

[1121] DBWE 2:133.

reality and to the fact of Jesus Christ. Jesus Christ, this once-ness of personality, is a historical fact that sets limits for human beings and challenges the human being into personal decisions, and is not an abstract idea for worldly use within philosophical systems or political programs. It is in the intentionality of the directness of faith, in the Christ-reality of faith, that the human being finds the indivisible wholeness of the true self. The person and work are one whole and cannot be abstracted and measured in their intent and consequences against worldly ethical standards and human decisions. And laws and norms cannot be abstracted from the world in separation from their origin and goal, that is, from God. Theology and preaching belong entirely to the church. In theological obedient thinking to the past revelation, the preacher transforms revelation into ecclesiastic knowledge of the present. The preacher's office is authorised by the community of faith as long as Christ seeks to speak through the preacher's proclamation, which is a word of decision, God's decision, to those who hear it in faith. Thus Bonhoeffer's intent was to establish God's intentionality.

4.5.3 Intent and Intentionality

"Intent" and "intentionality" mark for Bonhoeffer and Schmitt the most central part of the decision, and expose the innermost differences of their positions. With the immediacy of intentionality, Bonhoeffer addressed Schmitt's abstractions which were rooted in the latter's earliest theories. Schmitt's objection to *dolus directus* and Bonhoeffer's embrace of *actus directus* are located at the diametrically opposing sides of Justitia's scale while addressing the same issues.

The rejection of a *dolus directus*, the immediacy between the violation of a legal standard and guilt within criminal law, helped Schmitt to separate the objective intent from the subjective guilt. This separation transformed through a variety of intermittent stages eventually into the abstraction of idea from factual reality. Abstracting subjective thought from the evaluation of the human being as its object, led to turning Christ into an idea of man to be represented to the people. This abstracted the office from person, and divided the institutional church into a formal carrier of juristic spirit and into a material, substantial part for social formation. Schmitt intended to provide with the method of politically distinguishing between friend and enemy, and the modos of structural analogies between theology and juristic models, to overcome the dualities that entered the world with the sin of man. Thus the abstracted idea of God that the Catholic Church, the heir of Roman jurisprudence, was authorized by Christ to

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represent and implement, together with the unity-creating *complexio oppositorum*, provided the form for Schmitt that could be applied in an analogy to the contemporary secular context for the purpose of consolidating and representing the unit of the people, and for implementing a political idea in the modern state.

To measure subjective motives and intentions, and their consequences, over against standards such as laws, which are abstract from the ultimate reality of God, was for Bonhoeffer a superficial activity. Instead, in God's intentionality the human being is willing to hear and do the will of God as revealed in Jesus Christ in direct immediacy (*actus directus*), without interpretation or self-reflection. The *actus directus* draws the whole human being outside of philosophical systems into continued relation to the limits of transcendence and revelation. Separating God from reality as an idea in distance to the world is a heresy. Based on this separation it is impossible to know and apply God's idea. Rather it is in Jesus Christ where God and reality meet in simplicity and wisdom, beyond principles. Jesus Christ is the place at which in once-ness the human being is united to the truth of God. Original Sin did not bring dualism to the world, but the Fall had separated the human being from God and had moved humanity under the one-dimensional ultimate reality of God's decision. In God's intentionality, Christ reconciled the human being to the wholeness of the self. Knowing God is an act of faith in His revelation in Christ. In opposition to Schmitt's *complexio oppositorum* through which ideas are unified, it is for Bonhoeffer the *sanctorum communio* in which human beings participate in the indivisible whole that God intentionally united, and where the Word of the past as revealed in Jesus Christ is spoken by preachers that are authorized by the church community.

The function Schmitt assigns to Christ is that of an archetype of non-conflict. In Christ as the God "becoming human", God and human beings cannot move into conflicting positions. The archetype Christ thus can be used as an ideal model for ending the conflcts that came into the world with Original Sin. For Bonhoeffer, in Christ, as the one person in history in whom God "had become human", God's revelation can be heard and acted on by human beings in the directness of non-conflicted simplicity. Christ is not an idea for removing conflict, but in God's intentionality the uninterpreted immediacy of the simplicity of faith is without conflicting thought. Christ, understood as God "becoming human" (*Mensch werden*), separates him into idea and personality, but as "having become human" (*Menschgewordener*)

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he is the Trinitarian Christ who is the One in historical once-ness.[1122] For Schmitt, the human being, whose act-of-will (*Willensakt*) is objectively evaluated over against human (criminal) law, lives under legal decisions. Bonhoeffer's human being lives despite human decisions in an act-of-relating (*Aktbezug*) to God's ultimate reality, His Word and decision. Thus, according to Bonhoeffer, it is not the lawyer, but the preacher who speaks 'a word of decision'.[1123] The specific shape in which Schmitt's and Bonhoeffer's view of intent and intentionality became actively manifested will be discussed in the following chapter.

4.6   Active Manifestation: Synchronisation (*Gleich-schaltung*) or Conformation (*Gleich-gestaltung*)?

The element of "active manifestation" provides to the intent the external material structure. It is the active implementation of an envisioned resolution. Generally, its purpose is to change a present situation and, specifically, it is meant to alleviate a concrete need. For both Bonhoeffer and Schmitt, the German words *Gestalt*, and its more active version of *Gestaltung*, became central to implementing their visions. In his 1923 *Roman Catholicism and Political Form*, Schmitt stated that 'Formation (*Gestaltung*), figure (*Figur*) and symbol' follow from the representation[1124] of an idea. In the "crisis of 1933" Bonhoeffer criticized using the once-ness of the historical fact of Jesus as symbol.[1125] In his *Lectures on Christology* he defined Christ as *Gestalt*,[1126] and in the 1940s he connected ethics to formation (*Gestaltung*).[1127]

The German word *Gestalt* is a difficult word to translate and is best served by being circumscribed. The term *Gestalt* appeared in the late 19th century, connected to meaning, essence, content, and perception, and was used interchangeably with "form".[1128] Later *Gestalt* became the essence of a figure that determined exactly what the figure was,[1129] and the word

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[1122] cf. DBWE 12: 354- 55.

[1123] DBWE 2:133.

[1124] Schmitt, *Katholizismus*, 37.

[1125] DBWE 10:457.

[1126] DBWE 12:297.

[1127] DBWE 6:62.

[1128] W. B. Pillsbury, "The Units of Experience – Meaning or Gestalt", *The Psychological Review* 40, no.6, 484, 485.

[1129] Pillsbury, "The Units of Experience", 485.

Gestalten came to describe ideas that were used in or developed through thoughts.[1130] As a 'doctrine of the group as a whole',[1131] *Gestalt* is 'not definable in terms of its parts or of the conditions under which it arises.' It is immediately known and not analyzed, described, or modified by experience. Supposedly, *Gestalt* completes itself and is measured as good according to its degree of domination.[1132] In his essays on Goethe and Schiller which Ernst Cassirer published in 1921 under the title *Idee und Gestalt* he declared that the "form" of any philosophical system of thought is united in its method because method denotes the point at which the subjective and objective moments connect and separate and is the most personal element of mirroring the intellectual process.[1133] In the course of the 1920s, *Gestalt* rose to prominence as an approach to change. *Gestalt* incorporated, amongst others, the principles of simplicity, proximity, and continuity and used as a general focus of interest the "figure" as a concept of perception, and "ground" as the unbound and formless context to "figure" for providing the connection to past memories and present moment.[1134] Schmitt and Bonhoeffer used the terms *Gestalt* and *Gestaltung* with references to form, figure, and symbol for manifesting their intent in regards to the synchronization (*gleich-schalten*) and conformation (*gleich-gestalten*) of human beings.

4.6.1 Schmitt: Subject, Content, and Self-significance

In his book *Roman Catholicism and Political Form*, Schmitt praised the Catholic Church's "jurisprudential invention" of representing the idea of Christ. His *Political Theology* provided the method of "how", the structural analogy, for transforming the Christian idea into a jurisprudential idea (*Rechtsidee*) and the "who", the sovereign, for applying it. His analysis in *The Crisis of Parliamentary Democracy* criticized liberal parliamentary democracy and delivered the connection to other contemporary political ideas. Subsequently, in his *Constitutional Theory*, he defined the concept of representation as it was built on the political, foundational idea of homogenous identity of the ruler and the ruled. On this basis, he

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[1130] Pillsbury, "The Units of Experience", 486.

[1131] Pillsbury, "The Units of Experience", 484. In DBWE *Gestalt* is explained as referring 'to an integrated structure and pattern that comprises a whole and is more than the sum of its parts'; DBWE 12:300 note 3.

[1132] Pillsbury, "The Units of Experience", 486, 487.

[1133] Ernst Cassirer, *Idee und Gestalt: Goethe / Schiller / Hölderlin / Kleist: Five Essays* (Berlin: Bruno Cassirer, 1921), 79.

[1134] cf. Erving Polster and Miriam Polster, *Gestalt therapy integrated: Contours of theory and practice* (New York: Brunner and Mazel, 1973), 30.

participated in developing the statute-law that synchronized (*gleichschalten*) the provincial administrations to a centralized federal institution, the state, and in 1933 he accepted the political idea of National Socialism. Adapting to this idea, he turned to structurally form this new reality in reference to normativism, decisionism, and institutionalism, and to define the political idea of homogeneous identity of the German people in racial terms, represented by the *Gestalt* of a dictator and as their highest judge.

According to Schmitt, as a reaction to the processes of mechanization and objectification of all social relations since the 16th century,[1135] the Catholic Church had preserved the Roman rationalism in a way that captured human nature.[1136] It was not an apparatus of mechanized soulless formality,[1137] since the Church had preserved the matter of human life, rational creativity and humanity.[1138] Through centralizing its bureaucracy, organization, and its hierarchical administrative structure, the Catholic Church had utilized the universalism of the Roman Empire.[1139] This had enabled the Church to unify, in a *complexio oppositorum*, different, even oppositional ideas, by responding to an either-or situation with an as-well-as,[1140] instead of synthesising antithesis into an always absent higher third.[1141] Schmitt understood the Catholic Church as being able of combining ambiguity with precise dogmatism and a will to decision (*Dezision*).[1142] For Schmitt, 'this rationalism is grounded in the institutional and is essentially juristic'.[1143] The jurist, the 'theologian of the existing order', was similarly capable of accommodating different political forms and power-complexities.[1144]

For Schmitt it was the strict execution and the strength of the concept of representation that had determined for the Church the formation (*Gestaltung*), figure (*Figur*), and visible symbol.[1145] He understood the political idea of the Roman Catholic Church as a juristic

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[1135] Schmitt, *Katholizismus*, 28.

[1136] Schmitt, *Katholizismus*, 23.

[1137] cf. Schmitt, *Katholizismus*, 19.

[1138] Schmitt, *Katholizismus*, 24.

[1139] Schmitt, *Katholizismus*, 9.

[1140] Schmitt, *Katholizismus*, 11-12.

[1141] Schmitt, *Katholizismus*, 19.

[1142] Schmitt, *Katholizismus*, 14.

[1143] ,Dieser Rationalismus liegt im Institutionellen und ist wesentlich juristisch'; Schmitt, *Katholizismus*, 23.

[1144] Schmitt, *Katholizismus*, 49-50; own translation.

[1145] Schmitt, *Katholizismus*, 14, 31, 37.

representational-institutional form that personified in the office of the pope the idea of Christ's mediating function. In his earlier writings, Schmitt had insisted that the essence of the Church was Christ the mediator who had descended, because mediation can only proceed from above.[1146] With Christ, 'divinity entered humanity', and also the corporate entity which is the great institution of mediation, namely the Church.[1147] Drawing in 1923 a connection to the Roman law of antiquity, Schmitt added that the church represents the *civitas humana*; she facilitates in every moment the historic connection to the "becoming human" (*Menschwerdung*) and crucifixion of Christ. Thus the Church represents Christ personally, the God who "became human" in historic reality.[1148] For Schmitt, God entered through Christ the human social body of citizens. Here he was represented by the Church. Schmitt also built on his earlier thought that only in the realm of mediation between God and the world human personality exists,[1149] that is, here the personality of Jesus Christ, the mediator, exists. Schmitt now views the church as a 'concrete, personal representation of concrete personality'[1150] with the figure of the pope in the middle between the church and the Papal state, whose sovereign the pope is insisting to be.[1151] The greatest achievement of the Catholic Church was for Schmitt having turned the priest into an office.[1152] And the pope was not a prophet,[1153] but authorized in a personal mandate in a straight line from Christ himself and thus was bestowed with a dignity that was abstracted from the person, but was nonetheless not impersonal as that of the modern civil servant.[1154] Thus, as Schmitt had

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[1146] cf. Schmitt, „Visibility", 50, 52.

[1147] Schmitt, „Visibility", 57.

[1148] ‚Sie repräsentiert die civitas humana, sie stellt in jedem Augenblick den geschichtlichen Zusammenhang mit der Menschwerdung und dem Todesopfer Christi dar, sie repräsentiert Christus selbst, persönlich, den in geschichtlicher Wirklichkeit Mensch gewordenen Gott.'; Schmitt, *Katholizismus*, 32.

[1149] Schmitt, „Visibility, 51.

[1150] ‚... [ist] die Kirche aber eine konkrete, persönliche Repräsentation konkreter Persönlichkeit.'; Schmitt, *Katholizismus*, 31, own translation.

[1151] Schmitt, *Katholizismus*, 31. At the time of Schmitt's writing in 1923, the sovereignty of the Pope as head-of-state of the Vatican was a contentious point of discussion because the founding document of the Vatican state, the Lateran Contract between the Italian state and the Papacy, was signed only six years later in 1929.

[1152] ‚... seine große Leistung liegt darin, daβ er das Priestertum zu einem Amte macht ...'; Schmitt, *Katholizismus*, 23.

[1153] Schmitt, *Katholizismus*, 23.

[1154] ‚... erhält der Priester eine Würde, die von seiner konkreten Person ganz zu abstrahieren scheint. Trotzdem ist ‚... seine Würde nicht unpersönlich wie die des modernen Beamten, sonder sein Amt geht, in ununterbrochener Kette, auf den persönlichen Auftrag und die Person Christi zurück.'; Schmitt, *Katholizismus*, 24.

declared earlier, the unity of God, mediated in history through mortal man, assumed the form of a legal succession.[1155]

To his previous differentiation between public and private law and the discourse on juristic persons, Schmitt added now the thought that in distinction from economically grounded juristic persons, such as shareholder-corporations,[1156] the juristic person of the Catholic Church carried a juristic spirit. It is capable of juristic form (*Gestalt*) because of its pathos of public representational authority.[1157] Even though Schmitt called the pope the agent (*Stellvertreter*) of Christ,[1158] he clarified that in distinction to the 'simple agency' (*einfache Stellvertretung*) of private law,[1159] representation needed an authoritarian person or an idea, which upon being represented was also immediately personified.[1160] What could personify through being represented was the idea of God, the people of the democratic ideology, or abstract contents such as freedom and equality.[1161] And the personified authority needed an ethos of conviction because a technic of power was insufficient for the survival of any political system.[1162] Within the hierarchy of values in the world, the political idea of Catholicism lives also in the juristic form and the historical forms of power.[1163] Apart from the ethos of Justice, the Roman Church represents, according to Schmitt, the glory and honor of its own power based on the reigning, ruling, and victorious Christ. The perpetual opposition between Justice and Glory that is rooted in a general human antagonism becomes visible in the public institution of the Catholic Church instead of remaining a private Christian matter.[1164] Thus the Church makes visible God, the idea, and Justice, as-well-as Christ, power and Glory.

[1155] Schmitt, „Visibility", 57.

[1156] Shareholder corporations are collective forms that are defined in the German Commercial Code (*Handelsgesetzbuch*) which belongs to the area of private law.

[1157] Schmitt, *Katholizismus*, 31.

[1158] Schmitt, *Katholizismus*, 24.

[1159] In German Private Law, the most basic version of agency is called simple (*einfache*) *Stellvertretung*.

[1160] ‚Repräsentieren im eminenten Sinne kann nur eine Person und zwar – zum Unterschied von der einfachen "Stellvertretung" – eine autoritäre Person oder eine Idee, die sich, sobald sie repräsentiert wird, ebenfalls personifiziert.'; Schmitt, *Katholizismus*, 36; emphasis in original.

[1161] ‚Gott, oder in der demokratischen Ideologie das Volk, oder abstrakte Ideen wie Freiheit und Gleichheit sind denkbarer Inhalt einer Repräsentation, ...'; Schmitt, *Katholizismus*, 36.

[1162] ‚Kein politisches system kann mit bloβer Technik der Machtbehauptung auch nur eine Generation überdauern. Zum Politischen gehört die Idee weil es keine Politik gibt ohne Autorität und keine Autorität ohne ein Ethos der Überzeugung.'; Schmitt, *Katholizismus*, 28.

[1163] Schmitt, *Katholizismus*, 36.

[1164] Schmitt, *Katholizismus*, 53.

That the political idea in its institutional form of the Catholic Church could serve as a model for the structural formation (*Gestaltung*) of the state, Schmitt hinted at when he referred in *Roman Catholicism and Political Form* to representation as being ideologically and theoretically contained in parliamentarism. He criticised as "odd" that the members of parliament who represent the whole of the people receive an independent dignity over against the voters despite their dignity being rooted in the peoples.[1165] To him the parliament was the unit that personified the peoples (*Volk*), and was meant to represent, in similarity to the idea of the *complexio oppositorum*, a variety of interests and parties.[1166] Observing the increasing failure of the parliament, Schmitt assessed in *The Crisis of Parliamentary Democracy* that democracy missed publicity, and that individualism could not claim dignity and personality by nature. However, the political idea of Roman Catholicism suggested that the political idea of a single dignified personality could represent and unify a state and overcome the 'radical dualisms that ruled his contemporary epoch in a variety of forms (*Gestaltungen*)'.[1167] According to his *The Concept of the Political*, the friend-enemy antagonism could, in fact, have a unifying effect. However, in *Politische Theologie*, while referring to the Protestant theology's teaching of a non-political God who is the "wholly other",[1168] Schmitt turned to connecting the "theological" political idea of papal representation to the sovereign of a state and to *Dezision*.

Dezision is, according to Schmitt's *Politische Theologie*, a specific jurisprudential form that is revealed by the exception,[1169] the *extremus necessitas casus*,[1170] the utmost urgent case. This form is a two-fold decision. It decides on an extreme danger to the existence of the state, and on the measures for returning to normality.[1171] The one who decides on this formative *Dezision* is the sovereign.[1172] In the confusion and exceptional situation of the nothingness of the *Krisis*, the subject of sovereignty and the decision become independent of any concrete

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[1165] Schmitt criticized jurisprudential interpretations of Art 21 Weimar Constitution that referred to the parliament as a "representational organ" of the state; Schmitt, *Katholizismus*, 44.

[1166] Schmitt, *Katholizismus*, 43, 44.

[1167] Schmitt, *Katholizismus*, 16; own translation.

[1168] Schmitt, *Politische Theologie*, 7.

[1169] Schmitt, *Politische Theologie*, 19.

[1170] Schmitt, *Politische Theologie*, 17.

[1171] cf. Schmitt, *Politische Theologie*, 14, 18-19. The word "normality" refers in Schmitt's *Political Theology* to norms of the legal order and to legal standards.

[1172] ,Souverän ist, wer den Ausnahmezustand entscheidet.' And : [Der Souverän] ,entscheidet sowohl darüber, ob der extreme Notfall vorliegt, als auch darüber, was geschehen soll, um ihn zu beseitigen.'; Schmitt, *Politische Theologie*, 13, 14.

statute-law (*konkreten Tatbestand*),[1173] that is, of any normative legal foundation. Nonetheless, the sovereign continues to be tied to legal order because the state continues to exist despite the legal system's suspension.[1174] With his concise declaration that 'Sovereign is he who decides on the exception', Schmitt captured and combined in the situation of nihilism, a need for normative substance, and personality. For establishing and substantiating the form-principle of *Dezision*, Schmitt reconnected to his abstraction of the objective from the subjective of his early career, and criticized those efforts of the modern theory of state that used "form" for transferring any subjectivity into objectivity,[1175] such as in Gierke's, and Kelsen's theories.

Schmitt challenged Gierke's devaluation of the ruler, Weber's technical bureaucracy, the positivist normativism of Kelsen, and Krabbe's disregard for personality. For Gierke, according to Schmitt, it is not the will of the ruler that is the final source of Justice, but that the ruler is only the organ of the state who is called to proclaim the legal consciousness that emerges from the life of the people, and thereby fuses the personal will of the ruler to the state as an organic whole. A state reduced to stamping statute-law loses its sovereignty.[1176] Weber's concept of form, defined by Schmitt as a conceptual precision of legal content whose normative regulation is simply the causal component of approval, is ruled, according to Schmitt, by predictability, bureaucracy, and general technical functionality.[1177] Instead, what is necessary is a specific formation (*Gestaltung*) for the purpose of applying a juristic idea (*Rechtsidee*) to a concrete, real case.[1178] For Kelsen, the final point of reference with the highest competence in the state is not a person, but the sovereign order of a unity of a system of norms.[1179] To Schmitt, Kelsen's systematic unit, meant as an independent act of jurisprudential cognition, was simply a mathematical mythology[1180] with the purpose of

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[1173] German law knows the difference between *Sachverhalt* and *Tatbestand*. The former contains the facts of the case which are in need of evidence if their existence is questioned, while the latter is the statute-law under which the facts are to be subsumed. This difference explains Schmitt's statement that the 'exception is that which cannot be subsumed', it is a *Sachverhalt* for which no *Tatbestand* exists, and that the *Dezision* is a specific-juristic element of form; Schmitt, *Politische Theologie*, 19.

[1174] cf. Schmitt, *Politische Theologie*, 14, 18-19.

[1175] Schmitt, *Politische Theologie*, 35.

[1176] Schmitt, *Politische Theologie*, 31, 32.

[1177] Schmitt, *Politische Theologie*, 34.

[1178] Schmitt, *Politische Theologie*, 35.

[1179] Schmitt, *Politische Theologie*, 27.

[1180] Schmitt, *Politische Theologie*, 28.

discarding any arbitrariness.[1181] But in political reality no highest, that is, no greatest power functions according to the certainty of natural law.[1182] Kelsen's words of "order", "system", and "unit", paraphrase the same content, and the word "constitution", as the state's terminal point of ascription, is a possible tautology to unity.[1183] Kelsen fails to show how a point of ascription can establish itself. His state is a legal order in itself, and any perceptions to the contrary are personifications and hypostatizations.[1184] Finally, Krabbe's[1185] antagonism between personal and impersonal, and between person and idea, disregards that the correlation between personality and formal authority emerged from a specific juristic interest that forms the essence of legal decisions.[1186]

Instead, in similarity to his earlier *Gesetz und Urteil*, Schmitt declared again in *Politische Theologie* that any transfer of a legal idea into a different aggregate condition, such as a judgement, loses its purity because a moment is added that neither derives from the content of the legal idea or the applied general positive norm. The content of the statute law transforms into a different quality in the process of its application to a case, in a moment of indifference, when 'the juristic deduction is not traceable in the last detail to its premises'.[1187] However, in *Politische Theologie*, Schmitt used the earlier discourse not to explain the "how" of the interpretive inclusion of content alien to the norm, but for revealing the judge, the "who", and for establishing the judge's independence from law. Now, every transformation of a general norm in the course of evaluating a concrete case contains a distinctive designation of the authoritative person or institution, the "who", whose jurisdiction cannot be taken from the legal norm itself. Thus now, every constructive element of a decision, content and subject, is born from nothing when viewed from a normative perspective.[1188] Calling on Thomas Hobbes, the 'classical decisionist type', Schmitt declared, that within the reality of the juristic life the "who" of the decision was decisive for correctness and jurisdiction. Thus, 'the contrast between subject and content of a decision, and the significance of the self

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[1181] Schmitt, *Politische Theologie*, 46.

[1182] Schmitt, *Politische Theologie*, 26.

[1183] cf. Schmitt, *Politische Theologie*, 27-28.

[1184] Schmitt, *Politische Theologie*, 27.

[1185] Schmitt discusses at length the theory of state of Hugo Krabbe (1857-1936); Hugo Krabbe, *Die Moderne Staatsidee*, 2nd ext. ed. (Haag: Nijhoff, 1919); Schmitt, *Politische Theologie*, 22.

[1186] Schmitt, *Politische Theologie*, 36.

[1187] Schmitt, *Politische Theologie*, 36; own translation.

[1188] cf. Schmitt, *Politische Theologie*, 37-38.

(*Eigenbedeutung*)[1189] of the subject are the problem of juristic form.'[1190] Juristic form does not have the emptiness of an *a priori* form or the form of technical precision.[1191] It is coming into existence in the juristic concrete and thus is, in essence, not objective, impersonal purpose. It is a subject with a significant self, that is, it is of personality and content.

Thus having established with the principle of *Dezision* the subject and jurisdiction of the sovereign, Schmitt proceeded to manifest his position from *Roman Catholicism and Political Form* with a sociological method. In *Politische Theologie* he legitimized, authorized, and qualified the type of the sovereign. This methodological purpose was served, according to Schmitt, with a structural analogy, between theological and juridical conceptualizations, that transfers theological forms to the theory of state within the secularized context of the 20th century. The main example Schmitt used was the analogy between the exception and the miracle in theology,[1192] because of the similarity that becomes apparent in the way in which the exception, the form-element of *Dezision*, is born from outside normativity. That is, both, exception and miracle breach natural causality and originate from the nothingness of the chaos. Additionally, he argued that in the course of history the idea of God as the highest power had lost its essence,[1193] became immanent, and was replaced with the rising idea of the lawfulness of nature. Nature, as the new concept of legitimacy, had upended the monarchic principle and had claimed that all power resides in the *pouvoir constituant* of the peoples.[1194] In the revolutionary tensions, in the heightened intensity of the issue of decision, the decision manifested itself in the increasing significance of the nature of man as good or evil, and in the theological dogma of Original Sin.[1195] Through drawing parallels to thinkers of that revolutionary time, Schmitt mocked the Lutheran dogma of Original Sin as mandating

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[1189] The term *Eigenbedeutung* which Schmitt used, has been translated by George Schwab with the words "proper meaning of the subject"; Schmitt, *Political Theology*, 35. However, I translated the term literally because as "significance of the self" it also captures the attached sense of personality and independence of the subject's self. Translating „Bedeutung" as "significance" also connects to Schmitt's earlier work on *Der Wert des Staates und die "Bedeutung" des Einzelnen* (emphasis added) which is a discourse on the "significance" of the individual in relation to the state.

[1190] ‚In dem Gegensatz von Subjekt und Inhalt der Entscheidung und in der Eigenbedeutung des Subjekts liegt das Problem der juristischen Form.'; Schmitt, *Politische Theologie*, 40, own translation.

[1191] ‚Sie hat nicht die apriorische Leerheit der transzendentalen Form; denn sie ensteht gerade aus dem juristisch Konkreten. Sie ist auch nicht die Form der technischen Präzision;'; Schmitt, *Politische Theologie*, 40.

[1192] Schmitt, *Politische Theologie*, 44.

[1193] cf. Schmitt, *Politische Theologie*, 53-54; Schmitt, "Neutralizations", 90.

[1194] Schmitt, *Politische Theologie*, 51.

[1195] cf. Schmitt, *Politische Theologie*, 61-62.

obedience to every authority[1196] and complained that the decisionist and the personalist element of the concept of sovereignty was lost.[1197] And he rejected the anarchists who, based on the axiom of the goodness of the human being and corrupt government, rejected any and all government. Indirectly, through the counterrevolutionaries of the 19th century, Schmitt turned to suggesting the current need of a particular type of leadership and sovereign. Although 'dictatorship was not legitimacy', Schmitt appears to call for a decision which is 'pure, not rationalized, not discussed, not justifying, that is, built out of the absolute nothing' by someone who has the courage to political *Dezision*.[1198]

Schmitt's *Constitutional Theory* became a decisive step in the transfer of the Catholic Church's political idea of the institutional official representation of the idea of Christ into a jurisprudential-political idea (*Rechtsidee*) and its representation in the Weimar state and beyond. He evaluated the Weimar Constitution in the broader, general context of the emergence of, and in comparison to constitutions since the American and French Revolutions. Schmitt found the concrete political form of being (*Daseinsform*) of the Constitution, its core, its essence, in the idea of a democratic republic, combined with a federal-state structure and a parliamentary-representative legislative authority and government. However, it was not just the bourgeois idea of individualism and parliamentary democracy that had failed, according to his assessment in *The Crisis of Parliamentary Democracy*. It was also the combination of the three forms for a state (*Staatsformen*) – monarchy, aristocracy, and democracy – and their recurrence in the bourgeois separation and balance of powers[1199] that had led to the problem of the pretense-compromises. Most notably the problem appears within the four alternative forms (*Gestalten*) of government at the point where the monarchic principle, resting on the concept of representation, and the democratic principle, resting on the concept of identity of the peoples, intersect.

Although identity and representation are oppositional concepts, they are not mutually exclusive but are two points of orientation in the concrete formation (*Gestaltung*) of the

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[1196] 'Obwohl er [Donoso Cortes] hier mit dem Lutherischen Dogma übereinzustimmen scheint, hat er doch eine andere Haltung als der Lutheraner, der sich jeder Obrigkeit beugt;' Schmitt, *Politische Theologie*, 62.

[1197] Schmitt, *Politische Theologie*, 52.

[1198] Schmitt, *Politische Theologie*, 69; own translation; emphasis added.

[1199] cf. Schmitt, *Verfassungslehre*, 202, 204, 215.

political unit (*Einheit*), the state.[1200] Just as a state can never exist without a form that depicts it as an essential part the political identity, no state exists without representation.[1201] Because for Schmitt in a true democracy the political unit of the peoples can never be present in real identity, it therefore had to be personally represented by a human being.[1202] Needed is a form that depicts, that is, images (*darstellen*) the political unit which does not exist by nature but rests on human decision.[1203] Thus representation as a political principle of form is, according to Schmitt, an existential, never a normative occurrence.[1204] In representation, an invisible being is made public and is visibly recalled. In the dialectic of the concept, the presumed invisible is nonetheless present.[1205] Representation must be public; it can never be a private matter. This type of representative being cannot be inferior, because elevation into publicity affords glory and dignity. Already in his early *Der Wert des Staates und die Bedeutung des Einzelnen* it is only the "official" in his official capacity, the civil servant, who had impersonal dignity. He insisted thus that representation must be differentiated from private matters, and their forms of agency, authorization, managment, mandates, commissions, etc.[1206] If the parliamentary representative is treated as an agent who handles the economic interests of the voters, representation is not present.[1207] Now going beyond his earlier concept of the "official", he declared that because representation belongs to the sphere of the political it has an existential essence, cannot be captured with norms, and goes beyond a mandate

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[1200] ‚Diese beiden Möglichkeiten, Identität und Repräsentation, schließen sich nicht aus, sondern sind nur zwei entgegengesetzte Orientierungspunkte für die konkrete Gestaltung der politischen Einheit'. Schmitt, *Verfassungslehre*, 206.

[1201] ‚Es gibt also keinen Staat ohne Repräsentation, weil es keinen Staat ohne Staatsform gibt ...'; Schmitt, *Verfassungslehre*, 207.

[1202] Schmitt, *Verfassungslehre*, 206.

[1203] ‚... und zur Form wesentlich *Darstellung* der politischen Einheit gehört. ... [denn Politische Einheit] nicht von Natur aus vorhanden ist, sondern auf einer menschlichen Entscheidung beruht.'; Schmitt, *Verfassungslehre*, 207-08.

[1204] Schmitt, *Verfassungslehre*, 209.

[1205] ‚Repräsentieren heiβt, ein unsichtbares Sein durch ein öffentliches Sein sichtbar machen und vergegenwärtigen. Die Dialektik des Begriffes liegt darin, daβ das Unsichtbare als abwesend vorausgesetzt und doch gleichzeitig anwesend gemacht wird.'; Schmitt, *Verfassungslehre*, 209.

[1206] ‚Was nur Privatsache ist und nur privaten Interessen dient, kann wohl vertreten werden; es kann seine Agenten, Anwälte und Exponenten finden, aber es wird nicht in einem speziefischen Sinne repräsentiert.'; Schmitt, *Verfassungslehre*, 210. Schmitt demanded that the concept of representation be differentiated from similar concepts of private law and referrenced in this respect the 'upcoming' work of Gerhard Leibholz; Schmitt, *Verfassungslehre*, 208. Schmitt criticized Gierke's investigation into the history of law as not always consistent in the use of the words "representation", "authorization", and "agency"; Schmitt, *Verfassungslehre*, 214. He also observed that the Anglo-Saxon language does not differentiate between a private, business law version and a public law version of "representation". Schmitt refers to Johann Caspar Bluntschli who had made this differentiation already in his book *Allgemeine Staatslehre* (Stuttgart: J.G. Cotta, 1875), 488; Schmitt, *Verfassungslehre*, 209.

[1207] Schmitt, *Verfassungslehre*, 213.

(*Auftrag*).[1208] Representation produces the unity of the peoples in their political form. The personality within the publicity gives value to representation and character to political life. Personality is in public representation, not in the concept of the state, that is, not in the status of the political unit.[1209] The state is for Schmitt a combination of two principles of formation (*Gestaltungsprinzipien*): Identity denotes the peoples who as a political unit, by virtue of its political consciousness and national will, are able to differentiate between friend and enemy while representation images (*darstellen*) this political unit through government.[1210]

For Schmitt, in representation, here reminiscent of Kierkegaard, a higher form of being appears. Appearing is a higher, intensified form of the being of the political unit of a concrete, existing peoples which is always represented as a whole. This political unit, the German nation, differs from the natural being (*Dasein*) of a coincidental group of people[1211] because it is established according to the principle of differentiating between friend and enemy. This principle which Schmitt had developed shortly before in *The Concept of the Political* did not only differentiate between nations but served also for detecting the stranger within a nation. Combined in *Verfassungslehre* with the elements of sovereignty and identity, it would, according to Schmitt, define the specific character of Germany. He clarified that the German Reich of the Weimar Constitution was no longer a federation (*Bund*) in the sense of the 1871 Constitution. This previous federation between various independent German countries had the purpose of preventing war among them and for mutual protection against other nations. Their substantial homogeneity, that is, the concrete concord of being (*seinsmäßige Übereinstimmung*) of the population and their structural organizational homogeneity that was based on the monarchic principle, had enabled the member-states to transfer sovereignty to the federation in regards to questions of true conflict.[1212] Such questions concerned, according to Schmitt, conflicts with an enemy who is the existentially

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[1208] Schmitt, *Verfassungslehre*, 211-12.

[1209] Schmitt, *Verfassungslehre*, 205, 214.

[1210] Schmitt, *Verfassungslehre*, 214.

[1211] ‚In der Repräsentation dagegen kommt eine höhere Art des Seins zur konkreten Erscheinung. Die Idee der Repräsentation beruht darauf, daβ ein als *politische Einheit* existierendes Volk gegenüber dem natürlichen Dasein einer irgendwie zusammenlebenden Menschengruppe eine höhere und gesteigerte, intensivere Art Sein hat.‘; Schmitt, *Verfassungslehre*, 210; emphasis is in the original.

[1212] cf. Schmitt, *Verfassungslehre*, 371, 376.

other and alien, the utmost intensification of being-different.[1213] However, the Weimar Republic had overcome this model with the political unit of the German people as the constitution's foundational power, and thus had stated in the preamble that "the German people are united in their roots." [1214] The sovereignty regarding questions of protection, determining the enemy, and the situations of conflict rests with the Weimar state's representation as a whole.

Consequently, the Weimar federal structure incorporates the previously separate states into the overall organization of the Weimar state. The declaration that federal law overrides provincial law[1215] makes it a constitutional duty for the provinces (*Länder*) to execute federal administrative orders and presidential decrees.[1216] Schmitt regarded it as constitutionally permissible that federally ordered alterations (*Um-schaltungen*) could reorganize inter-provincial boundaries, regroup the provinces and even abolish one against its will, but not to the point of abolishing the federal structure altogether, and could differentiate between groups of population within a province.[1217] Even though at the time of writing this *Verfassungslehre* in 1928/29 Schmitt demanded a constitutional act of the political unit of the German people[1218] for transforming the Weimar state into a unitary state (*Einheitsstaat*), his "theory of federally ordered administrative alterations" presented the jurisprudential foundation for the 1933 Act of Synchronization (*Reichsstadthaltergesetz*). This Act reorganized (*gleich-schalten*) the provinces with a focus on the *Führer* as the representative of their combined whole of a racially differentiated population into Aryans and non-Aryans, according to the friend-enemy distinction.

With his active participation in developing the Act of Synchronization Schmitt manifested in reality the political idea of a superior identity over against enemies. Identity is represented, as a whole, by a dignified personality in methodological analogy to the Roman jurisprudential model as exemplified by the Catholic Church. Schmitt called this new organizational

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[1213] ,Der Feind ist seinem Begriff nach etwas seinsmäβig Anderes und Fremdes, die äuβerste Steigerung des Anders-Seins, die im Konfliktfalle zur Vereinigung der eigenen Art politischer Existenz führt.'; Schmitt, *Verfassungslehre*, 377.

[1214] Schmitt, *Verfassungslehre*, 389.

[1215] ,Reichsrecht bricht Landesrecht.'; Article 13, para 1 Weimar Constitution, in Hildebrandt, *Verfassungen*, 72. Schmitt, *Verfassungslehre*, 381.

[1216]cf. Schmitt, *Verfassungslehre*, 382-83, 385.

[1217] cf. Schmitt, *Verfassungslehre*, 390-91.

[1218] Schmitt, *Verfassungslehre*, 391.

formation (*Gestaltung*), this synchronization (*Gleich-schaltung*), the 'new constitutional law'. In a final manifesting move, Schmitt declared in June 1934 the *Führer*, the representative "figure" that unified the German people into an exclusive, racially defined superior identity, to be also their highest judge who decides in place of the whole nation on the content and scope of restoring "normal justice".[1219] In accordance with the foreword to his republished *Politische Theologie*, which named institutionalism as the meta-personal third type of formative jurisprudential thought – in addition to the impersonal-normativist and the situational, personal-decisionist types[1220] – he attempted to manifest the institutional type with his 1934 theory *Über die Drei Arten des rechtswissenschaftlichen Denkens*. However, this failed because the National Socialist sovereign judge could not to be brought back into an institutional "normal", not even the kind that grounded his totalitarian position.

Thus Schmitt actively manifested for the formation (*Gestaltung*) of the state a secularized version of the idea of God, as figure and symbol, and as represented to the world through the office of the pope. The formative element (*Gestalt*) of a people, unified in racial identity, was represented by the figure of a dignified personality in public office who provided content and was justified by the courage to act on the formative principle of *Dezision*. Synchronization as the formative method of a new institutionalism was meant to establish and supersede the representative decisionist formation. But Schmitt's attempt to ground the idea of National Socialism in a new institutional "normal" that defined content, failed due to the self-significant absolute sovereign's absorption of the *Gestalt* of the homogenous people into one synchronized identity that was represented solely by his figure of personality, and who had stepped and remained outside any normative or institutional structure.

4.6.2 Bonhoeffer: Idea, Appearance, and the Person

Bonhoeffer proceeded to actively manifest and preserve God's intentionality as instituted and spiritually continued in the form and figure of the *Sanctorum Communio*, the Christ existing as church community. Realizing the dangers a self-significant sovereign, who was legitimized through an analogy to a Christian institutional form, presented to the Protestant Church he insisted on a *status confessionis* and entered the inner-church discourse on

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[1219] Schmitt, "Der Führer", 230.
[1220] Schmitt, preface to *Politische Theologie*, 8.

constitutional matters and the public space with presentations, lectures, engagement in the ecumenical movement, and support of the work of the Confessing Church.

He grounded his objection to the political developments, and in due course his resistance,[1221] in the form of the institution of the Protestant Church as a worldly manifestation and continuation of the divine revelation in the person of Christ. In his Christology and his salvation history, rendered with his contemporary times in mind, Bonhoeffer grounded and manifested his objection to the dangers of replacing the Christian divinely revealed message in Christ with a human self-declared absolute dictator shrouded in the mythical idea of a national unit in identity with his self. Parallel to the political developments and to his various activities, the weight of his theology shifted from an emphasis on the form of the institutional, in *Sanctorum Communio*, to the *Gestalt* of Christ in his *Christology Lecture*s and finally to an emphasis on the con-formation (*Gleich-gestaltung*)[1222] of all human beings to Christ and its ecclesiastic form in *Ethics*.

His early work on the Church as a spiritual institution *sui generis*, centered on Christ, in independence of the state, and on establishing the difference of theology from modern philosophical concepts in *Act and Being*, proved a good foundation for objecting to the state's 1933 attempt of synchronizing (*gleichschalten*) the church to a state, under a Reich-bishop who was, similar to the provincial governors, personally accountable to an absolute, and shortly thereafter tyrannical, human leader. In the April 1932 essay *Concerning the Idea of God*,[1223] Bonhoeffer drew a connection between the idea of God and the idealist conception of history which he both assessed as being adverse to an understanding of Christ as a once-ness in history, and to God's personality as beyond ideas. Fully in line with his earlier assessment in *Act and Being*, he insisted in this essay that in idealist philosophy the fact of Jesus Christ becomes, through reinterpretation, only a 'transient bearer of eternal values and ideas' who teaches new truth according to God's will. This keeps God's will and truth within

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[1221] Christoph Strohm qualifies Bonhoeffer's theology since 1933 as an opposition (*Widerspruch*) which gradually progressed by 1938 into an active resistance (*Widerstand*); Christoph Strohm, *Theologische Ethik*, 6. Overall, Strohm ascribes this development to a shift in influence from Leibholz to Dohnanyi after Leibholz's emigration to England. Dohnanyi turned Bonhoeffer's attention to the single Christian outside the Church. For Strohm, Bonhoeffer thus moved from his 1929 original attempt at a Christian ethics that stood under the *völkisch* national-conservative influence of the Republic-hostile German Lutherans to a peace ethics in response to his America travels, to an ethics of the concrete command under Leibholz's initial influence in 1931/32, and gradually with Dohnanyi's input to a theological ethics of the political.

[1222] DBWE 6:322.

[1223] DBWE 10:451-61; also published as Dietrich Bonhoeffer, "Concerning the Christian Idea of God".

the human system of ideas. What is ignored is that the essence of history sets limits for human beings and is the place that leads 'into the situation of personal decision', 'a decision for or against God'.[1224] This decision, Bonhoeffer continued, is executed in facing Christ, that is, God's 'self-revelation of personality'.[1225] In the act of human faith, executed by God himself, human beings "transcend" the limits of the self. At the intersection between God's self-revelation and faith as the act of receiving, 'the personalities of God and of man come in contact with each other.' Differentiating between the formal and the material within faith, he stated that the 'idea of faith' as the counterpart to the 'formal idea of self-revelation' is 'primarily directed toward the authority of God, not to the content of his word' because 'it is the authority that gives weight to the content, not the reverse.'[1226] Thus the human "idea" of faith only recognizes God's authority for determining the content of His Word, His revelation.

But by the fall of 1932, Bonhoeffer began to rethink and concretize his position on authoritative personality, of content being secondary to authority, and the personal aspect of the decision of faith. Instead, it was the primacy of the Word, standing under God's decision, and the *Gestalt* of Christ who forms (*gestalten*) the human being, that gained strength in his theology. In his November 1932 address of *Thy Kingdom Come!* Bonhoeffer insisted on the institutional separation of the juristic person of the Church over against the juristic person of the state, but stated that both were part of the one kingdom of God. Church and state are the two forms of miracle and order 'in which God's kingdom on earth presents itself'.[1227] Within this kingdom 'the church limits the state, just as the state limits the church.'[1228] And in his summer 1933 *Lectures on Christology*, he clarified that Christ is not the center of a visible state-church but the hidden center of the history that is made by the state, and that in his form as church Christ is the mediator between the state and God. The church with Christ at its center mediates between state and God. Because it is the state's nature to create with its actions law and order for bringing the goal of its people closer to fulfillment, the messianic idea always lays hidden behind the state's idea of creating order.[1229] Thus the messianic idea

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[1224] cf. DBWE 10:457-58.

[1225] DBWE 10:456.

[1226] DBWE 10:459-60.

[1227] DBWE 12:292.

[1228] DBWE 12:294.

[1229] DBWE 12:326, 327.

directs the laws which the state uses for fulfilling the people's goals. However, the church constitutes the limit of the state; it judges and justifies the state. In the cross, 'in God's entering into history and having to die within history', the church proclaims 'the affirmation of the law and order of the state and its ultimate breaking and abolition'.[1230] Thus to those who live by the cross, Christ's form (*Gestalt*) is present in both forms, in the form of the church and the form of the state.[1231]

Bonhoeffer added a warning in the early 1933 radio address *The Führer and the Individual in the Younger Generation.* He warned that glorifying a human leader presents dangers and that such a "personality" can only and will always fail. Instead of having authority *qua* office as a father or teacher, the authority of a leader by ideology is constantly at risk of losing the people's and the follower's allegiance.[1232] The difference between leadership by office or by person is, that the former is 'beyond personality' and recognizes given limits and responsibilities.[1233] The latter, the leadership by person though means unconditional obedience, a radical surrender of one's own rights and responsibility as an individual, and a transfer of limitless freedom to the leader as the only personality. This form of collectivism leads to an extreme individualism and a 'political-messianic idea'.[1234] This figure, seeing himself as an ultimate authority, will break under the load of responsibility,[1235] because of his ignorance of a true leader's task of leading the led into responsibility, of eternal limitations and penultimate responsibilities before God, and of his neglect of communal reciprocal responsibilities.[1236]

Thus by spring 1933, with Hitler's ascent to power and the beginning synchronization (*Gleichschaltung*) of the church to the state, the earlier reference that human beings "transcend" in faith the limits of the self, migrated to putting a weight on the limitations God places on the human being. And the references to "idea" in regards to God's self-revelation of personality, which meets in faith with human personality, disappear. The importance Bonhoeffer placed on formal authority over material content became more qualified with a

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[1230] DBWE 12:326.

[1231] cf. DBWE 12:326.

[1232] DBWE 12:279.

[1233] DBWE 12:278-79.

[1234] cf. DBWE 12:277, 278, 279.

[1235] DBWE 12:280.

[1236] cf. DBWE 12:281.

differentiation between the limited authority based on office, over against that based on an abdication of individual freedom and responsibilities to a limitless, free leader. The former came to stand for obedience to God's limitations to power, while the latter referred to a human personality of unbound power nonetheless weighed down by an overload of human responsibility. Togeather with the extreme human personality that had in 1933 assumed the position similar to a human being *sicut deus*, as described in his late 1932 account of Christian history in *Creation and Fall*, the thought of God as personality disappeared and became almost completely eliminated from Bonhoeffer's vocabulary. Bonhoeffer must have realized the danger his earlier description of a point of contact between the personality of God and the personality of man at the intersection between God's self-revelation and faith presented. This could be misconstrued into an understanding that the human being may receive godlike powers at such an intersection. Any mentioning of such a meeting-point of "personalities" disappeared. Instead, Bonhoeffer clarified in his *Lectures on Christology* that personality is an apersonal concept, realized in the concept of power and history, and is the opposite to person.[1237] Now it was not Christ's personality but his work that is of importance, that is, the material content. Building on his account of salvation history, Bonhoeffer focused on Christ as the mediator at the center of history and the human condition, that is, not only at the center of history but also at the center of human existence and nature, and proceeded to define Christ as *Gestalt*.[1238]

Christ's form, that is, his *Gestalt* is, according to Bonhoeffer's *Lectures on Christology*, His Word, sacrament and church-community. Christ's *Gestalt* "is" the Word having become human, and was not just a represented and functional membership. Because 'Christ is Word', God's truth to which He has bound himself,[1239] Christ is neither idea nor prophet.[1240] God's *logos*, in the form (*Gestalt*) of Christ and the human 'word in form of an idea',[1241] are mutually exclusive, because the "idea of God" that is embodied in Christ is not accessible by any person at any time.[1242] Christ's presence, his existence, is preaching as this takes form in the sermon. The Word, God's revelation in Jesus Christ, is God's Word "having become

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[1237] DBWE 12:311.

[1238] DBWE 12:300, 315.

[1239] DBWE 12:315.

[1240] DBWE 12:317.

[1241] It appears that Bonhoeffer used the word form (*Gestalt*) only once in regards to the human word. He rather referred to the human word as an idea; DBWE 12:316.

[1242] DBWE 12:316.

human" (*menschgeworden*) in human word. God's Word spoken in freedom as personal address of speaking and response of one to another calls to responsibility and desires community.[1243] The continuity between Word and creature, which is lost to fallen creation, is provided for in the sacraments of the church-community where the God-human Jesus Christ is wholly present and not only as an idea.[1244] The sacrament is the form (*Gestalt*) of the Word, the Word in bodily form that becomes reality in the midst of the world. Bonhoeffer clarifies, that the sacrament 'does not represent (*repräsentieren*) the "Word", for only that which is not present can be represented (*repräsentiert*).'[1245] Thus the sacrament is not the hiddenness of a bodiless Word, and not the question 'about the possible union of divinity' with humanity; instead it is about the hiddenness of the God-human who is nonetheless present.[1246] As reality of the Word and the sacrament, Christ "is" the church-community, that is, the bodily form he takes 'between his ascension and his second coming' and not simply a concept that functions for its members.[1247] History lives between the promise of the messiah and fulfillment. Because it cannot fulfil the promise by itself, history wants to glorify itself in an impossible fulfillment of a degenerate (*entartete*) promise;[1248] that is, the salvation history in Christ cannot be fulfilled by a self-pronounced human absolute leader claiming faithful followers.

Further, Bonhoeffer explicitly clarified that Jesus Christ, the God who has become human (*Menschgewordene*) is not the representative (*Repräsentant*) of an idea of God. One should not speak of a God "becoming human" (*Menschwerden*), which is the "how" question. But instead the question should be "who" "became human" (*Menschgeworden*).[1249] To avoid, in regards to revelation, a new version of the Docetic heresy,[1250] which is based on an abstract idea of God that is known before revelation and independent of the human element,[1251] it has to be presupposed that 'the God revealed to us is identical with God himself'. Otherwise, due

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[1243] cf. DBWE 12:316-17.

[1244] DBWE 12:318-19.

[1245] DBWE 12:318.

[1246] DBWE 12:319-20.

[1247] DBWE 12:323.

[1248] DBWE 12:325. Within the National Socialist ideology everything non-Aryan was called degenerate (*entartet*), such as degenerate literature or art.

[1249] DBWE 12:341.

[1250] 'If one does not rid oneself of this [philosophical] presupposition – about idea and appearance – one will never be free of docetism in some form.' DBWE 12:335.

[1251] DBWE 12:333.

to the Docetic antithesis of idea and appearance, there would be only an appearance or an idea.[1252] Since the "how" question, the material thinking of how God became human, has proven itself over time to be unanswerable,[1253] Bonhoeffer refers to the *Formula of Concord's* two states for Jesus Christ, the state of humiliation (*status exinanitionis*) and the state of exaltation (*status exaltationis*)[1254] and the concept of identity of substance,[1255] that is, that Christ's person "is" God's revelation.[1256] Bonhoeffer added that already Luther had spoken of the divinity and humanity of Jesus as if they were one nature for the purpose of preventing a deified human being.[1257] It is the ultimate mystery of the Trinity, the Three in One, that the humiliated One is He "who" has already become human, is not visibly glorified by Jesus Christ even though He is the God of glory.[1258]

For Bonhoeffer, Jesus Christ, the person, the God who has become human, the *Gestalt* is not an idea, separated from appearance. This God-human, the crucified and the risen one, does not represent (*repräsentieren*), but reconciles in *Stellvertretung* all human beings. In the midst of history as a divine miracle, and as the mystery of the world, Christ attacks the heart of an era filled with contempt for humanity.[1259] In *Ethics*, Bonhoeffer added that all formation (*Gestaltung*) of the world proceeds from this *Gestalt* of Jesus Christ. But he clarified that this *Gestaltung* differs from forming the world with plans and programs, or with Christian ideas, teachings, and principles. Rather, reversely, formation (*Gestaltung*) con-forms (*gleich-gestalten*) to the unique form (*Gestalt*) of Jesus Christ,[1260] of being judged by God and having risen. Formation is thus not an independent process or condition that can somehow be detached from the form of Jesus Christ, but only happens from and toward this form.[1261]

[1252] DBWE 12:350.

[1253] DBWE 12:353.

[1254] DBWE 12:345-47.

[1255] DBWE 12:350.

[1256] DBWE 12:351.

[1257] DBWE 12:346-47.

[1258] cf. DBWE 12:355.

[1259] cf. DBWE 6:82-83.

[1260] DBWE 6:93.

[1261] DBWE 6:97.

Being con-formed (*gleich-gestaltet*) with the One who has become human therefore means to be really human;[1262] to be loved and judged by God. Con-formed human beings do not attempt to outgrow human nature through deifications, establish themselves as models above other people, or are forced to submit in false uniformity to an ideal type, that is, to a particular image of the human. They recognize themselves as sinners, die to their own will and let God's justice prevail over them.[1263] They are no longer in a state of disunion from God that splits everything in conflicts between is and ought, as the Pharisees do. After considering innumerable facts, Pharisees determine their own correct decisions from their self-proclaimed position as lawgiver and judges.[1264]

Being con-formed also means being a transfigured, new human being. The human being is without independent form. Instead the form of Jesus Christ takes form in the human beings.[1265] This then is the risen Christ, the final sovereign approval of God "for" the new human being.[1266] Their forms are not imitations[1267] or repetitions of Christ's form because they are not transformed into the form of God, but into human beings before God, in the form that belongs to them,[1268] into what is each 'one's own true nature'[1269] and 'that which belongs to each one of us, is in each case something different'.[1270] Bonhoeffer also called this a

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[1262] ‚Gleichgestaltet mit dem Menschgewordenen – das heiβt wirklicher Mensch sein.'; DBW 6:82; DBWE 6:94.

[1263] DBWE 6:94-5.

[1264] cf. DBWE 6:308, 310, 317, 328, 335.

[1265] ‚Die Gestalt Jesu Christi gewinnt Gestalt im Menschen. Der Mensch gewinnt keine eigene, selbständige Gestalt, sondern was ihm Gestalt gibt und in der neuen Gestalt hält ist immer nur die Gestalt Jesu Christi selbst.'; DBW 6:83; DBWE 6:95-96.

[1266] DBWE 6:92.

[1267] Peter Frick points out that Bonhoeffer's early spiritual formation was most likely strongly influenced by Thomas à Kempis' *Imitatio Christi*. This appears to have found expression in Bonhoeffer's books *Life Together* and *Discipleship*; Peter Frick, "The *Imitatio Christi* of Thomas à Kempis and Dietrich Bonhoeffer", in Peter Frick, ed. *Bonhoeffer's Intellectual Formation*. The books Frick mentions, Bonhoeffer wrote in the mid to late 1930s in response to his experiences at the Finkenwalde Seminary of the Confessing Church. It appears, though, that Bonhoeffer realized that "imitating Christ" could express the exact reverse to what he meant to express with "con-forming to Christ". Imitating Christ could be understood as an act of forming (*gestalten*) that is within the power of the human being. *Gestaltung* in the hands of human beings turns them into *sicut deus*. Instead, being con-formed (*gleich-gestalten*) is an act that rests with God in Christ. The point Bonhoeffer wants to make is that a self-deified human 'despiser of humanity' cannot construct, form, or synchronize (*gleichschalten*) human beings to his ideal form of identical Aryans.

[1268] cf. DBWE 6:96. At another place in *Ethics* Bonhoeffer explains that this does not mean that all human beings are "the same", but that 'each one of us, is in each case something different'; DBWE 6:181.

[1269] DBWE 6:134.

[1270] DBWE 6:181. On Bonhoeffer's discourse on the meaning of "one's own" in regards to arbitrariness, Leibholz's juristic interpretation, and the Roman law formulation of *suum cuique* as meaning "to each his own" see Radler, „Equality and Human Dignity".

complete inner change of existing form, a metamorphosis, which induces a renewal of the mind to living as children of light, that is, in the form of the child of God.[1271]

Being con-formed means that for the church-community as the *Sanctorum Communio*, as the Christ existing as church community, the term *Gestaltung* is solely reserved for Jesus Christ who takes form (*Gestalt*) in Christ's Church and no other form besides Christ's own. Also, the church is not an independent form apart from the form of Jesus Christ. Here Christ takes form among human beings. The body of Christ forms the church in the image of humanity in *Stellvertretung* for all human beings.[1272]

Summarizing, it can be said that for Bonhoeffer it is not a deified human personality who represents an idea of God in abstraction to appearance that stands at the center of the formation (*Gestaltung*) of human worldly life. This position belongs to the *Gestalt* in earthly reality, to the "figure" of Jesus Christ who "is" God's Word, His revelation and Christ's person in One. Neither Christ nor human beings represent God. Christ instead stands through *Stellvertretung* on the cross at the center of a triangular relationship between God, the self, and others,[1273] in order to reconcile the human beings to God's love and into community with each other. Obedience to God's will in the time between Christ's ascension and return, in the time in Adam under Original Sin means being formed, transformed, and con-formed in faith to a new human being according to God's will as revealed in Christ.

4.6.3 *Gestalt*

Both Bonhoeffer and Schmitt manifested a form (*Gestalt*) through forming (*gestalten*). The center of Schmitt's theory is that in Roman juristic spirit a human being in office was authorized by an idea to represent this idea to a group of people for the purpose of unifying them into the identity of an institution with consolidated content. This structure is legitimized through an analogy to the Catholic Church whose pope was directly authorized by Christ to represent the idea of God, and to form with the *complexio oppositorum* among the faithful a unity based on dogmatic content. Schmitt manifested an institutional form (*Gestalt*) and a

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[1271] DBWE 6:322.

[1272] DBWE 6:96-97.

[1273] Radler, "Theology as Politics versus 'Political Theology'", 280.

figure of personality for the purpose of exchanging the idea and the elite of the Weimar normal. An abstraction between content and subject led to the formation (*Gestaltung*) of a synchronized (*gleich-schalten*) identity between a representative figure of self-significant personality and a racially defined unit of the people. But his form-principle of *Dezision* eventually transcended the method of structural analogy and the self-declared human judge implemented the content of his political idea beyond any restraints.

Bonhoeffer responded, opposed, and resisted the formation (*Gestaltung*) of Schmitt's theory of state through disclosing the heresy on which it was built. Bonhoeffer's con-formation (*gleich-gestalten*) confronted Schmitt's institutional synchronization on the basis of rejecting a separation of idea and appearance and Schmitt's concept of representation.[1274] He exposed the disunity of idea and appearance and manifested instead the One-ness of the Trinity and the once-ness of the *Gestalt* of Christ in historical presence. God, Christ, and Word are identical; they are an identity that differs from Schmitt's racial identity of the people insofar as the latter needs to be represented for appearing as personality. For Bonhoeffer, there is only the one person of Jesus Christ who is identical with the content, the revelation of God. Jesus Christ "is" God's revelation, and reversely God's revelation is the one who has become human (*Mensch geworden*). For Schmitt in representation, which differed from private forms of agency such as *Stellvertretung*, the invisible idea, the political program, is present because this higher form becomes personified. The idea becomes personality; it becomes human (*Mensch werden*); divinity enters humanity. The political idea, whose content is identity, is not identical with the human being, the representative. The unity of the peoples as a whole, the unity in the *Gestalt* of the people, is represented and publically appearing in personality. Thus representation presents (*darstellen*) the content, the idea, the unity, the *Gestalt* as personified in the subject, the one significant, dignified, public personality. The political idea in the form, the *Gestalt*, of the unit of the identical people is present in a personality when it is represented.

For Bonhoeffer, however, representation is only there where that which is to be represented is not present, but absent. Because for Schmitt the political idea of the *Gestalt* of the people

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[1274] The consistency with which Bonhoeffer used, in the discourse on *Gestalt*, the German word *Repräsentation* for representation but not *Stellvertretung*, a term he exclusively reserved throughout his theology for reconciliation, exposes that Bonhoeffer was very conscious about the juristic difference between the concept of representation and *Stellvertretung*.

needs to be present in order to turn through representation into personality, representation in analogy to the idea of God is impossible for Bonhoeffer. Instead, for Bonhoeffer, it is not an idea that is appearing as personified presence, but rather Jesus Christ "is" the personified Word of God, the content and person in One, who is present in the Church and in the sacraments. Schmitt's model of representation and the Trinitarian God are incompatable. The God-human Christ is the human *Gestalt*, the person, who is identical with the Word of God, revelation, content, and is present in historical reality, that is, exists in historical presence in the *Gestalt* of the church.

What Schmitt called the "contrast between subject and content", between idea and form (*Gestalt*), Bonhoeffer called the heresy of the "antithesis between idea and appearance". Schmitt solved the contrast with the "significance of the self of the subject" (*Eigenbedeutung*) which stands in analogy to the God who becomes human (*Mensch werden*) when divinity entered humanity. Bonhoeffer contradicted this with Christ as the one who had become human (*Menschgewordenen*) in the once-ness of appearing in historical reality and that this Christology had nothing to do with the 'union of divinity with humanity', because there was no point at which the personality of Christ and a human being of personality could meet. Thus divinity does not becomes human (*Mensch werden*) in a human self as *sicut deus*, but in Christ God's divinity had become human (*Mensch geworden*) as essence and in the once-ness of history. Bonhoeffer consigns Schmitt's "who" back to the irrelevant position of the "how"-question that cannot explain the modus of the divine "becoming human" (*Mensch werden*). Rather the only relevant "who" is the One who "became human" in factual reality (*Menschgewordene*), at one time in human history.

For Schmitt, the "how" superceded the "who". The "how" of representation was the *modus operandi* of unifying for the purpose of overcoming the conflict between human beings that had entered the world through Original Sin. It meant to identify the correct type of human being according to the concept of friend and enemy and to institutionally synchronize (*Gleich-schaltung*) those "who" belong to the form of the figure of the leader, the sovereign. However, as Bonhoeffer insisted, unifying is not reconciling, unity is not wholeness. Political unity *qua* human program differs decisively from the reconciliation of human beings to God who had been separated from God since the Fall into Original Sin. Reconciliation restores wholeness to the single human being and to community. This was only possible through

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Christ's *Stellvertretung* on the cross, through Christ "who" was standing in for absent humanity, through Christ who was present on the cross. Only faith in the once-ness of Christ on the cross could reconcile to a con-formed (*gleich-gestaltet*) life in personal wholeness under the God-identity. It is not the *Gestalt* of a unity in form of the institutional "how" that is decisive, but the form of the "who", the *Gestalt* of the Christ who ended the dis-union (*Ent-zweiung*)[1275] of human beings from God, from other human beings, from the world, and from themselves, a dis-union which entered the world with eating of the forbidden fruit and was the consequence of knowing good and evil. It is not the exception emerging from chaos but the God-human Christ, the humiliated one who let the law have its way and took sin upon himself that is the miracle of the God who had become human. This *Gestalt* makes possible faith in the Word precisely because he did not take recourse to an exception at the decisive moment.[1276] By not displaying his divinity but remaining in the form of human nature His *Gestalt* provokes faith in His redemptive work on the cross.

Overall, for Schmitt it is decisive "how" the idea is implemented in reality, that is, "how" the *Gestalt* of the people becomes unified to an identical unit that, in turn, becomes personified in the representative personality. Decisive is for Bonhoeffer, the "who", the reconciling God-human *Stellvertreter* Christ who continues to be present in the Church of the penultimate time. And it is faith in Christ that con-formes (*gleich-gestalten*) the human self to wholeness and restores human community to the form of God's intentionality. God's decision of revealing Himself in the *Gestalt* of the body of Jesus Christ con-forms the human being of faith to His will, who in turn form the world with human decisions in recognition of the limitations placed by the transcendent God.

4.7   Conclusion: Forced Unity or Reconciled Wholeness?

In the irony of life, Bonhoeffer's 1932 prediction that an absolute leader will fail under the overload of responsibility was confirmed when Schmitt's transfer of the Roman Church's institutionalism into state-institutionalism failed due to the totalitarian sovereign's refusal to resubmit to a new "normality" and instead assumed in 1934 the responsibility for the whole

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[1275] DBWE 6:300.

[1276] See 'If he had replied to the question, are you the Christ? By doing a miracle, then the statement that he became a human being like us would no longer be true, since at the decisive moment an exception would have been made. … the form of the irritant is the form that makes possible all our faith in Christ.'; DBWE 12:358.

nation but had destroyed it by 1945. Similarly ironic is that in the final analysis Schmitt's theory of state ended in a system with one final point of ascription, that is, at exactly the point which he most vehemently criticized in Kelsen's positivist system, however with the decisive difference that this point was for Schmitt the dictator and for Kelsen the constitution. But both extremes lost their substance and capitulated to power and facts. In Kelsen, the substance of the decision disappeared in the logic of the norm and in Schmitt in the decision itself in the absoluteness of the exception.[1277] In comparison, Bonhoeffer's final point of ascription, the God-man Christ who revealed God's Word, combines the search for a decisive word in the penultimate reality with that of ethical leadership and thus provides for substance in the decision.

Bonhoeffer's and Schmitt's position and response to the events of their time were compared according to a definition of the concept of decision that was comprised of the elements of alternatives for choices, the timing for resolving the problem, the intended goal, and the implementation of the envisioned goal in a manifested form. Schmitt's constitutional theory analyzed the Weimar Consitution and detected, apart from an essential core, problems for the juristic person of the state in the pretense-compromises of defective leadership and in the formation of a precise political program. The Constitution had not brought the political developments of the 19th century to a close because it compromised on the democratic and monarchic principle of leadership. The flawed pretense-compromises demanded that the unit of the people, which is prior to the constitution and is determined by excluding those who are inequal, needed to choose between the alternatives of office or person, of responsibility or trust, and of representation or identity.

Bonhoeffer, similarly interested in bringing to a close the developments of the 19th century as regards the progressive separation of the church from the state, proceeded to develop a concept of church that could stand independently as an alternative form of life over against the state. Taking serious the constitutional prescription for the juristic person of the church as a corporation of public law with a personality as defined in private law, he searched for a fitting structure for the institution among the legal corporate structures of the commercial and civil law codes. He determined that the church's communal form *sui generis* differed from

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[1277] Christian Graf von Krockow, *Die Entscheidung: eine Untersuchung über Ernst Jünger, Carl Schmitt, Martin Heidegger* (Frankfurt/Main: Campus Verlag, 1990), 65.

other legal collective forms in that it combined community (*Gemeinschaft*), society (*Gesellschaft*), and an federation of hierarchical structure (*Herrschaftsverband*), and centered on the divine essence of God's revelation beyond the human ethical sphere. This form captured God's revealed will to rule in love which, as prior to community, is focused in a vertical direction toward the horizontal relations among the multitude of the equally sinful human beings to each other, as well as the hierarchical direction of the faithful to God. Christ, as the person without sin, stands as "Christ existing as church-community" at the middle (*Mitte*) of the church and provides for the continuity of God's revelation within the reality of the world. The choice between church and state received relevance with the approach of the *status confessionis* that the state had forced upon the church with the heresy of synchronization and race legislation.

For both Bonhoeffer and Schmitt, the respective constitutional and confessional problems could only be solved with assessing the situation of their present time and era. Schmitt's linear trajectory of time is occupied with a succession of domains with central ideas and corresponding elites which strive to eliminate conflict through political neutralization and depolitcization. But in the moment of reaching this void, the nothingness, new conflict arises which demands human creations *ex nihilo* for building a new domain, an idea and an elite. In every domain, the structure of the political idea and institution corresponds to the prevailing metaphysical perception. The domains are comparable to each other according to the method of structural analogy. Thus the Weimar situation which had reached the extremely urgent point of nothingness was in need of a human creation *ex nihilo* for a structural political and institutional solution that matched the contemporary metaphysical situation of secularization.

In Bonhoeffer's account of a circular salvation history that perceives the human being's life as moving from God to God, God is the only one who creates *ex nihilo* which is the transcendental limit for the human mind. God's *ex nihilo* situation is separated through the Fall into Original Sin, from the existential urgent human situation of exceptional nothingness. Already in the pen-ultimate time of emptiness, while being-in-Adam as this is marked by the deification of the human being as *sicut deus*, humanity is in need of being preserved through the fulfillment of God's promise of reconciliation, his promise of Easter, that transforms in the moment of nothingness on the cross the human being to being-in-Christ. With similarities to Schmitt's line-up of domains, Bonhoeffer assessed the contemporary Weimar situation as

having reached, through a process that stretched back to antiquity, a situation in which deified humanity had become confronted with a nothingness that immediately turned into new conflicts. In this fear of nothingness, the miracle of Christ, standing at the middle of history, mediates between the death of nothingness and reconciled life and thus stands invisibly in the middle of the state. In the one kingdom of God, Christ is the middle of church and state.

Schmitt intended to solve the difficult situation of urgent nothingness with creative abstractions while Bonhoeffer sees the solution in the simplicity and wisdom of the immediacy of God's intentionality. Bonhoeffer's insistence on an *actus directus*, on an application without interpretation, rejected Schmitt's abstractions that go back to his earliest work on the dismissal of a *dolus directus* which had removed subjective will to a meta-physical level outside the reach of the state. His separation of objective intent, which underwent an evaluation over against a legal standard, an ought, and subjective guilt which remained outside of being measured against an ought, laid the foundation for Schmitt's subsequent abstractions of office from person, fact and reality from idea, subject from content, and the formal from the material. He intended to overcome the conflict that had entered the world with Original Sin and reunite the abstractions in a structural analogy to the Catholic Church which supposedly had captured the Roman juristic rationality. The church's ability of uniting ideas through a *complexio oppositorum* had made possible a prepresentation of the idea of God in which Christ is the archtype of non-conflict. The representative office of the pope was authorized by Christ but acted in abstraction from the concrete person who was holding that position. Transferred to the state, a sovereign personality, directly authorized by the pre-constitutional unit of the people, could represent the identity of the people as united by the principle of differentiating between friend and enemy. This would solve the leadership problem as it had been posted by the constitutional pretense-compromises. For Bonhoeffer instead, Christ is not the non-conflicted model for a conflicted world. Christ is the Trinitarian God in whom Christ, God and Word are united in immediate one-ness and who had entered the historicity in once-ness. Bonhoeffer understood God as having intended with his revelation through Christ to humankind a direct, unmediated, simple, immediate reaction in the behavious among human beings. Original Sin was not the foundation for dualisms, but for the separation from God and humanity. Thus God had revealed that human beings should participate in his church, the *Sanctorum Communio*, in the indivisible whole that He had intentionally united through faith in Jesus Christ.This is where the Word of God was revealed

by preachers who were authorized by the community. The human being does not live according to human evaluations of their acts-of-will but despite human decisions the human being lives in an act-of-relating under God's decision.

In the active implementation of his theory of state Schmitt synchronized all life to the *Führer*-principle. Bonhoeffer detected and disclosed the underlying modern version of the Docetic heresy that separated idea from appearance. This heresy had become manifest in applying to the state Schmitt's structural analogy of his understanding of the Roman Church's juristic model. Hidden underneath the "how" of transfering the idea of God into appearing as a "who" in the reality in the world was a forcefully united division. The division of idea and appearance was unified through the friend-enemy principle in structural analogy to the *complexio oppositorum*, and represented by the sovereign in structural analogy to the pope's office and its divine authorization. Bonhoeffer redirected Schmitt's form, *Gestalt*, of the unit of the people as represented by a significant personality with analogical divine authorization to the person, *Gestalt*, of Christ. This replaced the forced unity of identity of the people and the sovereign with reconciled wholeness through *Stellvertretung* of Christ on the cross. He redefined representation by clarifying that only something absent, that is, what is not present could be represented. Representing the idea of God in Christ could not be represented because the *Gestalt* of Christ was present. In the *Gestalt* of Christ, representation was impossible because God, Word, and Christ are One and continue to be present in this world in the church. What is decisive is not the process of the "how" of "becoming human" (*Mensch werden*), of becoming a personality, but the once-ness of the person of Christ "who" "had become human" (*Mensch geworden*) in the penultimate reality of human history. It is not divinity that becomes human, that becomes a human God, a *sicut deus*, but it is in Christ that divinity has become human as essence and in the once-ness of history. It is not the significance of the self of the subject that turns content into a subject, a personality, a sovereign for the purpose of synchronizing (*gleich-schalten*) every human being to his human image, but the significant One in the middle of life "who" con-forms (*gleich-gestalten*) human beings to God's vision of replacing divisions with the wholeness of the self and of true community. It is in God's intentionality to end disunion with his decision of fulfilling on the cross His promise of preserving the world.

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In the overall assessment, Schmitt's *Dezision* was meant to solve the problems of the constitutional pretense-compromises, as this presented a problem between representation and identity, and the conflicts within society. The sovereign ruler's decision of implementing a new political idea on the trajectory of history was legitimized by Schmitt with a structural analogy to Roman juristic rationalism which rests in the Catholic Church's ability to unite controversial ideas and its institutional invention of an office that represents the idea of Christ in the world. In his theory of state this meant that a personality in the *Gestalt* of the sovereign represented and implemented the political idea that was embedded in the *Gestalt* of the unit of the people who were forcefully united, by way of exclusion and through synchronization to him in identical form. Bonhoeffer disclosed that a modern version of the Docetic heresy was hidden within the structural elements of Schmitt's theory of state. Underlaying Schmitt's theory of state was an abstraction between idea and appearance which carried the structural method for creating identity, the forced unity in *Gestalt* of the people and leader, an idea becoming personality, and the principle of representation. Bonhoeffer replaced these elements with the immediacy of simplicity, the reconciling to wholeness and community through *Stellvertretung*, the *Gestalt* of Christ, the person of Christ "having become human" once in history, and the identity of God, Word, and Christ in the Trinitarian God who continues to be present in the world. For Bonhoeffer, God's decision of keeping his promise of upholding humanity through faith in Christ ends the separations in the penultimate world in the true sense of the word *Ent-scheidung*.

Chapter 5:

Conclusion

This thesis asked, by way of a comparative study that indirectly engages Bonhoeffer's theology with Schmitt's theories, in what way possible exposure to the jurisprudential paradigm might have prompted Bonhoeffer to use juristic concepts within his theology and might have entailed uncovering, objecting to, and redirecting with his theological understanding of "decision", the foundational structural elements that underlay Schmitt's jurisprudential concept of *Dezision* in which an individual personality decides with finality over jurisdiction and the implementation of an abstract idea.

In the overall and final analysis, Bonhoeffer's theology of divine decision provides a correction to the paradigm associated with Schmitt's human *Dezision*. It is based on his insistence of a heresy. He disclosed that a modern version of the Docetic heresy which had separated the idea of God from the appearance of Jesus Christ in earthly reality, had returned within his Weimar political context. Now, a structural analogy to Christ and His church let a political idea appear in the reality of the world through the represention by a sovereign dictator. This led Bonhoeffer to assigning significance to whom it was truly due, to God in Jesus Christ and His revelation. Insisting on spiritual independence from the state over against human *Dezision* complemented Bonhoeffer's concept of the church as "Christ existing as church community", and his understanding of the single human being in community with God and others.

Bonhoeffer's exposure to the jurisprudential paradigm of thought provided him with insights that enabled him to make use of juristic concepts, informed him on the theory of state and indirectly also on Schmitt's theories. The intellectual connection to jurisprudential thought was foremost facilitated through his close friendship to Leibholz, his brother-in-law. Bonhoeffer's closeness to Leibholz's academic work could be traced to their interconnected *Habilitation* theses in 1929, and their coordinated early public objection to the approaching National Socialist system in November 1932. Both their *Habilitation* theses were concerned with questions of conscience and the extent of human knowledge. Additionally, Leibholz's inquiry into political public representation was connected to Bonhoeffer's earlier *Sanctorum Communio*, which had established Christ as an agent (*Stellvertreter*) for humanity on the

cross. Their public objection to the approaching National Socialism in 1932 exposed closeness in their argument in regards to the relationship of the state to the church and vice versa. Bonhoeffer also benefitted from Leibholz's in-depth knowledge of Fascism, and his warning of the dangers that approached the church through collectivization, and the state's attempts to absorb matters of faith. Leibholz had gained this in-depth knowledge through his intellectual and academic closeness to, as well as his personal acquaintance with, Schmitt between the years 1926 and at least 1932. Leibholz had even delayed publishing his *Habilitation* thesis until he had included references to Schmitt's *Constitutional Theory* and he knew that Schmitt was working in 1932 on the upcoming Act of Synchronization. In the argument of their 1932 objection, both Bonhoeffer and Leibholz portrayed an impersonal office as being conscious of the importance of limits to authority, a position that differed from Schmitt's personality-leader who was impersonal in an abstracted sense that avoided limits. And by 1932/33 Bonhoeffer appears to have been familiar with Schmitt's definition of the concept of the political as a conflict between friend and enemy. Also, at this point in time, the most relevant books that disclosed Schmitt's theory of state and its references to theology had already been published.

The circumstances that led Bonhoeffer and Schmitt to engage with the topic of "decision" were, for both of them, rooted within their contemporary "age of crisis". As was typical for their context, both Schmitt and Bonhoeffer referred to a *Krisis* in an organic, humanistic-individualistic dimension. In assessing the *Krisis* both were inspired, similarly to their peers, by the Kierkegaardian divide between the eternal and the temporal, and they additionally proceeded from their contemporary discourse on juristic persons and natural persons. For both this involved Gierke's focus on the difference between the Romanist absolute and the Germanist relativist concept of person but which differed in regards to the relationship of the multiplicity of natural persons within the unity of a juristic person. For Schmitt, this concerned the question of the position of the individual in relation to the state, and for Bonhoeffer the relation of the church and its members to the state, to God, and to each other. For Schmitt, the Modern individual was insignificant, isolated, and indecisive. He based this assessment on a disconnection between law and judgement, normative Justice and empirical facticity, between occasion and reality, and between liberalism and democracy. To him the individual was peripheral to legal judgements. Value and dignity came only with office. And just as the "normative power of the factual" is a fiction in regards to the Constitution, so is

the freedom and equality of the individual of individualism a fiction because natural rights *qua* existence were impossible. Thus the insignificant individual could not be violated in its essence by the law of the state, the mediator (*Mittler*), which was used in times of mediation (*Mittelbarkeit*) for implementing Justice. For Bonhoeffer, the "crisis of 1933" turned the widespread perceived insignificant individual into the self-significance (*Eigenbedeutung*) of one single individual, that is, into an extreme individualism in which single persons abdicate all rights and responsibilities to a new authoritative leader. The implementation of synchronizing the church to the state with a *Führer*-principle that demanded allegiance to the totalitarian leader as the only one of significance − combined with the persecution embedded in the Aryan legislation − amounted, for Bonhoeffer, to a crisis of the magnitude of a *status confessionis*. It threatened the recently constitutionally implemented independence of the Protestant Church from the state. In 1933 this "too much law" of the state violated the significance (*Bedeutung*) of the person of Jesus Christ, the mediator (*Mittler*) between God and human being as well as the essence of human beings within the church.

For both Bonhoeffer and Schmitt, the alternatives they identified as leading towards a decision were based on the 1919 Weimar Constitution, but Schmitt envisioned a collective model while Bonhoeffer supported a community-based concept. For Schmitt, this meant that the pre-constitutionally existing unit of the people had decided on a political collective form for the state that had a parliamentary democracy at its core. However, constitutional pretense-compromises had left undecided the question of executive leadership either according to the monarchic or democratic principle. What remained undecided was the alternative between parliamentary responsibility and trusting in a president. Hidden behind these constitutional labels was for Schmitt the choice between representation of the people and identity of the ruler and the ruled. Either way, it demanded a people unified by excluding those who were inequal according to a selection between friends and enemy. For Bonhoeffer instead, the prescription of the Weimar Constitution that there was no longer a state-church meant that the Christian faith could no longer serve as state-ideology, and thus the church had become altogether an alternative way of life to the state. Therefore, a concept of church was needed that, although complying with the constitutional legal requirements, nonetheless established the church's institutional (*iura circa sacra*) as well as a full spiritual independence (*iura in sacra*). His *Sanctorum Communio*, the "Christ existing as church community" turned the Protestant Church into a community *sui generis* by way of defining its form, will, and

meaning. He combined legal institutionalism and Christian spirituality and freed the human being to an alternative life within the one kingdom of God that comprised of the church and the state. In the constitutionally prescribed form of a corporation of public law (*Körperschaft des öffentlichen Rechts*), with a legal personality determined by private law, the church was for Bonhoeffer in its institutional character a juristic person. For the Church's constitutionally prescribed personality of private law, he identified the miracle of the person of Jesus Christ, the God who once appeared as natural person in history, as the personality of the Church. Setting Christ at the spiritual middle (*Mitte*) of the church and human life was meant to capture the divine essence of God's revelation beyond the human ethical sphere. Christ continues to be present in the word through the sacraments of his church and the church's existence among human beings. As a communal person (*Gesamtperson*), ruled in love by God's will, the church, in essence, differed for Bonhoeffer from any collective person (*Kollektiverson*), especially from the juristic person of the state.

Bonhoeffer as well as Schmitt made use of concepts taken from the other's paradigm of thought and differentiated between the legal realm of public and private law – a separation that had developed during the 19th century's constitutional fights of the bourgeoisie for economic independence and a realm of rights separate from the state. Schmitt insisted that constitutional law and representation belonged to public law in distinction to contract law which was part of private law. Bonhoeffer's use in his theology of legal institutes of private law, such as a particular form of agency (*Stellvertretung*) and a specific form of taking on debt (*Schuldübernahme*), emphasized the position of the church's independence from the state and the church's meaning as the worldly existence of Christ as reconciler between humanity-in-Adam and humanity-in-Christ. Additionally, for the purpose of determining the concrete institutional form of the Protestant Church within the fallen world of Adam, Bonhoeffer drew upon elements from juristic institutional models for economic activities that had been codified in the Commercial and Civil Codes in the late 19th century, such as association (*Verein*) and forms of societies. For the church as *Sanctorum Communio*, he settled on an institutional character *sui generis* which varied from defined forms and was comprised of a combination of community (*Gemeinschaft*), society (*Gesellschaft*), and a federation of authentic rule with hierarchical structure (*Herrschafts-verband*), because it best captured the spirit of the mutual relations of the three realities of unity, community, and singleness. It confirmed the dissimilarity of the plurality within the unity in which,

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nonetheless, are all of equal sinfulness and it combined the elements of superiority of and subordination to God.

For both, the Kierkegaardian "moment" had in their contemporary present, in the *Krisis*, consolidated to an extraordinary urgent "concrete situation" of nothingness at the edge of the normal and law. A point was reached in history at which compromises were insufficient and decisions were required. Schmitt insisted on a human creative *ex nihilo* decision and Bonhoeffer saw a need for human adherence to limits which are given once one acknowledged a prior decision made *ex nihilo*, that is, God's decision at creation and beyond which the human mind could not venture. Schmitt's view of history as a linear trajectory of time that held a sequence of exchanges of central domains with their respective central idea and elite group grounded his combination of the urgent nothingness of the human present with a human creative *ex nihilo* decision. The neutrality and depoliticization of conflict that each domain strived to resolve would lead to the moment of nothingness but would immediately be again filled with conflict, leading to new ideas *ex nihilo* and their implementation with decisions of the new elite. For Bonhoeffer, history is a movement from God to God with the post-Fall penultimate reality of the human being in the middle, and which is centered on Christ as the fulfillment of God's promise of preserving and giving life. In this middle, the human being lives either in-Adam or through faith in-Christ. The once-ness of God appearing in worldly time separated God's creation *ex nihilo* from the nothingness of the human situation. The Fall into Original Sin and death in the Adam-event separated humanity from the tree of life at the middle (*Mitte*) of Eden, and exposed humanity to the problems of human knowledge and self-perception as *sicut deus*. The Fall foreshadowed the Easter event of Christ on the cross in the middle (*Mitte*) of history. The moment of nothingness on the cross, when God fulfilled his promise of preserving humanity and Christ reconciled sinful humanity to God and life, is the moment of confessing that God is the creator *ex nihilo*. At the Fall and at the cross, each time, the dominion over the human being and the identity of the ruler over the earth is altered. Schmitt's view of history as a succession of domains, ideas, and elites permitted comparisons and drawing analogies which are impossible in Bonhoeffer's understanding of Christ as a fact of God's promise at the middle of human life and who continues to be present in the Church.

Bonhoeffer did not develop a method that was specifically designed for applying juristic concepts within his theology. Instead he made use of already available juristic concepts, but without transferring the juristic, philosophical method as well. For him, there is no method for human beings to place themselves into God's truth. God cannot be reached through an idea of God and can be known only as an act of faith in the revelation in Jesus Christ.[1278] Faith is also the only way of solving the tension that was brought about by God through His incarnation and in the crucifixtion of Christ. Christ, as the fact of God's promise in the middle of history and the human life, makes systematic analogies and human creativeness impossible. Christ remains the essence and the miracle also in the technological modern age, because in the personal moment on the cross He "is" the "method" that reconciles in His *Gestalt* the subjective and the objective into wholeness. Schmitt, however, developed a method for structural analogies between theological and juridical conceptualizations, for the purpose of transferring theological forms to the theory of state within the secularized context of the 20th century. With his sociology of juristic concepts, he established that the metaphysical image a particular epoch has of the world is of the same structure as that which is immediately understood to be an appropriate form for the political organization of that age. Thus in the modern secular age, the "systematic structure" of the Catholic Church's representation of the idea of Christ through the office of the pope and the Church's unity-creating principle of merging opposite ideas through the *complexio oppositorum* was transferrable analogically to the modern state. Thus the political idea transforms through representation into a personality who creates unity and implements the political idea. In support of the transferred model, the principle of differentiating between friend and enemy was meant to overcome dualities and to create a unity in structural analogy to the *complexio oppositorum*. The systematic of analogies also provided for transfers of theological dogma into concepts of the modern age, such as God to the political leader, Original Sin to the origin of conflict, and miracle to exception which both breach the natural causality of normativity. Christ becomes the archetype of non-conflict and serves as an idea for solving conflict among human beings, while the creation *ex nihilo* legitimizes the human creativeness underneath decisions.

[1278] To Bonhoeffer on method see Patrick Dunn, "Discipleship as Theological Prolegomenon: Implications for the Relation of Theory and Praxis in the Work of Pascal, Kierkegaard, and Bonhoeffer" (PhD diss., University of Stellenbosch, 2018), https://scholar.sun.ac.za.

Bonhoeffer's theology laid bare the fundamental structure of and the elements which served Schmitt's *Dezision*. They amounted to a heresy in its attempt at synchronizing the church to the state. Underneath Schmitt's solution of *Dezision*, was hidden a modern version of the Docetic heresy that separated idea and appearance, the separation of divinity and humanity in Christ. According to Schmitt, *Dezision* is a specific jurisprudential form over jurisdiction and content that is revealed by the exception. He legitimized *Dezision* through the method of structural analogy between theological thought and jurisprudential institutions. Schmitt intended to overcome the political conflicts of his context through applying to the state a structural analogy to the Roman juristic rationalism that he thought the Catholic Church had captured. Through inventing the office of the pope, who was directly authorized by Christ, the idea of God was represented to the world. In this the idea "becomes human" (*Mensch werden*), divinity enters humanity, and using dogma, the church unifies ideas through the principle of the *complexio oppositorum*. Analogically, in the office of the sovereign a political program becomes personality and is represented in identity with the unit of the people which was unified through the friend-enemy principle. In Schmitt's assessment, in the personality of the authoritarian sovereign the constitutional problem of leadership would be decided because representation and identity would be unified. Schmitt's structural analogy was based on a line of abstractions that reached back to his early rejection of a *dolus directus*. He had separated objective intent from subjective guilt and had removed the subjective to a meta-physical position removed from the state's evaluation over against normative standards. However, Bonhoeffer recognized that in *Dezision* the subjective absorbs with the significance of the self all other subjects as well as the content of the idea. The idea becomes *Gestalt* in personality and represents the *Gestalt* of the unit of the people. The self-elevated sovereign would forcefully unite the political idea and the unit of the people and synchronize (*gleich-schalten*) them to the self, based on an analogy between the idea of Christ as political idea and of Christ giving authority to the sovereign.

Bonhoeffer's theology of "decision" insisted on the unity of the divinity and humanity in Christ. This challenged and redirected the structural elements of Schmitt's analogy that underlay his *Dezision*. His insistence on God's decision, that is, his view on the theological form over jurisdiction and content that the God-human Christ, the *Gestalt* who is present in the world, revealed, entailed a rebuttal to Schmitt's juristic *Gestalt* over jurisdiction and

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content which becomes revealed by a self-significant sovereign personality. Bonhoeffer's theology challenged Schmitt's

- forced unity of identity with wholeness through reconciliation in *Stellvertretung* on the cross,

- political idea with revelation,

- synchronization (*gleich-schalten*) of all with conformation (*gleich-gestalten*) to Christ,

- representation of political ideas with Trinitarian identity,

- view of an idea "becoming human" (*Mensch werden*) in the appearance of personality with personality "having become human" (*Mensch geworden*) in the once-ness of the person of Jesus Christ.

Overall, Bonhoeffer's confession of faith entails a challenge and redirection of Schmitt's institution of myth. Bonhoeffer's theology redirects the self-significance of Schmitt's form, *Gestalt*, as a synchronized personified idea, to Christ, the only figure, *Gestalt*, of significance. It was not the forced unity of ideas into an identical group and imaged by the *Gestalt* of a sovereign that was decisive. Rather, decisive is the reconciled wholeness of the human being to God and the dissimilarity of the plurality of God's community. Bonhoeffer's *Sanctorum Communio* sets reconciliation against Schmitt's forced unity of the *complexio oppositorum.* Also, Bonhoeffer refuted Schmitt's identity as represented by the sovereign to Christ's *Stellvertretung* on the cross, to the moment of God fulfilling in Christ His promise of sustaining humanity. Identity existed instead in the Trinitarian unity of God, Word, and Christ which made representation impossible. Because only that which is absent could be represented, representation was impossible due to the presence of Christ in the sacraments of the church, and of God's continually revealed Word in the church within historical time. Bonhoeffer exchanged Schmitt's process of "how", his act-of-will of turning idea into personality, with the "who" of the person of Jesus Christ and the once-ness of "having become human". In God's intentionality, the human being of faith is in *actus directus*, in an act-of-relating in single-minded obedient simplicity and wisdom con-formed to the significant *Gestalt* of Christ in the middle of life. For Bonhoeffer, the *Krisis* of significance (*Bedeutung*) is not solved with the heresy of self-significance (*Eigenbedeutung*) that conquers insignificance (*Bedeutungslosigkeit*), but only with the One whose significance (*Bedeutung*) has to be confessed. For Bonhoeffer, God's decision of self-revelation and redemption serves

as corrective to the *Dezision* of the self-significant. Not a human forced unity by exclusion, but God's decisions of self-revelation and of reconciling through Christ, ends the separations of the human being to God and to other human beings in the true sense of the word de-cision (*Ent-scheidung*)

Thus in the concluding analysis, Bonhoeffer's view on decision entails a rebuttal to Schmitt's *Dezision* on all accounts from history, goal, method, to the identity of the actor by way of focusing on a Creator God who "had become human" in the person of Jesus, and continues to be present in the reality of the Church. In effect, Bonhoeffer adjusted juristic concepts of private law and set them over against Schmitt's jurisprudence of developing concepts within public law. For Schmitt, compromises were only pretenses for avoiding decisions and for Bonhoeffer compromises were simply impossible. For Bonhoeffer, it was impossible to compromise in one's faith, that is, in regards to the presence of God's Word in the God-man Christ and in the this-worldly church. Most importantly, by denying Christ, the self was removed from the decisions that truly mattered, that is, from God's promise of reconciling to wholeness. Faith meant trusting in God's creative first *ex nihilo* decision as well as God's final decision at the moment of nothingness.

For Bonhoeffer, decisions were not a question of the lawbreaker over against the law-abiding person because then Christ 'would have died on the cross in vain.'[1279] Nonetheless, as long as the world exists or until Christ returns, the questions of the "who" as well as the "how" of judging and deciding, person and process, decision and responsibility, will continue to be suspended in the tension between those in-Adam and those in-Christ.

[1279] DBWE 9:452.

Afterword:

"Who are you?"

'Who are you?' Bonhoeffer asked in his 1933 *Lectures on Christology*, and he used this question as the focal point for developing the Christological question of the *Gestalt* of Christ in the immediate context of the beginning efforts of the state that would amount to a *status confessionis* which was legitimized by a heresy. The same question of "Who are you?" confronted Schmitt when it was directed at him[1280] during his incarceration from 1945-47.[1281]

The question of "Who are you?" that was directed at Schmitt by the detaining authorities was connected to a request for providing some transparency for his person apart from his theories. Schmitt perceived this inquiry as an encroachment, if not a violation of his personality, essence, being, and existence.[1282] Being confronted in this way by his captors made him feel 'naked' in his humanity and powerless, just as Adam and Eve when they were expelled from paradise.[1283] In response he quoted in *Ex Captivitate Salus* the words ‚*Der Feind ist unsere eigene Frage als Gestalt*' (The enemy is our own question as *Gestalt*)[1284] which were written by his favorite poet of his early years, Theodor Däubler (1876-1934).[1285] And he redirected the question "Who are you?", at least in thought, back at the interrogator and wondered about the essence of power as well as whether the anthropological question of "who" the human being is, starts with those who are powerful (*Mächtigen*) or those who are unconscious (*Ohnmächtigen*), or rather, "without power".[1286] He concluded that this question had fallen out of fashion in favor of not asking questions at all. Instead, one had to respond to questions that questioned the self and were asked by the new elite of the new level of being (*Daseinsstufe*).[1287] The one who has the power to ask is for Schmitt the enemy who, in turn, is the self and the brother, but overall the other. This dialectic tension within the enemy, which,

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[1280] Schmitt, *Ex Captivitate Salus*, 3rd ed. (Berlin:Duncker & Humblot, 2010), 9.

[1281] Mehring, *Schmitt*, 440-48.

[1282] Schmitt, *Ex*, 9.

[1283] Schmitt, *Ex*, 79.

[1284] Schmitt, *Ex*, 90; own translation. For Ruth Groh this sentence is the so-far-unsolved problem of the Schmitt research; Ruth Groh, *Arbeit an der Heillosigkeit der Welt: zur politisch-theologischen Mythologie und Anthropologie Carl Schmitts* (Frankfurt am Main: Suhrkamp, 1998), 64.

[1285] Mehring, *Schmitt*, 50-53.

[1286] Schmitt, *Ex*, 10, 79. Schmitt is playing with the German words *Macht* and *Ohnmacht*. The latter means unconsciousness but if divided in the syllables "*ohne*" and "*Macht*" it means "without power".

[1287] Schmitt, *Ex*, 86-87.

according to Schmitt, entered the world at the beginning of history with the story of Cain and Abel, classifies the self. Thus this is the tension that provides the form (*Gestalt*) of the self.[1288] However, he insisted, a scientist speaks about problems of objectivity and a researcher about forces and power in church, state, party, class, profession, and generation. He, as a jurist, not a theologian, was trained to maintain objectivity and to avoid psychological self-reflection.[1289] Consequently, Schmitt refused to be pressured with the question "Who are you?" into a tension in which a self-reflection may classify him in a particular *Gestalt*.

Finding himself in a situation that had reversed his position from judge to accused, Schmitt returned to his jurisprudential foundation in criminal law and his writing about guilt and forms of guilt in which he had abstracted, in objection to a *dolus directus*, the objective intent from subjective guilt. Having been inspired in early years by Kierkegaard[1290] he had resorted in *Political Theology* to this 'Protestant theologian' in support of explaining that the exception confirms the norm.[1291] Schmitt seemed to have returned now to Kierkegaard's assessment that subjectivity, the internality of the subject, is the non-objective and cannot be directly expressed.[1292] However, Kierkegaard meant to reach in the subjective the point of nothingness of actual existence, because it exposes the truth, that is, Christ. Schmitt, to the contrary, wanted now to hide the subjective self behind the objective to avoid subjective guilt. Thus he interpreted the question "Who are you?" to inquire into the personality of individuality, which he differentiated from a meaning in the sense of subjectivity for the purpose of avoiding inquiry into one's own subjectivity.

By not inquiring into personal subjectivity, he was able to abstract from his person his activities in the various offices as scientist, researcher, and jurist, especially as jurists are supposedly trained to objectivity anyways. With returning to the separation between objective intent and subjective guilt, and to his abstraction of office from person in *Gesetz und Urteil*,

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[1288] cf. Schmitt, *Ex*, 89-90.

[1289] Schmitt, *Ex*, 76, 89

[1290] Especially Schmitt's book on *Romanticism* engaged with Kierkegaard.

[1291] Schmitt, *Politische Theologie*, 21. Schmitt had quoted from Kierkegaard's *Repetition*; Søren Kierkegaard, *Wiederholung* (Düsseldorf: Diederichs, 1955).

[1292] Søren Kierkegaard, *Gesammelte Werke*, trans. Hans Martin Junghaus, vol 6: Abschlieβende unwissenschaftliche Nachschrift zu den Philosophischen Bocken, 3rd ed. (Gütersloh: Gütersloher Verlagshaus, 1994), 265, 283, 350.

he attempted to prevent any inquiry into his personal responsibility, unless it can be first proven factually, from an objective perspective, that he, Schmitt, the accused, had willed and wanted to violate any legal prohibition. *Nullum crimen, nulla poena sine lege*![1293] Ironically, for the purpose of avoiding criminal responsibility, Schmitt's rejection of the "normative power of the factual" had turned into an insistence on a legal norm and the factual – an indirect acknowledgement of Kelsen's system?

The subjective moral guilt that remained even though criminal guilt was excluded in the absence of objective intent, Schmitt dismissed with reaffirming his early separation of the moral from the political. This he accomplished by applying his friend-enemy axiom which, according to his own definition, identifies enemies for one's own protection. Schmitt, the jurist, recognized that if the own self acknowledged the conflict with the other, the enemy could question the very self. Thus he referred to the extension of the Däubler quote: ‚*Und er wird uns, wir ihn zum selben Ende hetzen*' (And he will hunt us, and we him, to the same end).[1294] For being able to claim that the enemy could classify the self, the own *Gestalt*,[1295] he redirected the beginning of the history of conflict from the Original Sin to the story of Cain and Abel. This changed it from being a conflict between God and human being to a conflict among human beings. A conflict between human beings permitted to identify the objective intent of the enemy which, in turn, enabled opposing and negating the enemy's status of classifying the self. For the purpose of safeguarding the own subjective self, the friend, from the intruding other, the enemy, he turned to calling the other a friend.[1296]

Also, acknowledging the enemy, the other, now as the new elite, withdrew from the interrogator the power over the self. At the same time, this affirmed Schmitt's concept of history as a trajectory of never-ending exchanges of domains and elites, which is the consequence of constant conflict between dichotomist ideas that endanger the *Gestalt* of the unity of the group, nation, race, and also the self. To determine which ideas were dangerous or rather who, which personality, embodied such dangerous ideas, afforded the method of

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[1293] This was the central jurisprudential question of the post-war Nuremberg Trials regarding offences against humanity which had been "only" principles grounded in legitimacy until the 1946 United Nation Declaration of Human Rights grounded them in a legal form.

[1294] Meier, *The Lesson*, 1.

[1295] ‚Wen kann ich als meinen Feind anerkennen? ... Indem ich ihn als Feind anerkenne, erkenne ich an, daβ er mich in Frage stellen kann.'; Schmitt, *Ex*, 89. ‚Man klassifiziert sich durch seinen Feind.'; Schmitt, *Ex*, 90.

[1296] "Weh dem, der keinen *Freund* hat, denn sein Feind wird über ihn zu Gericht sitzen."; Schmitt, *Ex*, 90; emphasis in original.

differentiating between friend and enemy, that is, an objective assessment of the intent of the other. Thus, by redirecting the question "who are you?", which had challenged his abstraction between office and person, he asserted his definition of the political and his theory of history as an exchange of elites. Accepting the new elite removed the enemy and protected the consistency of his self against moral assertions of subjective guilt.

Schmitt's early abstractions threw a long shadow over the theorist beyond theology. His theories cannot simply be exclusively reduced to a fight for power, for being or non-being, solely determined by a 'pseudo-theological myth of the enemy'.[1297] They also cannot be limited to a concern of 'How should I live?',[1298] and a reduced inquiry mainly into Schmitt's *Political Theology* and his friend-enemy distinction.[1299] Rather, Schmitt did not recognize, or he disregarded, the dangers that are entailed in transferring and transforming mythologies. Schmitt had replaced the 19th century Christian ideology of the state with a political ideology of pseudo-unity that could be enforced with a myth of racial identity and a sovereign who was legitimized with an analogy to a juristic, political idea that he had found captured in the institution of the church. Schmitt was thus not a theologian but rather could be called a "political ideologian".[1300] He had ventured into the political field but had not remained objective as he claimed. With the sovereign he had overridden the objective with the subjective. But in the last consequence, he remained true to his abstractions. His final abstraction removed responsibility from decision for the purpose of protecting the self. This abstraction permitted Schmitt to withdraw into the inner self and enabled rejecting any responsibility as his own. Thus he called himself in 1945 a Christian Epimetheus.[1301] He referred to the mythical story of Prometheus's brother and husband to Pandora who had unleashed havoc. But Schmitt downplayed Epimetheus' personal responsibility.[1302]

[1297] Groh, *Arbeit*, 73.

[1298] Meier, *The Lesson*, 76.

[1299] Meier, *The Lesson*, xxi-xxiv.

[1300] Meier claims that Schmitt was a political theologian who applied his own theories with an understanding of acting in history according to a command of obedience. Meier, *The Lesson*, viii. But if theology is defined as the question about God, about the divine, Schmitt, who was thinking of the self and obedience to the self, cannot have been a theologian. If Bonhoeffer's view is applied, Schmitt remained enclosed within the self, which would make Schmitt a political philosopher.

[1301] Schmitt, *Ex*, 12.

[1302] Hollerich, "Carl Schmitt", 109.

Bonhoeffer's theology is a profound rejection of the position of self-justification which Schmitt took in 1945 in response to the question of "Who are you?". For Bonhoeffer, the *Gestalt* that sets the standard is not the self but Christ, and guilt and responsibility are not deferred or refused but accepted. Already in 1933, Bonhoeffer took the effect the question of "Who are you?" can have on the self as the point of departure for his *Lectures on Christology*. According to Bonhoeffer's description of the human logos' reaction to being confronted with this question depicts exactly Schmitt's 1945 response. Bonhoeffer described the "how" of the human response. When the human logos' autonomy is confronted and threatened from the outside, the demand is negated because 'it is the last thing it [the logos] has the power to do'. This is not a defense, but the acknowledgment of the power of self-negation because self-negation affirms the own logos and thus assimilates the counter-logos into itself, as is done in idealism.[1303]

But for Bonhoeffer, the *Gestalt* of Jesus, who is no longer an idea or a threatening word but a person in history, turns the question of "who are you?" around. This question thus addresses the "Word made flesh", the "who", which is outside the logos' classification system, and thus becomes the question of faith for the dethroned human reason.[1304] Thus by redirecting the question to his accuser, Schmitt, in 1945 in the position of the accused, now a dethroned theorist and jurist, refused to accept the "who" question from outside his self and remained in the "how" question. This means that from Bonhoeffer's perspective, Schmitt, despite continual attacks on Kelsen's closed system of legality, was caught in the philosophical system of the idealist self and refused the encounter with the outside other. Instead, Schmitt took recourse to the dialectic structure of conflict that was embedded in the dialectic of the political and in his concept of history.

It appears as if Bonhoeffer was talking straight to Schmitt's concept of the political for overcoming conflict, his discourse on intent and guilt, and his view on the "rightness" of judgements, when Bonhoeffer discussed the attitude of judges, i.e. the Pharisees who question Jesus. He criticized them as being obsessed with fact-based correct decisions. Every moment of their lives is a situation of conflict, a state of disunion.[1305] They divide the world

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[1303] DBWE 12:302.

[1304] cf. DBWE 12:302.

[1305] DBWE 6:310.

into good and evil, and satisfy their conscience when a prohibition is not defied because 'whatever is not prohibited is permitted'.[1306] In general, guilt is scarred over by success.[1307] In their "objective attitude", the Pharisees acted as if they possessed the knowledge of good and evil but without realizing that they had lost their true nature by having fallen away from their origin,[1308] from God. In splitting everything into "is and ought", they did not see that even what is permitted is in disunion from God,[1309] and that success was a denial of judgement.[1310] Bonhoeffer, similar to Kierkegaard, assessed that those who are judging do nothing but accuse others and can never arrive at doing, thus can never reach the next stage, the religious stage. Rather, a child-like attitude of accepting God's Word in the simplicity and the immediate obedience of the *actus directus* was needed.

The decision that affected the world was for Bonhoeffer not the Pharisee's decision, but God's decisions of the Fall into Original Sin and His reconciliation through Christ in the middle of history. The standard for the judgement of the "is" over against the "ought" was not human law but Christ. Christ was not an idea, a fiction, or an analogy, but a fact of reality. Christ's *Stellvertretung* in the reality on the cross demands responses that are tied to God and the other. Being con-formed to Christ meant being free for taking on guilt (*Schuldübernahme*), just as Christ took on the guilt for humanity, for others.[1311] In the moment of nothingness on the cross, he renounced support from human laws.[1312] Christ took on an unmediated objective and also subjective guilt over against human laws, in distinction to Schmitt's rejection of the transfer of subjective guilt. For those who take on guilt, the "rightness" of their human decision remains hidden, but the "hope" for God's justification remains. This differs from Schmitt's assessment in *Gesetz und Urteil* that a human metaphysical principle justifies the judge.

Bonhoeffer overcame Schmitt's "how"-attitude with a focus on the "who" by redirecting the question of "Who are you?" away from the self and toward Christ, toward the Word of God. This "who" is God, is not the self, and is not a human representative of the idea of God. The

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[1306] DBWE 6:307.

[1307] DBWE 6:88.

[1308] DBWE 6:315.

[1309] DBWE 6:307, 308.

[1310] DBWE 6:90.

[1311] Schließer, *Schuld*, 54.

[1312] cf. Schließer, *Schuld*, 56.

"who"-question does not concern the immanence of the "how" and one's own authority, but becomes the religious question of transcendence, other authority, existence, limits, and the love for the neighbor. In the words of Bonhoeffer's early writings, the redirected question is no longer that of the fallen Adam, but it is, until God's self-revelation, the question of the obedient Adam.[1313] However, the question of "Who are you?" is once more redirected by the powerless resurrected One, by Christ. It is addressed to the now convicted human being, but is at the same time answered with justification and grace, and with giving the human being of faith in Christ the boundary to his existence.[1314] With his Christology of Christ as the center of the confession of faith, Bonhoeffer sets Christ as the insurmountable ethical counterpart over against the human being's self.

In the final consequence, Schmitt resorted to self-justification and Bonhoeffer lived and died in the hope for God's justification and grace. In 1945 Schmitt's recourse to his earliest abstraction between objective intent and subjective guilt, as well as to his abstraction of his official theories from his person, served to avoid inquiry into, and an evaluation of his own self, his *Gestalt*, over against legal and moral standards. In the position of the accused, he protected the self. He applied his friend-enemy principle in order to discover the intent of his inquirer, and, in application of his theory of history, he preferred to accept the new political idea and elite as the new domain. Bonhoeffer instead rejected losing one's true nature and resorting to a self-negation that leads to remaining in the enclosed idealist self, and moreover removed the human being from revelation and from the *Gestalt* of Christ. The *Gestalt* of Christ demands from the human being, who is reconciled to God and con-formed to Christ, not abstractions that abscond with self-justification from guilt and responsibility. Instead, it meant making ethical concrete decisions in the particular context of one's life, and trusting in God's promise of reconciled wholeness, while leaving the final decision to God because

'responsibility is the whole response of the whole person to reality as a whole.'[1315]

[1313] cf. DBWE 12:302-03.

[1314] cf. DBWE 12:305.

[1315] DBWE 6:293.

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