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The tension between "risk" and "guilt" in the theologian Dietrich Bonhoeffer's exploration of responsible life

Karola Radler
Stellenbosch University
Stellenbosch, South Africa
karo.radler@gmail.com

Abstract

This article discusses the two definitions for a responsible life and action that the theologian Dietrich Bonhoeffer provides in his book *Ethics*, which suggest that accepting *Schuld* – taking on guilt, debt, or an obligation – seems to override the risk involved in responsibility. A comparison of *Stellvertretung*, *Schuldübernahme*, and *Zurechnung* of the German codified civil law and their dogmatic intricacies shows that Bonhoeffer adopted jurisprudential thought into his theology of acting responsibly through taking on *Schuld* in accordance with Jesus Christ, the incarnated God who once existed in human reality and acted on the cross as *Stellvertreter* for humanity. Embracing elements of the sub-constitutional German civil law tradition of the bourgeois liberal-democratic movement of the 19th century served Bonhoeffer to emphasize, as part of his resistance to a dehumanizing totalitarian political system, an independent private space of freedom that is removed from the public sphere.

Keywords

Bonhoeffer; responsibility; Schuld; freedom; law

In his book *Ethics*[1] the theologian Dietrich Bonhoeffer provides two definitions for a responsible life which differ decisively in respect to risking (*wagen*) decisions and actions, and regarding guilt, debt, or obligations (*Schuld*).[2] In the course of Bonhoeffer's study of "The

1 DBWE 6.

2 Because in the German language the word *Schuld* can refer to a contractual debt, a criminal guilt, or a legal obligation I will use in this article the German term unless the context necessitates a specific identification as debt, guilt, or obligation.

Structure of Responsible Life"[3] the early element of "ascription to the self" (*Selbstzurechnung*) of one's own life and acts appears to become replaced with the element of taking on *Schuld* (*Schuldübernahme*). Although Bonhoeffer left this exchange unexplained it can be observed that as *Schuld* appears in the definition the risk-factor of responsible decisions loses its central importance. This shift may be explained with a view to the particular legal institutes of the German private law tradition which are defined in the 1900 Civil Code as "authorized actions in the place of someone else" (*Stellvertretung*), "taking on debt or obligations" (*Schuldübernahme*), and the "ascription" (*Zurechnung*) to the self of risk or *Schuld*. Bonhoeffer uses these terms and principles of the German private law tradition in his theology in a strikingly similar way. The concept of *Stellvertretung* is, in absence of a corresponding word in the English language, often translated by making use of the word "representation".[4] However, the directly corresponding word to "representation", the German word of "Repräsentation", became during the 19th century increasingly associated with the public sphere. *Stellvertretung*, instead, became a legal institute of private law and was for economic contexts defined in the 1900 Civil Code as a form of deputyship. In Bonhoeffer's context of resistance to public oppression this distinction is of importance as this essay will clarify.[5] This article will begin with introducing (1) the effect *Schuld* appears to exert on the quality of risk due to the discrepancy in Bonhoeffer's definitions of the structure of responsible life. An (2) outline of the context that enticed Bonhoeffer to utilize institutes of civil law and (3) a clarification of such legal institutes which are of relevance to Bonhoeffer's theology will follow.

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3 DBWE 6:257–89.

4 The official translation of the DBW uses for *Stellvertretung* the descriptive wording of "vicarious representative action"; DBWE 1:120, n. 29. However, German legal history associates the concept of representation within the public law to the constitutional and administrative law. A representative's legal position depends on politics and electoral methods which transfer authority from an electorate to various executive bodies. This differs from *Stellvertretung* mostly insofar as this concept concerns contractual relations.

5 For the reason of accentuating in this article Bonhoeffer's use of the private law concept of *Stellvertretung* in his objection to a state which absorbs the private free person into a public space that is represented by a totalitarian leader, I will avoid the official English translation with its reference to 'representation' and instead will use throughout the original German word.

The final part of the paper is (4) concerned with Bonhoeffer's adaptation of the intellectual features of the legal institutes to his theology.

1. Schuld's effect on the risks connected to responsible life

In the summer of 1942 while beginning to experience the underside of life as a participant in the resistance movement against a violent political regime, the theologian Dietrich Bonhoeffer wrote two drafts on the topic of "History and Good".[6] Both drafts addressed the issue of acting on one's faith in Jesus Christ and the resulting consequences of accountability. While the theme of responsibility appears as a central issue already in the first draft, it is given in the second draft an even more elevated place by being specifically accentuated through a variety of sub-headings, including one titled "The Structure of Responsible Life". In the two definitions for responsible life which Bonhoeffer provides in this sub-section, responsible life is structured at its foundational level in the twofold way of a bond to other human beings and to God on one side and of freedom to one's own life on the other side.[7] The form of the bond is in both definitions conceptualized with the element of a particular action which Bonhoeffer identified as *Stellvertretung*, and the element of "accordance to reality" (*Wirklichkeitsgemäßheit*) that ties the action that is undertaken to worldly context.[8] In regards to freedom a major discrepancy becomes apparent between the two definitions. In the first definition freedom is comprised of the element of "ascription to the self" (*Selbstzurechnung*) of one's own life and acts and the element of a venture (*Wagnis*) to, i.e. of risking, concrete decisions which resides in the tension between bond and freedom.[9] However, a second definition at the end of the same sub-section replaces the element of "ascription to the self" (*Selbstzurechnung*) with the element of "taking on debt" (*Schuldübernahme*) and places the latter coequally with the element of freedom.[10] Thus in a responsible life the inherent risk in the tension of the "humanly impossible situation"[11] between bond,

6 DBWE 6:219–45 and 246–98.

7 DBWE 6:257.

8 DBWE 6:257, 288.

9 DBWE 6:257.

10 DBWE 6:288.

11 DBWE 6:288.

now described as obligation and obedience,[12] and freedom changes its quality at the approach of the element of *Schuld*. But ultimate judgement over the decisions and actions of responsible life and their inherent risks and *Schuld* rests with God.

2. The contextual incentives for Bonhoeffer's utilization of civil law institutes

Bonhoeffer, born in 1906, belonged to the partly aristocratic upper class of the Prussian[13] educated bourgeoisie, mostly comprised of doctors, lawyers, theologians, scientists, and professors.[14] In the 1848/49 German revolution which meant to establish a first all-German constitutional monarchy, a group of Berlin professors had attached a bill of rights and freedoms to the so called *Paulskirchen* Constitution.[15] Despite the revolution's failure[16] the bourgeois class succeeded in the second half of the 19th century in securing freedom in regards to property ownership and commercial transactions on the sub-constitutional level with the 1897 Commercial Code,[17] and the 1900 Civil Code.[18] Achieving such freedoms on the private law level in unified all-German legal Codes paralleled the movement in the public sphere that had led in 1871 to the unification of

12 DBWE 6:288.

13 With the unification in 1871 of the German countries the previously independent state of Prussia became the leading province of the imperial German Reich. On the history of Prussia see Sebastian Haffner, *Preußen ohne Legende* (3rd ed., Hamburg: Gruner, 1998).

14 6% of the Prussian society belonged to this affluent upper class of the educated bourgeoisie and 1% of the population belonged to the aristocracy. On the class relations see Gunther Mai, *Die Weimarer Republik* (Munich: Verlag C. H. Beck, 2009), 75–79.

15 Friedrich Ebel and Georg Thielmann, *Rechtsgeschichte: Von der Römischen Antike bis zur Neuzeit* (Heidelberg: C. F. Müller, 2003), 334, 339–43.

16 Instead of accepting the imperial crown he was offered "from below" the Prussian King chose a violent military solution to the constitutional challenge to his monarchy. The Frankfurt Constitution nonetheless indirectly triggered in 1850 limited democratic reforms to the Prussian Constitution; Ebel and Thielmann, *Rechtsgeschichte*, 336, 343.

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

18 *Bürgerliches Gesetzbuch* (*BGB*), Bundesministerium der Justiz und für Verbraucherschutz, accessed March 30, 2018. [Online]. Available: https://www.gesetze-im-internet.de/bgb/BGB.pdf

the German countries into the imperial German Reich under Prussian leadership centred in Berlin.[19]

Thus, by the dawn of the 20th century the bourgeois struggle between democratic and monarchic powers for liberty and national unity had formed a private legal sphere in relative independence from and parallel to the constitutional, public and political sphere. Because the primary interest of the authors of the Civil Code was to secure and clarify legal rights on the private level over against public interferences, the Code regulates (with a systematic, positivist tendency to completeness and a high degree of structural abstractness) all those concrete legal relations among individuals that show the closest connection to social realities. With its foundational principle of abstraction, the Code contains a German legal peculiarity, which goes back to the Prussian minister *von Savigny*, which strictly differentiates between the contractual will of persons and the rule over property[20] or objects (*Sachen*). Nonetheless, the central idea behind the codification is a formal economic equality among individuals and a (theoretical) liberty in the sense of a contractual freedom that permits one to freely enter into and shape the content of contractual obligations (*Schuld*).[21]

Despite this late 19th century's dominance of private law increasingly public legal norms encroached on its scope due to the overarching public concern for the changing material needs in an advancing industrialization.[22] The new emphasis on the aspect of purpose as

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19 Michael Stolleis, *A history of Public Law in Germany 1914-1945*, trans. Thomas Dunlap (Oxford: Oxford University Press, 2004), 25; Frank B. Tipton, *A History of Modern Germany since 1815* (Los Angeles: University of California Press, 2003), 90–128; Ebel and Thielmann, *Rechtsgeschichte*, 346–52, 358–9.

20 Astrid Strack, "Hintergründe des Abstraktionsprinzips", Jura 1 (2011):6–7, DOI: 10.1515/Jura.2011.002.

21 Ebel and Thielmann, *Rechtsgeschichte*, 358, 361–2. The principle of contractual freedom is inferred from Para 305 *Bürgerliches Gesetzbuch* which regulates entering into contractual relations and determining their content. Michael Stolleis, "Legal Pluralism in the 19th and 20th century," *Anali Pravnog Fakulteta Beogradu* 66, no. 4 (January 2018): 7, DOI: 10.5937/AnaliPFB1804005S.

22 Under the conditions of the industrialization access to air, light, energy, and water demanded proper distribution and normative safety standards, standardized mass contracts, as well as collective wage agreements. Stolleis, *Public Law 1914–1945*, 12–14, 40.

criterion of the allocation of services indicated a turn away from the early 19th century idealism and towards a new realism that incorporated empirical fields such as sociology of law and comparative law.[23] Methodologically, this discovery of purpose loosened the grip of legal positivism which strictly subsumed facts under the written words of legislated statutes. In the context of a newly regained self-confidence of public law that reduced its distance to private law, the "constitutional event of epochal significance", namely the promulgation of the 1914 Enabling Act at the start of the First World War, was hardly noticed. Hidden among economic and banking regulations[24] this sovereign intervention law not only curtailed the contractual freedom of the private law of obligations and rendered completely meaningless the shield of positivism.[25] It also circumvented the constitution, installed a provisional dictatorship, and drastically intervened in the sub-constitutional liberal freedoms.[26] Purpose and expediency had spurned a *de facto* abolition of the freedoms at the core of private law[27] and as arranged in the Civil Code.

The post-World War One revolutionary crisis of private and collective existence, combined with the decline of the bourgeois class society vis-à-vis an industrial mass society, engulfed the German state and the Protestant Church. The 1919 Weimar Constitution for Germany abolished the last elements of the feudal system of privileges for nobility,[28] listed basic rights as programmatic political statements,[29] and eliminated the Protestant church from the position of a state-church.[30] The 19th century-limited local self-governance of the Protestant church had now been elevated, at

23 Stolleis, *Public Law 1914–1945*, 15.

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

25 Stolleis, *Public Law 1914–1945*, 36, 38; Georg Buch, *Der Krieg und die Vertragsfreiheit* (Breslau: Bergstadtverlag Korn, 1918).

26 Stolleis, *Public Law 1914–1945*, 25, 27.

27 Stolleis, *Public Law 1914–1945*, 40–41.

28 Art 109, Sec 3; Art 155, Sec 2, Line 2 Weimar Constitution, in *Die deutschen Verfassungen des 19. Und 20. Jahrhunderts*, ed. Horst Hildebrandt, 11th enl. ed. (Paderborn: Ferdinand Schöningh, 1979), 96, 107.

29 Art 109 – 177 Weimar Constitution, in Hildebrandt, *Verfassungen*, 96–111.

30 Art 137, Sec 1 Weimar Constitution, in Hildebrandt, *Verfassungen*, 102.

least nominally, to the constitutional level. For the Protestant Church, the state's constitution prescribed the institutional form of a corporation of public law (*Körperschaft des öffentlichen Rechts*) with a legal personality determined by the general rules of the Civil Code.[31] This entanglement of public and private law meant that the Church, a collective person, needed to be officially registered as a private law association (*Verein*) in order to be legally capable of carrying rights and obligations,[32] a precondition for participating in contractual interactions. Without sovereign power and being a derivative of the state, the church remained in its legal status subject to public law despite participating in legal relations as an entity of private law. In this arrangement it remained unclear if the state could deduce from the constitutional tax regulations and financial support payments to the Church the right to exercise oversight even if the Church executed its determinative will within the private law sector.[33]

Parallel to the issue of the remaining scope of the state's control over the Lutheran Church a dispute on public representation ensued due to the constitutional competitive dualism between the Reich-President and the *Reichstag*, the parliament, a remnant dualism from the 19th century's struggles of popular versus monarchic sovereignty . To complicate the situation further, the state, in its purpose of shaping public life as a collective person of public law, used the organizational structures as defined in the Codices of private law to participate in economic activities of the private law sector.[34] Through these channels, reversely, the concepts of civil law, namely the doctrine of discretion (*Ermessen*) and the concept of indefinite legal terms (*unbestimmter Rechtsbegriffe*), infiltrated public law and raised a general awareness that executive decisions and judgements of the state could be arbitrary.[35] Systematically this jurisprudential gap

31 Art 137, Sec 4 and 5 Weimar Constitution, in Hildebrandt, *Verfassungen*, 102.

32 Paras 1, 21 *Bürgerliches Gesetzbuch*.

33 That Bonhoeffer was aware of the intricacies of this constitutional constellation becomes apparent in his discourse on compulsory organization (*Anstalt*) and association (*Verein*) that involves the elements of purpose, persons, and the tax regulations even though he discusses this under the mantel of sociological typology. DBWE 1:253–57.

34 Stolleis, *Public Law 1914–1945*, 199, 205.

35 Carl Schmitt, *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis* (Berlin: Liebmann, 1912).

between empiricism and normativity became bridged with the fiction that the doctrine of the separation of powers provided correctness and legitimacy.[36] Overall, this methodological blurring of the late 19th century's "traditional" boundary between public and private law provoked by 1925 a demand for interpreting the constitutional basic rights as a protective layer and as claimable subjective public rights over against the legislator and public administration, and in separation from and in addition to claims based on the civil law Codices.[37] This finally elevated to a universal level the demands for liberal rights which the Berlin group had first expressed in the 1848 failed revolution but had remained limited to the sub-constitutional standard of contractual freedom and equality. An elevation would provide an additional protective legal shield for the private against interferences from the public space.

But starting in 1933 the National Socialist state eliminated the fiction of the separation of powers, targeted the liberal rights, foremost freedom and equality, and proceeded to remove the principle of abstraction from the Civil Code which prevented a legalistic rule over persons as dehumanized property or objects (*Sachen*).[38] In contrast to the 1914 Enabling Act, the 1933 National Socialist Enabling Act completely eliminated the protective distance between the juristic person of the state and the natural person, i.e. the private citizen, for the purpose of replacing the constitutional -parliamentary system with the uncertain legal grounds of *Führer*-will and command. Non-bureaucratic purposive action was to eradicate the different spheres between state and citizen, ruler and the ruled, the public and private space, and thus also between public and private law. What was aimed for was the dissolution of the idea of the state as a juristic person and carrier of rights and with obligations[39] towards the natural person, endowed with will and rights as well. Basic rights as claimable subjective public rights were mocked as liberalistic, bourgeois remnant products

36 Stolleis, *Public Law 1914–1945*, 209–10.

37 Stolleis, *Public Law 1914–1945*, 211–2.

38 Strack, "Hintergründe", 5.

39 Even though National Socialism targeted the legal figure of the juristic person of the state it nonetheless continued to need this point of reference for tax law, civil service law, police law, and international law and thus never fully succeeded in its elimination. Stolleis, *Public Law 1914–1945*, 346.

of the 19th century. And communal thought became superimposed on any legal norms that had protective functions, including *von Savigny's* foundational abstract differentiation between rule over non-free objects and the free will of persons towards entering into relations characterized by rights and obligations.[40] The outcome was that human beings were no longer perceived as individual subjects of private law but instead as purposive points of ascription with specific functions within a network of public obligations such as man, woman, farmer, father, soldier, foreigner etc.[41] Anyone who invoked a law that applied to all of humanity, or formal juristic guarantees, or insisted on separations was *ipso facto* an enemy of the national community that aimed in the name of a higher justice for the destruction of racial and ideological difference.[42] In consequence, this turned also the principle of contractual freedom that permitted whatever was not prohibited under public law into the opposite that "everything was prohibited subject to permission".[43]

Bonhoeffer, although recognizing that the social structures of the worldly reality of the 19th century were fast receding,[44] nonetheless received from his ancestors and immediate family context the intellectual inheritance of Berlin professors. Bonhoeffer's father was a professor of psychiatry at the University of Berlin and his mother Paula von Hase was of aristocratic background and came from a long row of Prussian professors with collegial ties to the German cultural icon Goethe. Among his brothers and brothers-in-law were one physicist, four lawyers and one other theologian beside himself.[45] It was in this family setting, "not in the world outside, that the

40 Strack, "Hintergründe", 7.

41 Stolleis, *Public Law 1914–1945*, 334–5.

42 Stolleis, *Public Law 1914–1945*, 343–9, 358.

43 Stolleis, *Public Law 1914–1945*, 362.

44 "… the bourgeois parquet floor has been ruthlessly pulled out from under our feet, and we must now search for a bit of earth on which to stand"; DBWE 10:327, emphasis in original.

45 Bonhoeffer's mother was the daughter of Countess Clara von Kalckreuth and his great-grandfather was called to his professorship in Jena by Goethe himself. On further details of Bonhoeffer's family background see Eberhard Bethge, *Dietrich Bonhoeffer: A Biography*, ed. Edmin Robertson, trans. Eric Mosbacher, Peter Ross, Betty Ross, Frank Clarke and William Glen-Doepel, rev. and ed. Victoria J. Barnett (Minneapolis: Fortress Press, 2000), 3–5, 13, 32, 56–57.

beliefs characterizing him as a theologian matured."[46] The constitutional lawyer Gerhard Leibholz, with whom Bonhoeffer had experienced a growing friendship since the early 1920s, and who became his brother-in-law in 1926, played a special role for Bonhoeffer as they coordinated their entry into public objection to the approaching National Socialism in 1932.[47] In tune with the legal discourses of his time, Leibholz had (in his 1924 doctoral dissertation[48] in public law) argued for interpreting the programmatic basic right of equality before the law of the Weimar Constitution as a prohibition against arbitrary use of state authority and thus for elevating this nominal right to a protective level for citizens. Furthermore, he reasoned in support of subjective public rights, a need for judicial oversight, and discussed the doctrine of discretion.[49] And the very essence (*Wesenschau*) of public representation in the constitutional age[50] was the subject matter of Leibholz's 1929 Habilitation thesis.

During the same timeframe Bonhoeffer engaged in his 1927 doctoral dissertation *Sanctorum Communio*[51] with the legal reality of the Protestant Church under the Weimar Constitution and its spiritual implications. His characterization of the church as "Christ existing as church community"[52] combined the constitutionally prescribed legal form of a collective person grounded in public and private law with personal Christian spirituality to form a community *sui generis*.[53] The constitutional requirement of becoming a *quasi*-personal carrier of

46 Bethge, *Dietrich Bonhoeffer*, 45.

47 Karola Radler, "The Leibholz-Schmitt connection's formative influence on Bonhoeffer's 1932–33 entry into public theology." *Stellenbosch Theological Journal* 4, no.2 (2018): 690.

48 Gerhard Leibholz *Die Gleichheit vor dem Gesetz: Eine Studie auf rechtsvergleichender und rechtsphilosophischer Grundlage* (Berlin: O. Liebermann, 1925).

49 Gerhard Leibholz, "Das Verbot der Willkür und des Ermessensmiβbrauchs im völkerrechtlichen Verkehr der Staaten." *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1 (1929):77–125. [Online]. Available: http://www.zaoerv.de

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

51 DBWE 1. Bonhoeffer completed his dissertation and doctoral defense in 1927 but published it only by 1930; DBWE 17, 66, 68.

52 DBWE 1:121, 141, 189, 190, 191, 199, 200, 207, 211, 214, 216, 231, 260, 280, 288.

53 DBWE 1:264, 266.

rights and obligations he identified as being satisfied in the miracle of the person of Jesus Christ,[54] the God who once appeared as a natural person in history and continues to exist as Church community. In analogy to associations attaining, according to the Civil Code, the status of being a carrier of rights and obligations in similarity to a natural person,[55] Bonhoeffer placed at the centre of the church Jesus Christ who as a natural person in history was once the carrier of rights and obligations and who transfers this status to the church by continuing to live as the spiritual middle within the communal person (*Gesamtperson*) of the church and within the natural human beings of the community of faith. For Bonhoeffer, the Church stood as a collective juristic person alongside the juristic person of the state within the one kingdom of God.[56] It had a natural personality with spiritual essence in an analogical sense to the foundational principle of the Civil Code according to which every human being carries by birth legal capacity,[57] which is conferred by the Church through baptism.[58] Defining the Church as a collective and communal existence[59] centred on a natural person, yet in a spiritual sense, takes seriously the constitutional requirement of combining public law with the conceptual thoughts of the Civil Code and opened up the opportunity to an intellectual engagement with further conceptual institutes of the Civil Code such as *Stellvertretung*,[60] *Schuldübernahme, and Zurechnung.*

Although both Bonhoeffer, in his use of the concept of *Stellvertretung*, and Leibholz with his gaze at the essence of parliamentary representation,

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54 For a Lutheran analysis of Bonhoeffer's use of the concept of person see Michael P. DeJonge, "The Fact of the Person of Jesus Christ: Dietrich Bonhoeffer's *Act and Being*." PhD diss., Emory University, 2009, 85–104; and Michael P. DeJonge, *Bonhoeffer's Theological Formation: Berlin, Barth, and Protestant Theology* (Oxford: Oxford University Press, 2012), 83–100.

55 Paras. 1, 21 *Bürgerliches Gesetzbuch*.

56 DBWE 12:292.

57 Para 1 *Bürgerliches Gesetzbuch*.

58 DBWE 1:257, 241–2.

59 Karola Radler, "Decision" in the thought of Dietrich Bonhoeffer and Carl Schmitt: A comparative study" (PhD diss., University of Stellenbosch, 2019), http://scholar.sun.ac.za, 127–31.

60 Bonhoeffer refers to *Stellvertretung* for the first time in his doctoral dissertation and subsequently substantiates it as a central feature of his theology. He discusses the concept of *Stellvertretung* most intensively in 1931/32; DBWE 11:274–5.

were engaged in researching and employing particular forms of "standing in for someone else" in a wider sense, they remained strictly within their chosen academic spheres of theology and jurisprudence respectively. Neither Bonhoeffer nor Leibholz ever explored the depth of the connection between the concept of *Stellvertretung* and the concept of representation throughout history. But by remaining within their respective paradigmatic space they clarified the distinction between the public law concept of representation in distinction to the contract and civil law institute of *Stellvertretung*.[61] In effect, by Bonhoeffer taking up the term *Stellvertretung* of the civil law tradition, while Leibholz was working on the public law term of representation, both respected and observed the freedom of the private space in independence from public interference as it was fought for by their 19th century bourgeois ancestors.

Thus in 1933 with the beginning of the National Socialist negation of liberal rights for the purpose of absorbing the individual person into the state-collective, the use of civil law institutes became for Bonhoeffer an effective tool in his objection because it underlined the freedom and equality within a space untouchable by public demands. This is especially the case in regard to the National Socialist's attempt to eliminate the Civil Code's principle of abstraction which specifically protected the will of free persons from being ruled over as non-free objects. The Civil Code and its various institutes, not least personhood, *Stellvertretung, Schuldübernahme*,

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61 Hasso Hofmann, inspired by the close intellectual congruence between Gerhard Leibholz and Carl Schmitt in insisting on an anti-thesis between representation and identity under the Weimar constitutional conditions, investigated the historical developments of the terms *Repräsentation* and *Stellvertretung*. Starting with the *corpus mysticum* and *persona repraesentata* Hofmann traces the terms from their origin in Roman antiquity into the 19th century, including their jurisprudential, ecclesiastic and political terminological usage. While Hofmann's study focused on public representation Karl-Heinz Menke turned to *Stellvertretung* as a central theological concept and its many historical and systematic interpretations, including among many others also Bonhoeffer's understanding of *Stellvertretung* as an identity and synthesis between act and being. The understanding on Leibholz's part of identity as anti-thesis to representation while Bonhoeffer takes up this principle in regard to a synthesis concerned with *Stellvertretung*, additionally highlights the differentiation Bonhoeffer and Leibholz made regarding the two concepts of "standing in for someone else". Hasso Hofmann, Repräsentation: *Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert*, 2nd ed. (Berlin: Duncker & Humblot, 1990); Karl-Heinz Menke, *Stellvertretung: Schlüsselbegriff christlichen Lebens und theologische Grundkategorie* (Freiburg: Johannesverlag, 1991).

and *Zurechnung* are Bonhoeffer's bourgeois inheritance from his 19th century ancestors which epitomizes the freedom of human beings to shape the content of their lives in alternative difference to the demands of the state. Intellectually incorporating Civil Code institutes into his theology undermined a *Führer* who ascribed exclusively to his self all responsibility and rights for making lawful decision[62] and demanded their faithful observance which in consequence negated for all other persons the prospect of engaging themselves in decisive actions based on faith in Jesus Christ.

3. The German private law institutes relevant to Bonhoeffer's theology

As a general institute of the 1900 German Civil Code *Stellvertretung*[63] applies in principle also to the Code's specific concept of "taking on debt" (*Schuldübernahme*)[64] as part of the law of obligations[65] which regulates the relations between at least two parties, the creditors and debtors. Within the legal concept of *Stellvertretung* reality (*Wirklichkeit*) is a necessary prerequisite for its authoritative scope (*Vollmacht*) and both, *Stellvertretung* and *Schuldübernahme*, carry particular risks for the involved parties and ascribe responsibilities, known as liabilities.

The Code defines *Stellvertretung*[66] as an act of declaring a will in a legally binding way in the name of the person one stands in for and which remains within the boundaries of an authoritative scope that was set by this person who becomes the principle party to the transaction *Stellvertretung* effects. The act of *Stellvertretung* is valid as long as the scope of authority is in "accordance to reality" (*wirklichkeitsgemäß*), that is, it actually exists. If in difference to this "immediate" or open form of *Stellvertretung* someone acts in the "own" name but nonetheless in the interest and on account of someone else this form is called "mediating"

62 Heribert Ostendorf, "Politische Strafjustiz in Deutschland." *Informationen zur Politischen Bildung* 306 (January 2010): 23, 30.

63 Paras 164 to 181 *Bürgerliches Gesetzbuch*.

64 Paras 414 to 419 *Bürgerliches Gesetzbuch*.

65 Paras 241–908 *Bürgerliches Gesetzbuch*.

66 Para 164 *Bürgerliches Gesetzbuch*.

or concealed[67] *Stellvertretung*. Although this latter form is not specifically defined within the Code it is nonetheless recognized within private law.[68]

The institute of *Schuldübernahme* in the sense of the Civil Code means that despite not having been a party to the original contract between at least two parties, a third party nonetheless steps forward into the position of the debtor or creditor of that original contract.[69] In difference to *Stellvertretung* where the third party interconnects the principle parties to the transaction, in *Schuldübernahme* one of the principle parties gets replaced by the third party. An agreement with a creditor results in the third party stepping into the position of the original debtor. Then the third party takes on all rights and obligations (*Schuld*) flowing from the original contract which fully releases the original debtor.[70] If the third party enters into an agreement with the debtor the approval of the creditor is required[71] because the creditor faces the inherent risk of the new debtor's possible insolvency. For both *Stellvertretung* and for "taking on debt" in *Schuldübernahme* risks (such as for delivery or payment) can be a motivational calculation or a consequence of the relationship between the principle partners. The risk is suspended between the freedom to contractual engagement and the bond among the parties that results in obligations. The risk disappears when either the contractual debt, the *Schuld*, is fulfilled or is removed from an original principle party when someone else takes on the debt.

Both concepts of "standing in place of" and of "taking on", of *Stellvertretung* and of *Schuldübernahme*, are by design triangular relationships to which not only the principle of contractual freedom but also the principle of abstraction apply. Basically, anyone is free to enter into and determine the content of such relationships, but the basic underlying agreement of the

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67 Heinrich Lehmann, *Allgemeiner Teil des Bürgerlichen Gesetzbuches*, 6th ed. (Berlin: Walter der Gruyter, 1947), 227.

68 Helmut Heinrichs, „BGB §§ 1–432," in *Bürgerliches Gesetzbuch*, edited by Otto Palandt (50th rev. ed., Munich: C. H. Beck, 1991), 156. Both forms of *Stellvertretung*, the unmediated and the mediated form, differ from a courier (Bote) who only transmits someone else's message but without authorization to any discretionary variances; Heinrichs, „BGB §§ 1–432", 157.

69 Para 414 *Bürgerliches Gesetzbuch*.

70 Heinrichs, "BGB §§ 1–432", 459.

71 Paras 415, sub-para 1; 184 *Bürgerliches Gesetzbuch*.

relationship remains abstractly independent from the relationship. Thus in *Stellvertretung*, the really-existing authoritative scope that is defined between the authorizing principle party and the one who stands in for this party remains untouched even if the subsequently arranged relationship between the principle parties collapses.[72] In *Schuldübernahme*, in principle, the defects of the prior basic relationship, or the so called "causal" relation, between the original parties do not automatically touch the validity of the subsequent agreement in which a third party takes on the *Schuld* of one of the original parties.[73]

Finally, the conceptual thought of *Zurechnung*, the ascription of an act to the self, which also appears in Bonhoeffer's theology of responsibility, denotes within civil law a result in form of a contractual liability or a tort and thus is synonymous to the result of responsibility.[74] This responsibility incorporates from the *Zurechnung* of the law of tort the requirement that an individual party possesses the ability to the insight of having to protect the self from damaging consequences.[75] In a concrete case this necessary ability to be able to understand that consequences are ascribed to one's acts must be carefully separated from the question of culpability (*Ver-schulden*) for damaging results or consequences that have occurred. The culpability of the law of tort relates in a less stringent way to criminal guilt where it is defined as a foremost objective assessment of subjectively willing and wanting the violation of a protected value. Applied to contract law culpability means bringing about an unlawful result with one's action.[76] Thus culpability which flows from subsequent results of actions differs from the prior ability of understanding that actions risk consequences. The prior insight to the ascription (*Zurechnung*) of consequences is an individual prerequisite and focuses on the person who acts, while culpability deals subsequently to acts with their consequences.

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72 Heinrichs, "BGB §§ 1–432", 156, 162.

73 Para 417 *Bürgerliches Gesetzbuch*. Heinrichs, "BGB §§ 1–432," 463.

74 Lehmann, *Allgemeiner Teil*, 264. Responsibility, that is, *Verantwortlichkeit* in civil law concerns all forms of liability and tort (*Deliktsrecht*).

75 Para 254 *Bürgerliches Gesetzbuch*. Heinrichs, "BGB §§ 1–432," 284.

76 Para 276 *Bürgerliches Gesetzbuch*. Heinrichs, "BGB §§ 1–432," 321.

4. Bonhoeffer's adaptation of intellectual features of German private law

In reminiscing in 1944 on the difference between the jurisprudential and the theological existence Bonhoeffer basically states the approach he took to his theology of responsibility. To him the theological standpoint was, due to faith, the more "flexible and alive way of acting" because it was "ultimately more attuned to reality"[77] Instead of using the stringent systematic positivism that characterizes the Civil Code, he intellectually adjusted this jurisprudential inheritance. By drawing in his chapter on "The Structure of Responsible Life" connections between the acts of human beings within this world and Christ's action on the cross he establishes that responsibility means to take actions in the place of someone else (*Stellvertretung*) in accordance to the reality in Christ who has been and is a fact of faithful existence (*wirklichkeitsgemäß*). Being aware that responsible acts, which are taken in faithful bond to Christ, carry the risk for the acting human being of becoming ascribed with *Schuld*, he establishes the freedom of the human being from adhering to the law of logic and instead links it to the intrinsic law that is grounded in its origin beyond legal definitions.[78] Taking on responsible acts within this situation of tension between bond and freedom, the awareness of the risk turns into the consequence of *Schuld*. However, such acts that take on *Schuld* (*Schuldübernahme*) remain abstractly independent to the non-abstract connection of the human being's relationship to God which persists unchanged due to the authorizing faith in Christ's redemptive standing-in for humanity (*Stellvertretung*) on the cross. The persisting underlying and authority-giving faith in Christ's mediating *Stellvertretung* sustains the hope that God will justify the responsible acts once the awareness of the risk of an ascription (*Zurechung*) of *Schuld* turns into the consequence of taking on *Schuld* (*Schuldübernahme*).

In 1942, at the time of penning his theology of responsibility, Bonhoeffer was no longer foremost concerned with the ecclesiastic situation[79] but

77 DBWE 8:304.

78 DBWE 6:271.

79 By 1942 the Confessing Church had failed. In March 1940 the Gestapo, the state's secret police, had closed its Preacher's Seminary under Bonhoeffer's directorship which

instead with the situation of the individuals that were involved in the underground resistance and desperately searched for a remaining space of freedom for actions leading out of the formal-legalistic totalitarian grip of the National Socialist state. In order to establish that responsible actions, contrary to existing legal norms, are foundationally resting on the human being's faith-connection to Christ's *Stellvertretung* on the cross, Bonhoeffer, draws a line from all humanity and to Christ by referring to the father-child[80] connection which is also a basic Civil Code provision for acting on behalf of someone else.[81] Thus responsible actions are not only those undertaken for the self but include those that one engages in "for" all human beings. This comes with the caveat that excludes self-absolutizing idolatry and instead demands selflessness, "a complete devotion"[82] in which Christ determines the "origin, essence, and goal of all things, conditions, and values" of inter-human connections. It serves as the limit for inverting life through the rule of objects (*Sachen*) over people.[83] The selflessness of Jesus Christ who fulfilled in his human existence the "entire living, acting, and suffering"[84] for all human beings, "for" humanity, exemplifies "the responsible human being par excellence".[85] By stressing Jesus' selflessness and action for others on the cross Bonhoeffer draws an analogy to the mediating or concealed *Stellvertreter* of the civil law tradition who acts in his own name but for the interests of others. And similar to the codified version of *Stellvertretung* which rests on an authorizing dimension that exists in reality, so Bonhoeffer establishes that actions in faith to Christ rest on His "origin, essence, and goal" and must be "in accord with reality"[86] (*wirklichkeitsgemäß*). But this "concrete reality" is not a general earthly context, but "the Real One [*der Wirkliche*], namely, the God who became

had been working underground since September 1938. DBWE 14 and 15.

80 DBWE 6:257–8.

81 Paras 104–107 *Bürgerliches Gesetzbuch*; transactions with minors have to be authorized by a parent or guardian before they enfold legal validity.

82 DBWE 6:258–259.

83 " … Herrschaft der Dinge über den Menschen ..."; DBW 6: 259.

84 DBWE 6:258.

85 DBWE 6:258–9

86 DBWE 6:261, 263; emphasis in original.

human", "the Real One".[87] If actions are within the scope of being "in and from" Christ, who "has borne and fulfilled the essence of history", human selfless action on behalf of others is "action in accordance with reality".[88]

At this intersection between the human world and the bond to the Reality of *the* One a "number of mutually irreconcilable laws", of incompatible laws, threaten to destroy the human being.[89] Prior to taking action, though, the situation has to be concretely assessed and a risk-evaluation must be undertaken. The essence of the Greek tragedies show according to Bonhoeffer the dilemma of life's intrinsic structure of accruing *Schuld* toward life itself through being obedient toward one law while at the same instance breaking another one.[90] Bonhoeffer asserts though that in this world as the "domain of concrete responsibility"[91] it is not because of the dispute in the form of laws and the inevitability that *Schuld* gets ascribed is of serious importance, but rather the consequence of the unity of God and the simple life that flows from the mediated reconciliation of the world to God in Jesus Christ.[92] Nonetheless, because human beings are "limited by our creatureliness", action in accord with reality[93] must seek to understand it in its situational entirety. Similar to the civil law's obligation of avoiding damages to the self which establishes the necessity of a prior insightful risk-assessment of the consequences that might get ascribed (*Zurechnung*) to the self as a result of an action, Bonhoeffer demands a similar risk-assessment prior to actions. To qualify the action as responsible "it is necessary to observe, weigh, evaluate, and decide" the given situation which considers motives, courage, intent, content, and the other within their own net of responsibilities.[94]

And in tune with his relative Leibholz's work and the jurisprudential discourse of his time on discretion (*Ermessen*), Bonhoeffer adds to the

87 DBWE 6:261; emphasis in original.
88 DBWE 6:263.
89 DBWE 6:264.
90 DBWE 6:264–5.
91 DBWE 6:267; emphasis in original.
92 DBWE 6:265.
93 DBWE 6:267; emphasis in original.
94 DBWE 6:268–9.

risk-assessment the criterion of the appropriateness of an act for the case-at-hand (*Sachgemnäßheit*)[95]. This is attained when the relation of persons to objects is aligned in the sense of freeing oneself from secondary personal agendas and own aspirations. Similar to the element of selflessness within Christ's *Stellvertretung* an action serves a cause best if it is pure from the self because only then the actor is freed for the original relation to God and to human beings. However, of far greater importance for the appropriateness of actions is discovering the intrinsic law (*Wesensgesetz*) by which an object (*Sache*), such as the law of a state, subsists.[96] This is relevant for assessing the risk and the appropriateness of the action in the specific and central problem of the extraordinary situation that can pose the question of the *ultima ratio*.[97] Then the basic necessity of human life presents the dilemma that despite the need for operating within the confines of law as an essential component of order, the intrinsic law of the state reaches beyond this normal and regular and appeals to a freedom that calls for a free venture.[98] Taking action in this free space despite the risks affirms the legitimacy of the law in the very act that violates its legality because the risk and the action are surrendered to the divine guidance of history. In this dynamic process of risking and acting in appropriate free responsibility the call to accruing *Schuld* from transgressing both the law of the state as well as the intrinsic law in its wider sense must be accepted.[99]

In the tense dilemma of the extraordinary situation where the discretionary assessment of risk prior to actions discerns a space of freedom, the risk that is recognized becomes lodged into the inner tension between this freedom and the bond to the redemptive act of *the* Real One on the cross (*Stellvertretung*). It is also at this point where the free responsible action brings about an unlawful result in the sense of culpability but in a less stringent understanding than guilt in the sense of a criminal willing

95 DBWE 6:270; own translation of the term *Sachgemäßheit*. For further information on the difficulty of translating this term because of its many possible meanings, see DBWE 6:270, note 89.

96 DBWE 6:270–1.

97 DBWE 6:272–3.

98 DBWE 6:274, 284.

99 DBWE 6:274–5.

and wanting of the violation of a law. It is rather a culpable instance of accepting the consequence for acting despite the risks involved. At this moment at which the risk that was assessed prior to action turns into consequences to the free responsible action, culpability is ascribed to the actor in an analogical sense to the ascription (*Zurechnung*) within the concept of the Civil Code in which with debt or an obligation also liability is taken on (*Schuldübernahme*).

For Bonhoeffer also the willingness to be burdened with *Schuld* is located at the intersection between the bond to the Real One and the human beings of this world. He dismisses a definition of the willingness for taking on culpability, *Schuld*, in the sense of a need for or the idea of a new human being which triumphs over a defeated humanity. Rather the origin lies in Jesus Christ's selfless love for the other human being and His being-without-sin that is demonstrated in Jesus' *Stellvertretung* and its exclusive concern with other human beings.[100] Therefore, just as Jesus took on the *Schuld* of all human beings, of all of humanity, it is the ultimate reality of human existence to selflessly take on *Schuld* in responsible action. But a free responsible act done in the situation of a concrete conflict can clash at the intersection between Reality and human existence with the call of one's conscience. When right and wrong, good and evil, or even right and right or wrong and wrong collide[101] responsible action must be in favour of Jesus Christ.[102] Everyone is within the own life's circumstances, despite ties to social class, vocational position or a standing in public life, in the position of making free decisions using own insights and accepting obedience to God's will.[103] Yielding instead to natural conscience would be self-justification before God, because it rests "in the *autonomy* of one's own ego" or someone else's human ego.[104] Then it is the "demand to be 'like God' – sicut deus – in knowing good and evil".[105] This serves only to destroy the unity of the self which, however, can be restored if the self-

100 DBWE 6:275.

101 DBWE 6:284.

102 DBWE 6:282.

103 DBWE 6:283–7.

104 Bonhoeffer refers here explicitly to the National Socialist claim that "says, 'my conscience is A.H.'"; DBWE 6:278.

105 DBWE 6:277; emphasis in original.

justifying conscience is overcome "by the conscience that is set free in Jesus Christ" who as the "lord of the conscience"[106] "has become one's own conscience".[107] Thus if selfless acts for the sake of human existence and in faith to the Real One are recognized as risky but are nonetheless acted upon in a freedom beyond personal egocentric goals and even beyond legality then the consequence of culpability is ascribed to the self in the same manner as it was taken on by the one-without-sin, Jesus Christ, in his redemptive *Stellvertretung* on the cross.

In adapting to his theology of responsibility the two concepts of *Schuldübernahme* and *Stellvertretung* of the Civil Code Bonhoeffer combines the two concepts in a flexible and alive way that is ultimately attuned to *the* Reality. In this process he both affirms and reverses the principle of abstraction that underlies such concepts. Although Bonhoeffer states that those who act in free responsibility must avoid living in an abstraction from the Real One[108] he nonetheless affirms that the authority-giving faith in Jesus Christ's *Stellvertretung* remains untouched by any possible defects that might be present due to an interference of natural conscience or flawed human selflessness. However, in *Schuldübernahme* he reverses the principle: it is not because of impossible defects of the action of the One-who-is-without-sin that flawlessly fulfils God's will but the possible defects in the process of taking on *Schuld* which are at the centre of Bonhoeffer's understanding of abstraction. Defects in the process of taking on *Schuld* remain abstract in the sense that the faith in Jesus' *Stellvertretung* stays untouched. Thus, ultimately defects in the sense of human errors do not alter, and therefore remain abstract within the structure of responsible life. Responsible life is foundationally grounded and carried by non-abstract Real faith, that is, by the concealed faith-tie of human beings to the redemptive *Stellvertretung* of Jesus Christ on the cross. This tie of human beings to the reality in Christ frees them, despite their sinfulness, to taking responsible actions which preserve the human beings over against the object (*Sache*) of state-law that does not subsist on the wider intrinsic law.

106 DBWE 6:282.
107 DBWE 6:278.
108 DBWE 6:262.

The *Schuld*, the culpability, that is taken on and which[109] overrides in a process of ascription the insight to the inherent risk finds a non-abstract faith-foundation in *Stellvertetung*. Nonetheless, Bonhoeffer states, it is neither the bond, the reality of Jesus's *Stellvertretung*, nor the own insight to the risks that can justify free responsible, obedient, and God's will-affirming action and the ascribed risk-overriding *Schuld*. Rather the actor is placed face-to-face with God. Due to the limited creatureliness of the human being it is impossible to gain human knowledge on the ultimate justification of the free responsible act that is taken in the situation of the humanly impossibly tense dilemma in which all sides lead to accusations.[110] This final "Judgement remains with God."[111]

In sum, using the liberal-democratic intellectual inheritance from his ancestors' civil law tradition that is rooted in the 19th century's bourgeois fights for freedom and equality, Bonhoeffer adopted the concepts of *Stellvertretung*, *Zurechnung*, and *Schuldübernahme* of the Civil Code and adjusted them to his theological structure of responsible life. This provides for a "flexible and alive way of acting" which is "ultimately more attuned to reality".[112] The intellectual feature of the principle of abstraction that underlays the Civil Code enabled turning faith in Jesus' Christ's *Stellvertretung* on the cross, which mediates in a concealed way a redemptive unity of the self to God, into a solid foundation for "The Structure of Responsible Life" and thereby provides for the human being the freedom from and a buffer to the object (*Sache*) of the law of the state. This emphasized Bonhoeffer's resistance to the totalitarian political system and defended the private sphere's autonomy from the dehumanizing legal constraints of the public space. Not a juristic positivist legal system, ego-focused self-ascription, self-conscience, and self-justification determine worldly reality but Jesus Christ, the sinless and selfless Real One, the God who once existed as human being and continues to exist through faith within the concrete reality of this world. A focus on the self is defiant of the

109 DBWE 6:287.

110 DBWE 6:268, 275, 288.

111 DBWE 6:275.

112 DBWE 8:304.

bond, the "relation from one human being to another",[113] and belongs to the sphere of the self-enclosed ego which stands apart from God's revelation in Jesus Christ and His reconciling Grace.[114] It is the faith in the Real One which authorizes the freedom to human action for taking on *Schuld* and facing the consequences although ultimate justification rests with God. Moving ahead with a free responsible act in the most demanding of all human situations, despite knowing from human insights the inherent risk of the consequences, their willing ascription (*Zurechnung*) to the self and the taking on of the consequence of *Schuld* (*Schuldübernahme*) is grounded in the faith of Jesus Christ's selfless, mediating, redemptive, and re-uniting *Stellvertretung* on the cross. This faith ties the worldly action to the Real One and provides for the hope of God's ultimate justification of the responsible action's risk and *Schuld*. In this dynamic process the consequence of culpability, the *Schuld*, overrides the human knowledge of the inherent risks which recede at the moment of actively engaging in the free responsible action that is taken in faith to Jesus Christ and in the hope of final justification by God.

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113 DBWE 6:259.

114 The details of the relationship between the philosophical understanding of the ego to theology Bonhoeffer investigated in his Habilitation thesis *Act and Being*; DBWE 2.

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