

ISSN 2307-1966

Ноосферные Исследования

ЭЛЕКТРОННЫЙ НАУЧНЫЙ ЖУРНАЛ

2020



2

ТЕМА НОМЕРА

ТРУДНЫЙ ВЕК ГУМАНИТАРИСТИКИ

НООСФЕРНЫЕ ИССЛЕДОВАНИЯ

Российский научный журнал (основан в 2003 году)

Журнал зарегистрирован в Федеральной службе по надзору в сфере связи, информационных технологий и массовых коммуникаций (Роскомнадзор) как электронное периодическое издание
Свидетельство о регистрации Эл № ФС 77-78954 от 07 августа 2020 г.

2020

Периодическое издание

Вып. 2

Учредитель ФГБОУ ВО «Ивановский государственный университет»

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СОДЕРЖАНИЕ

РЕДАКЦИОННАЯ КОЛОНКА

Трудный век гуманитаристики 3

НООСФЕРНЫЙ УНИВЕРСУМ: МЕТАНАУЧНЫЕ И ЭСТЕТИЧЕСКИЕ АСПЕКТЫ

Ермолина И. На пути к Ноосфере — Вернадский, Рерихи,
Живая Этика 4
Маринова Э. В. Прикладная этика — современные вызовы
академическому образованию 13

УНИВЕРСИТЕТСКИЕ МИРЫ В НОРМЕ И ПАТОЛОГИИ

Ерахтин А. В. Трансформации российского образования в
XX—XXI веках 19
Куликова О. Б. Философия и судьба университета как
образовательного проекта и социокультурного феномена 32

ОБРАЗОВАТЕЛЬНОЕ ИЗМЕРЕНИЕ СОВРЕМЕННОЙ ГУМАНИТАРИСТИКИ

Воронова Т. А., [Засобина Г. А.] Пять педагогических заметок в
пространстве современной гуманитаристики 41
Мельникова Е. В. Образовательная среда в информационный
век: особенности содержания 49
Дельцова И. А. Инклюзивность как новый ориентир
образования 55

ЭКОЛОГИЗАЦИЯ СОЗНАНИЯ: ТЕОРИЯ И ПРАКТИКА

Ерофеева К. Л. Форсайт-метод в стратегиях природо-
пользования: актуальные аспекты 59
Суворова Г. М. Отражение идеи устойчивого развития в
экологическом образовании Ярославской области 66

КОГНИТИВНЫЕ АСПЕКТЫ ГУМАНИТАРНОГО ЗНАНИЯ

Карташкова Ф. И., Ваняцкая Е. А. Типы ментальных
процессов: деятельностный подход (к проблеме
когнитивных аспектов языкового описания) 71

КУЛЬТУРОЛОГИЧЕСКИЕ ПРОБЛЕМЫ АНТРОПОЛОГИЧЕСКОГО КРИЗИСА

Крохина Н. П. Антропологический кризис в рецепции
отечественной литературы конца XX века 78
Океанский В. П., Океанская Ж. Л. Космос костромской избы:
символический локус в ноосферной динамике 84

ТОЧКА ЗРЕНИЯ

Ставр С. Административное право и проблема «воли»: не
ошибаемся ли мы? 92
Информация для авторов 108

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NOOSPHERIC STUDIES

Russian scientific journal (founded in 2003)

The journal is registered in the Federal Agency for the Oversight in the Sphere of Communication,
Information Technology and Mass Communications (Roskonnadzor)
as an electronic periodical edition

Registration certificate Эл № ФС 77-78954 of August 07, 2020

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CONTENT**EDITORIAL COLUMN**

- The hard age of humanitaristics 3

NOOSPHERIC UNIVERSE:**META-SCIENTIFIC AND AESTHETIC ASPECTS**

- Ermolina I.** On the way to the Noosphere — Vernadsky, Roerichs,
Living Ethics 4
- Marinova E. V.** Applied ethics — modern challenges to academic
education 13

UNIVERSITY WORLDS IN NORM AND PATHOLOGY

- Erahtin A. V.** Transformation of Russian education in the XX—XXI
centuries 19
- Kulikova O. B.** Philosophy and destiny of university as an
educational project and socio-cultural phenomenon 32

EDUCATIONAL DIMENSION OF MODERN HUMANITIES

- Voronova T. A., Zasobina G. A.** Five pedagogical notes in the space
of modern humanities 41
- Melnikova E. V.** Educational environment in the media age: content
peculiarities 49
- Deltsova I. A.** Inclusiveness as a new educational focus 55

ECOLOGIZATION OF CONSCIOUSNESS: THEORY AND PRACTICE

- Erofeeva K. L.** Foresight method in nature management strategies:
topical aspects 59
- Suvorova G. M.** Reflection of the sustainable development idea in
environmental education of the Yaroslavl region 66

COGNITIVE ASPECTS OF HUMANITARIAN KNOWLEDGE

- Kartashkova F. I., Vansyatskaya Ye. A.** Types of mental processes:
activity approach (the problem of cognitive aspects of language
description) 71

CULTURAL PROBLEMS OF THE ANTHROPOLOGICAL CRISIS

- Krokhina N. P.** Anthropological crisis in the reception of Russian
literature of the late twentieth century 78
- Okeansky V. P., Okeanskaya Zh. L.** Cosmos of the Kostroma
peasant's house: a symbolic locus in the noosphere dynamics 84

POINT OF VIEW

- Stavru S.** Administrative law and the problem of "will": do we get
the rights wrong? 92

- Information for the authors** 108

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ТОЧКА ЗРЕНИЯ

УДК 141.5
ББК 87.152.45

S. Stavru

ADMINISTRATIVE LAW AND THE PROBLEM OF “WILL”: DO WE GET THE RIGHTS WRONG?

C. Ставру

АДМИНИСТРАТИВНОЕ ПРАВО И ПРОБЛЕМА «ВОЛИ»: НЕ ОШИБАЕМСЯ ЛИ МЫ?

DOI: 10.46726/NOOS.2020.2.92-107

Ссылка для цитирования: Ставру С. Административное право и проблема «воли»: не ошибаемся ли мы? // Ноосферные исследования. 2020. Вып. 2. С. 92—107.

Citation Link: Stavru, S. (2020) Administrative law and the problem of “will”: do we get the rights wrong?, *Noosfernye issledovaniya* [Noospheric Studies], vol. 2, pp. 92—107.

God:
— Lazarus, come forth!
Lazarus:
— Wait, Lord! Is it not: If I want to?

Powers and rights

In *law* we could make a distinction between two regulative approaches in principle: everything which is not expressly allowed is forbidden (*public law*) and everything which not expressly forbidden is allowed (*private law*). What is decisive in the first approach are the peremptory legal norms: bans and orders which univocally impose certain behavior to their addressees. It is precisely in this approach that one can find the greatest approximation to John Austin’s definition of law as an order of the sovereign sent to his subjects¹ [Austin, 1832]. What is leading in the second approach are the discretionary legal norms proposals for a possible juridical regulation that leave room for negotiation. It is precisely in this approach that law is a transition agreed between the legal subjects from one natural state, be it a state of continuous “war of everyone against everyone” (Thomas Hobbes, Baron d’Holbach) or a condition of insecurity in property and in freedom (John Locke, Denis Diderot, Jean-Jacques Rousseau, Immanuel Kant), to a society organized as a state².

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¹ The views of law maintained in this book have become famous as the “command theory” of law. Max Weber defined law as “coercion applied by a staff of people” [Weber, 2001, p. 53].

² Bucher’s theory according to which subjective rights ensure room for the individual “to make (“individually-specific”) legal norms” is also of interest here: [Larenz, 2016, pp. 109—111].

The rigidity of legal norms in public law contrasts with the flexibility of private transactions in private law. *Administrative law* is part of public law but elements of private law penetrate it more and more often, for example ones related to the conclusion of the so-called administrative contracts (the state power seen as a kind of service, negotiating with administrative bodies, public procurement, etc.) as well as to the introduction of new administrative law regimes in exercising and protection of some specific human rights (consumer rights, rights of holders of personal data, rights of traffic participants, etc.). Not only specific legal concepts but also entire branches are beginning to migrate from administrative to commercial law: for example, medical law has been making attempts to do so in Bulgaria for many years. Some fields of private law are governed by new specific administrative law requirements: e.g. production and sale of genetically-modified organisms. But these requirements are again justified through human rights (in the case of genetically-modified organisms this justification passes through consumer rights). Thus, the rights as a concept are winning their victories even in the most preemptory field of law: public law.

The cases of the so-called tacit consent of the administrative body (administrative law silence, which is legally equivalent to consent) where the legislator restricts the scope of application of the principle of the tacit refusal (administrative law silence, which is legally equivalent to refusal) can also be associated with the process of human rights' entry into administrative law. It seems to me that the response to the question which one of the two approaches — the one of the tacit refusal or the one of the tacit consent — should be preferred in administrative law is also associated with public law's relation with human rights. In contrast to natural persons the administrative body has *powers, and not rights*. Powers are devised as more “powerful” rights — since they are imperative in nature and often prevail over the will (rights) of their addressees but their realization is also an obligation of the administrative body itself — there is the latter can not but exercise its powers, cannot but express its will³.

The principles of *tacit refusal* and *tacit consent* apply in cases where the administrative body does not carry out its powers: as the administrative body does not express will the latter should be stipulated by the law: either as refusal, or as consent. There must not be a third option. The silence of the administrative body should not be valid as a “lack of declaration of will” position. This exclusion of silence as a lack of declaration of will reflects an obligation of the administrative body to respond to the request made to it and the corresponding petitioner's right to “obtain” the will (the response) of the administrative body addressed by him/her. The relation between the administrative body and the petitioner is not a contractual one, they do not negotiate to defend their private interests, there are no rights standing between them. On the contrary — they are bound by specific obligations within the administrative procedure protecting certain public interest stipulated by the law. If in private (especially in civil) law the competing will of each one of the equal legal subjects encoded in generations of human rights must have

³ Another important role of the powers is that they outline the competences of the respective administrative body, i.e. the boundaries of its subordinate will-formation. The will of the administrative body is valid as far as it is expressed within the scope of its competence taken as the sum of its powers. In this role the “powers” of the administrative bodies become guarantees of human rights: everyone can refuse to obey and perform an administrative act (the orders contained therein) issued beyond the competence of the respective administrative body (beyond the boundaries of its valid “administrative will”).

priority, in public (especially in administrative) law the main regulatory core passes through the idea of certain public interests, which should be contained through the will (powers) of the administrative bodies empowered (competent) for that.

The *opposition between “will” and “interest”* that is characteristic of law should select different winner in different regulatory contexts of public and private law: if one’s will should be decisive in civil law (for example in the statutory regulation governing the (in)capacity to act where instead of effacement of the legal significance of personal will (interdiction) the legislator should propose a system of different measures to support the natural person in the formation and expression of his/her authentic personal will), then the key regulatory component in administrative law should remain the public interest (for example when choosing⁴ between tacit refusal and tacit consent where no harm to the public interest should be allowed by postulating a will for consent by reason of a particular administrative body’s failure to act (“lack of will”).

In Europe (at least as of 2016) one can find a clear tendency towards *liberalization* of national legislations. Liberally-oriented law does not rely on imperative and univocal orders that bind unconditionally but prefers to work through the rights and freedoms of its citizens: by respecting their (own) choice and their (own) refusal. This approach can be found more and more often in the branches of public law as well. Government through freedom is one of the methods stated by Michel Foucault as underlying one when exercising the contemporary political power. In the contemporary situation of power the freer people are the more included they are in the realization of government based on their rights and freedoms. The main axiom in such form of power is the human rights and the rights related to them: freedom of will and freedom of interests. The more rights one has and the more one exercises his/her rights the more bound (s)he is to the regulatory machine of law. The need for rights also becomes a need for law.

Orthodoxy, law and rights

In *Christianity* when the questions of regulation of relations between God and man, on the one hand, and among people, on the other hand, are discussed there is no talk of rights.⁵ There is talk of orders. Of course, this is a considerably simplified statement as the notion concerning the regulatory mechanism of relations between

⁴In 2015, 14 deputies from the parliamentary group of the Patriotic Front introduced a draft bill to amend the Administrative Procedure Code by replacing the principle of tacit refusal by the principle of tacit consent. The following revision of article 58 of the Administrative Procedure Code was proposed: “if no pronouncement is made within the term, this shall be deemed tacit consent to the issuance of the act”. According to the deputies who introduced the bill “the principal aim of the proposed amendments is to limit the omission in administration’s work by creating foreseeability and control as well as to facilitate the citizens and the business when they participate in procedures of issuance of administrative acts.” [Tacit Consent, 2012]. One can also read some objections against the introduction of the principle of tacit consent in the debate “for” and “against” [Stoyanov, 2012]. The text of article 58 of the Administrative Procedure Code currently in force remains unchanged: “If no pronouncement is made within the term, this shall be deemed tacit refusal to issue the act.”

⁵Indeed, an important part of church’s role in social life of people is beyond the talk about rights, and namely: “where the concept of human rights cannot give a satisfactory response to all questions posed by life we need the experience of the Church based on the Biblical and Patristic tradition” [Slavcheva, 2015, p. 127].

God and man as well as of the relations among people is interpreted differently by different Christian denominations as in each one of them this notion is multilayered and polyvalent. This text does not aim to exhaust or summarize the set of regulatory problems of Christianity, nor does it have any theological claims. It aims only to emphasize some specific aspects of this set of problems which could lead to different parallels and intuitions.

Dealing with commandments is what (somehow) approximates the Christian regulatory approach to public law, and in particular, to administrative law. If we try to define the branch of law to which we could attach the *Ten Commandments*, probably it would be administrative law. Major part of God’s instructions given through Moses to the Jews in their flight to their sacred land can also be viewed as general administrative acts. An example for that is the First Passover:

“Then Lord spoke unto Moses saying: And the LORD spake unto Moses and Aaron in the land of Egypt, saying,

This month *shall be* unto you the beginning of months: it *shall be* the first month of the year to you.

Speak ye unto all the congregation of Israel, saying, In the tenth *day* of this month they shall take to them every man a lamb, according to the house of *their* fathers, a lamb for an house:

And if the household be too little for the lamb, let him and his neighbour next unto his house take *it* according to the number of the souls; every man according to his eating shall make your count for the lamb.

Your lamb shall be without blemish, a male of the first year: ye shall take *it* out from the sheep, or from the goats:

And ye shall keep it up until the fourteenth day of the same month: and the whole assembly of the congregation of Israel shall kill it in the evening.

And they shall take of the blood, and strike *it* on the two side posts and on the upper door post of the houses, wherein they shall eat it.

And they shall eat the flesh in that night, roast with fire, and unleavened bread; *and* with bitter *herbs* they shall eat it.

Eat not of it raw, nor sodden at all with water, but roast *with* fire; his head with his legs, and with the purtenance thereof.

And ye shall let nothing of it remain until the morning; and that which remaineth of it until the morning ye shall burn with fire.

And thus shall ye eat it; *with* your loins girded, your shoes on your feet, and your staff in your hand; and ye shall eat it in haste: it *is* the LORD'S passover.

For I will pass through the land of Egypt this night, and will smite all the first-born in the land of Egypt, both man and beast; and against all the gods of Egypt I will execute judgment: I *am* the LORD.

And the blood shall be to you for a token upon the houses where ye *are*: and when I see the blood, I will pass over you, and the plague shall not be upon you to destroy *you*, when I smite the land of Egypt.”⁶

There are no human rights in the Egyptian desert. There are no such rights on the way to Calvary. Maybe this is one of the reasons that the Church’s position does not always seem adequate to contemporary tendencies in the protection of human

⁶ [Exodus 12:1-13]; this English version has been used for all other references to the Bible.

rights — especially in their extremely liberal forms. For the Church they are simply *not significant*, the legal emphasis on rights is *incomprehensible* for the Church. By “incomprehensible” I mean conceptually inadequate, going beyond the regulatory spaces of Christianity, subordinate to the practices of obedience, penance and humility.⁷ Thus, at a conference organized in 2011 in Bad Boll, Germany, Russian Orthodox Church’s the representative Archpriest Vsevolod Chaplin, head of the Department for the Cooperation of Church and Society of the Moscow Patriarchate stated that “it is inadmissible and dangerous to interpret human rights as a supreme and universal basis of social life governing the religious views and practices. Most human rights are completely compatible with the orthodox concept. But ROC (Russian Orthodox Church — SS’s note) pays special attention to the “hierarchy of values, according to which orthodox Christians, in contrast to secular humanists, are far from considering human life on earth and everything related to it a priority. For the orthodox Christian the value of faith of the sacred objects and the fatherland is higher than human rights, higher even than the right to life” [Slavcheva, 2015b, p. 7; Chaplin, 2015b, p. 51]. In the Fundamentals of the Teachings of the Russian Orthodox Church (ROC) on dignity⁸, freedom and human rights adopted at the Bishops’ Council of the Russian Orthodox Church held on 24—29 June 2008 it is stated that human rights “may not stand higher than the values of the spiritual world (article III.2), “must be concurred with the norms of morality and ethical principle planted by God in human nature and identified in the voice of the conscience” (article III.3), “must not contradict the love for the fatherland and fellow men” (article III.4) and their realization “must not lead to degradation of the environment and to exhaustion of natural resources” (article III.5). There is a separate text (article VI.9) about “collective rights” — their existence causes fierce debates among the jurists, as the right to family, “the right to peace, the right to natural environment, the right to preservation of cultural heritage and internal norms regulating the lives of individual communities” are stated among them.

There are two regulatory axes in Christianity. The first one is *the relation between God and man*. Its content is determined by the *commandments* (God’s will) and confession (the admitted personal guilt). The moving force is the love for God but it is legally present precisely through commandments and confession: “And ye shall know the truth, and the truth shall make you free.” [John 8:32] God who is Truth and source of life wants to free men — through their active cooperation (i.e. through their humility and penance) from the yoke of the sin and hence from the yoke of death

⁷ For the attitude of Eastern Orthodox churches on Greece and Russia towards the matters concerning the rights, [His Beatitude Christodoulos, Archbishop of Athens and All Greece*, 2006; Vasilik, 2009; Witte, Alexander, 2010; Moyn, 2015; Villa-Vicencio, 1999—2000, pp. 579—600; Slavcheva, 2015a; Slavcheva, 2015b].

⁸ Human dignity is the intermediary concept through which human rights are rationalized and legitimized in Christianity [Yotov, 2016a, p. 81]: “in Christianity — because of the idea of the original sin — the vector of behavior is directed not at the preservation of dignity acquired in the society but at the zeal to overcome the initial non-dignity and the hope in God’s counter help. Thus, in a most paradoxical way human dignity stands out through humility and obedience to God... Christ reveals his strength and inviolability precisely in enduring of the greatest humiliation and suffering, in solidarity with the déclassés and infamous men, with the humiliated and the insulted. The ontological privilege of human dignity is the most radical opposite of the social one. For that reason it is entirely a burden and a task; it entails only obligations, just secondarily with respect to the fellow men at that.”

(because death has entered human nature through the sin). The purpose of human life in Christ is precisely the liberation from the yoke of death and this can only happen if we obey God’s will. Confession helps man realize his/her imperfections and sinful nature as the only way out of it is to obey God’s will.

The second regulatory axis is *the relations between people* who obey the laws of *love*: “A new commandment I give unto you, That ye love one another; as I have loved you, that ye also love one another. By this shall all *men* know that ye are my disciples, if ye have love one to another” [John 13:34-35]. Love is precisely the source of human rights in Christianity but these are rights that “operate” (in “Kelsen’s” manner⁹) through believer’s personal efforts: what is decisive for abiding by them is not the claim behind another’s right but love that feeds my obligation. And here the intermediary and the guarantor in the relations among people is again God: the regulatory efforts in human interaction are directed to the following of God’s will (the “new commandment” given by him). Human will is realized in the choice and in following God’s will. What is decisive for the success of this following is humility and hope, the leap into faith that continues incessantly. *Self-denial*. Self-denial is also an abandonment of one’s own will fed by one’s own interests. What remains is only the will to retain one’s own will within God’s will, which is a will without any claims for rights, on the contrary: it is a will to assume unbearable obligations. And this is the most difficult will. This is the will of saints.

Thus the ideal Christian (“ortho-dox”) regulatory legal relation arises and develops among persons who have given up being bearers of their own will and who have willingly turned themselves solely into witnesses of *God’s will*. Some would say that in Christianity *the regulatory “legal relation”* is reduced to obedience but the believers would correct them [by saying] that in fact it has been transcended to penance. This is a “legal relation” that does not cash in personal wills but embodies His will. The “legal relation” so structured indeed gets liberated from its first word-forming part: it is deprived of “legal” and becomes only a “relation”. And then this relation becomes “ortho-dox”. Because what is important in it is to correctly (properly) glorify God without glorifying the rights of men.

In this regulatory situation the rights as claims lose their sense. “Claims” are calmed down to prayers, when they are addressed to God, and to petitions when they are addressed to other men, There is no *human demand*, there is no claim in the substantive or procedural sense of the word, there is no pretension. Only God addresses such claim to men. The world of Christianity is a world in which there is no place for assignments either to state, or to private enforcement agents. The only *special pledge* is the one of our own human soul and it can only, and solely be won if we give up the pretensions and possessions in this world and leave our lives in the hands of the Lord. This is what Christians say.

⁹ For the so-called “reflected right” (ReflexRecht) as a “reflection” of a valid obligation (commandment/prohibition), [Kelsen, 2016, pp. 45—48]. The second form of existence of subjective right (in addition to the “reflected right”) is the “subjective right in technical sense”, which constitutes “legal power granted in order to make a claim in relation to the default on a legal obligation” [ibid, p. 57]. To these two forms Kelsen adds two more: political right, i. e. legal power granted to the individual to participate in the establishment of common legal norms, and positive (ex officio) permission.

Right as Giving up Eternal Life

The attitude of *this world* towards the rights is quite different. After the Second World War it is as if the international community in Europe finally realized that *it could rely* neither on the religious worldview, nor on the nation-states in order to ensure an effective regulation of the relations among people. In the cases where this worldview is relied upon the errors in translation or interpretation of God's will can lead to crucial conflicts between sects and segregations. Lost in the depth of faith and in the irresistibility of human desires people decide to emancipate themselves both from the churches (there are so many of them now!) and from the nation-states (there have always been so many of them!). Thus, human rights become supra-ecclesiastical (secular) and supranational (natural) — they exist as immanent substances of human nature, which comes to the fore.

The vulnerability of man as a biological creature “produces” reasons for generations of rights related to his/her life, health, physical integrity, freedom of movement, etc. The vulnerability of man as a spiritual and religious creature, however, becomes too complex a concept to be subordinated to only one Will, to only one interpretation, to only one Church. A new approach combining pluralism of beliefs, freedom of personal will and privacy of private life is taken towards its legal regulation (which has become necessary!). The religious and spiritual life has been conclusively privatized and transformed into a “black box” of a kind, out of which only (one's own) refusals of different kinds are “released” into the political life. This is how the first entirely secular (whatever it means!) refusals and thereto related human rights were born. These are precisely “human rights” and not “rights (sic) of the believer”.

In this narrative the first human rights were born as a demand for recognition of certain (own) refusals. These are the *refusal-rights* or everyone's right to refuse certain effect/action with respect to him/her and his/her body (protection of personal inviolability). A refusal to present one's personal correspondence (protection of the inviolability of personal correspondence). A refusal to do certain work (prohibition of forced labor). A refusal to serve in the army (freedom of opinion and religious beliefs). A refusal to participate in certain community (freedom of association). And an idea is contained in all of them: *a refusal to obey* another's will. In order to be meaningfully affirmed and conceptually sustained as a legal right, however, this refusal must have succeeded in opposing the most intense will: God's will. One's own will and one's own interest must have won a key legal victory over God's commandments. The primacy of one's own will had to prove its legal validity in man's refusal to obey not only another man's will but the will of God himself. And here comes the dialogue I have come across quite recently, which paraphrases the conversation between Jesus Christ and Lazarus (John 11:43), when the latter was brought back to life by his Lord:

God:

— Lazarus, come forth!

Lazarus:

— Wait, Lord! Is it not: If I want to?

This “counter-phatic” conversation (periphrasis) can be found in “extended form” also in the parable “*Lazarus and Jesus*” by *Emiliyan Stanev*. The short-story was finished in 1977. There are 4 known revisions of this story as the first drafts date to 1942. In it the first Lazarus's words for Jesus are: “He is coming... But I don't want him.” Lazar then goes on: “I am afraid that he could do something to me. I want to

live with the same. Eh, how well I used to be.” Here is what the critic Sava Sivriev says: “This is a parable about the man who cannot bear his Creator. Who does not know the time when he was visited by Him. And who chooses the creation instead of the Creator, the human instead of the Divine, the material instead of the spiritual, the transient instead of the eternal. This is a drama showing the lack of spiritual reason. Or, to put it otherwise, a drama caused by human stupidity. By this parable Emiliyan Stanev also shows that drama of man that can be read in the Old and in the New Testament. One that has repeated and one that is repeating. There is nothing wrong with wealth as far as the heart is not there but it is a common practice in human behavior to choose the creation instead of the Creator. And the choice of the free will must be respected^{10,11}”.

Lazarus’s Will stands up between Lazarus and his Lord. This will has been capitalized in the capital letter of its writing: it is not only the first letter of Lazarus’s name that becomes capitalized but also His Will. It is precisely that change that necessitates the addition of a “pseudo” in front of the name “Lazarus”: the Lazarus from the said dialogue is a “pseudo” Lazarus because the real Lazarus from the New Testament would have never responded to his Lord in this way. This is the reason why I shall refer to him below as “(pseudo) Lazarus”. The will of (pseudo) Lazarus has emancipated as (his own, personal) Refusal. Being human Lazarus is entitled to refusal: both a refusal to get treated and a refusal to be resurrected¹². He has the right to personal life and to personal death. A right to paradise and a right to hell. His life is inviolable.

¹⁰ [Sivriev, 2011; Krasteva, 2009], where it is confirmed that Lazarus’s resurrection is the “greatest miracle done by Jesus” in which “Lazarus is everyone and mankind, liberated from the sleep of oblivion, from the curse of death”. For the possible connection between Emiliyan Stanev’s short-story and the play “Lazarus” (1928) by Luigi Pirandello, [Kapriev, 2008]: “Where Diego Spina (Luigi Pirandello’s character) is resurrected by the doctor. The five minutes of death and the absence of life beyond in which he has arduously believed lead to a tragic moral breakdown. Diego loses his faith and decides that the absence of God permits him everything”.

¹¹ The drama of Lazarus who is looking for his lost nature can also be found in the dispute with a dog held from the height of a tree recreated in the play in four seasons “Lazaritsa” by [Radichkov, 2014]. In the new literature Lazarus is also present in the short-story “Lazarus” by Dimitar Dinev (originally published in German in 2005, and then in Bulgarian in 2009). Lazarus is presented in a different light “of a merely theatrical “resurrection”, staged from the outside – as an entirely human act, a conspiracy of traffickers, without the sanction of God, without faith”. Lazarus stands up to get “resurrected” from the coffin where he was hiding to illegally cross the border. For the juxtaposition of Dimitar Dinev’s “Lazarus” and Emiliyan Stanev’s “Lazarus and Jesus”, [Metev, 2014].

¹² For the relation of oblivion, sleep, and death as degrees of man’s disappearance into the darkness, and namely in the context of the miracle of Lazarus’s resurrection, [Tomberg, 2016]. The possible refusal to be brought back to memory, to the state of being awake and to life can be examined as an extreme form of a test of the validity of human rights as rights directed towards the self-effacement of their bearer — the human being. Our claims to forget (to demand that the others should not remind us of things that embarrass us), to switch off our consciousness (to demand that the others should respect our will to be entirely irrational and to follow the particularism of momentous desires) as well as the right to put an end to our life (to demand that the others should respect our desire to be reckless and disinterested in our own health and existence) may function as such rights.

*His death is also inviolable*¹³. He can refuse not only a possible life on earth but also the Eternal Life offered to him by Jesus Christ¹⁴. This is his right and everyone must honor the decision of (pseudo) Lazarus. Including **God**. For (pseudo) Lazarus does not want paternalistic attitude. He does not want to be protected, directed, patronized. For he can decide on his own. For his autonomy “overtrumps” obedience. He is offered everything but he can choose Nothing. The arbitrariness of one’s own will.

Of course (pseudo) Lazarus can be given the chance to explain his refusal in order that it does not look like one made entirely “out of spite” — as a demonstration for its own sake and an act of hooliganism. Thus, for example, he may hesitate as regards the nature and the purpose of the trust Jesus has placed in him — why has Jesus chosen him while so many others are dying. Is this not a form of demonstration where he — (pseudo) Lazarus — has been instrumentalized? He could also ask himself what Jesus is giving to him indeed: brings him back to life but this is (again) a mortal life: (pseudo) Lazarus will die again. As it actually happened to Lazarus¹⁵. Where is (pseudo) Lazarus’s own interest? But both *the refusal “out of spite”* and *the question “where are my interests?”* are inadequate scenarios for the Biblical situation. What is inadequate in the conversation with Jesus is precisely the thinking through rights and not what Jesus does (gives). “Lazarus, come forth!” contains not only a commandment but also care, trust, love. The rational thought of (pseudo) Lazarus through the assessment of his own interests and even the interests of the believers as a whole creates only localisms that cannot be commensurable with what Jesus saw. It is precisely care, trust and love that legitimate the paternalistic concealment of the question about Lazarus’s own interests behind the will of Jesus.

Lazarus from the Gospel of John would not think about his interests, nor would he want to consult a lawyer before he makes his decision. The *regime of the relationship between Jesus and Lazarus* does not allow the thinking through the rights to get involved in these relationships. Jesus and Lazarus do not negotiate, do not concur their wills and interests. The obedience of Lazarus is to follow Jesus. There is no coercion in it but dedication, there is no resistance but love. Love keeps together the centrifugal forces of the rights. It is quite unimaginable that Lazarus would place his rights (as a human being) before Jesus.

Quite different is *the relation between Jesus and (pseudo) Lazarus*. (Pseudo) Lazarus tries to enter into a relation of equality of wills — despite the fact that he has already been revived. The refusal of (pseudo) Lazarus, even if made out of spite, will hold up in court. Even if it is unreasoned, even if there are no significant and understandable motives behind it this refusal is valid in legal context as the right of (pseudo) Lazarus to decide for himself (and to refuse to Jesus) is absolute one. An important

¹³ “Pseudo Lazarus likes himself dead, not alive” [Doychev, 2016, p. 18]. Father Vladimir Doychev transfers this claim of (pseudo) Lazarus to “the culture that surrounds us”: “it is precisely such: pretentiously dying. Dying in rhymes, insolent, graphomaniac. Dying live on TV (unless there is an interesting match, then it airs one play back in the half-time)” [ibid, p. 17].

¹⁴ For the relation between the miracle of the bringing Lazarus back to life and the resurrection of Jesus [North, 2001, p. 58].

¹⁵ If (pseudo) Lazarus proceeds from the thinking typical of administrative law he could also contest the competence of Jesus: who gave Jesus the power to resurrect, isn’t he a magician, (pseudo)Jesus. The main argument against such contestation is the fact of resurrection: no one but God can overcome death.

part of the protection ensured by the rights is precisely the elimination of the need to justify their exercising (and/or non-exercising). The non-transparency of the transition from the interest (motives) behind certain behavior to the will (the declaration) being objectified as a legal pretension is part of the protective mechanism of subjective rights. Once granted the subjective right does not need to constantly support with arguments the reasons for its exercise. Especially in the fields of personal inviolability. This absoluteness of the rights in some states (e.g. in Israel) is brought thus far as to allow for the possibility of a child (and not only child’s parents) who was born with disability, which could have been, but had not been, established by prenatal diagnostics during pregnancy, holding the doctors and the state liable for not having found his/her disability, for not performing an abortion and for having been born (wrongful birth)¹⁶. From here there is only one step to grating a would-be claim of such child against his/her parents stating that they had not requested an abortion as far as they did know that the child suffers from certain disability. My personal inviolability also includes my right not to be born?

The difference between the effect of the will of Jesus and the effect of the will of anyone else who would negotiate with (pseudo) Lazarus can also be *demonstrated* by the comparison of a concept of civil law and a concept of administrative law: *donation and license*. Donation is a contract whose legal effect occurs only if both parties consent to it: not only the will of the donor but also the consent of the donee are necessary (to put it otherwise: noone can be given a donation if (s)he refuses to be given one). License is a unilateral sovereign act that has performative effect for the occurrence of certain legally defined change, regardless of the addressee of such change: it suffices that the administrative act come into force in order that the empowerment occur (in some cases the exercise of such empowerment may depend on the effect of the license if the permitted activity is not realized within certain period: such as for instance the case of healthcare facilities). If the license, nevertheless, presumes the submission of a request in advance to the administrative body, there are also cases where the empowerment occurs regardless of the will of the empowered. For example such is the case with the registration under the Value-Added Tax Act: after certain threshold of income is exceeded the state empowers the respective private-law subject with the right and the obligation (the power) to collect to the benefit of the state the value-added tax due charged on each individual transaction (taxable delivery). Thus, regardless of their will the private-law subjects are obliged to co-participate in the power: by participating in the collection of value-added tax. Such subject is obliged to register under the Value-Added Tax Act.

Whether he wants it or not (pseudo) Lazarus has been resurrected by Jesus: *what he can* do is not to come forth (or to demand indemnity?) after he has already been resurrected (if this is “damage” in view of the interests of (pseudo) Lazarus?!), but he cannot refuse the “gift” presented to him (his resurrection is a direct effect of the will of Jesus), because this “gift” does not pass onto him as a result of a concluded donation contract. One more difference between the miracle of the resurrecting act of Jesus and the “miracle” of the administrative act is contained in the effect of their performative: the first act changes the physical reality, the second one changes the legal

¹⁶ For more details see [Stavru, 2013], subsequently supplemented and reworked in [Stavru, 2014, pp. 86—105].

reality. What (pseudo) Lazarus does is to pose the question of his rights in a situation of a miracle. Administrative law cannot do miracles but the will of the administrative body expressed validly and within the scope of its competences deserves obedience from legal point of view, which can (conditionally, of course) be juxtaposed with the obedience to Jesus.

The choice of (pseudo) Lazarus leads him from humility to pretension. To the cult of one's own will. Similarly to (pseudo) Lazarus man surrounds himself/herself with refusals protecting him/her from external wills: human (?) and divine (!). Every will of another can be invalidated [*desezirana*] by certain type of one's own refusal. The procedure of respecting the refusal protects one from the content of obedience. There are also some exceptions: public consensus could be established for some external (state or human but not Divine) wills and the Law could stipulate that they are required to be complied with. It does no harm to anyone. Pay regularly the taxes as established by statute. Observe traffic rules. Take care of your children. Etcetera, etcetera. Such statutory requirements replace God's commandments. These requirements penetrate but they must always conform to the admission regime of man's personal space surrounded by the refusals allowed by the state (one's own will). *A state that has enclosed man's personal life into his/her own will and own interests*. It is only in this space that one's will can choose the will of God. But it cannot thrust it beyond that space.

Claims, rights and the future of (in)security

After the first group of refusal-rights (pseudo) Lazarus can do his next move. Secluded in the room of his own will he is hatching a counteroffensive. Having withstood the will of the world, now it is his turn to start exporting his will into this world. To demand from the world: from people, and from God. After what he had not wanted has already been done by God — he has been resurrected — now he can demand to be brought back to death. A right to euthanasia? The will of (pseudo) Lazarus is transformed into a weapon for changing the world as it is made by God. Through his will he can demand — he can call up his own reality. Thus the *claim-rights* start to make up the main content of the legal relations among people. Moreover, in the world without God they become *a principal requirement for each citizenship*: the civil position presumes activity through claim-rights and not penance and obedience. One must fight for one's rights, no matter what is hidden behind them: interests, values, opinions. Rights are revered as a “pure will”, which can only in rare cases be invalidated through some exotic concepts such as “abuse of right”. On very rare occasions.

The relationships between people are no longer ones of quest for and performance of God's will but relationships for concurrence of and dispute between private wills. The public will of the state is in fact “private”. God's place in the regulation of human relationships has been taken by the state. The state (to some extent) defines what one can and what one cannot do. But now there is no place (justification) for obedience and penance. Noone makes a confession to the State. Noone becomes humble before it. Could we imagine a humble Consumer Act? Or Repenting Banks Act? Or Obedience in the Media Act. *Why couldn't we?*

*Because the state is not a person*¹⁷ and therefore it cannot be Truth, a claim it could have if we accept that the truth about the relationships between people is contained and validated in the laws created by the state. The state cannot love us, cannot forgive us, cannot give us personal example. It cannot die on the Cross. It is an abstract sum of contradictory and contradicting interests. A beehive of wills. We cannot trust the state and that is why we waive our rights. Legal relationships do not bring us together into the common will of the State (the Law) but set us against each other in our personal interests (contracts). The multiplication of the rights as “trumps” — in the hypothetical conversation above (pseudo) Lazarus in fact “plays” trump to his Lord, erodes humility as a state. Rights have made us seemingly stronger but they have taken away obedience and coherence of the single Will. And it can always be seen. If in *orthodoxy* [as the first part of Bulgarian word for “ortho-doxy” “pravoslavie” literally translates as “right” or “law”] one finds and sustains his/her own face in God’s face: of course, not without hesitation and doubt in *law enforcement* [as the first part of Bulgarian word for “law enforcement” “pravo-prilagane” literally translates as “right” or “law”] one encounters only insecurity in the faces of others: temporary contractual partners who could become competitors at any time.

The new *insecurity* required a new approach: the approach of rights. But whether more rights means more security, or on the contrary: more insecurity?¹⁸ Whether the rights turn their holders into a legal precariat of a kind¹⁹: into people whose status in life has no predictability and no security, which reflects on their psychological and material well-being? As soon as you have rights you can and must cope on your own, be effective in ensuring your own security on your own risk. On this plane the legal capacity functions as precarity. Your security now is “do-it-yourself security” — to sustain it by means of exercise and protection of your won rights is an

¹⁷ The personification of the state based on the will of the monarch has been stated as both “the strength, and the weakness of German theory from the end of 19th century” [Yotov, 2016b, p. 22]. Léon Duguit supports the personification of the state as the “point where the unity, the poisonous mixture of the two components — of individuality and statism — flashes up with its entire viciousness” [ibid, p. 33]. On one hand, Duguit denies the rights as a “conduit of isolating individualism” [ibid, p. 36], but, on the other hand, he denies statism by insisting that the right exists before the state — in the existing behavior of people formed on the basis of solidarity: “Duguit’s idea does not know the moment of counter-facticity, ... for him the norms seem naturalized, springing out of the spontaneous and joint organization of society; some necessity has simply settled in them, a necessity we can grasp if we properly focus our reason, will and feelings on it” [ibid, p. 32]. See: [Duguit, Malberg and Jellinek, 1993], quoted as per the Bulgarian edition containing Bulgarian translations of Léon Duguit’s *Traité de droit constitutionnel*, Raymond Carré de Malberg’s *Contribution à la théorie générale de l’Etat* and Georg Jellinek’s *Die Lehre von den Staatenverbindungen*.

¹⁸ This questions is univocally answered by, for example, Costas Douzinas who points out that the “rights culture” turns everything into a legal claim and leaves nothing to its “natural” integrity — “[t]he more rights I have, the smaller my protection from harms; the more rights I have, the greater my desire for even more but the weaker the pleasure they offer”. When the rights are what makes us human the law keeps colonizing life in the endless spiral of more rights [Douzinas, 2007, p. 50].

¹⁹ The term “precariat” is examined in detail in British economist Guy Standing’s book [Standing, 2011]; it was translated into Bulgarian by Atanas Vladikov in 2013 (published by Trud i Pravo Publishing House).

incessant and endless individual effort. The “cosmic” fear of which speaks Mikhail Bakhtin in his book *Rabelais and His World*²⁰ is brought back to life in security’s dependence on human rights [Bakhtin, 1968]. This is a fear of the occurrence of cosmic perturbations and natural disasters — a great part of events in a world governed under the laws of individual freedom begin to look like such cosmic perturbations and natural disasters. The unbearableness of this insecurity feeds power and the imperative commandments formulated by it: commandments calm down and tame the “cosmic fear” of the unknown (in a world without God) to an “official fear” of administrative punishment (in a world with a State). Bad law but law!

As Zygmunt Bauman points out in his book *In Search of Politics* (1999): “unlike the cosmic prototype, the official fear had to be, and indeed was, *manufactured* — designed, ‘made to measure’; [...] In the laws which Moses brought to the people of Israel, the echoes of thunders high up on the top of Mount Sinai reverberated. But the laws spelled out light and clear what the thunders only darkly insinuated. The laws offered answers so that the questions might cease to be asked.” [Bauman, 1999, pp. 58—59]. In his book *Strangers at Our Door* (2016) Bauman extends his idea:

“Out of the unmanageable because infinitely distant and impenetrable threat, a feasible and by comparison deceptively easy demand to obey the legibly spelled-out commandments had been conjured. Brought to earth, powers that be re-forged primeval fear into the horror of deviation from the rule; a superhuman cosmic tragedy into a mundane, human, all-too-human task and duty; and the fear and trembling caused by the unfathomable enigma of God’s will into the commandment to follow the intelligible, clearly spelled out proscriptions and prescriptions collated and codified by His plenipotentiaries — His anointed spokesmen walking on earth”²¹.

The “administrators of official fear” recycle the “cosmic fear” to its “official” variety by means of a series of (administrative) orders but it is *as if the time of commandments is passing away*. Insecurity returns — and it goes together with the new tools offered to master it: human rights. Administrative law opens up to negotiation, to the freedom of its addresses, to rights. As pointed out by Byung-Chul Han²² quoted by Bauman, “The late-modern achievement-subject does not pursue works of duty. Its maxims are not obedience, law, and the fulfillment of obligation, but rather freedom, pleasure, and inclination. Above all, it expects the profits of enjoyment from work. It works for pleasure and does not act at the behest of the Other. Instead, it hearkens mainly to itself. After all, it must be a self-starting entrepreneur”.

After the “end” of “cosmic fear” comes the “end” of “official fear”. In this incremental eschatology the mechanisms of assuming responsibility and the fear of the unknown paired with the reason for such mechanisms are consistently mastered by God’s ontological and soteriological commitment (if God’s will is followed), by a public commitment by the State (if the administrative orders of the state bodies are followed) and, ultimately, by personal commitment of each individual person

²⁰ The book was written in 1940, published in Russian in 1965 and translated into Bulgarian in 1978.

²¹ [Bauman, 2016, pp. 57—58], the book was translated into Bulgarian by Yuliya Geshakova and published by Iztok-Zapad Publishing House in the year of its original publication in Cambridge, England.

²² A professor at the Universität der Künste in Berlin, born in Seoul, South Korea. Bauman quotes Byung-Chul Han’s: [Byung-Chul Han, 2010, p. 38].

(if Human Rights are followed). The fear of “cosmic” (from God) and “official” (from the State) fear also becomes an “existential” fear — fear of our own personal inability (inefficiency) to cope with the world and its insecurity. The contemporary “liquefied” worlds compromises the fitness of rights in their capacity of legal tools by which individual man can attain the security (s)he needs, which is part of his/her human dignity. Opposite rights interfering with each other of legal subjects who oppose and restrict one another often lead to mutual neutralization of personal wills and inaction faced with the facts occurring as inevitabilities. The “cosmic fear” returns but without a God. The state has also succumbed to the rights of its citizens. But is this the best for these citizens as human beings? Are the rights the most adequate measure of the value of human potential? Or does man have to stop investing his/her will entirely in his/her own rights and instead try to create more (administrative, i. e. ones rationalized through commandments and obligations) spaces²³, “liberated” from personal will and subordinate to other priorities (various values and common interests could function as such priorities)?

These are questions that will be asked more and more often on political and social level. On that level the “commandments-rights” conflict seems resolved (at least in Europe) in favor of the rights (at least for now). But this conflict is also to be put on another level: on the level of each individual man where it is not about taking away rights (from outside) but about refusal (from the inside) to think based on rights. This refusal “from the inside” of the subject can also be an act of subject’s emancipation of a kind from the network of (fundamental, human, natural) rights covering the entire social surface of his/her interaction with other human beings. Then the refusal to think on the basis of rights can be repeatedly re-formulated, reconsidered and decided by everyone of us: on the level of our own lives, an effort that can set both the beginning and the end of our will.

It seems to me that administrative law is one of the areas where the collision of will and interest as leading paradigms for the explanation of the nature and essence of legal regulation should be decided in favor of interest substantiated as a “state” will. Abiding by such will and its survival is the decisive purpose in administrative law — regardless of the contested legitimacy of its underlying interest. This is the reason why the appeal against an administrative act does not stop its enforcement (the will objectified in the act must be complied with by its addressees even when the same is appealed against as per the proper procedure), and the regulation of invalidity in administrative law prefers the approach of repealability comparable to the voidability in civil law: in the predominant number of cases (types) of vitiations of the administrative act the act must be repealed by the court in order to be invalidated as the possibility of everyone demanding at any time that the nullity of the act be established is not allowed (the principle is performativity in the beginning: the administrative act comes into force by the pronouncement thereof, and performativity in the end: the administrative act ceases to be effective by the repeal thereof).

²³ The exclusive government through rights could be reconsidered also through Jellinek’s theory of the four statuses: passive (subjection to and service for the state), negative (independence from the state), positive (opportunity to rely on the state) and active (co-participation in the state) [Yotov, 2016b, p. 28, 40—41]. Different situations demand different attitude towards power and in this regard the rights are not always present and do not have to be always present.

In administrative law common interests formulated as a will of second order (commandments) play “against” private wills (rights) giving rise to resistance (contestations). Here, the human rights as tools for legitimization of individual’s own will (refusals and claims) must conform to orders of the state bodies as sovereign’s will (authority and powers) which subordinates different social interests. A similar restriction of human rights of another type is explicitly found also in the attitude of the Russian Orthodox Church towards human rights. Thus, arguments and tools of the orthodox approach towards human rights could be borrowed upon law enforcement in administrative law. In contrast to civil and commercial law administrative law is not and must not be quite welcoming to the “rights culture”. Decisive for its structuring and functioning is the will (of second order) set in the administrative acts, which activates and implements specific common interests.

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Статья поступила в редакцию 12.12.2019 г.

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