UDC 930.85 (4—12)

YU ISSN 0350—7653

ACADEMIE SERBE DES SCIENCES ET DES ARTS

COMITE INTERACADEMIQUE DE BALKANOLOGIE
DU CONSEIL DES ACADEMIES DES SCIENCES ET DES ARTS
DE LA R.S.F.Y.
INSTITUT DES ETUDES BALKANIQUES

BALCANICA

ANNUAIRE DE L'INSTITUT DES ETUDES BALKANIQUES

XX

BELGRADE
1989

BALCANICA XX, Beograd 1989, 9—453.

UDC 340.12(497.11):342
Original scholarly Work

Aleksandar PAVKOVIĆ
Macquarie University
Slovenic Studies
Australia

THE STATE AND THE INDIVIDUAL IN SLOBODAN JOVANOVIĆ'S *DRŽAVA*

The first edition of *Država* (The State) in 1906 established the reputation of Slobodan Jovanović as a leading political and legal theorist in Serbia. In its first edition, this treatise consisted of three parts. The first dealt with the concept of state, the second with functions of the state and the third with state organization; in the second edition (1914) three thirds of the text were rewritten and in the third (1922) there were further substantial changes; in the fourth (and last) edition (1935) a new concluding part on the post-war state was added.[1] The treatise was a textbook on constitutional law in the course taught by Jovanović at the Faculty of Law at the University of Beograd both before and after the First World War. Both as a textbook for law students, and as the most comprehensive treatise on the political aspects the state, *Država* was probably the most influental work in this field ever written in Serbo-Croat.

Written in a clear, polished and economical style, *Država* was widely read outside professional legal circles. Its detached non-partisan tone and vast learning presented in an easy and understandable style probably explains its wide appeal. Indeed. in its clarity of style, erudition and economy of thought this treatise has no rival in Serbian legal and philosophical writing It is an undisputed masterpiece of Serbian philosophical prose.

[1] The fourth edition of the treatise appered as volumes 13 and 14 of Jovanovic' *Sabrana dela* (Collected Works), published by Geca Kon in Beograd 1936. Attempts to republish Jovanovic's works in Beograd in 1985 were thwarted by the authorities. And so all page references in this essay, given in brackets, are to this edition, volume 13. All translations from Serbo-Croat are the author's.

In its approach the treatise belongs to the German juristic tradition of *Staatslehre*. The works of Otto Kelsen, some of which have been translated into English, also belong to this tradition. Within this tradition, the state is investigated as a phenomenon *sui generis*. The inquiry into this phenomenon requires a separate scholarly discipline which combines a juristic approach with the methods of social sciences. One of the chief problems which this discipline addresses is the nature and source of law and its relation to the state; as the state is, in this tradition of thought, regarded primarily as a social organization based on legal order. In consequence, in order to understand the nature of the state it is necessary to establish what legal order is and how it is related to state organization.

In contrast to the contemporary liberal theories of state[2] within the *Staatslehere* tradition, the relation of the state to an individual and its role in the protection of individual liberties are not viewed as the central problems of political or legal theory. Although writers of this tradition do not ignore the state's role in the protection the individual liberties, they do not view protection of individual liberties as its primary function or task. The state's power over its subjects is certainly limited by law, but the state is the only source of law which limits its power. From the main works of the *Staatslehere* tradition — the works of Gerber, Laband, Jellinek[3] — it is clear that their authors' chief theoretical interests were in the legal order and legal organization of the state and not in the state's obligations to its subjects. Writing in this tradition, Slobodan Jovanović naturally shared those interests.

In fact, in discussing the relation of the state to its subjects, Jovanović appears to argue for the supremacy of state over the rights and interests of particular individuals: the interests of state's collective existence override, in his opinion, the rights of individuals. This view also seems to reveal a particular political preference: the preference for the state over the individual which characterizes the conservative as opposed to the liberal political doctrine. And so it appears that Jovanović's discussion of the state's relation to its subjects reveals his conservative political standpoint. In this paper I shall argue that this is only an appearance; and that Jovanović's discussion of this issue reveals no particular political preference — conservative or

[2] I have here in mind Rawls's *Theory of Justice*, Nozick's *State, Anarchy and Utopia* and Dworkin's essays in his collection *Taking Rights Seriously*.

[3] In the edition of 1922, Jovanovic extensively refers to the following main works written in this tradition: C. F. von Gerber, *Grundzuge des Deutschen Staatsrechts*, Leipzig, 1880; Paul Laband, *Das Staatsrecht des Deutschen Reiches*, Tubingen 1911, fifth edition) and Georg Jellinek *Allgemeine Staatslehre*, Berlin, 1914, third edition) as well as Otto Kelsen *Hauptprobleme der Staatsrechtlehre* (1911).

liberal. Moreover, in the last part of the essay I shall try to show how Jovanović' relatively simple conceptual framework can help us understand some of the liberal arguments for basic human rights and liberties. In short, I shall suggest that in spite of sharing the theoretical interests of the *Staatslehre* tradition, Jovanović may have contributed to the clarification of arguments advanced in the liberal tradition of political thought.

Apart from this contribution, Jovanović'has also examined and rejected a variety of liberal doctrines concerning the state and its relation to the individual. In this paper I shall also examine some of his arguments and reasons for rejecting these liberal views. It is quite possible that his examination of these doctrine reveals failures of liberal philosophers to come to grips with some of the state's tasks rather than his personal political preferences; for, as we shall see, the arguments against the liberal doctrines to be discussed here are not based on a conservative view of the state and its role, but rather on a general analysis of state's functions.

This is not to say, of course, that in his treatise Jovanovic does not reveal his own political preferences. But his arguments concerning the state's relation to its subjects are not based on, nor are these arguments intended to provide support for his political views. In attempting to show this, I shall not be defending his arguments; I shall in fact suggest that some of them are neither valid nor conclusive. My aim is to show that his arguments and analyses of concepts concerning this particular issue are free from any political prejudice.

The issue here is that of the relation of the state to the individual i.e. its subject. In various parts of Jovanovic's *Država* this issue is examined from various points of view. In this paper I shall discuss the arguments advanced in Part I of the treatise concerning the justification of the state (Chapter II), the task of the state and the limits of state intervention (Chapter III), his views on the state as a juristic personality with a will of its own (Chapter IV) and on citizenship (Chapter VI); I shall also refer to Jovanović's views on constitutional laws (Part II, Chapter I) and on the division of power within the state (Part III, Chapter I).[4] In consequence, the present essay will be divided into six parts: the first will deal with Jovanović,s concept of the state and its task, the second with his discussion of contractual theories as attempts to justify the state's use of force, the third with Jovanović's views on the supremacy of the state's rights over these of its subjects, the fourth with legal restric-

[4] I shall not consider in any detail Jovanovic's views on the individual right to vote i.e. to elect political representatives (Part III, Chapter II). Jovanovic argues, rather implausibly, that this is not a right but a duty of a citizen; and his examination of the question is so long and detailed that it would take a separate paper to deal with it.

tion on the state's powers, the fifth with the state as the sole source of individual legal rights and the sixth, and concluding part, with Jovanović's distinction between natural and legal rights of individuals and the use one can make of this distinction in interpreting liberal arguments in support of individual human rights.

1. *The state: a juristic person and a legal order*

In Jovanović's view the state is different from society or any association within society: within the state there is an authority which commands that its rules and regulations be obeyed by the members of the state. No such commanding authority characterises society or any of its ordinary associations (p. 3). These rules and regulations concern only the conduct and not the thoughts and feelings of its members. The right of state authority to command is not based on voluntary consent of its members (p. 4). Thus the state is *not* a voluntary organization nor is it primarily concerned with the spiritual welfare of its members.

Already from these initial definitions it is clear that Jovanović is here concerned with the modern state based on a legal order: the rules and regulation prescribed by the state authority are laws. The legal order is a hierarchical system of laws and the means of their enforcement. The laws express the state's commands; and it is in these laws that the will of the state is expressed. And for someone or something to have this capacity to will, he or it has also to be a person ((p. 160). Thus the state is a juristic — as opposed to bodily — person because it possesses a will expressed in its commands — the laws.

But why would the state need to have a will at all? The reason is simple: "The law is called on to prevent the conflict among various wills by setting limits to their respective spheres" (p. 159). The state issues the laws and in order for these laws to be effective in curbing the wills of men, the state has to have a will of its own. In short, the state has a will because it is called upon, by issuing laws, to restrain the wills of others

Even within the German *Staatslehre* tradition[5], this view of law as the expression of the state's will did not pass unchallenged. One of its most influental opponents was Otto Kelsen who argued that to talk of the juristic person of the state and its will is an unnecessary personification. According to him, apart from legal norms there is no need to introduce the concept of

[5] Gerber, Laband and Jellinek in the works quoted above endorse with various qualifications the view of state as a juristic person.

a juristic person of the state. Against Kelsen's view Jovanović argues as follows:

> As against this [the above reasoning of Kelsen] one can note that the concept of state person is pressupposed in the concept of a norm. The legal norm is defined as a norm which the state authority authority commanded. One cannot take awaythe concept of the state person from the lgal reasoning without losing the feature which characterize the legal norm. (p. 180).

This argument — like all of Jovanović's arguments for the juristic person — is based on the definition of the legal norm as the state's command. Kelsen rejects definition and claims that "when laws are described as 'command' or 'expressions of the will' of the legislature... this must be understood as a figurative mode of speech... The rule of law is a command... which does not imply a 'will' in a psychological sense of the term"[6]. Jovanović was fully aware of this difference between his and Kelsen's view of legal norms. In an article on Kelsen, published in 1920, he praises Kelsen for exposing the anthropomorphism of the German school of Laband and Gerber. In his opinion, Kelsen was right to reject this personofication of the state but wrong in excluding any reference to the state's will in his account of legal norms; in Jovanović's view, one cannot explain the legal force of a law unless one regards it as an expression of the state's authority or as a command.[7] But Jovanović offers no argument for this view either in *Država* or in the article on Kelsen. And so in the passage quoted above, he argues against Kelsen's view on the basis of a highly controversial definition of legal norms which Kelsen himself rejects. Consequently, his argument against Kelsen is hardly conclusive.

For Jovanović the state is not only a juristic person but also a legal order which authorizes its organs to use force against both its subjects and the subjects of other states. Wherefrom does the state acquire the right to use force? This perennial philosophical question Jovanović addresses while examining various theoretical attempts to justify the existence and role of the state.

2. *How is the state's use of force to be justified?*

In discussing various answers to this question, Jovanović at the outset deals rather briskly with the view of the state

[6] Kelsen Otto, *The General Theory of Law and State*, New York, 1945, 35. This is the authorized translation of his *Allegmeine Staatslehre*, 1925.

[7] Jovanovic Slobodan, *Kelsen* in Društveni život, Beograd 1920, 313—315 from the reprint of the article in his collected works, volume 16, *Iz istorije političkih doktrina*, Beorad, 1935.

as a higher necessity as well as with the justification of the state's use of force by the right of the stronger (pp. 50—56). Neither of these attempts shows the origins of the state's *legal* right to use force. In contrast, the contractual theories of state advanced by Hobbes, Locke and Rousseau are discussed in some detail because they purport to justify the existence of the state by reference to a legal act — the contract between the subjects and the sovereign.

The contractual theorists hold however a great number of views which are unacceptable to Jovanović. For example, Locke views laws not as commands of the state's authority but as rules which one can discover by one's reason. For Locke the state does not create these rules but only organizes their protection and enforcement. In Jovanović's opinion, this view is abondonded as untenable. Jovanović also finds Locke's views on the right of the subject to rebel agains the state's authority confusing and wrong. He notes that one resorts to rebellion only when all legal means are exhausted and that a rebellion is a breach of the legal order. Therefore, contrary to Locke. there can be no legal right — a right recognized within the legal order — to rebel against state authority. Moreover, it is not clear to whom this alleged right of rebellion is conferred. If it is conferred to the majority of subjects, in a chaotic state preceding a rebellion, how is one to determine that such a majority exists? (pp. 65—66).

In Rousseau's attempt to reconcile the state's use of force with personal liberty, Jovanović finds a logical error. Rousseau starts with the premiss that the general will consists of the will of all its members: to this general will everyone would consent without losing his or her liberty. But in case which a minority of citizens does not consent, the will of the majority, Rousseau claims, would represent the interests of the dissenting minority and so the minority should accept the will of the majority. This argument, Jovanović notes, substitutes interests for the will; and so, from this argument it follows that if a will represents one's interests, then one should accept it even against one's own will. But against this reasoning, Jovanović points out that no one has the right to do anything to me — even to make me happy — against my own will. This form of reasoning could be easily used to justify tyranny in which the subjects' interests are promoted against their will (p. 70).

In addition to these objections to Locke and Rousseau, Jovanović also advances a general objection — which was already put forward by Hume — that only a state could legally enforce a contract, and so the original contract from which the state allegedly emerged could not have been legally binding, as there was as yet no legal order which would have made it legally binding.

It is within the framework of discussion of the contractual theories of state that Jovanovic argues in support of the state's restriction of individual liberties as follows:

> True, when one speaks of the justification of the state, one thinks in particular of the justification of its force. One accepts that without the state man would be free and then one asks by which right does the state restrict his freedom by force. But one forgets that without the state the man would not be free; his right to freedom, as his other rights, exists only in so far as it has been guaranteed by the legal order. The man is free only when there is a state to protect him against private violence. Otherwise he would be the slave of everyone who is stronger than he is. Of course, the state cannot protect us from private violence but by prohibiting all violence, not only the violence against us, but also the violence which we would inflict on others... In any case, freedom, as a legal good was created by the state. From this stems its right to restrict our freerom, as it may be needed (p. 77).

Jovanović's argument has a number of implicit assumptions. The following paraphrase of the argument would, I think, make the assumptions explicit: When there is no state, a weaker man is forced to serve the stronger. Therefore, without the state a lot of weak men are not free. The state gives equal protection to everyone from violence or the threat of violence. In offering equal protection, the state is protecting the freedom of man from *the force of others*. The only way to do so is to prohibit the use of force by private individuals. The prohibition of the use of force by private individuals is a necessary consequence of the state's protection of the freedom of all. Since the state has conferred freedom on us, it has the right to restrict it when required.

The conclusion about the right of the state to restrict our freedom in general, does not follow from the premises. Even if one grants that to prohibit the use of force by private individuals is necessary for the protection of freedom for all, it does not follow that the state has an *unlimited* right to restrict any freedom which it deems necessary. The state has the right to put such restriction on the freedom of every individual as is necessary to protect that freedom; in this case, the state gains the very limited right to restrict the freedom to use force.

This brings us to the main principle which Jovanović assumes in this argument. The principle seems to be that when an agent protects a freedom of another, he thereby gains the right to restrict that freedom if this is necessary for the purposes of protection. In its present general form, this principle strikes me as implausible, for if the state protects the freedom from want e,g, from hunger, this does not give it the right to restrict this freedom for its own protection. In order to feed all who are hungry, the state may be forced to give a little food to everyone — and so, some with greater needs for food than

others will go hungry (even if less so than before). Now in doing so the state is not exercising any right to leave some people hungry. It simply had no other option if it is to protect the freedom of all.

Note that according to this interpretation, the concepts of freedom and right are not (purely) legal concepts. The argument is regarded as a philosophical argument in which it is assumed that freedoms and rights are protected but not created by the state. However, in Jovanović's legal theory, no freedom or right exists outside a legal order. Freedom from violence of others is conferred on subjects by the legal order of their state. In short, within this theory these freedoms and rights are created by the state. If so, the principle which he may be assuming should read as follows: If the state confers a freedom on its subjects, it has the right to do whatever may be necessary to protect it including restricting that freedom. This principle would follow from the demand that a legal order, if it is to be legal order at all, be efficient in the enforcement of its rules. If a legal order confers a freedom, it should protect it efficiently; unless it does so, it has not granted any freedom. For it the stronger still rule the weaker by force, the state has not in fact conferred any freedom from violence to its subjects. And so to protect the freedom efficiently, the state should have the right to take all necessary measures. If the principle is accepted in this form, from Jovanović's premises one can draw a less general conclusion than he does viz., that the state which confers the freedom from violence of others, has the (legal) right to restrict *this* freedom if this is necessary for its protection.

Viewed from a legal point of view, the argument, granted its initial premiss concerning the creation of freedoms or rights, seems eminently unexceptional: if the legal order creates (legal) freedoms and rights, then in creating them it will do whatever is necessary to protect them — unless it does so, one cannot say that it did create them.

But it is not clear that the initial premiss — that freedom is created by the state's legal order — can be upheld even in this strictly legal framework. For one can argue, as Locke does, that the state is created with the task of protecting the liberties which men have by virtue of being rational creatures and not by virtue of being the state's subjects. For Jovanovic this is simply a philosophical argument which has no validity in the strictly legal framework. From a legal point of view individuals do not have rights by virtue of being rational creatures but in virtue of being subjects of a state. It is far from clear however that Jovanovic is right and that within every legal order individuals are endowed with rights solely by virtue of being subjects of the state. Within the Common Law tradition reference is

often made to the requirements of natural justice — the requirments which have not been created by the legal order alone. In order to uphold his view, Jovanovic would have had to show that such references to natural justice or to natural rights are elliptical references to the justice and rights created within a legal order and not outside it. Since he made no attempt to do so, his argument here is inconclusive.

But whatever the value of his argument, it at least shows that, in Jovanović's view, the state's legal right to restrict the freedom of its subjects stems from the state's conferring of that freedom upon them, within its legal order. And the argument shows that the state gains the right not by virtue of being a juristic person but by virtue of its legal order. The view of the state as a juristic person is not operative in this argument. Yet in his argument for the supremacy of the state's right over its subjects's rights, Jovanovic seems to be forced to appeal to the latter view too. To this argument we now turn.

3. *The state's mission and the scope of its intervention*

The question of the state's right to restrict the freedom of the use of force by private individuals is raised Jovanović in connection with the question of the justification of the state. The related question of the scope of state's right to intervene in or to interfere with various actions of its subjects Jovanovic raises in his discussion of the state's main goal or task. In establishing what task the state is to perform, one establishes the scope of its rightful activity; uotside this established sphere the state would have no right to intervene. This would in turn establish the sphere of its subjects' actions into which the state has no right to intervene (p. 108).

From a legal point of view, Jovanović holds, there are two distinct approaches to the question of the scope of state's legitimate activity: the socialist and the individualist approach. According to the first, the state's task (among others) is to protect the workers from capitalist exploitation; this task the state can perform by enacting legislation e.g. on social security and industrial relations. According to the second, the state's task is only to protect individuals from the violence of others; its role is that of a nightwatchman acting through the police and courts alone. In support of the individualist view, Jovanović quotes J. S. Mill's dictum that society as well as the individual is entitled to restrict someone else's freedom only for the purposes of self-defense. In consequence, one is not allowed to coerce anyone for his or her own good. For, in Mill's view, an individual is responsible to the society only for that which he does to someone else and not for that which he does to himself.

Over himself an individual has an unrestricted right of self-governance. He is alone the lord of his own mind and body (pp. 112—113).

Without endorsing the socialist approach, Jovanovic objects to the individualist one for ignoring the right of the state to defend itself from other states. This military mission or task of the state stems from its task to protect its own subjects from the violence of others. Unless a state can maintain itself among other states it cannot perform the latter task. Now in order to fulfill its military mission, the state has to require of its subjects performance of various actions of a non-military nature, e.g. to get vaccinated or to pay for the building of roads and railways. These actions often fall within a class of activities which Jovanović calls 'cultural'. In ensuring that such activities be performed, the state is fulfilling yet another mission — its cultural mission. Roughly, this mission consists of ensuring that its citizens enjoy such material and spiritual well-being as will would enable them successfully to perform their duties as citizens. Among their duties as citizens is the participation in the defence of their state. To do so they should be as healthy as possible. The state's cultural mission of keeping its citizens healthy is thus related to its military mission of defending them from other states. This cultural mission also gives the right to the state to act for the good of its citizens. For example, it confers the right upon a state to legally require its citizens to become vaccinated.

Now by reducing the state's role to that of a nightwatchman, the followers of the individualist approach, according to Jovanović, deny the state's cultural mission and ignore its military one; by doing so, they deny the state the right to a collective existence independent of its individual subjects. This is, according to Jovanović, and old view of the contractual theory which finds the sources of law in human personality and not in state organization (p. 115). Although the individualist restriction of the state's role to that of a nightwatchman was, Jovanović thought, an understandable reaction against the state's encroachments under absolutist regimes, such justification of the individualist restriction was no longer tenable under the democratic regimes that existed in 1922 when Jovanović wrote *Država*. Under democratically elected regimes "the state authority is so much under the influence of the people, that it is impossible for it to function otherwise than in its interests" (p. 117). In consequence, there is no longer any justification for the individualist restriction of the state's role.

This easy optimism so uncharacteristic of Jovanović is not the only reason for his rejection of the individualist view. As we have already noted, he believed that the state has as much right to defend its collective existence as an individual has to

protect himself from the state's encroachment. Jovanović offers no argument to support this belief. But his earlier comments suggest some reasons he might have had in mind: if state is a juristic person than it has at least the same rights as other juristic persons do e.g. its subjects. And if its task is defined in terms of both its military and its cultural mission — as he defines it — then it should have the right to pursue these missions even if in doing so it infringes on the rights of its subjects. The question which naturally arises here is how, if at all, this right of the state to pursue its tasks or missions is circumscribed. This we shall discuss in the next section.

This view of the state's military and cultural mission leads Jovanović to accept, at least in part, the socialist demand that the state regulate the relations between workers and employers. The large social differences and the resulting class struggle weaken the unity and power of the state. Inadequate pay affects the workers' health and their physical fitness; this not only lessens their cultural level but also decreases the state's ability to defend itself from other states. In consequence, it is in the interest of the state to intervene so as to minimize the harmful effects of class differences and class struggle (p. 134). In contrast to the socialists who view the state as a class organization, Jovanović holds that the state has already become a neutral power in the class struggle. Its bureaucracy — in so far as it is a truly professional force — does not take the side of any class but it pursues its tasks impartially. A neutral bureaucracy and a parliament with mixed class representation, in Jovanović's view, could insure that there is no supremacy of any single class in the state and its organization. (p. 143—145).

As for the state's cultural mission, Jovanović holds that it has natural limits. The state is called to improve the material conditions of culture but its intervention in the sphere of spiritual culture is naturally limited. The state simply "is not in position to command our soul". If there is no talent or inclination for science or art among its subjects, the state can do little to promote these endeavours. And so Jovanović accepts the individualist approach to state intervention in the spiritual sphere. The principle of personal freedom is to be upheld in spiritual matters because "an individual who has been managed too much and who has been trained like an animal would loose his capacity to think on his own and would become a creature without a will. With an automaton like this, the spiritual and cultural development would be impossible because all spiritual energy would be extinguished in him". (p. 148).

Thus, Jovanović acknowledges the right of the state to pursue its legal and military tasks without any specific restriction on the scope of its intervention set in advance as these are the tasks on the successful performance of which its collective

existence depends. But the scope of its intervention in pursuit of its cultural mission is naturally limited to the sphere in which the intervention can be effective and beneficial, both for the state and for its subjects.

But are there any legal restrictions to the activity of the state apart from these natural ones; and if so, who is to impose them on the state? To these questions we now turn.

4. *Is the state bound by its own law?*

As we noted in the second section, Jovanović holds that the state has a legal right to restrict the freedom of its subjects when this is necessary for the protection of the freedom in question. Further, in pursuit of its legal and military task, the state has the right to intervene and, if it need be, restrict its subjects' rights. But what rights, if any, have the subjects to defend themselves against the claims that the state makes on them? This question is examined in the context of the question of whether the state's own law binds the state in its activities.

But what does the latter question have to do with the subjects' rights *against* the state? As we have seen, Jovanović is primarily interested in the legal rights of subjects; and the legal rights of subjects are conferred upon them by the state's laws. So if subjects have any legal rights *against* the state these should be given in the form of laws restraining the state from certain acts against its subjects. And if so, it is natural to ask whether such restraining laws bind the state or not, and if they do, to what extent.

In discussing this question, Jovanović distinguishes the state's will from the works of its organs. In the sphere of its will the state is unrestricted and it can will whatever it pleases to will. The will of the state is expressed by its legislative organs, and the legislative organs are, consequently, completely unrestricted in their work. However, in the activity of its judical and executive organs the state is bound by the legal regulations enacted by its legislature. The same holds for an individual: his or her will is completely free but his or her actions are regulated by the legal rules enforced by the state (p. 104). As the state restricts its subject's freedom of *action* by its legal regulations so it restricts *its own* freedom of action concerning it subjects by its own laws.

In Jovanović's view then the state is ultimately not bound by its own law because its legislative organs are free to create any law they will. This view was subject of controversy among the writers in the *Staatslehre* tradition. One of the leading author-

ities, Georg Jellinek had challenged this view by citing instances in which certain types of legislation were prohibited by subsequent legislation. Thus bills of attainder, so frequent in the Tudor Parliament in England, were later judged to be unlawful and as such are explicitely prohibited in the Constitution of the United States of America. This, claims Jellinek, shows that the legislature has the power and right to restrict its own right to legislate.[8]

In arguing against Jellinek, Jovanović shows no interest in the examples of legislation Jellinek cites. Jovanović claims — in Part II of *Država* — that no legislation or law of any type can permanently bind the state's legislative organs. Thus, these examples of self-restricting legislation cannot affect his view. Instead, Jovanović argues that in holding that the state is *obliged* by its own laws Jellinek simply confuses moral with legal obligation. The state in its legislative function cannot be *legally* obliged by any rule or law; so Jellinek is in effect saying that it is *morally* obliged to follow its laws. But, according to Jovanović, the state cannot be morally obliged to anything. To be morally under an obligation one should have a conscience, and the state has none (p. 105—106).

Let us take first Jovanović's brief argument against the possibility of putting the state under any moral obligation. Its starting premiss that, the state has no conscience, may seem *prima facie* quite acceptable; but if one maintains that the state is analogous to a person with a (free) will, why should one now refuse to extend the analogy to conscience? Jovanović gives us no reason. The second premiss, that in order for an agent to be under a moral obligation, he or it has to be capable of having a conscience seems trivially true. The premiss seems to be saying that for someone to voluntarily put himself under a moral obligation, he should be capable of moral reflection or thought. The third premiss, that the state is *not* capable of moral reflection i.e. not capable of having a moral conscience, seems most dubious. If the state is represented by its legislature — the organ which expresses its will — one can argue that legislatures sometimes do show signs of moral reflection or thought. For example, in passing legislation indemnifying groups of people who were unjustly — but no illegally — punished by the state, these legislatures show their capacity of moral thought: in doing so they acknowledge the need to rectify moral — but not legal — wrongs.[9] Once again Jovanović's argument seems to be far from conclusive.

---

[8] Jellinek Georg, *Allgemeine Staatslehre*, third edition, Berlin 1921, 374.

[9] Here I have mainly in mind the legislation such as the one allowing for damages to the victims of war crimes or the victims of previous legislation (e.g. the Japanese interned in the USA during World War II) as well as the legislation granting land rights to the Australian Aborigines.

But, independently of the question of moral obligation, why could not a state, i.e. its legislature, be *legally* bound by its own laws? In answer to this question, Jovanović only points out that the legislature is always free to pass any laws which cancel any previous law it enacted. Consequently, in its enactment of laws is not legally bound by any of its previous laws. Even constitutional laws the change of which requires a special procedure, can be changed and cancelled; and so there are no legal regulations which can bind the legislature in its lawgiving capacity. The conclusion in this argument does not follow from the premiss: from the fact that a legislature can change or cancel any of its existing regulations or laws, it does not follow that it is not legally bound by any of them. From this it only follows that if a legislature is bound by any of its previously passed regulations or laws, it has the legal right and power to nullify this effect of this regulation or law by changing the law or regulation which binds it. But this does not mean that the legislature is not actually bound by the regulations while they are still in force. For example, the legislatures of the U.S.A. and Australia are firmly restricted by their constitutional laws as to the legislation they are legally empowered to pass. In order to free themselves from the restrictions in a legal way, these legislatures can only initiate special legal procedures but not actually carry out these constitutional changes themselves.

But could a legislative organ which is at present bound by its constitutional law simply *will it* not to have *any* — and not only the existing — constitutional law binding its actions? Could it will to be free of any legal constraints? This question Jovanović adresses in his discussion of constitutional laws in Part II of *Država*. According to him, constitutional laws or constitutions are laws like any other. It is only in the increased formal force — due to the special procedure required to enact or to change them — that they differ from ordinary laws. From a legal point of view, this formal entrenchment and the wider scope of constitutional laws are the only features that, according to Jovanović, differentiate them from the ordinary laws. He rejects the view — which is nowdays more widely accepted than it was in his day — that the courts are entitled to reject or quash the ordinary laws which they find in conflict with the constitutional ones. For Jovanović the precedence of constitutional laws is not self-evident. (p. 408—410).

Constitutional laws ensure the continuity of a legal system by proscribing the manner in which they can be abolished and replaced by other laws of the same kind. When a constituent assembly replaces one set of constitutional laws by another it is bound by the one which it is replacing. It is in this sense that constitutional laws "legally restrict" the legislative organs.

However, in a revolutionary situation in which the continuity of legal order is intentionally breached, the constituent assembly of equivalent legislative body "acts without any legal limitation but this does not mean that its action is not based on any legal norm." (p. 414). What would be the legal norm on which a revolutionary constituent assembly could base its action? According to Jovanović such an assembly irrespective of its revolutionary nature and intent is a legal authority and it confirms its status by enacting rules of legal validity. In consequence, Jovanović argues, "[w]ith the very appearance of this authority, one can take it that a legal norm has been created, which gives this authority a right — an unrestricted right indeed — to issue a constitution". And, "unless one accepts this view" claims Jovanović, "one would have to explain how a purely political power can create a constitution which has not only political but also legal validity" (p. 414).

Jovanović seems to maintain that the very assumption of legal prerogatives by a constituent assembly creates a legal norm. And in support of this view, he offers an argument from the absence of a better explanation: how else are we to explain the legal right of such an assembly to enact constitutional laws? The argument is clearly inconclusive, for one can say that such an assembly, acting outside the existing legal order, simply has no *legal* right to do anything. In creating a legal order by enacting constitutional laws it confers, retroactively, certain legal rights to itself. A revolutionary assembly is, after all, revolutionary in repudiating any existing legal norms. In consequence, Jovanović's insistence on the existence of a legal norm in such a situation seems to be an appeal to a legal fiction. This seems to be a rare instance in which Jovanovic appeals to a legal fiction of any kind.

But however fictitious legal norms may be in revolutionary situations, Jovanović's insistence on legal norms as the basis for the enactment of constitutional laws suggests that his view of the complete freedom of legislative organs — discussed above — is not intended as a factual description of the legal practice of legislatures. In practice, constituent legislatures are clearly restricted by the previously enacted constitutional laws; and even when they repudiate any such restriction in an act of revolution, they base their actions on a (fictitious) legal norm. Theirs is a freedom to repudiate any existing restriction and thus to become a revolutionary legislature. In saying that legislatures have a free will Jovanović probably meant that they are free to choose whether or not to be revolutionary and to reject the existing legal restriction.

If this is what is meant by the legislature's complete freedom of will, one can well ask the question which Jovanović inexplicably

fails to ask: Is this freedom of legal or political nature? In discussing constitutional laws — as well as in many other places in his treatise — Jovanović makes use of the distinction between political and legal aspects of the issue. Had he asked the question, I have no doubt that his answer would be that the legislature's freedom is of political and not of legal nature. For a legislature's freedom to legislate as it wills is neither explicitly stated in laws of any kind nor, more importantly, is it protected by any legal sanction. If a legislature repudiates an existing restriction of its constitutional laws and thus becomes a revolutionary legislature, it can appeal to no law either to justify this action or to protect itself from other organs of the state, e.g. the executive, which may want to preserve the previous legal order. As Jovanović noted in discussion of Locke's view of the right of rebellion, one resorts to rebellion or revolution when all the existing legal means are exhausted. Thus, a revolution carried out by a legislature can find no basis in the existing laws.

Of whatever nature this freedom may be, Jovanović is, as we have seen, firmly committed to it. The view according to which the legislature is free to legislate as it will is hardly a conservative view, and, as we have seen, Jovanović has defended it on purely juristic grounds. But granting such a freedom to the legislature makes it impossible for him to grant to its subjects unrestricted rights against the state. The legislature, according to him, can take away any legal right protecting the individual against the state which it has previously conferred upon him. The individual and his freedom is thus left at the mercy of the legislative — but no other — organ of the state.

The unrestricted freedom of the legislative organ cannot be reconciled with any unconditional or inalienable legal right against the state, provided, of course, that this organ of the state is the sole source of such legal rights of individuals. Is state is the sole source of such legal rights of individuals. Is then the state's legislative organ the sole source of its subjects's legal rights? Jovanović argues that it is. And to this argument we turn next.

5. *The state as the only source of its subjects' rights*

The rights of individuals against the state Jovanović discusses briefly in a section concerned with citizenship. While as a subject of a state, an individual has duties towards the state, as a citizen he has also certain rights. For example, as a subject an individual is obliged to obey the state's commands (e.g. to pay taxes) but as a citizen he also gains a right to be treated in a certain manner by the organs of the state. Now in order to gain certain rights one has to become a citizen of the

particular state which grants them to its citizens by specific legislation (p. 211). In his view, there are no universal legal rights granted to citizens of any state. Each state grants by legislation a particular set of rights to its citizens alone. As we shall see, Jovanović does not intend to deny that there are universal human rights; he only denies that such rights are legal rights.

In the terminology of the *Staatslehre* tradition which Jovanović uses, the rights of individuals against the state are called subjective public rights. To each subjective public right, he maintains, corresponds a duty of the state's authority towards the individual as to each private right of an individual corresponds a duty of another individual. For example, to the right of a lender corresponds the duty of the borrower, and to the right of a citizen to move freely corresponds the duty of the state not to infringe on this freedom (p. 212). Jovanović offers no particular argument in support of this rights-duties correlativism. But his view of the correlation of rights and duties suggests how a state by legislation can establish the rights of its citizens: it can set down the legal obligations of its organs towards them. In doing so it offers its citizens a legal basis for their claims against state organs. For example, in making it a punishable offence to interfere with its citizen's movements, it lays down the legal basis for a citizen's claim to be let to move freely.

However, Jovanović does argue that it is *necessary* to grant subjective public rights to individuals. For an individual to be a public juristic person presupposes that he or she enjoys certain public rights; therefore, if an individual is to be such a person, it is necessary for him to be granted certain subjective public rights (p. 212). A similar but not so brief argument for the necessity of public subjective rights appears in Jellinek's *Allgemeine Staatslehre.*[10] Jellinek insists that in a modern legal framework, legal relations hold only among "subjects of right" (Rechtsubjekte). And so for an individual to enter legal relations with one another and with the state it is necessary that it be recognized as a person.

Both Jellinek's and Jovanović's argument thus emphasize the individual's capacity to act of its own free will as a prerequisite for entering any legal relations with the state and others. If an individual is to be recognized as a person with his own will and capacity to act in accordance with it, it seems to them necessary to define his or her sphere of activity by granting him or her rights against the other important actor — the state. In saying that this is necessary Jovanović does not

[10] *Allgemeine Staatslehre,* Third edition, Berlin 1921, 418—419.

want to say that it is the nature of state that makes it necessary nor that the state is in some way compelled — e.g. by the laws of nature — to grant these subjective public rights; the necessity of which he speaks is neither a necessity of nature nor a necessity of force. This necessity springs from the modern legal order. In the modern legal order agents — the juristic persons — are conceived as persons with a free will. And in order for this conception to be consistently upheld throughout the legal order, it is necessary to create legal conditions for the agents' exercise of their free will. One legally probably the easiest way to do so, is to grant to the agents in question subjective public rights. Thus, this necessity of granting subjective public rights is, in the last analysis, conceptual; it originates in the demand for a consistent application of the conception of agent or juristic person in a legal system.

Having argued for the necessity of subjective public rights, Jellinek distinguishes three categories of claims an individual can make against the state. Jovanović paraphrases these categories as the conditions ('stanja') on which an individual can base his rights (p. 213—214). The first category is a negative one: it denies the right of the state to interfere with *some* of the liberties which an individual naturally possesses and demands that the state forbear from certain actions. Under this negative condition, Jovanović points out, a sphere is created whithin which the individual is free to act without state intereference. The second category is a positive one: it comprises the right of an individual to demand action — and not only forbearance — by the state in his personal interest. Thus in filing an action in a court of law, an individual demands that the state act in his personal interest. In doing so he or she is exercising the right to have such an action performed. To the third, active, category belong the rights of the individual to act as an organ of the state. The most important among those political rights — as they are usually called — is, in Jovanovic's opinion, the right to vote. According to him, by voting one acts as an organ of the state — as the electoral body (p. 215—217).

To this account of Jellinek, Laband objects that the first, negative category comprises no subjective rights at all. The legal regulations limiting state power of interference with citizens' liberties are in fact regulations concerning the limits of state's authority. These regulations however confer no right on an individual to claim anything from the state. For example, a regulation prohibiting any restriction on the movement of individuals, confers no right on an individual to move freely, but only leaves unrestricted his natural capacity to do so. If such regulations would confer any rights on individuals, these rights would have no object i.e. the state, and thus, in Laband's

view, would not be rights at all.[11] In his opinion, these are not rights but simply reflections of the objective laws setting the limits on the state's power.

Against this, Jovanović argues that even reflections of objective laws may be transformed into rights of an individual; for when an individual acquires the right of complaiint against the action of his or her state, then he or she also acquires the power to force the state to act within its own legal order. Now in acquiring the legal power to force the state to act in a particular way, the individual is acquiring a legal right. Unless one recognises this, one is not in position to distingish states in which an individual has no legal means of defending himself against unlawful acts of the state, from states in which he has such means at his disposal (p. 218). Laband is, according to Jovanović, not right in rejecting Jellinek's account of negative subjective public rights.

But Jellinek, in Jovanović's opinion, fails to emphasise that subjective public rights hold not against the juristic person of the state but only against state organs. For the state as a juristic person confers — thorugh its legal order — these rights on its citizens. It would be impossible for an individual to have the right against the juristic person which granted him these very rights. Rather, his rights concern the state's organs and its forbearances and actions (p. 217). The state through its legislatures grants legal rights to its citizens but is also free to take them away by appropriate legislation. For Jovanovic, there is no natural or universal legal right such that cannot be taken away from an individual.

As before, Jovanović is here considering only legal rights. In support of this view of legal rights against the state, Jovanović offers — as Jellinek and other before him had done — a brief history of this concept of right (pp. 220—222). In the absolute monarchy, an individual had no public but only private subjective rights; this meant roughly that an individual had no rights against the state but only against other individuals. And so, the concept of a public right of an individual arose outside the legal system of the absolutist monarchy. Consequently, public subjective rights of individuals appeared to be natural rights which are not conferred by the state. As Jovanović puts it, these rights appeared to be more human than civil rights. In gaining their independence from Britain, the North American colonies decided to list all the rights of an individual against the state in their constitution. This proved to be contagious and from then on most constitutions would list such personal rights. These rights are no longer only natural rights; they are conferred

[11] Laband, Paul, *Das Staatsrecht des Deutsches Reiches*, Tubingen 1911, Volume 1, 150—151.

on individuals by a legal document. However, constitutions proclaim rather than guarantee these rights: they do not specify how an individual is to defend them against the state. At this stage these are only 'reflective' rights: they 'reflect' legal prescriptions but are not specifically quaranteed by them. When specific laws are enacted granting an individual access to courts in defense of his rights againt the state, these rights become fully part of the legal order, i.e. fully fledged public subjective rights. Granted the protection of the judicial system, these rights — which at the start were only natural rights — become subjective public rights.

Jovanović also notes how the scope of the subjective public rights widened over time. In reaction to the absolutist police state, the right to personal liberty was viewed as the main and only right to be granted to individuals. By granting and protecting this right, the state's infrigement on personal liberty is to be curbed. But later the state was no longer seen as a possible source of infrigement on liberties but as source of personal benefit to individuals, and so subjects are thought to have rights to various services which the state provides for them. As a result the scope of public subjective rights was broadened to include rights to various state services (p. 222).

This brief historical outline suggests that Jovanović is not inclined to deny the existence of any but legal rights. Rather, in order to understand the role of individual rights against the state, he finds it useful to distinguish the rights which are thought to be natural i. e. not conferred by a legal order, both from the rights which are only conferred, but not guaranteed by a legal order, and from the rights which are conferred and guaranteed by a legal order. In the conclusion I shall examine this threefold distinction and its possible use in the discussion of human rights.

6. *Concluding remarks: Need human rights be universal?*

In his short historical outline, Jovanović distinguishes between natural rights, reflective public rights and fully fledged public subjective rights. The first are the rights enunciated by philosophers or political theorists; it is philosophers or political theorists who argue that all men by their nature possess rights e. g. to personal liberty. The second are the rights — often the same as the natural ones — enunciated in various constitutions but not guaranteed by specific laws. And the last are the rights — often of the same content as those mentioned in constitutions — for the protection of which specific legal guarantees are provided such as the right to sue in courts of law.

This threefold distinction appears to be a distinction between different levels of legal protection of a given right. This Jovanovic would have to deny: for him this is a distinction in the kind of right. For this distinction is based on the difference in the sources of a given right. The identity of a right is, in his opinion, dependent on its source and the means of protecting it. A right not conferred by a legal order is, therefore, different from a right conferred and protected by a legal order.[12]

Clearly this distinction is of no consequence to the philosophical question: Are there any natural rights and if there are, what are they? Jovanović in tact never discusses this question. If there are any purely natural rights, from his distinction it follows that they are not conferred by the state; his, of course, is hardly enlightening. But this distinction may be of some consequence to the question: Of what use are natural rights? This question is not only a philosophical one. Anyone with an interest in contemporary politics may ask this when confronted with an appeal to natural rights. For example, one can argue that in a particular state, the universal and natural human right to personal safety and the safety of one's family and belongings is being systematically abused by the government of that state. In support of such arguments, one can point out to arbitrary arrests, maltreatment of prisoners, illegal detentions without trial, random murders tolerated or even carried out by government agencies. Arguments such as this are nowdays freguently advanced in discussion of political practices of many countries.

Jovanović's threefold distinction suggests a way of avoiding the philosophical question — Are there any universal and natural human rights such as the right to personal safety? — in discussions of arguments of this kind. For even if there are no such rights — even if they are just philosophical fictions — an argument such as the one above would be quite intelligible and sustainable. The argument, as sketched above, does appeal to a natural right. Suppose, however, that there are no such natural rights. It is still a fact that in certain legal systems the right to personal safety is guaranteed and protected by specific laws prohibiting arbitrary arrest, illegal detention and the like. If there are no natural rights of any kind, appealing to them may simply be an elliptical way of referring to the existing and guaranteed legal rights. For the arguer may not want to say

[12] I do not see how one can establish whether this view of the identity of rights is true or false; as I am inclined to see rights — whether legal or political — as convenient fictions, I think that their identity is a matter of which convention one accepts. Jovanović's convention I would like to suggest has its advantages but is surely not the only one can accept. On this view, there is clearly no point in discussing the question of truth of Jovanović's doctrine of rights; and this explains why I do not do so in this paper.

that these specific legal rights guaranteed in the legal systems of various states are not guaranteed and protected in the state in question as he is not suggesting that the legal systems of these states should be transplanted to this state. He is perhaps saying only this: The rights of the same content and scope as the legal rights recognized in a variety of legal systems are being abused in the state under discussion. For the right of personal safety concerns the safety of an individual from arbitrary violence, and this safety is protected in various legal systems. And so in pointing to the abuses of this right, our arguer is pointing out to the lack of actual legal protection similar to that provided in the legal systems of various other states.

In short, in speaking of the universal and natural human rights, the arguer here is referring to some very general features of actual legal rights without at the same time referring to the legal orders within which these rights are recognized. His argument then depends on the possibility of referring to some general features of rights without specifying the legal or any other order within which the right is recognized. In allowing for this possibility, Jovanović's distinction could be used to show that arguments of the above kind need not presuppose a specific philosophical theory of natural human rights.

Moreover, the distinction may also be used in an attempt to clarify the form and force of the arguments — such as the one sketched above — which do appeal to universal and natural human rights. As we have seen, in the context of such arguments, the arguer is attempting to show, first, that there is a certain abuse of rights and, second, that this abuse is unacceptable because the rights in question are universal and natural human rights. In the above argument, the arguer starts from a non-legal right e. g. of personal safety and claims that such a right is a universal human right. In claiming that the right is the right of any human being — whatever his or her citizenship may be — the arguer is implying that the right *should be* protected in any society or state. And in many arguments of this kind, the primary aim of this claim of universality is to bring out this presecriptive implication. Usually, the arguer in fact means to say that such a right should be protected by legal means i. e. by enacting and enoforcing laws guaranteeing such a right. If so, in saying that a right is a universal human right, the arguer is implying that the right's non-legal status — which it has in some countries — should be changed into a legal one. Using Jovanovic's terminology, one could say that the arguer is implying that the right should be recognized as a fully fledged subjective public right within a specific legal ordier. And so Jovanovic's distinction may help us grasp the force of prescriptive implications of claims about universal human rights.

The above argument, whatever its interpretation, appears eminently liberal. And arguments and doctrines advanced in *Država* offer no grounds for questioning it. On the contrary, the threefold distinction discussed above offers us a framework for an interpretation of the argument. According to this interpretation, the introduction of non-legal universal human rights now appears to be a way of putting forward or of emphasizing a demand for legalisation of a certain non- legal right. On this construction, to use the concept of a non-legal universal right in this way is to put forward a demand for the *introduction of a new or not fully recognized legal right.*

On this account, Jovanović's threefold distinction of rights offers a conceptual framework for a paraphrase or interpretation of eminently liberal arguments concerning human rights. Whether it is an appropriate or useful conceptual framework I shall not discuss here. It is, however, worth noting that if this account of the distinction is correct, in discussing subjective public rights of individuals, Jovanović is not expressing any particular political opinion or preference but rather contributing to the clarification of political or philosophical arguments appealing to universal human rights. This contribution is, I believe, one of the most valuable legacies of his treatise *Država.*[13]

[13] I am grateful to Peter Radan for his numerous suggestions and comments on an earlier version of the paper.

ДРЖАВА И ПОЈЕДИНАЦ У *ДРЖАВИ* СЛОБОДАНА ЈОВАНОВИЋА

Резиме

Писац овога чланка детаљно је разматрао питање односа државе и појединца у делу знаменитог српског и југословенског правног писца и историчара Слободана Јовановића (1869—1958). Нарочита пажња посвећена је проблему људских права у организованим целинама. Коначни закључак аутора изражава начелно слагање са Јовановићевим начином мишљења и сврстава га међу либералне политичке мислиоце који не бране ниједно политички обојено становиште, већ се, напротив, труде да дају допринос општем разјашњењу политичких и филозофских аргумената у сложеном проблему људских права. У томе аутор и види највећу вредност наслеђа овог теоријског дела Слободана Јовановића.