

# Slobodan Jovanović

Life  
Work  
Times



Serbian Academy of Sciences and Arts







SERBIAN ACADEMY OF SCIENCES AND ARTS

SLOBODAN JOVANOVIĆ: LIFE, WORK, TIMES  
ON THE OCCASION OF THE 150<sup>th</sup> ANNIVERSARY OF HIS BIRTH

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## EDITOR'S FOREWORD

The monograph on Slobodan Jovanović (1869–1958), published on the occasion of the 150<sup>th</sup> anniversary of his birth, represents a unique account of his life, scientific work, society and the times in which he lived. Jovanović's work and his personality have always attracted the attention of the general public. The work he left behind is remarkably voluminous and versatile. It should be noted that a great number of his works was not included in the volumes of his collected works that have been published to date. Slobodan Jovanović worked as a university professor at the Faculty of Law in Belgrade for over forty years. He performed the duties of the dean of the Faculty of Law and the rector of the University of Belgrade. He was the president of the Serbian Royal Academy, legal expert at the Paris Peace Conference, president of the Commission for drafting the Constitution of the new state in 1920, president of the Serbian Cultural Club, president and vice-president of the Ministerial Council of the Kingdom of Yugoslavia. In view of the duties he performed, social and political activities represent an important part of the picture of this great scientist of ours. As the president of the Serbian Cultural Club and the pivotal personage of the Serbian people he was delegated to assume the responsibilities of the second vice-president of the Ministerial Council in the government of 27 March 1941. He was the president and vice-president of the government in the country and later in exile. He died in emigration in London in the late 1958, almost a hundred years since his father Vladimir Jovanović, one of the leading Serbian Liberals, had first arrived in the British capital as a political emigrant. Even though Slobodan Jovanović advocated parliamentary bicameral multiparty system, he had never participated in party politics. However, he took part in state politics, as Jovan Dučić wrote in 1942: "Slobodan Jovanović has never been a member of a party, a member of government, or a participant in any plot. He always kept himself at a distance from ruling politics, and yet for this very reason he stood close to its side, as its yardstick, its judge, and its state prosecutor. He used to be called 'the conscience of the Serbian people'. He was not a political person, but a statesman: always at the helm, and from there always taking in sweeping views that lie ahead of him." In the aftermath of the war, Slobodan Jovanović was convicted at the political trial organized by the new communist rule in Belgrade in 1946. His personality and work were expelled from the educational system and scientific circles and consigned to oblivion. He was rehabilitated in 2007.

This monograph first presents the biography of Slobodan Jovanović including the chronologically presented works that can be said to represent the milestones of his scientific develop-

ment, as well as his own theoretical viewpoints. Subsequently, the individual chapters trace the scientific areas he dealt with and scientific achievements he accomplished. The account starts with his theory of the state related to the subject he had taught, that is, General and Special Constitutional Law. It is followed by an account of the special legislation, that is, constitutional law, and an assessment of Slobodan Jovanović as a constitutional-legislative writer. The books in which he interpreted the constitutions of the Kingdom of Serbia and the Kingdom of Serbs, Croats and Slovenes (Vidovdan Constitution) are analyzed and reviewed. The following part of the monograph is devoted to the historiography of Slobodan Jovanović, to the multi-volume political history of Serbia of the 19<sup>th</sup> century, which is often justifiably regarded as his best-known work. If his other works to do with national history are also taken into account, it can be seen that he encompassed a period from the late 18<sup>th</sup> to mid-20<sup>th</sup> century. The subsequent part of the monograph deals with Jovanović as a literary scholar and critic. Special praise is given to his sophisticated language and well-known Belgrade literary style. The final part of the monograph contains Jovanović's bibliography.

With a view to making the text of the monograph easier to read, all footnotes, that is, notes, are to be found at the back of the book.

We thank all the authors for the texts published in the monograph dedicated to the 150<sup>th</sup> anniversary of the birth of our renowned scientist Slobodan Jovanović.

Kosta Čavoški and Aleksandar Kostić

## JOVANOVIĆ'S THEORY OF THE STATE

Boris MILOSAVLJEVIĆ

*SASA Institute for Balkan Studies*

In 1897, Slobodan Jovanović was elected and appointed a professor at the Law Faculty of the Great School in Belgrade, at the General and Special State Law course. The decree read only State Law, but the full subject title was State Law, General and Special. General State Law concerned the study of general fundamentals of the state, i.e. the concept of the state, while Special State Law pertained to the concept of constitutionality and interpretation of the Constitution. In accordance with the division of the subject into General and Special State Law, after books on general state law, Jovanović published books about special state law, i.e. interpretations of the constitutions of the Kingdom of Serbia and the Kingdom of Serbs, Croats and Slovenes.

Jovanović published four times his book on the state, titled: *The Fundamentals of the Legal Theory about the State (Osnovi pravne teorije o državi)*, 1906, *The Fundamentals of the Legal Theory about the State, the second revised and extended edition (Osnovi pravne teorije o državi, drugo prerađeno i prošireno izdanje)*, 1914, *About the State, the Fundamentals of a Legal Theory, the third reviewed and supplemented edition (O državi, osnovi jedne pravne teorije, treće pregledano i dopunjeno izdanje)*, 1922 and *The State (Država)*, 1936.<sup>656</sup> Each time, he either revised or added segments of the text. The book is a continuation of his study “On the Social Contract” (“O društvenom ugovoru”) – published in 1895 in *Srpski pregled* of Ljubomir Nedić, a professor of philosophy at the Faculty of Philosophy – and of his inaugural lecture at the Law Faculty “On





Slobodan Jovanović as a professor of the Faculty of Law in Belgrade

Sovereignty” from 1897. In the foreword to the second edition to the book about the state from 1914, he states that he rewrote two thirds of the text.<sup>657</sup>

The book was a textbook for students of the Law Faculty, which, however, does not diminish its importance, just like the importance of numerous seminal works that were textbooks, lecture notes or even unrevised students’ minutes from lectures cannot diminished. It is sufficient to remember Aristotle’s *Metaphysics* (μετὰ τὰ φυσικά) and Georg Wilhelm Friedrich Hegel’s lectures. Jovanović’s work by far surpasses the textbooks written only to meet the pedagogical needs of higher educational teaching. The title *The State* from 1936 best reflects the contents of his book since from its first edition it contained a general, comprehensive study of the state, as one of the oldest themes of philosophical, legal and political theories. Jovanović analyses the general concept of the state, the theory of creation of the state, various philosophical theories about the state and society, the concept of state sovereignty, relationship between the state and law, the legal state and self-limitation of the state with the separation of powers, and a bicameral parliamentary system.

If we assume that originality implies a revolutionary viewpoint which uproots the earlier one, Jovanović’s text cannot be considered original. The same, however, can be said for many other well-known philosophical and scientific works given that, based on in-depth interpretation, one can see that authors relied on earlier research. Originality in scientific revolutions is measured by the critical attitude towards the institutionalised frameworks for scientific research and hitherto scientific achievements, which should be mastered and interpreted beforehand. One can say that originality at all cost is more detrimental than eclecticism or epigonism. It is only originality drawing on an earlier scientific tradition, the accumulation of scientific achievements and the experience of thoughts that can ensure a true scientific breakthrough. In this regard, Jovanović’s analysis of the concept of the state is an original endeavour. His attitude towards his

predecessors and contemporaries was critical. At the same time, he did not hastily resolve issues, but examined and analysed important and influential theories with a lot of patience and tact, deriving his criticism from their internal inconsistencies and contradictions, and substantiating the truthfulness of a different viewpoint.

Jovanović studied the state as a unique and multifaceted phenomenon which could be approached from several angles – philosophically, politically, legally, sociologically, historically. The versatility of the approach does not mean that the phenomenon is in reality separated and fragmented by area. In fact, the objective of the entire research is the attempt to understand the unique phenomenon such as the state. Different scientific approaches serve a better and clearer understanding of the phenomenon. Basically, this was the rationale behind the study of the state (*Staatslehre*), in whose tradition Jovanović wrote his book about the state. Jovanović wrote systematically, but the book can also be read as a collection of versatile topics relating to the state. At the time, a systemic work was ranked above a monograph.<sup>658</sup>

Jovanović's study of the concept of the state relies on long history – from ancient philosophy, through modern-time theories, 19<sup>th</sup>-century German studies about the state and English political experience, to the theories about the extinction of the state and restoration of the theory of state absolutism. The cornerstone of Jovanović's research was the study of the state, organised systematically only in Germany in the 19<sup>th</sup> century. In French political theories, after Jean-Jacques Rousseau, the concepts of the “state” and “society” and of the “nation”, “people” and “society” were mainly equated. They were clearly differentiated in the German state, political and legal theory. The German study of the state, however, pertained to German institutions, while English studies about constitution and parliamentary system concerned almost exclusively the English political and legal tradition. Jovanović emphasises that the syntheses of German, English, French, Swiss and American state-legal theories and experiences were rare. While analysing the phenomenon of the state, he tries to synthesise the best works about the state of the leading European and American philosophers and scientists.<sup>659</sup> He makes sure to introduce in new editions of his book about the state the interpretations of the latest relevant books, and to always use the latest supplemented and corrected editions of earlier cited works.

Starting from Johann Gottlieb Fichte's teaching, Hegel's philosophy of law and the analysis of the law of reason (*Vernunftrecht*),<sup>660</sup> through the general study of the state (*allgemeine Staatslehre*),<sup>661</sup> to the theory of state law (*Staatsrechtslehre*), the study of the concept of the state was based on the long-standing philosophical tradition with the analysis of the state being the subject of politics as practical philosophy (ἐπιστήμη πρακτική).<sup>662</sup> The following Immanuel



Johann Gottlieb Fichte (1762–1814), German philosopher

Kant's metaphor is well-known: "an empirical doctrine of right [law, Rechtslehre...] is a head that may be beautiful, but unfortunately has no brain", i.e. philosophical grounds.<sup>663</sup>

The understanding of the state as a single political entity, i.e. the theory of state sovereignty is contained in Hegel's philosophy of law. Although Hegel is often left out from the analyses of the history of development of public law, while criticising Hegel's theory of the state, Hans Kelsen indicated the importance of Hegel's philosophy for the development of the study of the state: "[Hegel's] philosophy of law rests on the sovereignty of the state; moreover, it reaches its pinnacle in the deification of the state and consistently rejects any idea of an order of international law which is above states. It is no coincidence that Hegel's understanding of international law, which prevailed in the second third of the 19<sup>th</sup> century, came again to the fore in the third third of the century [...]"<sup>664</sup>

Dimitrije Matić, a professor of public law at the Lyceum in Belgrade (Jovanović's cousin and predecessor at the university department) espoused Hegel's theory of the state in his *Načela umnog državnog prava* from 1851.<sup>665</sup>

In the mid-19<sup>th</sup> century, the state was considered an organism, but no longer in Hegel's and Schelling's sense, but within the meaning that "organism" acquired in natural sciences. Johann Kaspar [Caspar] Bluntschli criticised the theories of the state and public law deriving from pure speculation.<sup>666</sup>

In the 19<sup>th</sup> and the first half of the 20<sup>th</sup> century, the general study of the state was also called the science of the state, theory of the state and general state law. Regardless of the name, it linked two areas – the basic philosophical, legal and political precepts, and legal knowledge about individual segments of state life. The basic concepts contained in books on the state were usually philosophically grounded. The fundamentals of the general study of the state imply, in fact, the philosophy of the state. During his studies abroad at universities in Munich (Juristische Fakultät), Zurich (Staatswissenschaftliche Fakultät) and Geneva (Faculté de Droit), Jovanović studied the German general doctrine of the state. Although Georg Jellinek's theory is most often mentioned in relation to Jovanović's theory of the state, only Bluntschli's theory can be considered to have been followed by Jovanović. This is why Bluntschli's theory deserves particular attention. In the footnotes to his works "On Sovereignty" ("O suverenosti") and "On Bicameral System" ("O dvodomnom sistemu"), Jovanović does not specify the year of publication of Bluntschli's three-volume work about the modern state. In these footnotes, he most often makes references to paragraphs



Georg Wilhelm Friedrich Hegel  
(1770–1831), German philosopher



Georg Jellinek (1851–1911), assistant professor of Philosophy of Law and professor of Public Law at the University of Vienna and General Public Law at the University of Heidelberg



Paul Laband (1838–1918), German jurist, taught Law at the University of Königsberg, and later at the University of Strasbourg. He was considered expert on constitutional law.

and chapters, and rarely to pages of books. He gives an invaluable critical overview of German, French, English and American literature on the state in the foreword to his book on the state written in April 1906.

According to Bluntschli, the state has a biological-spiritual organic character, as well as legal personality in the sense of public law. Bluntschli criticises the theory of popular sovereignty (following Hegel's arguments), the theory of national sovereignty, the sovereignty of law or justice, and the theory of the absolute monarchy. For Bluntschli, the real sovereign is "the state as a personality". Bluntschli's theory of the state was for a long time highly influential even outside the German speaking area. We may conclude that Jovanović followed Bluntschli's theory because he considered it reasonable and well-grounded. He did not follow "the latest fashion" in science, but relied on well-grounded, tested and reliable knowledge. A practical political state reason brought about disturbances in the scientific study of the state in Germany. What remained after the German unification was the political need to continue to consider some states within the German Empire sovereign, which influenced the formulation of German theories of sovereignty. Bluntschli's theory is scientifically more consistent than recent German theories of the state.<sup>667</sup>

In the second half of the 19<sup>th</sup> and early 20<sup>th</sup> century, the German study of the state ranged from the philosophical understanding of the state to the "purely" legal understanding, which eventually brought about the separation of law and the state, i.e. the interpretation of the state as a logically non-contradictory set of legal norms. Paul Laband contributed the most to the spreading of a purely legal method in studies about state law of the German Empire and separate German states: "With less historical erudition and lesser proclivity to philosophical speculation than Jellinek, Laband shows much more talent in purely legal constructions: it may perhaps be said that he is today the greatest legal talent in Germany".<sup>668</sup> Jovanović notes that Jellinek,



contrary to Laband, is “inclined to getting rid of the one-sidedness of the purely legal method, which in the past twenty five years ruled unquestionably in German state-legal studies, and which Jellinek aimed to combine with the social-political method”.<sup>669</sup> In addition, Jellinek, “of all German writers, made the greatest effort to get rid of national one-sidedness and to rise to a higher cosmopolitan viewpoint”.<sup>670</sup> The renewed interest in Kant’s philosophy in the late 19<sup>th</sup> century had a decisive influence on the general study of the state and the philosophy of law. Following Kant’s critique of pure reason, i.e. the Marburg school of Neo-Kantianism, Kelsen carried out the critique of “pure law” and re-established the entire law on neo-Kantian foundations.

As regards the professors who taught General and Special State Law before him, Jovanović was more inclined toward the theoretical considerations of Jakov M. Nenadović than those of Milovan Đ. Milovanović.<sup>671</sup> Dragutin Dragiša Mijušković’s standpoints should also be taken into account.<sup>672</sup> In the second edition of his book about the state from 1914, Jovanović refers to the published Parisian doctoral dissertation of Milan Gavrilović titled *The State and Law (Država i pravo)* from 1911, which analyses German state theories.<sup>673</sup> In the third edition from 1922, Jovanović also refers to the printed part of the doctoral dissertation of Đorđe Tasić *The Problem of Justification of the State (Problem opravdanja države)*, defended in May 1920 before the committee consisting of Živojin Perić (president), Slobodan Jovanović and dr Toma Živanović.<sup>674</sup> In the fourth edition from 1936, Jovanović mentions the works of Leonid Pitamic *The State (Država)* from 1927, Evgenij Spektorski *The State and its Life (Država i njen život)* from 1933, Dragoljub Arandelović *The Principles of State Organisation in Recent Past and Present (Principi državnog uređenja u skoroj prošlosti i sadašnjosti)* from 1935, and Đorđe Tasić *Introduction into Legal Sciences (Uvod u pravne nauke)* from 1933 and *Contemporary Political Systems and Understandings (Savremeni politički sistemi i shvatanja)* from 1936.

As already noted, Jovanović published his book about the state four times (1906, 1914, 1922, 1936). In all editions, regardless of the volume, the book contained the same three chapters of the introduction and the same three parts with the same number of chapters: the concept of the state (name, justification, task of the state, state personality, area, people and power as elements of the state, and the complex state), state functions (legislative, executive and judicial branches) and state organisation (separation of powers, organisation of the legislative branch, organisation of the administration). In all editions, the first part contains eight chapters, the second two and the third – three chapters. The fourth edition contains



Dragutin Dragiša Mijušković,  
Dr. jur, dean of the Faculty of Law  
at a time when Slobodan Jovanović  
obtained a professorship (Milan  
Jovanović Atelier, the photo owned  
by the Marković family)



a new, fourth part titled “Post-War State” (“Poratna država”) with five chapters. Only the first edition, the smallest in volume, contains 66 paragraphs, while other editions contain 64 each. As it is the case with other books about the state published at the time, more important than their form were the basic principles they were grounded on. This is why we shall, in the analysis of Jovanović’s theory of the state, focus particularly on a systematic overview of the main themes.

Jovanović analyses the idea of the state at the start of his book *The State (Država)*, in the chapter titled “How to arrive at the general idea of the state”. The subject matter of his research is the “general concept of the state”, which exists “only as an idea”. He underscores that there are “two different things: either the ideal state or a typical state”.<sup>675</sup> Jovanović examines the typical state. He arrives at the idea of the state based on species in biology: “Its image is derived from reality, by separating in real states those features that they all have in common. There are only individual animals and not species in the animal world; this is why species are considered sufficiently real to be the subject of scientific examination. A typical state is real as much as species are”.<sup>676</sup> Jovanović singles out the main features of the existing states and builds the idea of the state based on them. He does not go into the Platonic question of the ontological foundation of ideas, but presents the general characteristics of modern states in the Aristotelian tradition. He avoids the remark of derivation from pure speculation, which Bluntschli criticised: “The general theory of the state, particularly public law, is often considered the product of pure speculation and efforts are made to deduce it through purely logical conclusions, from a speculative viewpoint. This generated different systems of natural or philosophical public law, distanced both from positive and historical law. I understand the discrepancy differently. The state must be understood both philosophically and historically”.<sup>677</sup>

Jovanović points out that in the analysis of “general concept of the state”, not all states of all epochs can be reduced to a single type of the state. The absence of a feature marking all historical types of the state does not mean there is no the most general concept of the state, which can embrace all typical states of individual epochs. Responding to the question: “What is it that brings numerous types of the state, despite all their versatility, under the same concept and the same name of the state”, he observes that each state contains immutable elements such as people united within it, the soil they live on and the authority commanding them. This is the well-known three-element doctrine (“Drei-Elemente-Lehre”).<sup>678</sup> The state may lose its territory (e.g. Serbia and Belgium during World War I), but “it can be said that it is left without the territory temporarily and materially, and not constantly and in the legal sense”.<sup>679</sup>

Jovanović analyses the typical state of different nations of the same degree of civilisational development, where despite all particular differences, general similarity can be discerned. He writes that all states of the Western civilisation have joint public-law institutions, such as the separation of powers, representative systems, the accountability of the minister (prime minister) etc. He concludes that the typical organisation of the modern state can be ascertained based on these common features.

As already noted, Jovanović suggests that “general concept of the state” can, in addition to a typical sovereign modern legal state, imply the concept of an ideal state. For him, the ideal state entails utopian models with an overview of an ideal state: “It need not have any similarity

with the states that exist in reality; moreover, it can be entirely opposite to them, which is why the ideal state is never taken as the subject matter of scientific research”.<sup>680</sup> The concept of the ideal state can be understood in the third way as well: “An ideal state is the state as it should be”.<sup>681</sup> If one does not have in mind the existence of an imaginary state, but of the state as it should be, one can say that there is no difference between the idea of the state as a typical state and the idea of the state as an ideal. According to Bluntschli, the general concept of the state (*allgemeine Staatsbegriff*) contains essential characteristics of the existing states, while the idea or ideal of the state is the image of the state that one aspires to. By interpreting Aristotle, Bluntschli differentiates the concept of the state ideal and “the best average state” (*πολιτεία*).<sup>682</sup> He emphasises that the best average state, understood as a constitutional state, can be an ideal. Jovanović’s analysis of the legal state can be, in this sense, also considered the analysis of a state ideal.

In his book about the state, Jovanović explains what the state looks like in reality, and what it can be. As he is not naïve or prone to idealisation, his analysis of the state as an orderly force can be tedious for the reader, but such tediousness should be interpreted as a sign of soundness. He skilfully avoids the trap of “the night in which all cows are black”, as well as purposefully untruthful, i.e. fake presentation of the subject matter of scientific research. The validity of his attitudes can be best verified through the comparison with other theories which he critically analyses in his book on the state and other manuscripts. It should always be borne in mind that he espoused the separation of powers into the executive, judicial and legislative branch divided into two chambers, as well as political pluralism, i.e. a parliamentary multi-party system. In the chapter “Post-War State” of his book on the state from 1936, Jovanović critically analyses European totalitarian etatist systems – communist in the Soviet Union, national-socialist in Germany and fascistic in Italy.

In expounding on the theory of the genesis of the state, Jovanović has in mind the most general concept of the state. In his introduction to *The State*, he first examines



Jovanović critically analysed European totalitarian etatist systems, communist in the Soviet Union, national-socialist in Germany and fascistic in Italy.

the relationship between the state and society. The social situation historically precedes the state situation, because it can be reasonably assumed that before the creation of the state men lived in bigger or smaller social groups, such as the family, clan and tribe. Both the state and society are human communities based on the relationship among individuals: "There are communities that are purely internal; there are others where internal unity acquired external expression".<sup>683</sup> Unlike purely internal communities such as, for instance, the family, the state is an external community as it regulates the external life of individuals. The state differs from other communities which also have general rules, because there is a single authority that orders the implementation of those rules: "Such authority does not exist in any other community. It is possible to define rules in other communities as in the state, but such rules, no matter how imperatively understood, remain rules respected by an individual out of his own feeling of duty. Their authority is purely moral".<sup>684</sup> Jovanović states that a community which is not the state can have its administration, but cannot have its power in the real sense. Some of its members need not execute some orders issued by the administration, as it depends on their free will whether to belong to such community or not.<sup>685</sup> In contrast to them, the state is a community where the authority orders individuals to behave according to rules, regardless of their internal feelings, and imposes rules by the force of external authority. The state and society differ as an external and internal community, but the state is not an exclusively external community. The state is a wider, complex group, consisting of narrower, smaller groups, which are closer, "more intimate" communities than the state, but do not encompass all members of the state. These social groups are in constant rivalry, because though the interests of all members of the state coincide at a more general level, they diverge at a separate level. "Two forces are felt" in the state, "of which each works towards a different direction: one connects and the other separates; the internal equilibrium is the result of the interplay of these two forces".<sup>686</sup> Jovanović calls these forces "centre-aspiring" (centripetal) and "centre-fleeing" (centrifugal).<sup>687</sup>

Jovanović points out that man had the existential need to organise himself in order to preserve his life and defend himself and his natural social group. The state arose from society, through the collective act of creation, half-instinctively and half-consciously, i.e. intuitively and artificially, in the struggle for life and death. The organisation for struggle is, in fact, military organisation. According to Jovanović, the state was created with the self-subjugation of a group of people to military organisation: "People wanted to organise an army and, practically beyond expectations, obtained a state".<sup>688</sup> As the state was created in a war and due to a war, military organisation remained forever its most important characteristic: "No matter how numerous and developed its tasks become in time, the state, in its essence, remains a military institution. This is best seen in the fact that, as a last resort, the state could renounce its legal and cultural mission [function], but could not renounce its military mission [function]".<sup>689</sup> Namely, the state would not jeopardise its survival if it neglects the construction of roads, or renounces its legal task. In the first case, progress would be slowed, and in the second case, the safety of personal property would be endangered. However, if the state renounces its "military mission", its existence would no longer be certain because it would be, without weapons, conquered and divided by the neighbouring countries: "The military mission [of the function] is the basic, historically the oldest



Thomas Hobbes (1588–1679), philosopher, representative of British empiricism



Adam Ferguson (1723–1816), Scottish philosopher and historian

mission of [the function] of the state, upon which other missions were implanted only in time. This statement could be a sort of indirect evidence that the state truly emerged from a war”.<sup>690</sup>

Thomas Hobbes took it for granted that a war preceded the state. He believed that in the state of nature an incessant war was waged against all: “For where there is no Commonwealth, there is, as hath been already shown, a perpetual war of every man against his neighbour; and therefore everything is his that getteth it and keepeth it by force; which is neither propriety nor community, but uncertainty”.<sup>691</sup> Unlike Hobbes, Jovanović believes that a war which preceded the creation of the state was not a war of all individuals against all individuals, but a war of social groups. Jovanović agrees with Walter Bagehot: “Bagehot starts from the assumption that the struggle for survival is also present in relationships among people, but here a man does not struggle with a man, but a group with a group”.<sup>692</sup> Jovanović does not believe that mere egotism rules among people and that there are no feelings that keep them in the community. If a man was exclusively a non-social being, it would be unclear how he managed to create the state, even less so how he managed to preserve it: “A single basic remark may be made against Hobbes. His stance is such that there are no social feelings that would connect people, but only egotistical appetites that would separate them”.<sup>693</sup> Contrary to Hobbes’ viewpoint about a war of all individuals against all individuals, Jovanović believes that before the creation of the state a man was not a lonely egotistical individual, but a part of the social group in which he was born: “[The state] was preceded by natural communities, such as a tribe and family, whose members were mutually connected through blood kinship, as descendants of the same predecessors”.<sup>694</sup> Namely, some social groups with joint interests preceded the creation of the state. For people to be able to live in social communities, they must have, in addition to their egotistical drive, an inclination to mutual cooperation.

According to Jovanović, the state was created in a war, i.e. in the struggle of a social group for survival. For a tribe to be able to defend itself, it had to undergo military organisation. Ludwig Gumplowicz insisted on the theory when one horde subjugates another horde (winners and the subjugated ones).<sup>695</sup> Gumplowicz used the term “horde”, but referred to Adam Ferguson who, however, believed that people were organised in units and troops, i.e. military formations. A military unit is not the same as a horde. It is not possible to conclude that Jovanović followed Gumplowicz’s theory only because both of them mention a war as the factor for creation of the state. It is particularly Jovanović’s views that cannot

be brought into connection with Social Darwinism that he criticises. He believes it is too much “to say that the state could be created only through the subjugation of one tribe to another”.<sup>696</sup> Jovanović makes an important distinction. He points out that the state could come into existence through the association of two tribes against a common enemy: “Two associated tribes are in a war union, and a war union is not a natural, but a legal community”.<sup>697</sup> The state could also come into existence without forceful or voluntary association of tribes: “Such case would exist when one tribe, due to the struggle with other tribes, had to succumb to military discipline”.<sup>698</sup> Thus, Jovanović does not follow Gumplowicz, but criticizes the one-sidedness of sociological theories that emphasise the aspect of subjugation, i.e. class state. Franz Oppenheimer believed that a sociologically understood state is “a social institution imposed by a victorious group of people upon the defeated group with the sole aim to regulate the rule of the former over the latter ones [...] Such rule did not have any other ultimate objective except for the economic oppression of the losers by winners”.<sup>699</sup> Though a difference can be made between the objectives of Gumplowicz’s and Oppenheimer’s theory, i.e. the theory of force and the socialist theory, the followers of such theories were convinced they acknowledged the ultimate sociological scientific truth.<sup>700</sup> Jovanović’s theory about the creation of the state and law from a war is, in fact, the closest to Carl Schmitt’s theory about the creation of the state from a war and the viewpoint that the state is always at war. In *The State*, Jovanović critically examines Schmitt’s theory of the state.<sup>701</sup>

Jovanović particularly emphasises the role and importance of the army. Military organisation is the basis of state power and the beginning of the state. The state was not created to prevent struggles among individuals, or as an agreement between rational and good individuals, but emerged from an existential struggle for life and death of a social community. Although the very onset is the most important, the creation of the state is not an act that happened only once, but generations of its subjects contribute to its development. Just like individuals, states also have their lifespan – the beginning, significant changes and the end. The state is more long-lasting than an individual to whom it resembles god, but unlike immortal God, the state is, according to Hobbes’ metaphor, “a mortal god”: “It is the generation of that great Leviathan, or rather to speak more reverently, of that Mortall god, to which we owe under the Immortal God, our peace and defence”.<sup>702</sup>

Jovanović, in fact, agrees with Edmund Burke’s idea that the creation of the state is a joint act of a social group: “The state comes into



Walter Bagehot (1826–1877), writer, author of *The English Constitution*, influenced political thought in the Balkans



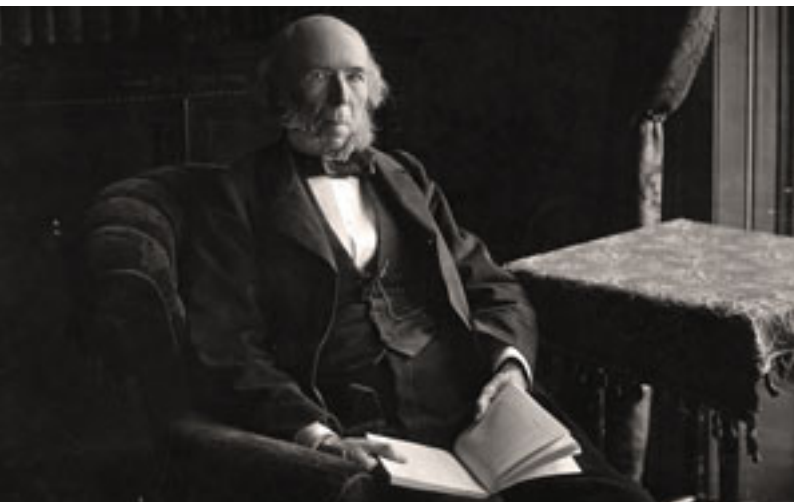
existence through an act of collective creation, springing from the unfathomable psychological depths”.<sup>703</sup> The development of the community such as the state cannot be comprehended by individuals in entirety, because the state lasts longer than an individual, and the principle of existence is present in own tradition more than in the current will of its members. The state is a historical community, which exists not only because of current, but also for the sake of future generations. Burke emphasised that the state can also be talked about as a contract, but not among individuals, as contractualists claim, but among generations, because the state is “a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born”.<sup>704</sup> As states are mediated through society, i.e. people of a country, they have their characters and differ among themselves.

Hobbes’ and Rousseau’s understanding of the creation of the state is individualistic, but their theories are entirely different. According to Hobbes, before the creation of the state, natural man was a wild animal – “a wolf”, while according to Rousseau, he was a noble natural being gifted with the strength of clear reasoning. Jovanović follows Burke’s viewpoint that the creation of the state is a collective act of the community, which cannot be rationally explained in all particulars. In its essence, the creation of the state is, on the one hand, a half-instinctive, and on the other hand a half-conscious act: “The first groupings among people, if based on blood kinship, can be understood as more or less instinctive. However, the organisation of state power, the separation of those who command and those who obey, had to be carried out in a conscious way: both the acts of commanding and obeying are the acts of will”.<sup>705</sup> The governance of the state, i.e. statesmanship or politics, is not an exclusively rational activity, as it was thought during the Enlightenment. Statesmanship is not a relational technique because it is inextricably linked to moral characteristics. The political wisdom of previous generations is transferred through heritage and institutions, as well as the character and destiny of a people and its state: “The attempts to have [the state] take the direction which does not suit its character are – if not futile – then deleterious”.<sup>706</sup>

Jovanović follows Hobbes’ theory according to which there was no law before the state: “Where there is no joint power, there is no law, where there is no law, there is no injustice”.<sup>707</sup> Law is created with the creation of the state, because military organisation is at the same time the first legal organisation. In contrast to seniority in the family and tribe, military organisation, out of the very necessity of self-preservation, entails that those who are the fittest for the war are also seniors: “Military organisation introduces into the tribal life the principle of inequality; an army cannot exist without a sharp difference between the betters and juniors; the army must have its hierarchy and discipline. The military commander is determined according to his personal capacity demonstrated in the war; military seniority need not overlap with family seniority”.<sup>708</sup> When the state began to care about internal peace as well, it became a legal institution in its full sense, because its objective was no longer only violence over the external enemy, but also the suppression of violence within itself: “In suppressing violence, the state doubtless applied force, but the use of force was only a means of achieving abstract rules, ideas and principles. By upholding ideas, the state itself assumed the semblance of something rational and orderly”.<sup>709</sup>

The state power prescribes norms that are mandatory for its subjects because it prescribed them. It derives its right of stipulation of legal norms from the already existing legal norms. The authority of power is based on legal norms, i.e. laws, and the validity of legal norms is based on the authority of power which has the force to implement them. Law and the state are, in fact, inseparable: “The first power that arose was at the same time the first norm, enshrined in the principle that such power had to exist. And vice versa – the first norm that came into being was in itself an act of power, because those who created it had to act as power already at the moment of its creation. State power arises from law and law arises from the state, until the initial moment is reached when state power and law appear as the obverse and reverse of the same thing”.<sup>710</sup> Jovanović emphasises that there is no law without power, because the concept of law implies that something is mandatory. It is impossible to have something mandatory if there is no force to guarantee mandatoriness. For the rules of social life to assume a legal character, it is necessary to organise a higher authority to impose them, which means that the legal character can be contained only in those rules behind which there is state power.

Jovanović suggests that the “justification of the state” usually implies the justification of the state as a coercive force, because it was believed that man without the state would be free. The question was therefore posed whether the state has the right to restrict the freedom of individuals through coercion. It is the question of state (government) intervention. Jovanović, however, underscores that “without the state, man would not be free; his right to freedom and his other rights exist only if guaranteed by the legal order. Man is free only when the state is there to protect him against private violence. Otherwise, he is the slave of all those who are stronger than him”.<sup>711</sup> The state provides support from all kinds of violence – equally from the violence over an individual, and violence that the same individual would inflict upon another individual. Jovanović concludes that it is true that the state is a coercive organisation, but primarily because it forces people to refrain from violence. He concludes that state coercive organisation is better than non-state coercive disorganisation, i.e. the anarchy of the state of nature in which provisional forces rule. Given that state coercion is in direct connection with protection offered by the state, “it could be considered a flip side, rather than the denial of our freedom”.<sup>712</sup> Freedom would not exist without state coercion that protects the individual. In fact, the state enabled or, one may say, created freedom, which is why it has the right to limit it, when necessary. Jovanović proves the conditioning of freedom by state necessity through knowledge about protection that the state offers to the individual. He thus gets close to Hegel’s understanding of the relationship between necessity and freedom, with freedom understood as “perceived necessity”. Although this basically concerns the dialectic understanding of freedom and necessity, Jovanović does not equate his theory with Hegel’s study of the state,<sup>713</sup> which he analyses in his overview of the development of German classic philosophy: “Kant connected personal freedom and moral duty, claiming that voluntary subjugation to moral law is the highest degree of personal freedom. Hegel added that the idea of morality finds its materialisation in state organisation, which implied that voluntary subjugation of the individual to state power meant the connection of personal freedom and moral duty that Kant wrote about. As regards those who held that an individual could not be



Herbert Spencer (1820–1903), British philosopher, biologist, sociologist and political theorist



Leon Duguit (1859–1926), French jurist, expert on public law, professor at the University of Bordeaux.

required to subjugate to any state power, but only power that was rationally organised, Hegel responded that the rationality of state organisation was a relatively historical notion. Covered by the historical process, the state goes through incessant phases that take it towards its increasingly fuller rationalisation: from the historical viewpoint, any state organisation existing in a given moment is rational for that particular moment, by the very fact of its existence. The ideology of the French Revolution placed the individual with his rights above the state, and in the principles of freedom and equality it had an absolute measure for the changeable historical organisation of the state. On the contrary, Hegel placed the state above the individual as the highest form of his own morality, believing a given state organisation is sufficiently justified by the fact that it managed to materialise during a historical process. In Hegel's interpretation, idealistic philosophy offered the metaphysical basis of conservative policy, which defended the existing situation and was inclined to the *fait accompli*?<sup>714</sup>

Jovanović's criticism of the theory of natural rights derives from the basic attitudes about the unity of power, state and law. As the theory of natural rights underpins the social contract doctrine, it is from the criticism of natural rights that Jovanović derives the criticism of John Locke's learning, John Stuart Mill's liberal individualism and the relating Herbert Spencer's individualistic positivism and Social Darwinism, as well as the criticism of Rousseau's social contract and the concept of popular sovereignty, Léon Duguit's learning about the social origin of law and Marxism which embraced some segments of these theories, as well as Kelsen's normativism.



The starting point of Jovanović's criticism of the theory of natural rights (natural laws) is contained in his opinion that law cannot be separated from the state.<sup>715</sup> Law is the state will, i.e. a set of rules to which the state gave the force of mandatoriness. There is no law without the state, because rules that would exist without the state would be deprived of the special obligatory force guaranteed by the state. Law outside or before the state could not be implemented because no one would have the force to implement it. Jovanović follows Bluntschli's criticism of contract theory, according to which outside the state there is no political freedom that would enable free conclusion of contracts: "the [contract] theory is refuted not only by history, but by logical criticism as well. It assumes the freedom and equality of individuals concluding the contract, but political freedom, implied here, is possible only in the state".<sup>716</sup>

Jovanović believes that natural rights can always be the subject of philosophical reasoning: "If the problem of the justification of the state is considered from a higher philosophical viewpoint, the contract theory can look differently than from a purely legal viewpoint. In such case, it would not mean that the state was created by means of a contract as a legal transaction between individuals, in the manner in which societies are generally created in private law, but, instead, the contract theory would imply that the ultimate reason of the state is found in the free consent of those living in it".<sup>717</sup> However, the creators of natural law (right) and contract theories used the notions of "law" and "contract", which also implies the adoption of the meaning of these notions. Jovanović easily plays with logical and philosophical weaknesses of the theories that he criticises. His Socratic irony always hovers in the air.

Law and the state are inseparable for Jovanović because law permeates the entire state system. By contrast to morality, law is a set of rules of social life which must be fulfilled. For the rules of social life to have a legal character, the first condition is to organise a higher authority which guarantees their implementation. If law cannot exist without state power, "it is clear that natural rights [natural laws] that would exist before the creation of the state and organisation of its rule are impossible": "Natural rights would be *contradictio in adjecto*".<sup>718</sup> In other words, as individuals before the creation of the state could not have any rights, their acts could not have legal importance. In the pre-state situation, each contract was void of mandatoriness, because the mandatory force of a contract does not arise from individuals concluding it, but from the state which guarantees its enforcement.



John Stuart Mill (1806–1873), British philosopher



John Locke (1632–1704)

Jovanović pays particular attention to the analysis and criticism of Locke’s and Rousseau’s version of contractualism. Locke’s theory had a great political importance as he was the founder of 19<sup>th</sup>-century individualistic liberalism. Rousseau’s political importance was even greater because “if Locke is the father of individualistic liberalism, Rousseau is the father of individualistic democracy, which won victory in the French Revolution”.<sup>719</sup> Locke’s contractualism is the English version of the theory of natural rights, and Rousseau’s contractualism represents the French, continental variant of the same thought. The belief shared by both doctrines is the existence of law before the creation of the state, which is contrary to Jovanović’s view that there is no law before the state, because the state and law come into existence at the same time. Jovanović ultimately reduces even later theories – such as Kelsen’s theory of legal sovereignty, Duguit’s learning about the social origin of law, the theory about “autonomous subservience” of the German law school<sup>720</sup> – to the theory of natural rights as abstract rights related to man, i.e. rights (law) preceding the state.

Jovanović states that Locke presumed the state of nature before the creation of the state, i.e. the situation where there was law, although there was no power. All men are, by their nature, free, equal, independent of each other, which means that every man has the natural right to life, liberty and property.<sup>721</sup> Locke believed that even in the state of nature it was not allowed to jeopardise someone else’s natural rights, but without the protection of the state, which still did not exist, everyone had to defend them on their own in the event of an attack.<sup>722</sup> Jovanović notes that Locke espoused the stance of natural law “which is abandoned today”, but its political importance is great, because it is from Locke’s teaching that the liberal school derived its main principles under which “the state exists for the sake of individuals, and not individuals for the

sake of the state, and that the state's task should be limited to the protection of personal rights, i.e. the rights of life, liberty, property".<sup>723</sup> Jovanović emphasises that Locke did not understand law as a set of commandments of state power, but as a set of rules that our reason uncovered by studying the general human nature: "The state does not create the rules of our joint life; it only organises the protection of those rules, whose source is in our nature".<sup>724</sup> In contrast to Hobbes, according to Locke, when transferring his rights to the sovereign, an individual did not transfer to him his right of self-government, but only the right to defend on his own his natural rights and to punish those violating them.<sup>725</sup> State power was established with the clearly limited objective to protect the life, liberty and property of an individual. If state power begins to jeopardise the natural rights of an individual, he would have the right to defend himself, just like in the state of nature he had the right to defend his natural rights from other individuals. Locke believed that the individual's subservience to state power can be only conditional. If state power protects his natural rights, he will obey it, but if it does not protect them, he will defy it. According to Locke, people have the right to rebel against the government which does not respect the social contract.<sup>726</sup>

According to Jovanović, in Locke's theory, the relationship between state power and subjects is contradictory. As Locke concluded that state power has the right to command, he vested subjects with the right of rebellion. These two rights are mutually exclusive: "A rebellion can be explicable from the historical viewpoint, and worthwhile from the political viewpoint; which is why one cannot talk about the right of rebellion. One resorts to a rebellion when legal means are exhausted; it is accompanied with the violation of the legal order, and just like there is no right to the violation of the legal order, there is no right to rebellion".<sup>727</sup> Jovanović emphasises that Locke did not believe that each citizen has the right to rebel, as this right belongs to the people, with members of the people being all individuals together. It is not possible, however, to expect that a rebellion is justified only when all members of a people agree that a rebellion should be instigated. If all individuals making up the people agreed to instigate a rebellion, they would have no one to rebel against. Therefore, the majority of people have the right to rebel. However, the question is asked "how it should be determined that the crowd that rebels represents the majority of people?" Jovanović highlights that "the majority can be determined in regard to an organised body, and not a chaotic mass, which is why the right of rebellion that Locke speaks about seems to be a right without its bearer".<sup>728</sup> It should be borne in mind, among other things, that there were no modern political parties in Locke's time.

Jovanović believes that the concept of law is problematic in Locke's theory of natural rights and the resulting understanding of the social contract. He highlights that law was created together with the state, and that it exists only where there is state power which guarantees the implementation of regulations. Therefore, law cannot exist in the state of nature, where there is no state. Invoking natural rights is unacceptable for Jovanović because he believes such rights legally do not exist.



First edition of the book  
*On Liberty* authored by John  
Stuart Mill from 1859

According to liberal individualism, the state exists to enable an individual to live and work without hindrances: “[the individualistic school] considered state intervention an evil that should be minimised, and recognised, in fact, only the legal mission [function] of the state as justified”.<sup>729</sup> At the same, individualism did not consider the legal function of the state as the set of all rules prescribed by the state, but only those that regulate relations among individuals. As any use of force, state coercion can be justified only when violence is to be prevented. The state has the right to defend subjects from one another, but not an individual from himself, because its force conflicts with a free conviction which is inviolable. Mill believed that the prevention of violation of other individuals is the only principle which should absolutely rule all actions of society against an individual: “The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”.<sup>730</sup> No one should be coerced to do something which would be, in somebody else’s opinion, good for him personally. According to Mill, an individual is accountable before society only for the things he does to someone else, and not for something he does to himself, because he has above himself an unlimited right of self-government, because he is the master of his spirit and body.

According to the liberal-individualistic school, the state should not care about the health of its subjects. However, it is on the health of its subjects that the quality of soldiers who should resist the external enemy depends: “By designating the legal mission [function] of the state as the only justified, the individualistic school assumed inadvertently that only an individual, and not the state, can be the holder of rights that deserve to be ensured through state coercion. That is the old position of the contract theory, according to which a right is related to man’s personality, and not to state organisation”.<sup>731</sup> The individualistic school disregarded the fact that the state has the right to defend itself from foreign states. If the state cannot survive as a state, it cannot offer protection to its subjects either. Thus, in addition to the legal and police function that the liberal-individualistic school speaks about, the state must also have the military function. As soon as the military function is recognised to the state, it is no longer possible to deny its cultural function either. Jovanović reduces individualism to contractualism and thus to the natural-legal theory. Namely, an individual enters the state to be protected from others, but does not accept state intervention if it does not suit him. Jovanović, however, emphasises that the state also has its rights and that without them it would not be capable of protecting an individual.

According to the liberal-individualistic school, state intervention is detrimental. If the state indulges incapable members of society, it hampers the result of natural competition. The individualistic sociological doctrine espouses a simplified view of the struggle for survival and the idea of the survival of the fittest, i.e. the best adapted ones. All changes in social life aim at ameliorating society which progresses towards increasingly more perfect states. As in the animal and plant life only those organisms that are capable of adapting to life conditions survive, in social relationships there is a struggle for survival where “the incapable members of society are rejected, and the capable ones preserved”, with “society going forward as if by fatality”.<sup>732</sup> To ensure the health of society, state intervention must be abolished, because providing aid to the less capable elements is the same as hindering social progress.<sup>733</sup>

However, the individualistic school does not reject state intervention entirely. State intervention should ensure the legal order: “[The state] should not influence the result of the struggle, but regulate its manner. Not all means are allowed in the game; immoral means [e.g. violence, fraud, slander] must be forbidden”.<sup>734</sup> Without such prohibition, the game may be won by unscrupulous members of society. The state should prevent the use of immoral means, but must not positively discriminate against participants in the individualistic Social-Darwinist struggle for survival. Jovanović highlights that the conclusions of the individualistic school do not tally with its basic assumptions. If competition in society is only a variant of the Darwinist natural competition, i.e. the law of the struggle for survival, the victory of the fittest members of society is determined by natural necessity. The individualistic school, however, claims that state intervention is sometimes needed, and sometimes detrimental “as in the one case it can be used to improve, and in the other to harm the effect of natural laws which are ensured by social progress”.<sup>735</sup>

According to the individualistic theory, progress is the objective of social changes, but is, however, a human concept: “No tendency to progress can be discerned in nature. Natural selection truly exists, but its sole aim is to achieve harmony between the material environment and organisms living in it”.<sup>736</sup> Jovanović emphasises that the capacity to adapt is a relative capacity which can and need not be the indicator of the perfection of those possessing it: “It is entirely possible that a material environment is such that only less perfect organisms can adapt to it; for instance, only less perfect plant organisms can survive in the northern belt”.<sup>737</sup> The law of natural selection leads to the conclusion that the external nature fashions organisms according to itself, and not according to the ideal of perfection



Slobodan Jovanović, photo taken in the early 20<sup>th</sup> century at Milan Jovanović Atelier



Lester Ward (1841–1913), American botanist, paleontologist and sociologist, first president of the American Sociological Association

that the theory of progress implies. Man does not fit into the frameworks of thus understood law about biological natural selection: “In biology, the environment changes the organism, and in sociology man changes the environment”.<sup>738</sup> Jovanović puts forward the conclusions of American sociologist Lester Ward.<sup>739</sup> Man can, to an extent, influence and change nature (drain swamps, irrigate dry areas, erect dams), i.e. he can progress provided he civilises himself: “His civilisation is his moving away from his subjugation to nature, i.e. his attempt to subjugate nature to himself [...]”. It is therefore wrong to speak about man’s progress as a natural process. One could rather say that progress is a man’s idea, which he tries to force upon nature, changing according to that idea the material environment in which nature placed him”.<sup>740</sup> Apart from this, one can see that man is trying to organise the entire social life upon the principle of justice, which is not “natural” in the biological sense. There is no justice in nature in which there is struggle for the survival of species. According to the idea of justice, however, each man, regardless of his strength, is recognised certain rights only because he is man: “before law, a strong man is worth just as a weak man”.<sup>741</sup> Jovanović emphasises several times that development (process) is not the same as progress: “Each group develops, but not every group progresses [...]; given that sooner or later each group enters the phase of decline and deterioration, it seems that social development fatally leads to regression, and not to progress”.<sup>742</sup> Progress is spoken about because it seems that “humanity progresses”: “Such progress consists of the fact that people are getting increasingly more capable of subjugating nature to their objectives through organised joint work”.<sup>743</sup> The role of state intervention also changes in this context. As society progresses, some social groups can regress. Taking this into account, state intervention is not superfluous because it can prevent “natural” regression to which all specific social groups are more or less exposed.

Jovanović states that the individualistic school realised that competition triggers social changes, which its representatives dubbed progress. The mistake is that it had in mind only the competition of individuals: “Individuals vie over who will gain a better social position in society and those who win in this competition are those who are in terms of their morality and intellectual characteristics more capable of adapting to the social environment as it is”.<sup>744</sup> In nature, greater capacity to adapt does not suggest greater organic perfection. The same stands for human society. Individuals with greater capacity to adapt to a particular social environment need not necessarily be better social elements: “There are also such



Slobodan Jovanović's glasses and wax seal for letters (ASASA, SJL, 14891/179, 180, photographer: Vlada Popović)



social environments in which worse, and not better elements thrive”.<sup>745</sup> Jovanović gives the example of Jesus Christ and his followers who were cast from the society of that time. He refers to the analogy of nature and society. The external nature adjusts organisms according to itself, just as society adjusts individuals according to a general mould, which can be both good and bad: “Those who compete for as better a position in society as possible inevitably fall to the general social level, which is why their competition is a conservative, rather than a revolutionary force in social development”.<sup>746</sup> Jovanović therefore concludes that such kind of competition cannot trigger any social changes.

Competition of a group against a group is more important, as well as competition between political parties or social orders. As in this competition each group aims to exert the greatest possible influence on the general affairs of the entire community, it in fact aspires to exert the greatest possible influence on the legal order in the community. The struggle among groups has the social importance that the struggle among individuals does not have: “Individuals compete about who will better adapt to the social environment, in order to gain in it the best possible position. Groups compete about which one will take state power in their hands, and in order to adjust social institutions to their special interests, impose upon the social environment their own type, adjust the environment to themselves and not themselves to the environment”.<sup>747</sup> As the struggle among individuals does not change the social environment, social development (which is not the same as progress) can be produced only by the struggle among groups. However, the state should not allow any, including the most numerous social group, to adjust the legal order to itself: “The interests of a single group, no matter how numerous it is, are not identical with the interests of the state community”.<sup>748</sup> The state has the right to intervene and prevent that a social group jeopardises the interest of the social community.

The criticism of the theory of natural rights (natural law) and the social contract is one of the key aspects of Jovanović's philosophy of the state. Given that according to his theory about the origin of the state, the state, power and law are inseparable, as the obverse and reverse of

the same thing, i.e. of the same phenomenon, all theories that separate the state and law are unacceptable as they wrongly define the concept of law. In Jovanović's opinion, mandatoriness is inherent to the concept of law. Law is only what must be implemented, all other things are feelings, morality, ethical maxims, wishes etc. If mandatoriness is eliminated from the concept of law, which in its definition is *differentia specifica*, law stops being law and can be called a feeling. With this essential difference, he refutes all theories based on natural law..

In the context of the theory of the state, Jovanović specifically analyses the theory of sovereignty, which was the focus of his inaugural lecture at the Law Faculty in Belgrade. Sovereignty means the international-legal sovereignty of states and internal sovereignty, i.e. the supreme power in a state. Although the concept of sovereignty has a long history, during which the concept of "sovereignty" underwent changes, the basic meaning of the supreme power did not change.<sup>749</sup> The concept of sovereignty, in the sense of the supreme power, can be found in Plato's and Aristotle's writings on the state, as well as in Roman law.

In line with the general definition of state sovereignty, for Jovanović, the state is the sovereign, i.e. the supreme power in its area. According to the theory of state sovereignty, "the supreme power" is the characteristic of state sovereignty in internal politics, and "independence" is typical of external relations with other countries. State sovereignty is a limitless and indivisible force which can be limited only by the same such force. According to the general concepts of the German theory of the state, which Jovanović embraced, under the "three-element doctrine", for a state to exist, there should be people, state territory and single power. The state has the right to command its subjects in a particular territory and, based on this right, it prescribes a legal order that is obligatory for its subjects and bodies. State power implies the right to command, the right to stipulate the legal order, and the right to achieve the legal order by means of coercion.

Jovanović notes several times that states can have mutual relations within which they coordinate their activities, but that no state can be subordinate to another one. Societies and individuals can establish states, but the society of states cannot be turned into the state of states. According to Jovanović, states can subsume their relations under rules, but only if those rules are based on their mutual consent. The rules of international law are not imposed upon an individual state as a legal order where a will higher than its own would be expressed, which is why there was no organised coercion that could be used against those states which refused to respect the rules. This topic was particularly important at the time when Jovanović was a legal expert at the Paris Peace Conference in 1919. It is today of one key international law questions.

In addition to the state which represents the supreme power, there can also be other public legal entities with the right to command such as, for instance, municipalities. All public legal entities in the state are subordinated to the state, but none of them can coordinate their activities with the state.

Jovanović reiterates the general definition of state sovereignty according to which state power must be limitless: "Both limitlessness and indivisibility are implied in the concept of sovereignty".<sup>750</sup> However, the fact that sovereignty is indivisible does not mean that state power

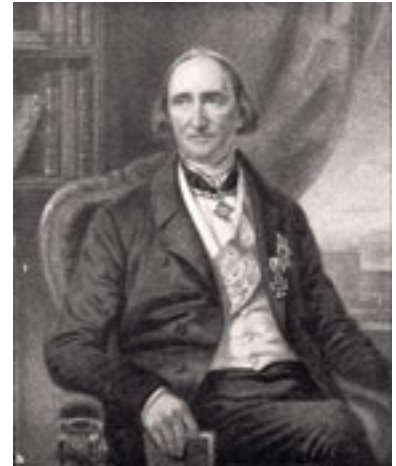


should be contained in a single body because “then, the absolute monarchy, where laws express the will of an omnipotent monarch, would be the only one in the logic of state sovereignty”.<sup>751</sup> At the time of absolute monarchy, which superseded the medieval monarchy, the ruler’s absolutism was defended with the claim that the indivisibility of state sovereignty entails an absolute monarch. Jovanović, however, suggests that the multitude of state bodies in the modern state does mean that sovereign power is divided among them. Different legislative factors in the constitutional monarchy are interrelated and represent a single power, because only their decisions which are jointly agreed by the monarch and the assembly have the force of law.

For Jovanović, the theory of state sovereignty, though narrower than the most comprehensive learning about the unity of the state, power and law, also includes the state of the absolute monarchy and the legal state, as narrower, special terms. Jovanović embraces the theory of the legal personality of the state. Unlike Friedrich Carl von Savigny, Jovanović does not see the expression of people’s will in the state. He does not follow Bluntschli’s view according to which the state carries a sort of distinctiveness as an organism.<sup>752</sup> For Jovanović, the state is a legal-political body. That is why Jovanović links the sovereignty of the state with its state-legal personality, i.e. legislative body. Although he identifies with Jellinek’s formulations more than with Kelsen’s criticism, Jovanović does not follow the learning of Jellinek, of whose specific contributions to the theory of the state he is highly critical.

Jovanović emphasises that a people is a group of individuals united by means of state power, which is why it can be said that the people and the state are the same. The theory of popular sovereignty is, however, opposed to the theory of state sovereignty. In order to formulate the theory of popular sovereignty, people must be understood much more differently than in the theory of state sovereignty. Therefore, to understand Jovanović’s criticism of popular sovereignty, his view of the concept of “people” must be analysed.

Jovanović writes about the polysemy of the term “people” (narod) because in one case it means the population as “a group of people united under the same state power” (nation), in another case it implies an ethnic community from which the state is created, and in the third case it connotes “populace”. In his book *The State*, Jovanović uses the term “people” (narod, nation) to denote “citizens” or “the population”, and the term “nationality” (narodnost) to denote people as an ethnic community. Given



Friedrich Carl von Savigny (1779–1861),  
German jurist and historian

since the time when *The State* was published, the terms “nationality”, “people”, “nation”, “national minority” have often changed meanings, with the term “nationality” (narodnost) being for a long time in socialist Yugoslavia customary for national minorities, while reading Jovanović’s text, one should have in mind the exact meaning of the terms and their history. It should be emphasised that Jovanović consistently uses these terms in each his work, which is why confusion may arise only as to the choice of terms, and not in regard to their meaning.

Jovanović gives the example of Great Britain as a multinational state, where the English, Scots and Welsh live, “who feel themselves as different peoples, but are connected with the same, Great British state idea”.<sup>753</sup> Namely, the nation or people, as a group of citizens, are the Great Britons, while ethnic peoples are the English, Scots, Welsh. Yugoslavia was a similar example – its “people” (nation) were its citizens – the Yugoslavs, while its “ethnic peoples” or “nations” were the Serbs, Croats, Slovenes: “We believe the confusion arises from the belief that the national and state idea must always coincide; therefore, Serbian nationalism (patriotism) would be permitted only in a Serbian state, while only Yugoslav nationalism (patriotism) is possible in the Yugoslav state. In history, however, there are examples which clearly show that the state and national idea need not fully coincide”.<sup>754</sup> Jovanović underlines that state nationalism should not be confused with ethnic nationalism. Someone could be at the same time an English or Great British nationalist (patriot). There are also the cases when the same ethnic people has several separate states, as was the case with the German people in the 19<sup>th</sup> century. The Germans are a single ethnic people, who lived in a multitude of independent states, the larger of which were, for instance, Prussia and Bavaria.

Jovanović follows Bluntschli’s, i.e. Hegel’s view that “people and the state are the same thing”: “the state means the people observed as a legal entity, taken as a whole, with the right to command its members”.<sup>755</sup> Jovanović highlights that the state differs from a people united in the state by the fact that the state exists longer than different generations of a single people. Although the state is not perceived through senses, it is felt, its decisions are implemented and have force. The state lasts longer than an individual and grounds its law on own traditions, rather than the current will of its members. The most acceptable for Jovanović is Edmund Burke’s view that in decision making, the state should rely on the state experience of previous generations. The members of the same people are turned towards each other through inherited spiritual characteristics which do not depend on their will. Their community is not based on a single act of will, as it is the case during the establishment of a citizens’ association. A people is, as a tribe, present from the very moment of the creation of the state, because the state arose from a tribe which succumbed to military organisation. Jovanović emphasises that religion and language are the most important social factors that define a people. A people understood as a group of citizens and a people understood as an ethnic community are a necessity for their members. A people as a group of citizens is a legal, and a people as an ethnic community a historical necessity.

It can be often heard that the political concept of a nation was created at the time of the French Revolution. The prejudice that a nation was created in the French Revolution and did not



Estates-General, 5 May 1789

exist before was particularly prominent among the Marxists and intellectuals formed upon Marxist models. In fact, by adopting Emmanuel Joseph Sieyès' proposal that the assembly of the Third Estate be called the National Assembly (1789), minority subgroups which included the king, the First Estate – the clergy and the Second Estate – the nobility, were excluded from the people as a group of citizens. Since he “bitterly hated the nobility”, Sieyès narrowed the notion of the French people, reducing it, in fact, to one its part that was called the nation. Jovanović, however, prefers Mirabeau's understanding of people to that of Sieyès. Mirabeau tried to avoid the term “nation”, suggesting that the assembly should not be called the National Assembly (*Assemblée nationale*), but “representatives of the French people” (*Représentants du peuple français*), which could relate both to the whole (people) and part of the people (*populace, mass*): “Mirabeau considered the name “National Assembly” a great mistake because speaking on behalf of the entire people, the Third Estate engaged in things it dared not even think about before”.<sup>756</sup> According to Jovanović, the people, nation, nationality – regardless of the name, are a group of all citizens, i.e. the entire people organised in the state. Jovanović equates the people with a single whole consisting of different “social orders”. He used to say: “The people – that is all” of us.<sup>757</sup> The same applies to the state: “that is all” of us.

According to Jovanović, the theory of popular sovereignty becomes entirely understandable when perceived as a reaction to the absolute monarchy. As the practical consequence of the theory of popular sovereignty was



Emmanuel Joseph Sieyès (1748–1836), one of the most renowned theorists of the French Revolution

ruler's absolutism, the opponents of ruler's absolutism rejected the theory of state sovereignty as well. As the theory of sovereignty was already dominant, another subject of sovereign authority was sought. The term "people" turned out to be the most appropriate.

Jovanović criticises Rousseau's understanding of the people as the most primitive and poorest social group which, due to its primitivism and poverty, is the least spoiled by civilisation and is the closest to nature. As in Rousseau's time nature was the subject of adoration, he implied under the people those closest to it, which is why he gave to them the prerogatives of a sovereign. Jovanović suggests that Rousseau's notion of "people" meant, in fact, the concept of class – the cities' poor and all peasants working in nature. Jovanović also does not accept Rousseau's understanding of people in terms of the majority. The majority is not the entire people, because the entire people consists both of the majority and the minority. He follows Mill's and Jellinek's arguments that "the government of the majority, not limited by anything, could become a serious obstacle to progress, as always a minority, a negligible minority, is thrilled with new ideas first".<sup>758</sup>

The theory of popular sovereignty was underpinned by Rousseau's social contract theory and natural rights. According to Rousseau, a new personality is formed through the social contract, which absorbs all separate persons of the contracting party. This person, the general will (*volonté générale*), is the people. Everyone in society is committed to the same unconditional obedience to the community. The government of the people is not against the freedom of individuals because each individual enters the aggregate people's personality and governs himself through it.

According to the popular sovereignty theory, the people are entitled to the limitless right to command over individuals. The general will should rule in society. After it expresses the general will, the people may grant power to individuals who will implement the general will. The expression of the general will, however, must be the direct act of the very people. Rousseau rejected the representative system and advocated direct democracy, where the people elect and rule. The people are the supreme authority in the state, i.e. "the sovereign". Only direct democracy corresponds to the logic of popular sovereignty. However, the question is asked what happens if not everyone agrees with the general will. Rousseau believed that the will of the majority must, in such case, be accepted as the general will, which, of course, is not the same as the general will. Rousseau's theory had a great influence during the 19<sup>th</sup> century, from the time



Jean-Jacques Rousseau, *The Social Contract*, the 1762 edition

of the French Revolution, particularly in France, where the politicians of the radical school invoked Rousseau's principle of popular sovereignty.

Jovanović reduces Rousseau's theory of popular sovereignty to contractualism based on the theory of natural rights. As the theory of popular sovereignty comes down to the wrong theory of natural rights, it separates the state and the people, understanding the people as a subjugated mass which has the unity of the will. That would not be an ethnic people, but a people understood as a group of citizens, but not all – only those who are not state organs. The theory of popular sovereignty does not imply the state as a community, but divides it into two parts: “The adherents of popular sovereignty consider the people a subjugated mass. They do not understand the state as single community, but split it into two – on the one hand, they place state organs, which command; and on the other hand – the subjugated mass, who obey”.<sup>759</sup> This very division introduces discord into the state. The proponents of popular sovereignty believe that although state bodies command, the right to command, the sovereign rule, does not belong to them, but to the subjugated mass: “[the subjugated mass] obeys [state bodies], not because they have to, but because they want to; once they get bored with obeying, they overthrow them. Revolutions, which so many times managed to overthrow the government, are the clearest evidence that the people and not the government is the real master”.<sup>760</sup> Government authorities can never fully rule, because the supreme matter of the government – its sovereignty, remains always with the people, in an unorganised state: “Sovereignty cannot be presented for the same reason as it cannot be alienated; its essence is reflected in the general will, and the will cannot be presented; it is either itself or another one, there is no in between. The representatives of the people are not and cannot be its representatives, but only trustees”.<sup>761</sup> Jovanović shares Bluntschli's view that the Rousseau's theory anatomises the state and grants the supreme power to the unorganised mass. He also follows Hegel's argument, directly or indirectly, according to which the unorganised people are “a faceless mass, which is no longer the state, and is no longer entitled to any of the designations which exist only in a totality shaped within itself”.

Jovanović points out that the people are a set of individuals, of whom each has his own will. It would be possible to talk about the joint people's will only if the people were a legal entity (person). However, if the people were a legal entity, they would no longer be a subjugated mass, but a politically organised people in the state. Therefore, Jovanović concludes, a legal person is the state, equalised with the people united through state power. A people united through state power (government) receives the unity of will which a legal entity (person) needs, while without state power a people is an unorganised mass incapable of the unity of will in the legal sense.

Jovanović underlines that popular sovereignty can be accepted only as a political principle when one talks about the objectives of power, such as the general people's interests that state power serves. If, however, the people was sovereign in the legal sense, the will of the subjugated mass would be the most important – more important than the will of state organs: “The theory of popular sovereignty presumes an entirely distorted relationship between state organs and subjects; with such distorted relationship any organisation of power would be impossible”.<sup>762</sup>



Therefore, a consistently implemented theory of popular sovereignty results in populism, revolution and anarchy.

Jovanović upholds the theory of popular sovereignty, according to which sovereignty is a feature of state. As in the legal sense the people is a group of individuals united through the same state power, the group of citizens is nothing else but a group of individuals united in the state. The people is a people only in the state given that an unorganised people does not have the unity of will, and the ethnic people is a people understood in a different sense. If the people is a group of citizens of a country, then the theory of state sovereignty also synthesises the theory of popular sovereignty.

Apart from the theory of popular sovereignty, Jovanović devotes particular attention to the criticism of the theory of legal sovereignty, which, just like the theory of popular sovereignty, represents, in its essence, the theory of natural rights, called in this case the basic legal norm. Jovanović indicates that the theory of popular sovereignty assumes that norms (e.g. the constitution) bind by themselves state power or arise from a power which is above the state. According to the first assumption of adherents of the theory of legal sovereignty, legal norms bind by themselves state power: “No one disputes that there are norms which impose themselves on the conscience and consciousness of a normal man. But these norms are not what we call legal norms”.<sup>763</sup> As they are not legal norms, they cannot be the basis of a theory aspiring to be purely legal. Legal norms must obtain their mandatoriness from state power as otherwise they cannot be considered legal norms. For instance, constitutional norms are legal norms because the state bestows on them their mandatoriness. The norms which are not related to the state’s external authority, as the voice of the general human reason, are not legal, but moral norms: “The theory of legal sovereignty cannot be accepted because it assumes the possibility of separating law from the state and counterposing law to the state”.<sup>764</sup> As the creation of the state is a factual and not a legal act, according to Jovanović’s theory of state sovereignty, the state, power and law emerge simultaneously, which is why it is impossible to separate law from the state. Separating law from the state and linking law to something else – as a rule, to an individual’s personality, leads to the theory of natural laws.

If the second thesis is accepted, according to Kelsen, international law has primacy over state law: “Until now, the idea of the sovereignty of own state – whether rightly so or not – stood in the way of everything that



Slobodan Jovanović, the photo taken in January 1941 (LSASA F-221/18)

aims at shaping the international legal order into an organisation operating based on the division of labour, and the establishment of special bodies for the further development and implementation of international law, including the further development of the international legal community from its primitive stage into a *civitas maxima* – also in the political-material sense”.<sup>765</sup> Jovanović highlights that the first assumption would not change anything in theoretical sense in the concept of state sovereignty because the only difference would be the fact that state power subsumed to legal norms would no longer be sovereign given that the higher power would be sovereign. In other words, if states belonging to the international community were subjected to the norms of international law, sovereignty would stop being a feature of individual states and would become a characteristic of the international community – “there would be a sovereign suprastate consisting of a large number of non-sovereign states”.<sup>766</sup> However, the sovereignty of such suprastate would be state sovereignty, and not “pure” legal sovereignty. States, just like individuals, can enter into contractual relationships and create state unions. Unlike state contracts or state unions (united states), a federal state is sovereign to the same extent as a unitary state. If any other force, regardless of whether it is the international community or an individual world power, could implement the norm in the territory of a state, that force would, in fact, be the state, while the latter would become only a province of the new suprastate.

State power derives from law, and law derives from the state. Their beginning is the innate unity of power and law. Such unity of power, which is the sovereignty of the state and law, is the basis and specificity of Jovanović’s theory of state sovereignty. He does not place power above law, but believes that power and law are created at the same time. They diverge in theory, but are inseparable in their essence and in practical terms. Any attempt at their separation is doomed to failure, regardless of whether it is the theory of natural rights, which assumes the existence of law before the state, the theory of popular sovereignty arising from iusnaturalism where the right of people as an unorganised mass is separated from state law, with the mass therefore not having the unity of will needed for the adoption of legitimate decisions, or the theory of legal sovereignty which presumes that the legal norm precedes state power.

After World War II, in his work *On Totalitarianism (O totalitarizmu)* published in Paris in 1952, Jovanović examines again the issue of sovereignty. He concludes that totalitarianism perverted the question of sovereignty: “At the time of creation of sovereign states, sovereignty



Slobodan Jovanović, *O totalitarizmu*, Paris, 1952



May Day Parade in 1946

implied their independence from any other power, i.e. both from the Pope and the Holy Roman Empire, which, just like the Pope, demanded a sort of supreme oversight over Christian states. An independent state doubtless had the possibility to define its competence on its own and was in this regard omniscient. In practice, it did not spread its competence beyond measure. At least for the first time, democracy tried to narrow state competence as much as possible. It was only totalitarianism that tried to make the state truly omniscient, which means omnipotent. Laying hopes in such an accidental thing such as the ingenuity of a dictator, or relying on a hypothetical thing such as Marx's social theory, totalitarianism fully destroyed personal freedom, declared its leaders omnipotent and its doctrines infallible".<sup>767</sup> Jovanović's manner of limiting state supremacy in the parliamentary system relies on the self-limitation of the limitless power of the legislative body, through its division.

Although in the introduction to *The State* he gives only formal reasons for his analysis of the state, i.e. state organisation of a legal state, Jovanović has far deeper systemic arguments in favour of the legal state, i.e. legality of the state. The main reason lies in the fact that the first principle of his theory of the state is the principle of the unity of the state, power and law as a single phenomenon. State power and law arise at the same time, as a unique phenomenon, as "the obverse and reverse of the same thing". There is no law without state power and there is no state without law. It should be borne in mind that the first principle is contained in the general theory of the state, which includes the most general idea of the state. Jovanović considers law as the feature immanent to the state. The fact that law is immanent to the state is seen in the fact that the wellbeing of the state, epitomised in its unity, strength and stability, is linked directly to the concept of the legal state. Namely, the legal state is not an accidental historical event, a mere



phase which the state entered, but the realisation of the idea contained in the very concept of the state. In other words, there is the intrinsic logic of the development of the state, from the concept to realisation.

When he writes about logic in *The State*, Jovanović refers to the logic of the state: “The legal state was a finished type; its logical unity became so clear that it could be talked about as an abstract form, independently of the states which conformed their constitutions to such form”.<sup>768</sup> The intrinsic logical unity of Jovanović’s concept of the state is seen already in the contents of *The State*. The book contains three main parts – the concept of the state, state functions and state organisation. All three parts share similar, tripartite divisions. It is from the concept of the state that Jovanović consistently derives its functions: “To be able to act outside itself, in the outer world, each idea must turn into a force; therefore, the state cannot realise its interests other than by developing a quantum of strength. State life is manifested in such way that the state is trying to realise its ideas about its interests through its collective force”.<sup>769</sup> In addition, two moments stand out in state activity – ascertaining the state interest and its realisation. Ascertaining the state interest means deliberating about the most useful thing to be done for the state in a particular moment – it is still not an external activity, but only a conclusion “on what and how things should be done”.<sup>770</sup> The realisation of the state interest, however, transcends from “the sphere of thought” into “the sphere of facts”.<sup>771</sup> Jovanović suggests two ways of ascertaining the state interest. A case-by-case basis may be applied, i.e. each case is taken into account per se, and based on its specific circumstances it is assessed what is the most opportune thing for the state to do. Alternatively, the same-type cases can be grouped to assess what is “on average the most beneficial for the state” to do: “The moment the cases of state life are grouped by types, it becomes possible for the state to act in an equal way in all same-type cases, i.e. to act according to pre-defined rules”.<sup>772</sup> In the case-by-case method, there is a small interval between ascertaining and realising the state interest, which is why both activities are carried out by the same bodies. The bodies that act should also determine how to act, because this question is posed on the eve of the activity. The state then acts arbitrarily, as it does not act based on previous thinking, but on a case-by-case basis. The situation is different when the average state interest is assessed for the entire type of cases: “In such case, the state interest is determined according to an abstract, typical case, which means it can be determined before a concrete case of such type appears in practice”.<sup>773</sup> Given that the deliberation and decision-making and implementation of what was previously determined are different functions, the third function appears: “As soon as these two functions get separated, the third function also emerges”.<sup>775</sup> When rules are already prescribed for individual same-type cases, it is known what is the most useful for the state in each typical case. The type of each case and its rules should be determined, and then rules should be applied to a concrete case: “All these three moments appear in a state activity only when the regulatory function is separated from the executive. What happens then is, first, the formulation of the state interest in the form of general rules, whereafter concrete cases emerging in practice are subsumed under such rules and, finally, these rules are realised in those concrete cases”.<sup>776</sup> Thus,

Jovanović derives the difference between three state functions – legislative, judicial and executive (administrative) from the logic of the state, i.e. state activity to achieve own interests. Through the internal logic of the state, he arrives at the assumption of the separation of powers which should correspond to state functions in state organisation.

Jovanović concludes that the legislative and judiciary function “reckon” about state interests, while the administration achieves them. The legislative branch basically acts in line with the inductive method. Based on an indefinite number of cases, it generalises, i.e. “concludes what rules should be prescribed for them”.<sup>777</sup> The legislative branch is slow: “Hesitation is a downside to executive bodies, and is almost a virtue for legislative bodies”.<sup>778</sup> The judiciary acts in a deductive way because based on the previously established general rule it concludes how to act in a given case. Jovanović suggests that the legislation and judiciary are a theory, while the administration is practice: “For this reason, the administrative [executive] function can be considered the function without which state life would be impossible”.<sup>779</sup> The state can be imagined without the legislative and judicial branches, but would not exist without the executive function. The interest of the state, however, is to separate its regulatory from executive functions. When suggesting that the judiciary acts in a deductive manner, Jovanović does not take into account the Anglo-American legal tradition, but only continental.<sup>780</sup>

According to the main principle of Jovanović’s theory, the state, power and law are inseparable. The authority of power is based on legal norms and laws, and the validity of legal norms is based on the authority of power which has the force to implement them. The very definition of the concept of law enshrines the concept of mandatoriness, and mandatoriness is guaranteed by the state force only. The state arose from society, when society, in its struggle for life and death, had to subject itself to military organisation. The first power that arose was at the same time the first legal norm whose content was such that such power should exist. The first norm was an act of power because those who created the norm had to hold power at the moment of its adoption.

Jovanović follows Montesquieu’s school which sees the foundation of the bicameral system in the principle of the separation of powers. According to this principle, three branches are separated so as to limit each other. The legislative branch remains limitless as it contains sovereignty and state personality, and cannot be limited by the executive and judicial branches because they are subordinated to it: “The legislative branch cannot be limited but by itself: in other words, it should be divided into



Montesquieu (1689–1755), French philosopher, writer and political theorist

two parts which will limit each other. A bicameral system is nothing but the extension of the separation of powers”.<sup>781</sup> There is also the opinion that the introduction of the bicameral system only complicates the parliamentary system. Such view is most often related to the belief that the democratic system should be as simplest as possible to be closer to the people. However, the parliamentary system “is the most complicated of all forms of a representative government, but such complication was, in fact, necessary to ensure political freedoms”.<sup>782</sup>

Given that the legal norm is only the norm proclaimed by the state as obligatory, the rule of law rests, according to Jovanović, on the separation of powers and the government’s compliance with law, i.e. laws. Through the legislative branch, the state can declare any rule obligatory, as well as abrogate a rule which it previously made obligatory. It is therefore only positive law that the state abides by.

Therefore, for Jovanović, the legal state (Rechtsstaat) is not a state where natural rights are respected, or a state of legal sovereignty. The state is sovereign, and not law, regardless of whether it is natural law or other kind of law. A modern legal state (Rechtsstaat) means, above all, “the separation of the legislative from the administrative [executive] branch, the subsuming of the administrative power under the legal order, and the provision of lawful administration”.<sup>783</sup> Jovanović indicates that at the time of the absolute monarchy, as the first form of the modern state, the legal order regulated only individuals’ mutual relationships (subjective private rights). It was believed at the time that “the state interest is always and in every case more important than an individual interest; that state bodies are the only ones capable of accurately assessing the state interest, which is why they should be without legal impediments in their work and their relationships with individuals”.<sup>784</sup> He underscores that, originally, the concept of the legal state, which was developed “contrary to the concept of the police state”, was understood too narrowly, because it was believed that the state administration (executive branch) had to be within the bounds of the legal order in terms of discharging exclusively its legal function, while later the concept of “the legal state was extended and it is considered today that the legal state exists the moment the administrative [executive] branch is brought within the bounds of law, regardless of the scope of its mission. The concept of the legal state has become purely formal”.<sup>785</sup> According to Jovanović’s concept of the legal state, “the state can broaden the circle of its activities as much as it wants to, but under the condition that it always adjusts its work to pre-determined legal rules. The state acting in such way is called the legal state”.<sup>786</sup>

In Jovanović’s opinion, the state is a separate personality, existing above natural persons. As a separate personality, the state can be, according to one viewpoint, a social group with own personality or a legal organisation. The state does not have its own personality as a social group, but it does have it as a legal organisation.<sup>787</sup>

Although the state cannot be perceived by the senses, it after all lives its own life, which differs from the lives of its subjects. The state is capable of outliving its subjects. Although generations of its subjects pass by incessantly, it remains one and the same. Jovanović gives the example of present-day France which is considered the same country as 18<sup>th</sup>-century France, although no Frenchman from the 18<sup>th</sup> century is alive. However, the fact the state has its own life



Slobodan Jovanović and Lady Paget in London, June 1952

does not mean that it has a personality as a social group, i.e. per se, as an organism, but only as a legal person.

Jovanović points out that both an individual and a group of people can have the capacity of will. It does not mean that a group of people constitute a personality as an individual, but that in terms of satisfying the criterion of the unity of will it is not important whether there is a single man or a group of people: “Given that, from the legal viewpoint, only that trait of human personality is important, it is abstracted in law from all differences otherwise existing between a group and man, which is why the group and man are placed within the same legal category”.<sup>788</sup> Jovanović infers that by equalising the group and man in the legal sense; the group is recognised as being the subject of law, just like man. The unity of will occurs in the state by separating one category of people – state bodies, which are left to say what it means to have a joint state will to which all members of the state community must subjugate: “in the modern state, that task is entrusted to legislative bodies”. In one organism, consciousness lies within a single body, while in the state there are a large number of conscious wills. Unity is achieved in the state, although there are a large number of different wills which are not equal – in the legal sense, the will of state bodies is hierarchically older than the will of ordinary citizens, and the will of state bodies binds the will of others, like a command, and thus offsets their own will, if opposite.

The state must “borrow” its will, because “in the absence of bodily existence, it lacks its own will in the real sense, because a foreign will, i.e. the will of its organs, is taken as its own will”.<sup>789</sup> In fact, state organs must lend to the state their “capacity of will” and not their personal will, because it is their “duty to uncover the will that the state would probably have if it were capable to will”.<sup>790</sup> At the same time, the will of the state is entirely real and individual wills directly feel its supremacy. The fact that the state cannot be seen does not mean it does not exist. Its will is the law that is active just like the will of a live being because “the one who violates law feels he conflicts a real will which responds to the attack”.<sup>791</sup>

Although it is customary that all those performing legislative, administrative (executive) or judicial functions of state power are called state organs, Jovanović emphasises that only legislative organs represent the state personality because it is only them that lend to the state the capacity of will: “the state will is expressed in law; consequently, the will of legislative bodies will be taken as the state will”.<sup>792</sup> In contrast to legislative bodies, executive and judicial bodies do not work on creating the state will, but on bringing it to fruition.

Jovanović believes that the theory of the state as a legal person best resolves the issue of the relationship between the legal order, ruler and subjects: “Understood as a legal person, the state gets separated from its subjects and is capable of outliving them. At the same time, it gets separated from its own bodies as well, and is also capable of bringing them within the bounds of the legal order, which then represents its will, and not theirs”.<sup>793</sup> According to the theory of the legal personality of the state, the legal order expresses the will of the state, understood as a personality. Jovanović makes sure that the state does not assume the features of a physical organism, which it had in the early Bluntschli’s theory. However, the state has all features of a person, which is legal, just like man is a legal person (natural person). Jovanović believes that the repudiation of the theory of the state legal person leads to equalising the state with the will of authorities, i.e. the absolutism of state organs. If, on the other hand, the legal order is imagined as an ideal law which “hovers above authorities”, committing them beyond their consciousness, this, according to Jovanović, signifies the old natural-law theory, i.e. the legal order existing beyond states. Considering the theory of natural rights legally inscrutable, Jovanović underlines that the theory about the legal personality of the state is the most suitable of all legal theories.

Jovanović believes it is unquestionable that the state represents a force: “a person blinded in its egotism”.<sup>794</sup> If there is a conflict between *raison d’État* (national interest) and morality, the *raison d’État* would prevail in every state. In his opinion, however, it is naïve to think that there was once a society without coercion, to which mankind can return. Although coercion is inevitability, there is a great difference between the unorganised coercion of a pre-state condition and state coercion, because unlike the force of the pre-state condition, both law and freedom appear with the state. The justification of the state lies in the very fact that without the state there is no freedom of an individual. At its inception, the state was not a “legal state”, but given that the state and law are inseparable, it carried from the very beginning the seed, i.e. potential of completing its legal sense.

Jovanović highlights great differences between the personality of the state and personality of an individual: “In terms of its longevity, one can go even further and say that it consists not only of a group of people, but also a group of generations. In short, the state is a person with a more general and durable interest than an individual”.<sup>795</sup> Although the state, standing as a person above its subjects, cannot associate with them, it and an individual have joint interests. Freedom, wellbeing and success in the performance of own activities are in the interest of both individual and the state. The state has always been a legal person, but this was less noticeable at the time of the absolute monarchy, when the state person and the monarch’s person were equated. The rights of an individual developed in parallel with the progress of the state, whose interest is such that it

materialises its legality which it always had as a potential. Jovanović wishes to avoid the remark of the personification of the person of the state, but it can be said that he has in mind the fact that the state, as a legal person, acts as a human organism. Just like man, the state deliberates before it embarks on an activity, and later judges the merit of its actions. These three main actions are at the same time the foundation for the separation of powers into the legislative – which cogitates, the executive – which acts, and the judicial – which judges. It is more opportune for the state to have such separation of activities rather than to have all of them mixed. At the same time, the separation of powers creates the conditions for the wellbeing of an individual, because the state ensures greater respect of his freedom and rights. In this way, the interests of the state and an individual and their joint development and progress are inextricably intermingled. Jovanović believes that Niccolò Machiavelli did not realise that the state's interest lies in fostering the moral development of its subjects, which is the topic he particularly examined.

According to Jovanović, the state grants and withdraws all rights and freedoms, because it is the only source of subjective public rights. This consistently means that without the state there is no freedom, i.e. that it is only in the state that an individual can be free, in a legal state, which is for Jovanović the ideal state. However, one does not reach the legal state by propounding natural rights, but through the separation of powers, i.e. by self-limitation of the state which is a legal person by the acts of the legislative body which passes laws.

Jovanović's theory of constitutionality and the constitution naturally rests on his theory of the state. However, it should not be expected that his constitutional-legal observations are contained in the books on the Constitution of the Kingdom of Serbia and the Constitution of the Kingdom of Serbs, Croats and Slovenes, although they can be read in his introduction devoted to the creation of the new state of the South Slavs and in his interpretations of some articles of the Constitution.<sup>796</sup> One may say that these works are a real monument of scientific consciousness, self-discipline and self-control, because the author expresses in an unbiased and objective way the views he disagrees with. The task of these books was a correct, clear and understandable interpretation of the main legal acts of the then states. Jovanović fully achieved this objective. Jovanović's views of constitutionality and the Constitution should be looked for in the studies "The Great National Assembly" and "On Bicameral System", rubric "Parliamentary Chronicle", *Archive for Legal and Social Sciences, Draft Constitution of the Constitutional Commission*, which he headed in 1920,<sup>797</sup> as well as in the debates led in scientific magazines and daily papers, overviews and comments on constitutional arrangements, e.g. the Constitution of 1931. As a professor of General and Special State Law, Jovanović had to present and interpret the actual Constitution for students. He, however, criticised both constitutions, as he explained in his two books on constitutional law.

As already noted, Jovanović examined the theory of the creation of the state in his book about the state. He applied his theoretical insights also in respect of the creation of the joint state of the South Slavs. For Jovanović, the greatest guarantee for the establishment of the legal state is the division of the legislative body into two parts, and the self-limitation of the boundless will of the sovereign state. The legislative will (the king, assembly), as a state-legal personality,



can establish and abolish everything. Not a single law or constitution is unchangeable because a sovereign legislative body can change it incessantly (in one way or another, more rapidly or slowly). The most important thing is to preserve the separation of powers. All other limitations proved insufficient compared to the internal division of the legislative body. Such division creates the backbone (self)limiting the limitlessness of the legislative will. The political theory and organisation of states in the world relied on the English political practice. However, the absence of a written constitution is typical of English constitution. A durable set of laws embodies the British constitution where the concept of “parliament” implies the upper house, lower house, government (prime minister) and crown, taken together. Jovanović’s line of reasoning runs contrary to any dogmatism, including legal dogmatism which, although it can be entirely correct in terms of formal logic, often disregards logical limitations. In any case, his comments on the Constitution contained in his two books devoted to the constitutions of the Kingdom of Serbia and the Kingdom of Serbs, Croats and Slovenes have to this very day remained the models of our constitutional legal science.<sup>798</sup>

Slobodan Jovanović taught General and Special State Law for decades at the second year of law studies (from 1897 to 1928, on his own). Later, other professors were Dragoslav Jovanović (from 1928/29 to 1940) and Jovan Đorđević (from 1936/37). State Law was taught during one semester, and the Constitutional Law of the Kingdom of Serbia, i.e. the Kingdom of Serbs, Croats and Slovenes during the second semester. At the time of World War II, the subject General State Law (with the basics of the cooperative state) at the Department for Legal State Science was transferred from the second to the first year of studies at the Legal Course, and to the third year of the Economics Course of the Law Faculty (General State Law with Constitutional and Administrative Law). In 1942, Milan Vladislavljević was elected an associate professor and Radomir Lukić an assistant professor for this subject, but they were not certified.<sup>799</sup> After the war, the professors at Belgrade University who refused to embrace dialectic and historical materialism (the official state philosophical doctrine) as the only true scientific method, were accused of not being scientists and were removed from the Faculty. “The professional and pedagogical competence” of professors was constantly examined, which implied “the capacity to nurture the youth in the communist spirit”.<sup>800</sup>

After World War II, the subject was taught at the first-year course (before the war it was taught at the second year). It concerned constitutional (special) law before the war, the basics of a cooperative state during



Radomir Lukić (1914–1999)  
(LSASA F-604)

the war, and the theory of law after the war. Radomir Lukić taught the Theory of the State and Law. The pre-war theory of the state mainly followed the tradition of the German theory of the state, but Slobodan Jovanović synthesised various state-legal theories and experiences, particularly the English parliamentary system. Jovanović considered the state and law a single phenomenon, but kept them separated (“two sides of the same thing”), avoiding Hegelian syntheses. Divining rather than deeply penetrating the foundations of Jovanović’s theory, Đorđe Tasić dubbed it a combination of the Hegelian school and English political experience: “[Jovanović] reminds of some English writers who, by embracing the Hegelian concept of the state, imbue it with such sense that an individual obtains freedom and protection in the state itself”.<sup>801</sup> According to the Marxist teaching, the state and law will die out. Slobodan Jovanović, however, suggested that the state did not go extinct in communism, except rhetorically, but was actually strengthened, fully in line with the Marxist socialisation of an individual through social discipline.<sup>802</sup> With the theory of the extinction of the state, Jovanović’s subject General and Special Study of the State lost its importance and place it had before the introduction of the Marxist theory of law.<sup>803</sup>

Translated by Tatjana Čosović