

General Paradigms of Law as Seen by Emil Svoboda

ELIÁŠ, K.*

“Lawyer’s wisdom does not consist in what we believe in; it consists in what we know.”

Emil Svoboda¹

ELIÁŠ, K.: General Paradigms of Law as Seen by Emil Svoboda. *Právní obzor*, 101, 2018, special issue, pp. 40-59.

General Paradigms of Law as Seen by Emil Svoboda. The paper is devoted to work and life of the important Czech expert in civil law Emil Svoboda; 140th anniversary of the birth will commemorate in October 2018. Emil Svoboda among others contributed to the foundation of the Faculty of Law of Comenius University in Bratislava, where he worked as one of the six founding professors in the first half of 1920s. Svoboda started his academic career before World War I at the Czech Technical University in and the Charles University in Prague. He refused traditional dogmatics that dominated legal science in Czech lands by a sociological, psychological and philosophical approach. His lawyer thinking was influenced more by Schopenhauer, Dostoevsky and Masaryk than by professors of law (with the exception of Emanuel Tilsch). Svoboda defended the idea that *“a paramount measure of the sense and value of law is life and its need”*. He believed that law should be evaluated in particular on the basis of ethical criteria. In the atmosphere of legal positivism of that period Svoboda was regarded as a solitaire, but his views did not sink.

Key words: *Emil Svoboda, civil law, legal philosophy, sociology of law, Comenius University, Charles University*

I. Introduction

Many people who significantly contributed to the scientific development of their branch, served not only to it, but also to general good purposes, and lived to experience recognition and honours, sink into oblivion after some time and their name will remain in the memory in the best case. The same fate befell Emil Svoboda (1878 – 1948),² who stays an important expert in civil law in minds of members of the academic community, but who is hardly known to the present generation and whose legacy is more or less vague for most lawyers. The one hundred and forty years that elapsed from his birth on 2 October of this year (and the seventy years that elapsed from his death on 19 August) are a good opportunity to remind people of his scientific importance. Among other reasons – and in particular on pages of this magazine – also because Emil Svoboda among others contributed to the foundation and development of academic education of

¹ SVOBODA, E. *A human and society*. Prague: Volná myšlenka, 1924, p. 128.

* Prof. Dr. JUDr. Karel Eliáš, Faculty of Law of Trnava University in Trnava. The paper was elaborated as part of the project APVV-14-0061 Extension of the social function of Slovak private law in the application of principles of European law.

² Svoboda was born in Prague, where he spent most of his life. He died in Český Brod, where his family owned holiday home.

lawyers at the first Slovak university that was founded in Slovakia during the existence of the common state of Slovaks and Czechs. *Právny obzor* often reminded in the past the importance of Emil Svoboda for legal science and his merits in development of Slovak jurisprudence³ and some present Slovak academicians did not forget him as well.⁴

II. Profile

The purpose of this paper is not to present a detailed CV of Emil Svoboda.⁵ I only indicate information that is necessary for getting an idea of his remarkable personality, so different from that of ordinary lawyers.⁶ It was probably caused by the basis and influences under which Svoboda's intellectual world and his lawyer erudition were formed. His parents, let alone his predecessors, siblings or wider family had nothing in common with Svoboda's profession. In his memoirs he wrote: "*With my jurisprudence and philosophy I stood in the whole family a like a spare wick at a wedding.*"⁷

He had been attracted to philosophy since the high school: "*I very much liked to read books unless somebody ordered me to read them.*"⁸ In my library I have a collection of essays *On the earth*,⁹ that Svoboda dedicated to Arnošt Wenig on 4 May 1938. He wrote there with a pencil the following remark: "*A passion for reading, which accompanies ES his whole life*". Svoboda's unusual erudition and knowledge of literature from different branches were observed by many people who knew him: it is also apparent from many of his texts. Svoboda's opinions of life and human nature were significantly influenced by Dostoevsky: "*When someone talks about Fyodor Mikhailovich Dostoevsky he is almost obliged to use the expression: "Great analyst of human soul."*"¹⁰ He wanted to study medicine or philosophy, but under pressure of his family he finally chose law. He was not taken with this branch of human wisdom,¹¹ but "*was (...) hard on himself and*

³ SOMMER, O. Emil Svoboda. Medallion to the fiftieth birthday. *Právny obzor*, 1928, Volume XI, p. 537 an.; TOMSA, B. Prof. Emil Svoboda as legal philosopher. *Právny obzor*, 1928, Volume XI, p. 540 an.; TOMSA, B. To the sixtieth birthday of university professor dr. Emil Svoboda. *Právny obzor*, 1938, Volume XXI, p. 477 an.; ŠTAJGR, F. Emil Svoboda died on 20 August 1948. *Právny obzor*, 1948, Volume XXXI, p. 306 an.

⁴ For example BEŇA, J. History of the Faculty of Law of Comenius University in Bratislava in: BLAHO, P. – VLKOVÁ, E. (eds.) *Lawyers at Comenius University in Bratislava. Seventy-five years of the Faculty of Law of UK (1921 – 1996)*. Publishing Department Bratislava: PF UK, 1996 p. 26; VOZÁR, J. Vladimír Fajnor. Bratislava: Veda, 2017, p. 76, 77; ZAVACKÁ, K. in OVEČKOVÁ, O. – VOZÁR, J. et al. *A centenary of the magazine Právny obzor*. Bratislava: VEDA, 2017, p. 82.

⁵ This was recently published: ELIÁŠ, K. *Over life and work of Emil Svoboda* in: SVOBODA, Emil. *A pilgrim beyond the limits of positivist circles. Selected works*. Prague: Wolters Kluwer, 2018, pp. VII. – LXIV.

⁶ Compare ŠTAJGR, F. Emil Svoboda died on 20 August 1948. *Právny obzor*, 1948, Volume XXXI, p. 306.

⁷ SVOBODA, E. *Once upon a time*. Masaryk Institute and Archives of the Academy of Sciences of the Czech Republic, Emil Svoboda Fund, carton 1, sign. Ic, inv. no. 17, typescript of the memoirs *Once upon a time*, p. 173 (hereinafter quoted as: *Once upon a time*).

⁸ *Once upon a time*, p. 173.

⁹ SVOBODA, E. *On the earth*. *Volná myšlenka*: Prague, 1938.

¹⁰ SVOBODA, E. *Utopia*. 2nd edition. Prague: Borový, 1929, p. 125. Emil Svoboda participated in the foundation of the Dostoevsky Society in 1930 and was one of its managers.

¹¹ *Once upon a time*, p. 33.

swotted up (...) until he got his doctor's degree".¹² At the Faculty of Law in Prague he became fascinated with Emanuel Tilsch (1866 – 1912), who as one of the few was open to new thoughts and opinions of law.¹³

Law captured Svoboda's full attention law during his work at the municipal council in Prague, where he worked on agenda linked to radical reconstruction of the city centre, including liquidation of a large part of so-called "Old Jewish Town. From the knowledge he obtained material for several texts, the most important being the work "About a real division of houses in the district of the former Prague ghetto",¹⁴ on the basis of which the author was habilitated at the Imperial-Royal Czech Technical University¹⁵ in Prague. Another, even more important file "Internal will and will manifested by a legal act"¹⁶ together with a supplement¹⁷ served to Svoboda's habilitation at the Faculty of Law of Charles University. At work on this text Svoboda familiarised himself with ideas of Arthur Schopenhauer and gradually studied his files. He repeatedly returns to Schopenhauer in his memoirs and often refers to him in his texts, although he did not share his pessimism.¹⁸

In that period Svoboda had many friends from different social classes. Already before World War I he engaged himself in the public life and contributed to different periodicals, especially to the weekly *Přehled* edited by the lawyer and sociologist Emanuel Chalupný since 1906. Svoboda subscribed to this realistic weekly starting from the first volume and in view of its opinion affinity with Herben's *Čas*, a periodical of so-called "realistic group"¹⁹, he familiarised himself with Masaryk's opinions.²⁰ Immediately after the outbreak

¹² *Ibid.*, p. 338. Svoboda obtained his doctor's degree on 28 June 1905. Compare Graduation Ceremony of lawyers at the Czech University in the academic year 1904-5. *Právník*, 1905, Volume XLIV, p. 599. In October of the same year he married Viktoria, daughter of the building contractor Jan Koula; daughter Zdena was born to the spouses in the following year and son Emil in 1909.

¹³ Tilsch proved it not only by his own work (in particular Austrian law of succession from the perspective of comparative legal science. Collection of Jurisprudence and Political Science: Prague, 1905 and Austrian civil law. General Part. Prague: Czech Graphic Union, 1910), but also by support of habilitants with unorthodox opinions such as František Weyr, habilitated in 1911 on the basis of Contributions to the theory of forced marriages (Prague: Collection of Jurisprudence and Political Science, 1908) or Emil Svoboda. KUBEŠ, Vladimír. History of thinking about state and law in the 20th century with regard to Moravia and in particular Brno. I. Brno: Masaryk University, 1995, p. 126. He appreciated Tilsch as "*the genuine founder of Weyr academic trajectories*"; the same we can say about the academic trajectories of Svoboda.

¹⁴ Prague: People's printing and publishing cooperative in Prague, 1909. Svoboda's work About a real division of houses did not escape attention of the important Slovak expert in civil law Štefan Luby, who refers to it also after many years (LUBY, Š. Ownership of homes. Bratislava: Publishing house of the Slovak Academy of Sciences, 1971, p. 23 or 43).

¹⁵ Now Czech Technical University.

¹⁶ Prague: author published, 1911.

¹⁷ SVOBODA, E. Problem of will in Austrian law of succession. *Právník*, 1912, LI, p. 195 an., 257 an. The author also published a study himself through the Printing Office Dr. Ed. Grégr and son (SVOBODA, E. The issue of the will in Austrian law of succession. Author Publisher, Prague, 1912).

¹⁸ Compare e.g. SVOBODA, E. Life mysteries. Prague: Melantrich, 1941, p. 64 an.; SVOBODA, E. People and deeds. Prague: Edvard Fastr, 1945, p. 77, 82.

¹⁹ Beside of T. G. Masaryk, main representatives were K. Kramář and Josef Kaizl.

²⁰ "When I compare Svoboda's work with work of our other thinkers," Bohuš Tomsa wrote, "I cannot help feeling certain external and internal affinity with Masaryk's thinking, resulting from the affinity of their personalities." TOMSA, B. Professor Emil Svoboda as legal philosopher. *Právní obzor*, 1928, Volume XI, p. 546 an.

of the war Svoboda was mobilized to the Galician front, but after one year he was released from military duties for health reasons. Back in Prague he engaged himself in the public life again.²¹ He was there also on 28 October 1918, when the Republic was proclaimed. He enthusiastically worked for it to rise and prosper, although he realised that also “*slurry pushed forward*”²² to the head of the nation. Svoboda was not the only one who noticed how careerism damages the Republic.²³ Nevertheless he did his best to be useful for the Republic, among others by his work in favour of Comenius University. Although Svoboda’s priority was his academic career and in particular his connection with Charles University in Prague, where he was awarded professorship in 1924, he also engaged himself politically - in the national democratic party and later in the national socialist party,²⁴ but especially in different private and public institutions with scientific, social or cultural and sportive aims. Since 1919 he had been chief editor of the just founded magazine of the Czechoslovak Notaries’ Society *České právo* for twenty years. In the period of 1919 to 1932 he worked in the respective committees that were preparing the draft civil code: ²⁵ he managed works on amendment of law of succession, after the death of professor Bruno Kafka in summer 1931 he was entrusted with agenda of family law²⁶ and later he participated in work on the final version of the government bill of the code.²⁷

During the 1930s Svoboda’s personal life became strained. Emil Svoboda was a cardiac and his chronic heart disease manifested itself with increasing urgency.²⁸ His wife suffered from a mental disease and had to be permanently hospitalised. Svoboda observed the political development with growing concerns, was having difficulties in coping with the doom of the Republic, when he “*listened to its death cry from the radio*”²⁹

²¹ Among others he signed Manifest of Czech Writers, the first domestic public declaration requiring the self-determination of the Czech nation.

²² Once upon a time, p. 404.

²³ For example PEROUTKA, F. Diaries, letters, memories. Prague: *Lidové noviny*, 1995, p. 17, he writes: “*Unfortunately, careerism is heritage of the First Republic.*” PATOČKA., J. Czech intelligence in Europe in: Our national programme. Prague: European cultural club, 1990, p. 18, he wrote about the interwar Republic in 1939 that: “*the political sense degenerated so much that policy became a kind of business*”.

²⁴ When he learned their internal life, he got disappointed of political parties. He abandoned national democracy in 1921. He considered his membership of the social democratic party, but listened to Masaryk who told him that “*he does not like to see intelligence entering the social democratic party, because it is and should stay a workers’ party*” (Once upon a time, p. 480), and became member of a party which was then called Czechoslovak socialist party (until 1926). But he gradually limited his work at the national socialists.

²⁵ Compare SVOBODA, E. Great work is finished. *České právo*, 1932, Volume XIV, p. 9 an.

²⁶ The fate of the bill of the civil code is well known. Maybe it is appropriate to say that after liberation of Czechoslovakia this work finally find some use, even though fragmentary – in the right of construction (Act no. 88/1947 Coll.) and in the Act no. 41/1948 Coll. on international and interregional private law and on the private law status of foreigners.

²⁷ SVOBODA, Emil. Masaryk Institute and Archives of the Academy of Sciences of the Czech Republic, Emil Svoboda Fund, carton 1, sign. Ic, inv. no. 16. Biographies.

²⁸ KNAPP, Viktor. Transformations of time. Prague: Prospektrum, 1998, p. 25, says that in 1937 (Svoboda recovered from a severe heart attack in Poděbrady) the assistant Pražák of the Civil Law Department was working on Svoboda’s obituary. To Knapp’s question whether Svoboda died he answered: “*his death is expected every day.*” Svoboda himself wrote: “*In March 1937 – superstitiously waiting for death to come*”.

²⁹ Once upon a time, p. 691 (also on page 1).

The Munich Diktat and occupation of Czechoslovak border regions by the German and later Polish army coincided with his sixtieth birthday. *Právny obzor* noticed “*the gruff mockery of fate*”, which it allegedly brought to Svoboda.³⁰ He worked at the Faculty of Law until the closure of Czech universities by the Nazi occupying administration. Svoboda’s life during the “*nasty period of the Protectorate*”³¹ was not easy. In 1940 his closest friend from the Law Academy, Romance scholar Otakar Sommer, died. In 1943 Gestapo arrested Svoboda’s son.³² A German army doctor with his family was forcefully moved in the Prague flat of the Svobodas.³³ His publication possibilities were rather limited. After the liberation of Czechoslovakia he assumed that the way to social progress and establishment of social justice was opening to the Republic. He believed in the specific Czechoslovak road to socialism proclaimed by the communist party in the election programme in 1946 and in the possibility to combine Masaryk’s humanism with the Soviet socialism. He addressed this issue in detail in one of his last books.³⁴ In 1948 he was already seriously ill. He took over the honorary doctorate from the Faculty of Philosophy of Charles University in his bed. In July he suffered another severe heart attack. Svoboda died on 20 August 1948, not living to see “*the new destruction of cultural values, new state massacre in civil wars and in social neologisms*”,³⁵ which he dreaded already before the war.

III. Svoboda’s work in Bratislava

In the life of Emil Svoboda Bratislava appears on two occasions. Longer and more important is Svoboda’s engagement with the Faculty of Law of Comenius University. “*Strange situation*” at the Prague faculty³⁶, the overburdening with lectures at the Technical University and elsewhere (e.g. at Social Services College, of which he was co-founder) that involved teaching of basic knowledge rather than actual scientific self-realization, as well as creative Romanticism³⁷ finally led him to (at instigation of Otakar

³⁰ TOMSA, B. To the sixtieth birthday of university professor Dr. Emil Svoboda. *Právny obzor*, 1938, Volume XXI, p. 477.

³¹ SVOBODA, Emil. The eternal issue of freedom. Prague: Edvard Fastr, 1948, p. 83.

³² KRČMÁŘ, Jan. Speech over the coffin of Emil Svoboda. *Právník*, 1948, Volume LXXXVII, p. 244, Svoboda “*escaped apprehension by chance, because I am positive that a son was apprehended instead of a father in September 1943.*” Svoboda’s son Emil survived the war. His daughter Zdena married an Italian in the interwar period and moved to Italy. Svoboda last met her in summer 1939. In autumn of the same year he also last visited his ill spouse in the mental hospital in Bohnice. Svoboda was heavily shaken by a parting, in which his wife “*was hardly held back by three nurses (...), with a handshake through the grid and with an unforgettable look in the eyes*” (Once upon a time, p. 689).

³³ SVOBODA, Emil. The eternal issue of freedom. Prague: Edvard Fastr, 1948, p. 44.

³⁴ SVOBODA, E. Spirit of socialism. For freedom: Prague, 1947. The book won the May Prize of Czech land in 1948 (2nd edition. For freedom: Prague, 1948; 3rd edition: Socialist Culture Club: Prague, 1950; 4th edition. Melantrich: Prague, 1950).

³⁵ SVOBODA, Emil. On the earth. *Volná myšlenka*: Prague, 1938, p. 44.

³⁶ Once upon a time, p. 460. But only at the faculty; elsewhere (p. 462) he writes: “*I was disgusted by the conduct of Prague circles, I got sick of political career (...).*”

³⁷ *Ibid.*, p. 463.

Sommer, officer responsible for university matters at the Ministry of Education)³⁸ to the decision to participate in building up of Faculty of Law of Comenius University. It was established in Bratislava by Act no. 375/1919 Coll. as a Czechoslovak state university.³⁹ Svoboda thinks back how he together with Augustín Ráth,⁴⁰ Karel Laštovka and Otakar Sommer “*made an oath to the minister professor Dr. Šust*” (on 4 June 1921) and became founding members of the faculty. They were followed (initially as associate professors) by Bohuš Tomsa and Jan Vážný, and after a year by Richard Horn.⁴¹ In a situation where he was the only Slovak in the forming teaching staff of the Faculty of Law in Bratislava, A. Ráth logically became the first dean of the faculty.⁴²

In that period Svoboda had several books and many essays on his account. Since 1919 he had been full professor of Czech Technical University (in 1920/1921 also its dean), and from the teaching staff of the Bratislava faculty he was first to be habilitated at the Faculty of Law in Prague.⁴³ Before moving to Bratislava he tried to achieve full professorship at the university in Prague, but Krčmář, who had the main say in this area, did not comply with his wishes.⁴⁴ Svoboda was displeased and believed that he moved to Slovakia with a “*stigma of incompetence for working as professor in Prague.*”⁴⁵ It

³⁸ Ibid., p. 462. To Sommer’s work at the Ministry of Education and National Awareness see also BOHÁČEK, M. Otakar Sommer. Prague: Czech Academy of Sciences and Arts, 1949, p. 27.

³⁹ Comenius University won its name by Government Regulation 595/1919 Coll. The Government decided about foundation of the Faculty of Law by its Regulation no. 276/1921 Coll.

⁴⁰ Ráth had been the Section Head of the Ministry of Unification of Law and Organisation of Administration in the Czechoslovak Republic (Act no. 431/1919 Coll.) since 1920; compare e.g. the paper RÁTH, A. Unification. Právník, 1920, Volume LIX, p. 153 an., 193 an. He was habilitated at the Faculty of Law of Charles University in Prague thanks to effort of J. Krčmář on the basis of the essay RÁTH, A. Rights between a man and a woman in Hungary. Collection of Jurisprudence and Political Science, 1906, Volume VI, p. 167 an., 354 an.

⁴¹ Once upon a time, p. 463. The named four lawyers were appointed full professors of Comenius University by a decree of the President Masaryk of 20 May 1921. BEŇA, J. History of the Faculty of Law of Comenius University in Bratislava in: BLAHO, P. – VLKOVÁ, E. (eds.) Lawyers at Comenius University in Bratislava. Seventy-five years of the Faculty of Law of UK (1921 – 1996). Publishing Department Bratislava: PF UK, 1996 p. 26.

⁴² Ráth was soon afterwards elected the president of Comenius University and replaced by Karel Laštovka. Ráth became dean of the Faculty of Law two more times (1923/1924 and 1927/1928).

⁴³ Svoboda was habilitated in 1912, Sommer in 1913, Ráth, Tomsa and Vážný in 1920, Laštovka and Horna in 1921. But Svoboda was not the oldest member of the teaching staff; Ráth was five years and Laštovka less than two years older than Svoboda.

⁴⁴ KRČMÁŘ, J. Memoirs. Volumes II. – III. Prague – Pelhřimov: Faculty of Philosophy of Charles University, 2007, p. 226 an. Krčmář had long objected Svoboda’s different personality, his approach of law based on Tilsch’s approach (Krčmář saw his authorities in Randa and Stupecký) and did not doubt that Svoboda would never become his supporter or even pursuer. Therefore he did not take great pains to support Svoboda’s appointment as professor. (About the relationship of both civil lawyers e.g. KUKLÍK, J. Professor Jan Krčmář. Forgotten personality of Prague civil law science. Prague: Charles University – Prague Association of the Czech Lawyers’ Society, 2008, p. 72.) Svoboda laid it up against Krčmář. Svoboda still had not forgotten how Krčmář obstructed his habilitation and held grievance that nobody took into account the fact that he taught civil law at the Prague Faculty (especially in years 1919 and 1921, when Krčmář was engaged as expert of the Czechoslovak team, in particular for negotiations of international peace treaties), alone (Once upon a time, p. 465). He regarded it as injustice on the part of Krčmář (Ibid., p. 471) and compared it with Krčmář’s support of Ráth habilitation, which took place in 1920 on the basis of a study Publisher 14 years ago.

⁴⁵ Once upon a time, p. 465.

undoubtedly affected feelings with which he started to work in Bratislava, all the more so that the forming faculty was regarded in Prague with little respect.⁴⁶ At the faculty he “*contributed to the founding efforts and gave lectures of civil law*”,⁴⁷ but he did not become used to the Slovak environment.

Svoboda’s teaching at the Faculty of Law in Bratislava started 24 October 1921 by lectures for the academic year 1921/1922. Previously Svoboda attended a meeting of the teaching staff and was elected vice-dean of the faculty on 22 June 1921.⁴⁸ He initially took his mission in favour of Slovak university education as a temporary matter. For personal reasons he waived professorship at Bratislava faculty by a letter dated 15 November 1921 (he was expected to teach there from the start of the summer term 1922) explaining that he continued his relationship with Czech Technical University in Prague, where he still worked as a professor. The Ministry of Education acknowledge the letter and entrusted Svoboda with lectures in Bratislava for compensation of CZK 2000,- per term.⁴⁹ Otakar Sommer confirms that “*Svoboda, having refused the professorial chair of civil law at our university, nevertheless did not hesitate to commute to the faculty for years. He helped us in the most critical period (...), when everything was only formed at our faculty.*”⁵⁰ Svoboda still worked at the Faculty of Law in Bratislava in the academic year 1922/1923 and then, after being called to Charles University in Prague as professor in 1924, he helped in Bratislava as a substitute teacher for some time.⁵¹

Svoboda was in a difficult situation. He did not want to move to Bratislava, because he wanted to provide the best Czech education for his adolescent children, which they would not get in Slovakia; moreover by moving to Bratislava he would lose the authorization for *veniae docendi* at the Prague university, let alone the problems with finding of adequate home in Bratislava. He commuted to this city by overcrowded third-class train, and when coming back home he was very exhausted by travelling.⁵² He felt

⁴⁶ Compare VANĚČEK, V. Czech jurisprudence in the period of capitalism. Prague: NČSAV, 1953, p. 161 an. or KNAPP, Viktor. Transformations of time. Prague: Prospektrum, 1998, p. 19 an. If people at the Faculty of Law in Brno resented the effort of Prague lawyers to show “*primacy of general scientific reputation*” and “*condescending indulgence*” (WEYR, F. Memoirs. 2. Under the Republic. Brno: Atlantis, 2001, p. 41), the academic community in Bratislava undoubtedly had the same feelings.

⁴⁷ SVOBODA, Emil. Masaryk Institute and Archives of the Academy of Sciences of the Czech Republic, Emil Svoboda Fund, carton 1, sign. Ic, inv. no. 16. Biographies.

⁴⁸ I thank to doc. JUDr. Jozef Vozár, Ph.D. for information concerning AUK in Bratislava, Fund of the Faculty of Law of UK, minutes of the meeting of the teaching staff of the Faculty of Law of UK of 22 June 1921,

⁴⁹ Once upon a time, p. 470 an.

⁵⁰ SOMMER, O. Emil Svoboda. Medallion to the fiftieth birthday. Právny obzor, 1928, Volume XI., p. 537.

⁵¹ Documents in the Archives of Comenius University (in particular AUK in Bratislava: Fund of RUK, personnel department, reg. No. BII/2, personal file of Emil Svoboda, šk. 176; Fund of the Faculty of Law of UK, minutes of the meeting of the teaching staff of the Faculty of Law of UK, academic year 1921/1922) prove that Svoboda wanted terminate his work in Bratislava already in the end of January 1922, but at request of the teaching staff he postponed his resignation. According to resolutions of the teaching staff sent by the dean Augustin Ráth to Svoboda on 21 May 1924 the latter should have supplied lectures from civil law still in the academic year 1924/1925. In the end of the academic year 1925/1926 Svoboda terminated these activities, too. I thank to doc. JUDr. Jozef Vozár, Ph.D. for providing me with this information.

⁵² Once upon a time, on page 468 an. he writes about “*awful travels by train (08:00 AM – 03:00 PM express train, 03:30 – 06:00 PM lecture, 08:00 – 10.00 AM lecture, till noon examinations and 02:00 – 09:30*

(together with a few other Czech intellectuals commuting from Prague to Brno or Bratislava) as one of the “*Flying Dutchmen*”,⁵³ although travelling between Prague and Bratislava also had some bright sides.⁵⁴

But the social and cultural misunderstanding was the most serious problem. Svoboda came to Bratislava full of romantic idealism, devoted to the Masaryk’s Czechoslovak state and to the interests of the republic; moreover he refused the Catholic Church and was a convinced libertine,⁵⁵ so when his optimism clashed with the Slovak reality it was really hard on him. Svoboda was annoyed about treatment of Czechs by some Slovaks. He was infuriated when he heard students at the Faculty of Law speaking Hungarian. He was disappointed when Czechs in Bratislava had invited their Slovak colleagues to a common party – “*Czechs came to the party to the last man; from Slovaks nobody came.*”⁵⁶ In his memoirs written during the Protectorate⁵⁷ with the idea that maybe no one would read them, he reacts to the described situation exaltedly, but simultaneously concedes: “*However I add a question mark to these sentences. It is my subjective opinion; I had not time to properly verify my assertions.*”⁵⁸ In this context it is a mystery that Svoboda addresses in his memoirs extremely critical words to the personality of Augustín Ráth, whose sociological-philosophic approach to law could not have been alien to Svoboda and whose condemnation of anti-Czech propaganda are sufficiently known.⁵⁹ Ráth’s publication activity cannot be compared with work of Krčmář, Sedláček or Svoboda,⁶⁰ nevertheless it remains a fact that Ráth is by right regarded, together with Fajnor and Záturecký, as a founder of Slovak expertise in civil law. We also must take into account Ráth’s organisational and managerial skills that he used among others in favour of Comenius University and its Faculty of Law.

However Emil Svoboda kept his bad mood reflecting his explosive temper⁶¹ for himself and outwardly behaved as a professional. He thinks back to the students attending lectures from civil law, who understood and liked him.⁶² Svoboda tried to teach legal

PM express to Prague“). On page 470 he writes: “*I suffered from fatigue, stench and vibrations. It was a real ‘sea-sickness’ and many times I simply was at a loss.*”

⁵³ Ibid., p. 469.

⁵⁴ Thereto CHALOUPECKÝ, V. Bratislava express train. In: BOHÁČEK, Miroslav (ed.). Otakar Sommer. Turnov: Müller et al., 1941, p. 243 an.

⁵⁵ Svoboda was an active member of the Czech section of the Volná myšlenka, a society oriented among others anticlerically, already in the period of Habsburg Monarchy. In 1919 he joined the Masonic movement.

⁵⁶ Once upon a time, p. 468.

⁵⁷ Once upon a time, p. 15.

⁵⁸ Ibid., p. 469.

⁵⁹ BEŇA, J. in SKŘEJPKOVÁ, P. Anthology of Czechoslovak legal science in the interwar period (1918 – 1938). Prague: Linde Prague, 2009, p. 296. Compare e.g. Ráth’s presidential speech of 21 March 1922 in VOZÁR, J. Important Slovak lawyers from the region of Liptov. Bratislava: Veda, 2016, p. 62 an.

⁶⁰ Compare KNAPP, Viktor. Transformations of time. Prague: Prospektrum, 1998, p. 19.

⁶¹ KRČMÁŘ, J. Memoirs. Volumes II. – III. Prague – Pelhřimov: Faculty of Philosophy of Charles University 2007, p. 227. Svoboda realised his touchiness “*that tempted me to misinterpret, sometimes with tragic seriousness, fully random, unintended and petty remarks. It caused me much pain and to other people so much injustice that I would eat humble pie in public if I could assume that people know about it.*” Once upon a time, p. 19.

⁶² Once upon a time, p. 467.

science “so as not to discourage the students by its dryness and schematic character and to arouse their interest”.⁶³ After many years he met a group of graduates, whom he taught in Bratislava, who “thanked to me for kindness and justice, with which I treated not only Slovaks, but also Hungarians and Jews.”⁶⁴ Finally Svoboda evaluated his work at the Comenius University by conciliatory words: “Now I do not regret that decision, because the joy from work and friendship of good people in Bratislava brought me so much joy that I forgot even the fatigue from exhausting travels and disappointment, when I realized the fateful necessity to leave my workplace in Bratislava.”⁶⁵

But Emil Svoboda came again to Bratislava – to the 3rd Czechoslovak Lawyers’ Congress, held on 12 to 13 October 1930 under the auspices of the President Masaryk and under the presidency of Vladimír Fajnor.⁶⁶ Svoboda participated in this congress as a reporter of the 1st scientific division for civil law. On 12 October he presented there the main paper to the topic How to face the harmful fragmentation of farms.⁶⁷

IV. Svoboda’s concept of law

Svoboda’s scientific heritage remained “fully fragmented”.⁶⁸ During his life he wrote approximately forty-five books with different number of pages; he also contributed to collective works such as Otto’s Business Dictionary, Masaryk’s Encyclopaedia, Rouček’s and Sedláček’s Comment to the Civil Code or Dictionary of Czechoslovak Public Law, as well as to the tributes to several important professors – and hardly anyone could trace all his contributions published in specialised and popular periodicals and in the daily press. To find and study all works written by Emil Svoboda is beyond strength of a single person. Nevertheless the relatively extensive fundus of Svoboda’s literary production, that I have read, in my opinion allows me to summarise his basic views of law, its sense and functions.

Otakar Sommer wrote about Svoboda: “he escapes common literary criticism. He escapes it at his literary work, with which criticism is, so to say, at its wits’ end.”⁶⁹

I would say that it has three causes. The first is that Svoboda’s literary work does not have purely “legal character”. He expressed his opinions to many issues, often beyond

⁶³ Ibid., p. 339; Svoboda adopted the rule: “Do not make a camel drink when it is not thirsty.”

⁶⁴ Once upon a time, p. 472.

⁶⁵ In commemoration. In: BOHÁČEK, Miroslav (ed.). Otakar Sommer. Turnov: Müller et al., 1941, p. 268.

⁶⁶ During Fajnor’s habilitation at the Comenius University Svoboda together with Ráth and Laštovka was a member of the habilitation commission. Compare VOZÁR, J. Important Slovak lawyers: Vladimír Fajnor. Bratislava: Veda, 2017, p. 77. Ibid. On page 101 an. there is also a detailed description of the congress which was “an international event of such extent that now we cannot even imagine a law organisation that would be able to organise such an extensive event.”

⁶⁷ Svoboda addressed this issue in early 1920s, when as an expert of the national democratic party at the National Assembly he significantly influence the form of Act no. 13/1921 Coll. On renewal of small agricultural leasehold contracts, and then also in terms of the rights in rem and law of succession. Compare also Reports of the Third Czechoslovak Lawyers’ Congress in Bratislava in 1930. Congress published: Trnava, p. 16 an., of the minutes of meetings of the 1st scientific division on civil law, held on 12 and 13 October 1930.

⁶⁸ VANĚČEK, V. Czech law jurisprudence under capitalism. Prague: NČSAV, 1953, p. 163.

⁶⁹ SOMMER, O. Emil Svoboda. Medallion to the fiftieth birthday. Právní obzor, 1928, Volume, XI., p. 537.

his branch of law – a half of his works published independently are mainly essays about life, society and interpersonal relations. About books such as *Utopia* (1922), *The Path* (1924), *Lights in the Distance* (1927), *On a High Mountain* (1934), *Life Mysteries* (1941) or *The Search* (1946) few people would say that they were written by a professor of civil law, and even fewer would expect to learn from them something about law. However, Svoboda was also criticised for “*getting too much distracted by literary works that have nothing or very little in common with legal stuff.*”⁷⁰ The second cause is that Svoboda created his legal works differently from the method commonly used at the Faculty of Law in Prague: he worked “*with all the apparatus*”⁷¹ reflected in the footnotes or otherwise taken into account. Svoboda refused to organise “*a sort of repetitorium of literature (...) about the subject of work to be written*”⁷² before writing about a particular legal issue. Many of his works do not miss the footnote apparatus at all; they contain at most the list of basic literature about the topic in the end. In *Ethical and social basis of civil law*⁷³ the author used a single footnote; in the text he refers to Fyodor Mikhailovich Dostoevsky (three times), to Lev Nikolayevich Tolstoy (twice), to Vselovod Mikhailovich Garshin (once), and only in the final list he refers to fifteen law books. Svoboda also had to face objections that “*it is not scientific to illustrate the struggle for an idea by all kinds of examples from the everyday life*” (...) *Drop either examples – or the godly attribute “scientific”.*⁷⁴ Svoboda used examples from life, case-law and literary descriptions in his work on a regular basis; he believed that they say a lot about the effects, function and possibilities of law. He believed that life was a touchstone of law. His work was marked by the need to make law accessible to the students at the Technical University: “*I could not afford to use verbal knots to which the students finally get used and which finally becomes a habitual phenomenon, or even a criterion of actual science. I do not believe there is a thing in the world that could not be said briefly and clearly.*”⁷⁵ A special chapter is the way of Svoboda’s literary expression. Svoboda was a master stylist and knew that “*mother language and delivery were my bright side.*”⁷⁶ I can hardly imagine another professor at the faculty of law able to write in public for example: “*There is no actual creative work without erotic ecstasy.*”⁷⁷

By all this – the way in which Emil Svoboda understood and wrote about law – he escaped the “*traditional scheme of a legal dogmatist*”.⁷⁸ We must understand that in the period when Svoboda entered the territory of legal science, the tradition of the Romanicist historical law school rules at the Faculty of Law of Charles University “*as a frozen*

⁷⁰ KRČMÁŘ, J. *Memoirs. Volumes II – III.* Prague – Pelhřimov: Faculty of Philosophy of Charles University, 2007, p. 227.

⁷¹ Once upon a time, p. 461.

⁷² SVOBODA, E. *Internal will and will manifested by a legal act.* Prague: author published, 1911, p. 4.

⁷³ SVOBODA, E. *Ethical and social basis of civil law.* Prague: Melantrich [1923].

⁷⁴ SVOBODA, E. *Life mysteries.* Melantrich: Prague, 1941, p. 38.

⁷⁵ Once upon a time, p. 335.

⁷⁶ SVOBODA, E. *On the earth.* Prague: Volná myšlenka, 1938, p. 172.

⁷⁷ SVOBODA, E. *Dual love.* Prague: Emporium, 1935, p. 31.

⁷⁸ TOMSA, Bohuš. *Theory of legal sciences.* Všechno: Prague, 1946, p. 114.

fountain.⁷⁹ (Some professors, soon unjustly forgotten, cautiously pointed out to the existence of schools of thought that view law differently.⁸⁰) It was a period “*when positivism covered by its cold shroud the philosophy of law and turned scientific work to strict dogmatism*”.⁸¹ And in this environment enters a man of thirty-three, with rather different temperament and approach, who already at the first examination⁸² interprets *communio pro diviso* as a legal institute not only in the historical law context (however forgetting to start with Roman law, as it was – and sometimes still is – a custom), but also in the social, cultural, urbanism and technical context. And he is not afraid to write about “*a legion of the big-city landless*”, “*harsh dusk in narrow streets*”, condition of roofs of many buildings in the Jewish ghetto, “*that star constellations could be studied through holes that time ravaged in them*” and to draw “*a drastic picture of all deficiencies*” of the institute, at which the inadequate regulation under the rule of Josef II founded a “*pathological aspect*”, and when it developed, the legislator chose “*prohibition instead of a reform*.”⁸³ The plastic description of all deficiencies and problems did not lead the author to reject the possibility of dividing town houses into real parts. On the contrary, accepting that “*an ideal – to own a piece of property – hovers over a crowd of the dependent ones, exposed to the game of chance and movement of prices of homes*”⁸⁴, he stressed that legal regulation should accommodate the life needs and change the division of houses, taking into consideration the situation in big cities.⁸⁵ The collection of Svoboda’s early works accurately reflects the author’s approach to addressing of particular issues. He used a similar approach to the evaluation of the general ones.

When a lawyer thinks about law he tries to define it (lawyers – and many legislators – are obsessed by definitions) and usually fails.⁸⁶ But Svoboda’s thoughts were guided in particular by Kant’s thought: “*If we could not do anything with any term before having defined it, all the philosophizing would be in a bad way*.”⁸⁷ Svoboda “*recognised the troublesome nature of a definition (especially in legislative works)*.”⁸⁸ At the very

⁷⁹ Once upon a time, p. 152.

⁸⁰ In particular TRAKAL, J. Main directions of the newer legal and state philosophy. Prague: Fr. Řivnáč, 1885, then also HANEL, J. J. General legal and political science. Prague: J. Otto, 1909, p. 64 an.

⁸¹ SVOBODA, E. An individual and society. Prague: Volná myšlenka, 1924, p. 125.

⁸² SVOBODA, E. The decline and the end of the Prague ghetto. *Obzor národohospodářsky*, 1907, XII, p. 209 an.; SVOBODA, E. About a real division of houses in the district of the former Prague ghetto. People’s printing and publishing cooperative in Prague: Prague, 1909; SVOBODA, E. Some views of economic and social consequences of improvement of the district Josefov. *Obzor národohospodářský*, 1910, XV, p. 113 an., 161 an.; SVOBODA, E. About the legal nature of Prague underpasses and archways. *Správní obzor*. 1910, II, p. 173 an. (Svoboda published this work also his individual publication in the same year.)

⁸³ SVOBODA, E. About a real division of houses in the district of the former Prague ghetto. People’s printing and publishing cooperative in Prague: Prague, 1909 p. 6, 7, 35, 85, 87, 101.

⁸⁴ *Ibid.*, p. 4.

⁸⁵ As it is known, also thanks to Štefan Luby’s continuous effort this possibility of legal regulation became a reality after several decades. Compare e.g. LUBY, Š. System of private ownership of homes in socialist countries. *Právník*, 1964, Volume CIII, p. 635 an.

⁸⁶ Almost nothing changed in this area since the Kant’s period. “*Lawyers still try to find their own definition of law*.” KANT, I. Critique of Pure Reason. Prague: Oikonmenh, 2001, p. 441, note 326.

⁸⁷ *Ibid.*

⁸⁸ SVOBODA, E. Life mysteries. Prague: Melantrich, 1941, p. 41.

beginning of his academic career he pointed out that *“interpretation of a legal term could be started (...) by putting a definition at the beginning and then explain it by an analysis. However this method is linked to serious risks. You can namely never draw from a definition more than you have put in it before. (...) Moreover, if we base a thought construction on a thesis, which was created by abstraction, we can easily lose contact with facts of the life.”*⁸⁹ Elsewhere he writes: *“I do not intend to search for a philosophical definition of law. I take it into account as it manifests itself in the present, how it functions and where it goes. I would be satisfied also with a formal definition that law is what is regarded as law in the state.”*⁹⁰ Svoboda realised that *“also law contains a kind of divergence between its living and the written form”* and that this divergence *“is significant and obvious in many points”*.⁹¹ Svoboda notices this divergence but does not exaggerate its importance.⁹² Legal life, i.e. *“the sum of economic and social relations between people, observed from the view of law”*,⁹³ sometimes diverges from law. It may occur due to an error in law, but it also occurs due to the development of life, while codified law is a conservative element. This gap can be bridged, if law chooses abstract formulations, by which the legislator will define *“guidelines (...) in the interest of legal certainty”*.⁹⁴ The legislator should *“look at life from certain height where it is not disturbed by the details of everyday bustle”* and to create *“abstracted legal norms unlike casuistic rules that will descend into the stream of life and codify more or less fully the decision of common cases.”*⁹⁵ It will allow the judge – to whom *“the whole burden of responsibility will be transferred”*⁹⁶ – to adapt written law to the life pursuant to the legislator’s intentions. *“Only certain words, certain places remain flexible so that the legal rule better adheres to the life and longer defies the time.”*⁹⁷ Svoboda repeatedly highlighted that *“no casuistry can exhaust the possibilities brought by the surf of life”*.⁹⁸ The legislator must *“imagine and fully understand how the rule from paper enters in life and functions there, on the hot soil, where thinking and feeling people live instead of constructed zombies. (...) Literature, even printed in a collection of laws, can do somersaults – but life cannot.”*⁹⁹ If law meets resistance of social and economic forces it cannot win. Of course, the lifespan of law depends on its enforceability, but even more it depends on whether the

⁸⁹ SVOBODA, E. About the conceptual basis of law. (Inaugural lecture at Czech Technical University in Prague.) Přehled, 1913, Volume XIII, no. 9, p. 157.

⁹⁰ SVOBODA, E. Reflections on law, ethics and religion. Prague: Český čtenář, 1920, p. 17.

⁹¹ SVOBODA, E. Internal will and will manifested by a legal act. Prague: author published, 1911, p. 8.

⁹² Ibid., p. 12: *“But it would be an unmitigable error to generalise this phenomenon (...)”*

⁹³ Ibid., p. 10.

⁹⁴ Ibid., p. 14.

⁹⁵ Ibid., p. 13.

⁹⁶ SVOBODA, E. The path. Prague: Volná myšlenka, 1924, p. 150.

⁹⁷ SVOBODA, E. Reflections on law, ethics and religion. Prague: Český čtenář, 1920, p. 42 an. The idea that *“a material, in which a judge will find a fully explicit decision of each case, could be casuistically tolerated in law”*, was designated by Svoboda as *“utopian”* SVOBODA, E. Internal will and will manifested by a legal act. Prague: author published, 1911, p. 13.

⁹⁸ SVOBODA, E. To the issue of ethics and law. České právo, 1932, Volume XIV., p. 51.

⁹⁹ SVOBODA, E. Defences and attacks. Prague: Al. Srdce, 1926, p. 21.

legal rules are voluntarily observed by a crushing majority of its recipients,¹⁰⁰ even if they sometimes do not realise that they fulfil orders of law.¹⁰¹

Svoboda devoted a lot of his works to the examination of the relationship between law and morality. The main task of law is to prevent injustice. The state “*eliminates injustice repressively or preventively by external force*”,¹⁰² but it cannot change by all its laws a bad person to a good person, or even enforce love, loyalty or compassion.¹⁰³ Collective morality, *social morality requires from a human more than law. An individual has many social commitments, which cannot be enforced by law.*¹⁰⁴ Ibid. But Svoboda points out that social judgment sometimes does not overlap with ethical justice, because “*judgments of society and resulting humiliation, boycott, denial of honesty etc. are usually based on the facts of the case, inadequately and unilaterally investigated, or even on the rumours.*”¹⁰⁵ The conscience of the individual is decisive for individual morality.¹⁰⁶ An individual usually recognises what is good and what is bad, but it often does not prevent him from wrongdoing. From the ethical view Svoboda wishes an individual not only to recognise the good – he should “*also want or desire its transformation into a deed, and to contribute to this transformation, where possible.*”¹⁰⁷ This approach reflects Svoboda’s idealism – Karel Čapek wrote about him: “*Nothing is more alien to an educated lawyer than lawyer’s rationalism; he considers law as a too narrow framework for the needs of human heart (...). Creative work, he says, does not occur on the field of law, but on that of moral awakening without which even law cannot fulfil its mission.*”¹⁰⁸ Svoboda did not share the view that law should be an instrument serving to moral improvement of people; on the contrary, he often highlighted its limited possibilities.¹⁰⁹ “*Law is a social value and should make people to conduct at least so that they can live and work one beside the other.*”¹¹⁰ He saw the way in solid education and

¹⁰⁰ “*Large majority of people prefer a voluntary fulfilment of a legal order to the risk linked with its violation.*” SVOBODA, E. Reflections on law, ethics and religion. 2. edition. Prague: Volná myšlenka, 1925, p. 43.

¹⁰¹ Svoboda in his memoirs recorded words that Tilsch said to him at the habilitation colloquium “*Why do you say that in case of small purchase sometimes even a lawyer does not know that he executes a legal act? How could he not to be aware of it?*” “*Of course he is aware of it – but he does not realise it, otherwise it would cause pathologic legal hypochondria’ etc.*” Once upon a time, p. 154.

¹⁰² SVOBODA, E. About the conceptual basis of law. (Inaugural lecture at Czech Technical University in Prague.) Přehled, 1913, Volume XIII, no. 10, p. 181.

¹⁰³ SVOBODA, E. People and deeds. Prague: Edvard Fastr, 1945, p. 119: “*Law can teach a human to be formally perfect in certain economic and social activity, but it cannot change a bad person to a good person.*”

¹⁰⁴ SVOBODA, E. Reflections on law, ethics and religion. Prague: Český čtenář, 1920, p. 40.

¹⁰⁵ Ibid., p. 41.

¹⁰⁶ Ibid., p. 192: “*Each of us carries inside his own, but also the only God shared by all; his voice resonates in each of us as a voice of conscience.*”

¹⁰⁷ SVOBODA, E. Ideological basis of civil law. Prague: Vesmír, 1936, p. 11.

¹⁰⁸ ČAPEK, K. Emil Svoboda: Thoughts about law, ethics and religion. Národní listy, 28 May 1920. Available at: <http://ld.johannesville.net/capek-81-od-cloveka-k-cloveku-i-?page=49> (16. 8. 2018).

¹⁰⁹ SVOBODA, E. Thoughts about law, ethics and religion. 2nd edition. Prague: Volná myšlenka, 1925, p. 68: “*Can we be surprised by disappointment of those who expect from implementation of laws the moral awakening of humanity? (...) The role of law is different – its social mission is different.*”

¹¹⁰ SVOBODA, E. The path. Prague: Volná myšlenka, 1924, p. 139.

enlightenment. He warned that “*the lack of education is a ground prepared for demagogy and dictatorship.*”¹¹¹ He did not want “*to wait until humanity improves,*”¹¹² but he persuaded, tried, worked, spoke and wrote to contribute to this improvement, even though he realised that the ideal of a morally perfect individual was an unattainable goal, nowhere in sight. Svoboda adopted Schopenhauer’s principle of ethics: *Neminem laede, imo omnes, quantum potec, juva* (“*Injure no one; on the contrary, help everyone as much as you can*”¹¹³), and often refers to it.¹¹⁴ He underlines that law has limited possibilities in pursuing this maximum goal, mostly referring to its first part (*neminem laede*).

What is then the function of law in Svoboda’s notion of the world? Law should serve to a peaceful co-existence. “*He judges the facts of the life from the social aspect*”, and in this sense its provisions are formulated in public interest.¹¹⁵ In this context Svoboda understands public interest as a general collective interest, interest of a social group rather than as an interest of public power. Law serves to society and the state equally as a skeleton serves to a human or sculptural scaffolds to a sculptor. It is necessary, because without a skeleton anybody would be an amorphous unit.¹¹⁶ But a skeleton or scaffolds themselves do not create the beauty.¹¹⁷ “*Law is a skeleton, solid basis of social life. But for the life to become noble and beautiful and the skeleton to become a human, it is necessary to do more – to go beyond the legal orders, to achieve by means of ethics what cannot be enforced by law.*”¹¹⁸ The notion of law as a construction preventing social anarchy and chaos, as Svoboda described it by his typical literary means, was repeated in his theory of law by Viktor Knapp: “*law is justified because it prevents social entropy and pursues the establishment of homeostasis in society.*”¹¹⁹ This function of law manifests itself in the fact that law not only punishes injustice in the common sense of the word (*delict*), but also in the fact that the state performs “*many functions positively*”, e.g. by organising, protecting

¹¹¹ SVOBODA, E. *Government in democracy*. Prague: Svaz národního obrození, 1924, p. 12.

¹¹² SVOBODA, E. *Utopia*. Prague: Volná myšlenka, 1922, p. 101.

¹¹³ Compare SCHOPENHAUER, A. Two basic problems of ethics addressed in two academic papers competing for an award in: *About the will in nature and other works*. Prague: Academia, 2007, p. 445: “*The highest principle of ethics is the shortest expression for a conduct which prescribes or – if it had no imperative form – for a conduct to which it assigns a moral value. It is thus a call to morality in general, expressed by a single sentence. (...) It is a principle on the content of which all ethicists have agreed, although they assign it different forms. I also want to refer to an expression that is most simple and purest in my opinion: Neminem laede, imo omnes, quantum potec, juva. By this sentence all teachers of morality try to justify their efforts, it is the common reset of their various deductions (...).*”

¹¹⁴ E.g. SVOBODA, E. *Reflections on law, ethics and religion*. Prague: Český čtenář, 1920, p. 47; SVOBODA, E. *Ethical and social basis of civil law*. Prague: Melantrich, [1923], p. 15.

¹¹⁵ SVOBODA, E. *Ethical and social basis of civil law*. Prague: Melantrich, [1923], p. 31.

¹¹⁶ The need of rules in a collective entity was expressed by novelistic means by GOLDING, W. *The Lord of the Flies*. Prague: Naše vojsko, 1968.

¹¹⁷ SVOBODA, Emil. *Reflections on law, ethics and religion*. Prague: Český čtenář, 1920, p. 13. Compare *ibid.*, p. 10: “*Good scaffolds are important, because it is the basis of work. But good work is even more important, because scaffolds alone can also serve for wickedness, which is not worthy of a look.*” Likewise SVOBODA, E. *Democracy as an opinion of life and world*. Prague: Státní nakladatelství, 1927, p. 161.

¹¹⁸ *Ibid.*, p. 16. Likewise SVOBODA, E. *Democracy and election*. Prague: Státní nakladatelství, 1920, p. 15.

¹¹⁹ KNAPP, V. *Theory of law*. Prague: C. H. Beck, 1995, p. 16 an., 32 an.

and supporting “institutions that work on improvement of economic, artistic and social culture in a narrower sense.”¹²⁰ Ibid. The author concludes that even resistance against these tasks should be regarded as injustice; however, according to Svoboda injustice also means a case where the state crosses a line drawn by public law.¹²¹

Svoboda refused the concept separating law from morality, for example in his polemic reaction to the book of the philosopher František Krejčí:¹²² “*When Krejčí on page 113 says: „A codified moral norm ceases to be moral, because it lacks an element which makes a social phenomenon moral, it means “the sign of internal binding force” – he is wrong. For the life in the state to be possible at all, the legal norms must keep their internal binding force. (...) Law has and must have the educational power; otherwise a catastrophe would be unavoidable. (...) There are not enough executors who would have to intervene, if people cease to voluntarily fulfil their obligations to the fellow citizens and to the state. The world of our civilisation would drown in the sea of actions and executions.*” If people accept the legal system “as a rule of their communal life“, then we „simply must see a moral element in it. (...)”¹²³ “*Law is an element of the moral code. It is a moral code projected on the plane of the human mass.*”¹²⁴ The condition is a harmonious relation between the public power and the citizens. “*Bad law and defiance of citizens – although expressed by silence – is a germ of decay.*”¹²⁵ Štajgr correctly highlighted that Emil Svoboda had asked himself whether provisions of civil law could be evaluated in ethical terms and otherwise than in ethical terms, and that his answer had been positive – with a conclusion that law, and especially civil law, should be evaluated preferably in ethical terms.¹²⁶

The impetus on general interest in the legal organisation of society leads to a conclusion that law is a uniform thought construction.¹²⁷ “*Law evaluates the facts of life from the social aspect – under the viewing angle of society. In other words, law does not care at all about anything what lacks the public interest.*”¹²⁸ However it does not mean that the legal system as a whole should be uniform. Svoboda adopted the concept of dualism of private and public law. He realised the relativity of this classification. He saw its justification in the fact that public law affected “*at the first sight and directly (...) state organisms, or at least more or less broad circles of the public*”, so “*the public interest absolutely prevails,*” even if it indirectly affects individual interests (e.g. acts in the area of health care, acts for protection of trades, commerce, industry, agriculture etc.).¹²⁹ On

¹²⁰ SVOBODA, E. About the conceptual basis of law. (Inaugural lecture at Czech Technical University in Prague.) Přehled, 1913, Volume XIII, no. 10, p. 181.

¹²¹ Ibid., p. 182.

¹²² KREJČÍ, F. Policy and morality. Prague: Volná myšlenka, 1932.

¹²³ SVOBODA, E. To the issue of ethics and law. České právo, 1932, Volume XIV, p. 53.

¹²⁴ SVOBODA, E. Law and a citizen. České právo, 1936, Volume XVIII, p. 13.

¹²⁵ Ibid.

¹²⁶ Compare ŠTAJGR, František. Emil Svoboda died on 20 August 1948. Právny obzor, 1948, Volume XXXI, p. 309. Ibid. Štajgr highlights Svoboda’s concentrated interest in family and law of succession, where the issue of morality appears quite frequently.

¹²⁷ SVOBODA, E. Ideological basis of civil law. Prague: Vesmír, 1936, p. 39.

¹²⁸ SVOBODA, E. Ethical and social basis of civil law. Prague: Melantrich [1923], p. 31.

¹²⁹ SVOBODA, E. Basic ideas of civil law. Prague: Vesmír, 1936, p. 40.

the contrary, in private law, whether it concerns marriage, relationship between parents and children, or a contract, *“at the centre of interest is always an individual in his or her economical or social relations with another individual, although each such rule (...) pursues a public interest after all.”*¹³⁰ Private law thus puts the protection of individual interests first, while public interest appears in it indirectly and stays in the background.

Svoboda also address the issue of dualism of positive and natural law. He realised the longevity of natural law, saved in hearts and minds of people.¹³¹ He reminded that *“even legal science did not and never will send into oblivion so-called natural law, i.e. legal perception stemming from life and natural human wisdom. It shows (...) that natural legal perception is subject to changes like everything based on experiences and relations of life. But this living and changing legal perception is the basic, indispensable supplement as well as a development, progressive element of law – although, for sake of peace and order in the social life, it must retreat there, where it could collide with a valid provision of positive law (...).”*¹³²

Svoboda was a supporter of the Aristotelian concept of the rule of law:¹³³ *“A really constitutional life manifests by law ruling over all egoisms, whether personal or collective”*.¹³⁴ Therefore he refused the idea that natural law could beat positive law before *“legal perception stemming from the life itself”* forces the legislator to change the law. For the same reason he refused the idea that a judge searching for justice should decide against law. *“The concept of legal certainty requires that an unambiguous provision of an act represents an uncrossable line for a judge.”*¹³⁵

However, nothing was more alien to Svoboda than the idea that a perfect legal regulation of every aspect of the social life could create an ideal situation. He was aware how it would end if every movement and every human act were regulated by law. *“If people measured all their acts by law it would cause insanity of social hypochondria.”*¹³⁶ He realised that extension of state functions, e.g. in the social area, and their reflection in the respective legal regulations had different effects. He expressed the concern, he observes how *“legislation gives rise to whole libraries of legal systems”*, whether competences of the state do not grow *„in an unhealthy manner”* and he feared hypertrophy of etatism, which would make the state organisation an end in itself: *“it would treat citizens merely as its living cells that are predestined to create the material work of the*

¹³⁰ Ibid., p. 40 an.

¹³¹ SVOBODA, Emil. Life and a thought. Prague: Aventinum, 1928, p. 127.

¹³² Ibid., p. 129 an.

¹³³ ARISTOTELES. Nikomachov's ethics. Prague: Rezek, 1996, p. 136 (1134a 35): *“Therefore we prefer the rule of law to the rule of a human, who would decide in his own favour and become a tyrant.”* Compare e.g. SVOBODA, E. Democracy as an opinion of life and world. Prague: Státní nakladatelství, 1927, p. 51.

¹³⁴ SVOBODA, E. Law and a citizen. České právo, 1936, Volume XVIII, p. 13.

¹³⁵ SVOBODA, E. Internal will and will manifested by a legal act. Prague: author published, 1911, p. 33. Ibid. However he notes: *“Also here the decisive factor is the sense, declared to be undisputable using a logical-systematic method – non-literal wording of the text. (...) where dual interpretation is possible (...), the social function of law should be decisive, i.e. harmonious, fair and with the need of economic and social life accounting for decision of questions at issue.”*

¹³⁶ SVOBODA, E. Democracy as an opinion of life and world. Prague: Státní nakladatelství, 1927, p. 161.

state by their life, growth and work.” What if the state changes to “*a spectre living somewhere beyond us?*”¹³⁷ Emil Svoboda as a Masaryk democrat connected with the Czechoslovak Republic refused such idea. But as a Masaryk humanist he was aware of this risk, did not keep silent and warned against it.

He saw one of the risks in dehumanization. The development of intentional social care and rationalization of charity for the general benefit generate “*organisations to raise funds for health care, to systematic distribution of allowances in order to eliminate contingency and use of funds for wrong purposes.*”¹³⁸ Hand in hand with it goes specialization and statistics “*and an individual becomes a number, one unit among thousands. (...) of course, mass phenomena such as professional diseases, accidents, capacities diminishing with aging, wage fights and unemployment – which tempt to making an “arithmetic” solution.*”¹³⁹ “*An individual is not just a can of food. A factory can boast that a human hand did not touch offered foods in the production process. But an authority or office cannot boast that nobody felt the touch of humanity in communication with it...*”¹⁴⁰

But Svoboda saw more serious threat in the tendency of the state to supremacy and forceful coercion of people to accept its conception of the good and welfare, which causes that the public power “*spreads its legal network all over the country*” and then “*mends the holes and narrows the mesh size*“ until „*subjects (...) obediently crawl under the perfect protective net.*”¹⁴¹ Emil Svoboda proclaimed himself a socialist. Viktor Knapp wrote about him: „*He regarded himself as a socialist, but he was not one.*”¹⁴² I think that it depends on the viewing angle. Socialistic ideas were popular at that time, many people saw them as a cure for threats of the modern era. Fourteen political parties with the adjective ‚socialist‘ or ‚social‘ in their name were active in interwar Czechoslovakia, but their political views of the means, goals and result were very different. After all, in the national socialist party, of which Svoboda became member in the middle of 1920s, there were several currents of opinions with different ideas of what the Czechoslovak socialism should look like. Svoboda imagined it as a system based on social justice and individual freedom,¹⁴³ in which “*after the long wandering the cursed burden of uncertainty and care of property (...) fear for maintaining a quality of life adequate to the way of education and work (...), will be finally lifted from the shoulders of an individual, until everyone will be able to look to the future without concerns.*”¹⁴⁴ He realised that it was an ideal of “*dreaming about the future of humanity*”,¹⁴⁵ but he believed that it was right to search for a way to its achievement. As an old ill man disappointed by terrors of the two world wars and poverty of the great economic

¹³⁷ Ibid., p. 137.

¹³⁸ SVOBODA, E. *Dual love*. Prague: Emporium, 1935, p. 65.

¹³⁹ Ibid., pp. 65 – 66.

¹⁴⁰ Ibid., p. 67.

¹⁴¹ SVOBODA, E. *Defences and attacks*. Prague: Al. Srdce, 1926, p. 21.

¹⁴² KNAPP, Viktor. *Transformations of time*. Prague: Prospektrum, 1998, p. 24.

¹⁴³ “*Neither socialism, nor communism can do without a new individualism. No collective (...) can absorb a human personality. The slavery breeds defiance, hate and crime.*” SVOBODA, E. *Ordinary and extraordinary things*. Prague: Melantrich, 1931, p. 21.

¹⁴⁴ SVOBODA, E. *The eternal issue of freedom*. Prague: Edvard Fastr, 1948, p. 211 an.

¹⁴⁵ SVOBODA, E. *Citizen and law*. České právo, 1936, Volume XVIII, p. 33.

crisis, Svoboda believed in the possibility of combining Soviet collectivism and Masaryk humanism.¹⁴⁶ He did not live to see the actual result that he warned against all his life: *“Take care not to create new forms of slavery instead of freedom. Organisation is a good servant – but a horrible master, because it is invulnerable.”*¹⁴⁷

V. To conclude...

Emil Svoboda was a remarkable person. He wrote: *“I confess my adherence to the idealist camp”*¹⁴⁸ and short thereafter *“I confess my theoretical materialism”*¹⁴⁹, but I do not regard it as a somersault of opinions. In the introduction of his memoirs Svoboda described himself as a *“rationalist and fantasist.”*¹⁵⁰ The two words briefly explain his world of ideas based on empiricism and observation of life, but attracted by the prospect of society governed by ethical laws, fraternity, love and compassion. Svoboda tried to fight for good things all his life.

Svoboda defended freedom of thought and exploration: *“I cannot imagine,”* he wrote, *“an individual to be dragged to the jail and economically and socially destroyed for having shaken the basis of a scientific or philosophical thinking at a meeting or in his work. The scientific truth has never needed the protection of the police officers or gendarmes.”*¹⁵¹ He railed against the death penalty: *“Death penalty is a relic of barbarism.”*¹⁵² He designated it as judicial murder. He supported the idea of equality of men and women, among others at work on the draft civil code. On the contrary, the other members of the super review commission – especially Bruno Kafka – laughed at his *“fundamental and consistent feminism.”*¹⁵³ More than one ecologist would be surprised to hear that Svoboda already in 1920 wrote: *“An animal is not a thing. Its emotional life resembles ours. An animal experiences joy and sorrow, loves certain*

¹⁴⁶ František Weyr, to whom Svoboda sent his work about the spirit of socialism, wrote back to the author on 29 August 1947: *“I like very much its content and your excellent style, but I cannot share your great optimism, which distinguishes you from our common philosophical predecessor Schopenhauer. I simply cannot believe that Marx, Engels, Lenin and Stalin invented a miraculous cure (...), that a major change on the way to the heaven, which they promise to us, occurred in humanity since the period of Marx.”* SVOBODA, Emil. Masaryk Institute and Archives of the Academy of Sciences of the Czech Republic, Emil Svoboda Fund, carton I, sign. IIb1, inv. no. 362 (Weyr František).

¹⁴⁷ SVOBODA, E. Defences and attacks. Prague: Al. Srdce, 1926, p. 23.

¹⁴⁸ SVOBODA, Emil. People and deeds. Edvard Fastr: Prague, 1945, p. 130.

¹⁴⁹ ŠTAJGR, František. Emil Svoboda died on 20 August 1948. Právní obzor, 1948, Volume XXXI, p. 312 (Without challenging the authenticity of Štajgr’s quotation I note that the author of the obituary claims that he quotes from the Spirit of socialism; in spite of all my effort I have not found the quoted sentence in the 1st and the 2nd edition of the book.)

¹⁵⁰ Once upon a time, p. 12 an.

¹⁵¹ SVOBODA, Emil. A human and society. Prague: Volná myšlenka, 1924, p. 112.

¹⁵² SVOBODA, E. Life and a thought. Prague: Aventinum, 1928, p. 93. Svoboda earlier participated in the death penalty opinion pool: Chalupný, Emanuel – Kyr. Ondřej (eds.). About the death penalty. Opinion pool. Prague: Social services, 1923. SVOBODA, E. The path. Prague: Volná myšlenka, 1924, p. 87 an. (*“The death penalty is a sign of poverty of our civilisation.”*)

¹⁵³ Once upon a time, pp. 612 – 613. Compare also SVOBODA, E. A woman – a human. Three reflections. Prague: B. Kočí, 1925.

places and certain people. And it expresses his feelings in such a manner that they cannot be doubted."¹⁵⁴

Svoboda was a productive writer, he wrote many works on many subjects. A lot of his works are outdated. But his books on Internal will and will manifested by a legal act, on Ethical and social basis of civil law or on Conceptual basis of civil law kept much of their topicality even decades after their origin. And that's something.

Bibliography

- ARISTOTELES. Nikomachov's ethics. Prague: Rezek, 1996, ISBN 80-901796-7-3
- BOHÁČEK, Miroslav (ed.). Otakar Sommer. Turnov: Müller et al., 1941
- BLAHO, P. – VLKOVÁ, E. (eds.) Lawyers at Comenius University in Bratislava. Seventy-five years of the Faculty of Law of UK (1921 – 1996). Publishing Department Bratislava: PF UK, 1996, ISBN 80-7160-000-8
- ČAPEK, K. Emil Svoboda: Thoughts about law, ethics and religion. Národní listy, 28. 5. 1920
- GOLDING, W. The Lord of the Flies. Prague: Naše vojsko, 1968
- HANEL, J. J. General law and political science. Prague: J. Otto, 1909
- KANT, I. Critique of Pure Reason. Prague: Oikonmenh, 2001, ISBN 80-7298-035-1
- KNAPP, V. Theory of law. Prague: C. H. Beck, 1995, ISBN 80-7179-028-1
- KNAPP, Viktor. Transformations of time. Prague: Prospektrum, 1998, ISBN 80-7175-063-8
- KRČMÁŘ, Jan. Speech over the coffin of Emil Svoboda. Lawyer, 1948, Volume LXXXVII, p. 244
- KRČMÁŘ, J. Memoirs. Volumes II – III. Prague – Pelhřimov: Faculty of Philosophy of Charles University, 2007, ISBN 978-80-86559-83-4
- KREJČÍ, F. Policy and morality. Prague: Volná myšlenka, 1932
- KUBEŠ, Vladimír. History of thinking about state and law in the 20th century with regard to Moravia and in particular Brno. I. Brno: Masaryk University, 1995, ISBN 80-210-1143-2
- KUKLÍK, J. Professor Jan Krčmář. Forgotten personality of Prague civil law science. Prague: Charles University – Prague Association of the Czech Lawyers' Society, 2008, ISBN 978-80-87146-06-4
- LUBY, Š. System of private ownership of homes in socialist countries. Lawyer, 1964, Volume CIII, p. 635 an.
- LUBY, Š. Ownership of homes. Bratislava: publishing house of the Slovak Academy of Sciences, 1971
- OVEČKOVÁ, O. – VOZÁR, J. et al. A centenary of the magazine Právní obzor. Bratislava: VEDA, 2017, ISBN 978-80-224-1614-6
- PATOČKA, J. Czech intelligence in Europe in: Our national programme. Prague: European Cultural Club, 1990, ISBN 80-85212-04-8
- PEROUTKA, F. Diaries, letters, memories. Prague: Lidové noviny, 1995, ISBN 80-7106-063-1
- SCHOPENHAUER, A. Two basic problems of ethics addressed in two academic papers competing for an award in: About the will in nature and other works. Prague: Academia, 2007, ISBN 978-80-200-1547-1
- SKŘEJPKOVÁ, P. Anthology of Czechoslovak legal science in the interwar period (1918 – 1938). Prague: Linde Prague, 2009, ISBN 978-80-7201-750-8
- SOMMER, O. Emil Svoboda. Medallion to the fiftieth birthday. Právní obzor, 1928, Volume XI., p. 537 an.
- SVOBODA, E. The decline and the end of Prague ghetto. Obzor národohospodářský, 1907, II, p. 173 an
- SVOBODA, E. About a real division of houses in the district of the former Prague ghetto. People's printing and publishing cooperative in Prague: Prague, 1909
- SVOBODA, E. About the legal nature of Prague underpasses and archways. Správní obzor. 1910
- SVOBODA, E. Internal will and will manifested by a legal act. Prague. Author published. 1911
- SVOBODA, E. The issue of will in Austrian law of succession. Lawyer, 1912
- SVOBODA, E. About the conceptual basis of law. (Inaugural lecture at Czech Technical University in Prague.) Přehled, 1913, Volume XIII, no. 9, p. 157.

¹⁵⁴ SVOBODA, E. Thoughts about law, ethics and religion. Prague: Český čtenář, 1920, p. 132.

- SVOBODA, E. Democracy and election. Prague: Státní nakladatelství, 1920
- SVOBODA, E. Thoughts about law, ethics and religion. Prague: Český čtenář, 1920
- SVOBODA, E. Utopia. Prague: Volná myšlenka, 1922
- SVOBODA, E. Ethical and social basis of civil law. Prague: Melantrich, 1923
- SVOBODA, E. A human and society. Prague: Volná myšlenka, 1924
- SVOBODA, E. The path. Prague: Volná myšlenka, 1924
- SVOBODA, E. Government in democracy. Prague: Svaz národního obrození, 1924
- SVOBODA, E. Thoughts about law, ethics and religion. 2nd edition. Prague: Volná myšlenka, 1925
- SVOBODA, E. A woman – a human. Three reflections. Prague: B. Kočí, 1925
- SVOBODA, E. Defences and attacks. Prague: Al. Srdce, 1926
- SVOBODA, E. Democracy as an opinion of life and world. Prague: Státní nakladatelství, 1927
- SVOBODA, Emil. Life and a thought. Prague: Aventinum, 1928
- SVOBODA, E. Utopia. 2nd edition. Prague: Borový, 1929
- SVOBODA, E. Ordinary and extraordinary things. Prague: Melantrich, 1931
- SVOBODA, E. Great work is done. České právo, 1932, Volume XIV, p. 9 an.
- SVOBODA, E. To the issue of ethics and law. České právo, 1932, Volume XIV, p. 51 an.
- SVOBODA, E. Dual love. Prague: Emporium, 1935
- SVOBODA, E. Ideological basis of civil law. Prague: Vesmír, 1936
- SVOBODA, E. Law and a citizen. České právo, 1936, Volume XVIII, p. 12 an.
- SVOBODA, E. On the earth. Volná myšlenka: Prague, 1938
- SVOBODA, E. Life mysteries. Prague: Melantrich, 1941
- SVOBODA, E. People and deeds. Prague: Edvard Fastr, 1945
- SVOBODA, E. The spirit of socialism. Za svobodu: Prague, 1947
- SVOBODA, E. Eternal issue of freedom. Prague: Edvard Fastr, 1948
- SVOBODA, E. Once upon a time. Masaryk Institute and Archives of the Academy of Sciences of the Czech Republic, Emil Svoboda Fund, carton 1, sign. Ic, inv. no. 17
- SVOBODA, Emil. Pilgrim beyond the limits of positivist circles. Collected works. Prague: Wolters Kluwer, 2018, ISBN 978-80-7598-007-6
- ŠTAJGR, F. Emil Svoboda died on 20 August 1948. Právní obzor, 1948, Volume XXXI, p. 306 an.
- TOMSA, B. Prof. Emil Svoboda as a legal philosopher. Právní obzor, 1928, Volume XI, p. 540 an.
- TOMSA, B. To the sixtieth birthday of university professor Dr. Emil Svoboda. Právní obzor, 1938, Volume XXI, p. 477 an.
- TOMSA, Bohuš. Theory of legal sciences. Všehrd: Prague, 1946
- VANĚČEK, V. Czech jurisprudence in the period of capitalism. Prague: NČSAV, 1953
- VOZÁR, J. Important Slovak lawyers from the region Liptov. Bratislava: Veda, 2016, ISBN 978-80-224-1471-5
- VOZÁR, J. Vladimír Fajnor. Bratislava: Veda, 2017, ISBN 978-80-224-1600-9
- WEYR, F. Memoirs. 2. During the Republic. Brno: Atlantis, 2001, ISBN 80-7108-194-9