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A Few Words about the Law of Open Societies (In memoriam Professor Jürgen Basedow)

In 2024 the centenary of the International Academy of Comparative Law / *l'Academie internationale de droit compare* (the “Academy” or “IACL”) was commemorated.

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As it is indicated on its official web-site, the Academy “was founded in The Hague (The Netherlands) on 13 September 1924”, and its creation coincided “with the prodigious legal renaissance movement that followed the end of the World War I”.¹

It has been specifically emphasized that the location of the Academy, where the Permanent Court of International Justice and the Academy of International Law had already operated at that time, was chosen as a kind of “reaffirmation of the idea that The Hague was a symbol of protection of peace through law”.

On the Academy's website it is also mentioned that the Academy is an organization of scholars focused on comparative study of legal systems. The Academy's main role has been formulated as to stimulate research in the field of comparative law throughout the World being interested in and promoting comparative legal research in all legal disciplines. It has been also accentuated that the Academy is engaged in the universal dissemination of the results of its research (through publications), which examine all legal orders and all legal systems of the Globe.

The Fifth Thematic Congress of Comparative Law, which took place on 15 and 16 November of 2024 in Paris at the Sorbonne School of Law / *École de Droit de la Sorbonne*, was dedicated to the centenary anniversary of the Academy. The program of the Congress included discussions of the history of comparative law, a current state of and prospects for teaching comparative law, as well as the future of comparative law.²

As it follows from the Congress's program, during its first plenary session a tribute was paid to Professor Jürgen Basedow who has to be named among outstanding legal scholars of modern time as a great researcher in the fields of private international law and comparative law studies as well as a recognized

¹ International Academy of Comparative Law: History. Official web-site of the IACL: <https://aidc-iacl.org/en/lacademie/presentation/>.

² Centennial of the IACL and 5th Thematic Congress: on the Theme of Comparative Law (programme). Official web-site of the IACL: <https://aidc-iacl.org/wp-content/uploads/2024/11/Programme-2024-11-08-1-vert.pdf>

contributor to the development of private international law instrumentalities and practice.³

During so remarkable and fruitful eight years, from 2006 to 2014, Professor Basedow was the General Secretary of the Academy. But in April 2023 he passed away, unexpectedly and suddenly ...

On the official website of the Academy his name is listed among those four people who served as Secretaries General of the Academy in the past, and whose names have been perceived throughout the World as synonymous with the success that the Academy has achieved to date.

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Professor Jürgen Basedow has become a very special person for me, the one who has played a significant role in my life and continues to be a bright pattern for me of how to fulfill professional duties, appropriately engaged in scientific research and development of legal practice, a perfect model of a person of high morality and culture, education and broad outlook, honesty, human dignity and generosity.

My first, at that time still not in person, acquaintance with Professor Basedow occurred when I was studying results of the collective efforts of legal scholars in Western Europe purported to create certain theoretical foundations of a European Civil Code. I noticed repeated references to some important theoretical conclusions of Professor Basedow and his proposals for practical solutions to the problems discussed.

For example, some authors referred to his views that, in creating European private law as a new *jus commune* (which, as it was assumed, could be achieved through full or partial codification in the style of continental Europe), experience of Germany and The Netherlands (where the theory of European private law at that time was especially developed) should be taken into account, and also that it is advisable to develop norms of the European private law in all aspects where the law allows for the autonomy of persons of civil legal relations.⁴

In addition, his respected colleagues specifically mentioned Professor Basedow's proposal concerning preferable introduction of a European contract law by either adopting mostly recommendatory provisions or through a formation of a such regulation which for a certain period of time would not replace national legislation but which would allow contracting parties to choose respective provisions to framework their private contractual relationships as an enforceable alternative to an applicable national legislation.⁵

It appears to be that the approach proposed by Professor Basedow was adopted in developing the document created by efforts of many representatives

³ Prof. Dr. Dr. h.c. mult. Jürgen Basedow, LL.M. (Harvard Univ.) (1949-2023). The web-site of the Max Planck Institute (Hamburg, Germany): <https://www.mpipriv.de/1075943/juergen-basedow>

⁴ Towards a European Civil Code. Hartkamp, Hesselink, Hondius and others, Eds. Second Revised and Expanded Edition. Ars Aequi Libri and Kluwer Law International, 1998. – 652 p. P. 42 – 43, 46.

⁵ Ibidem. P. 47 - 48.

of the academic communities of the European Union member-States, namely the “Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference” (DCFR).⁶

As Professors Cristian von Bar, Eric Clive and Paul Varul noted in the Preface to the Russian edition of the DCFR, those model rules represent primarily a comparative-law text, a source of inspiration for the modernization of national legislation and a set of means for improving law-making, but the rules can also be perceived as an optional instrument for regulating specific civil law relations allowing parties to such relations to choose the DCFR norms as a source of regulation of legal relations in which they participate.⁷ And, by the way, the concept of an optional instrument as a technique of private regulation of cross-border relations is explained in detail by Professor Basedow in his General Course of International Private Law.⁸

Later, I was blessed to meet Professor Jürgen Basedow in person during the conference on legal implants which took place in Tbilisi in 2012. I made my presentation and participated in a scientific discussion with him on the topic. Moreover, I have got the honor of being nominated as a member of the Academy by Professor Basedow and in June 2013 receiving from him (then the Secretary General of the Academy) an official letter with notice of me elected as an associate member of the Academy.⁹

During 10 years until early 2023 I was in occasional contacts with Professor Basedow, met with him in person at the international conference on the private autonomy held in Tbilisi in November 2018 and, the most importantly, we worked quite closely in preparation of my contribution to the four-volume Encyclopedia of Private International Law, published under his editorship in 2017 by Edward Elgar Publishing Ltd.¹⁰

That excellent publication of the Encyclopedia prepared with participation of dozens of legal scholars from around the World under the leadership of Professor Basedow was carried out with the aim of improving the availability of information on private international law (PIL) and presents this field of knowledge (which once more than a century remained only one of the academic disciplines) from a global and comparative-law perspectives. In addition, the important purpose that the publication of the Encyclopedia has been supposed to

⁶ Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Outline edition. Christian von Bar, Eric Clive, Hans Schulte-Nolke, Paul Varul and others, Eds. Sellier. European Law Publishers, 2009. - 642 p.

⁷ Модельные правила европейского частного права. Пер. с англ. Науч. ред. Н.Ю. Рассказова. М.: Статут, 2013. – 989 с. С. 17 – 47.

⁸ Базедов Ю. Право открытых обществ – частное и государственное регулирование международных отношений: общий курс международного частного права. Пер. с англ. Ю.М. Юмашева. М.: Норма, 2016. – 384 с. – С. 159 -171.

⁹ Membership Directory. Official web-site of the IACL: <https://aidc-iacl.org/en/membres/annuaire/>

¹⁰ The Encyclopedia of Private International Law, Edward Elgar, 2017: https://www.elgar.com/shop/gbp/encyclopedia-of-private-international-law-9781782547228.html?srsltid=AfmBOooZu6_m7F4Pzum-iD04Npc5xxTy61a3OAwvPuQs-78GweMtOP31 .

achieve (and, no doubt, it did) has been also a stimulation of more comparative and functional discussions of issues of private international law as such, as well as the formation of a basis for future research.¹¹

The intellectual and, I would say, moral heritage of Professor Jürgen Basedow includes his ideas and concepts expressed in a huge number of books and other publications dedicated to PIL and comparative law studies. His monograph on private law of the European Union (EU) seems to be one of the most important of them. In the preface to the monograph he emphasizes that this book delves into the EU private law specifically, and not into European private law in a broader sense; it focuses on the impact of the EU legislation on private law.¹² In that book he summarized, refined and completed his numerous studies previously published by him over the period since the late 1980s.

The main motivation for the author's research was his conviction in the objectivity of the existence of a world of horizontal relations outside (although not independent of) vertical relations governed by the legal institutions of States and supranational entities. According to Professor Basedow, this world of social connections and changes has been based on existence of and driven by private initiatives and pursuit to realize private interests, and from a time immemorial this system of private relationships has been ensured by relevant legal regulation and public services the way that justice expected by people was achieved through harmonizing norms of private law with the fundamental orientation of the respective State.

Given such approach, and taking into account the fact that all areas of private law are now increasingly governed by a body of norm of both a national law and the European Union law, the aforementioned monograph is not focused on any particular area of private law and is not structured according to its (the law) traditional concepts and institutions. Professor Basedow explained that with that book he wished to create a counterbalance to the growing specialization of law and lawyers reflected in many publications on private law of the European Union, which he considered harmful to the consistency of the legal system.

In connection with that Professor Basedow drew our attention to the fact that he focused to analyze precisely foundations of private law of the European Union, general principles enshrined in the EU legislation and reflected in the practice of the European Court, as well as the related procedural and methodological framework, that is, the external manifestations of the EU private law.

It is noteworthy that Professor Basedow unconditionally believed in the value and prospects of the European Union as a growing legal order.

¹¹ Encyclopedia of Private International Law. 4 volumes. Basedow, Rühl, Ferrari and Asensio. UK: Edward Elgar Publishing Limited, 2017. Volume 1, p. vi.

¹² Basedow. EU Private Law: Anatomy of a Growing Legal Order. INTERSENTIA, 2021. 785 p.

Professor Basedow did not back down from his belief in the prospects of cooperation and interaction between people and a State based on reason and virtue, the need of taking into account objectivity of human nature and importance of forming such circumstances under which private and public interests would be coordinated and balanced. Based on this, the best (if not the only) prospect for the preservation of humanity, he put forward and justified “the cross-cutting idea of his research - the transformation of the State into an open society with the free movement of persons, goods, services, capital, information and, as a consequence, formation, along with the State, of private regulation of cross-border relations with the participation of individuals and commercial companies”.¹³

At the same time, Professor Basedov argued that “the current stage of development of modern history differs from previous ones in the sense that modern States can be called “open” not only as a matter of fact. Their openness also includes normative content, which is a characteristic of the perception of the inner essence of many concepts of international and constitutional law formed on the basis of the sad experience of the social existence of mankind in the first half of the twentieth century, from the one hand, and new directions in the development of political philosophy, on the other hand.

This state of openness has reflected in the tangible changes that PIL has undergone over the past 50 – 60 years”. Professor Basedow concluded that “in such circumstances, PIL becomes subject to a legal analysis of cross-border exchanges and contacts which are becoming increasingly intense. Consideration of this general topic serves as a kind of leitmotif of this work”.¹⁴

Taking into account this transformation, Professor Basedow proposed (in essence, he justified) the advisability of treating PIL no longer as a simple method of choosing law (in its traditionally narrow understanding), but precisely as the law of an open society which “could be described as the key which would help national private law relations to be universally implemented in a world divided into many jurisdictions”.¹⁵ This idea (convincingly substantiated by him within the framework of the course on international private law, which he taught in 2012 at the Hague Academy of International Law and published in Russian in 2016 in the form of the referenced publication) is fully consistent with the goal of ensuring or achieving peace through law.

Here we should pay attention to the conclusion of Professor Basedow that at some point “the illusory of separating conflict of law rules from the legal policy of national legislators became clear. PIL has increasingly come to be seen as one

¹³ Базедов Ю. Право открытых обществ – частное и государственное регулирование международных отношений: общий курс международного частного права. Пер. с англ. Ю.М. Юмашева. М.: Норма, 2016 г. – 384 с. С. 11.

¹⁴ Ibidem. P. 13 -14.

¹⁵ Ibidem. P. 12.

of the instruments of foreign policy. Unilateralism begins to prevail over bilateralism in relations”.¹⁶

It seems that the development of this trend is largely based on the subjective attitude of irresponsible rulers / governors to history and reality, and it does not consider the above-mentioned objective circumstances formulated by Professor Basedow regarding the coexistence of a sphere of horizontal connections and an area of implementation of vertical connections, as well as the advisability of a reasonable balance in the interaction of these two areas.

Modern wars waged against sovereign States and other similar events occurring in the World clearly show that the transformation of a modern State into an open society can be slowed down, stopped and even reversed by the subjectivity of political arbitrariness, imposition, with the help of brute military force and other resources, of ideologies that were developed without taking into account the objectively shaped picture of the World and that are marginal from the point of view of civilizational development.

At the same time, it is the objectivity of the circumstances noted by Professor Basedow that allows us to assert that the development of open societies (and, accordingly, the law of open societies) is the only alternative to archaism, degradation and dead-end path of development of humanity. It is this objectivity that gives reason to believe that good always triumphs over evil.

The problem, however, is that any effective mechanisms must be created both to accelerate such a victory of civilization with a long-term sustainable effect over, the almost absolute, evil of terrorism and the destruction of communities and cultures, and to prevent such deviations from the path of preservation and progress of human civilization. The existence of such mechanisms will make it possible to fairly reasonably answer the question (as well as assume some time frame) about how soon this victory will come, whether good will win at all, and if this victory is predicted, then when it will happen.

Continuing intellectual work on the search for and development of such mechanisms is a task not only for philosophers and politicians, but also for lawyers (and in their interaction). Effective tools are needed to achieve and maintain trust at all levels of social relations and ensure reasonable and conscientious behavior.

At the moment, most of these mechanisms require only the consciousness and good will of people (which at his time and in the vast majority of cases are stimulated only by economic factors). Moreover, philosophy, science and history show that behavior and cooperation between people and their communities based on repression and aggression do not contribute to the sustainability of civilized development of both individuals and human society as a whole.

The scientific heritage of Professor Jürgen Basedow serves as a fertile basis for mental and practical activity in this direction.

¹⁶ Ibidem. P. 8.

A deep bow to Professor Basedow, and may bright memory of him remain forever!

11 March, 2025