Farkhad Karagussov

On the Law of Open Societies
(In memoriam Professor Jürgen Basedow)

1. 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 of how to fulfill professional duties, appropriately engage 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.

In April 2023 Professor Basedow passed away, unexpectedly and suddenly...

And now I am honored to dedicate a few words to remember and thank him.

2. I knew about him in 2000 reading books concerning harmonization and unification of law. That period the CIS Interparliamentary Assembly was very active in developing model laws promoting a convergence of national legislation of former soviet republics.

I also participated in that process of drafting model laws on securities market, insolvency of banks, joint-stock companies. What was interesting, that none of the model laws (except for the model Civil Code) has not been serving as a real source of legal construction or even inspiration for making national laws. I was thinking why it is so…

Thus, 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 a sound 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.

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.

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

As it has been 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. [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].

The idea of the CIS Model Law was declared a kind of similar in terms of creating a source of reference to develop national laws. But two reasons I see to explain why it has remained not successful. First, is that in the CIS was not really strong unity of countries sharing similar vision and interests; domination of one country does not promote sincere desire to implement concepts which are not close to national interests. It relates to both cases, when a model law is developed under the strong influence of one member state, like the model Civil Code or Model law on securities market (though having different results, from full reception of the model or ignoring it), and when a model law is drafted based on legal concepts and experience of the developed World (like the second version of the Model law on joint-stock companies). Secondly, the luck of true dedication to the idea of legal harmonization on both levels – of the CIS and national jurisdictions. In such situation, the CIS model laws have not been neither source of reference for national legislators, nor (especially) an optional instruments to regulate private-law relations between private persons.

3. 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 International Academy of Comparative Law 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.

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 on preparation of my contribution to the four-volume Encyclopedia of Private International Law, published under his editorship in 2017 by Edward Elgar Publishing Ltd.

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 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.

These days, colleagues and co-editors of Professor Basedow dedicate their time and efforts to update the Encyclopedia and make publication of its second edition possible quite soon. And I have been honored to be offered to submit updated version of my contribution to the Encyclopedia.

4. The intellectual and, I would say, ethical or 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 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. In that book he summarized, refined and completed his numerous studies previously published by him over the period since the late 1980s.

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. [And I share the same concern because it does not seem reasonable to attempt to justify as a special branch or sub-branch off law some set of legal norms that are not distinguished by a separate method of regulation and specific social relations as an object of regulation].

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.

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.

This conclusion seems to be very important to understand in our countries which are member States of the Eurasian Economic Union. Before it was created by Russia, Belarus and Kazakhstan in 2014, the Eurasian Economic Community (EurAsEC) was functioning, and in 2013 the idea of developing of a EurAsES Civil Code was proposed by one of the member States. I was a member of the

interstate working group together with my teacher Professor Maidan Suleimenov and some of my colleagues. By that time, our countries were developing a bit differently (and sometimes in different directions), and in contrast to our colleagues from othe EurAzEC member States (like Belarus, Kyrgyzstan and Tajikistan) we strongly opposed the idea of a supranational civil code. Later we also opposed the idea of a supranational basics of civil law. The reason was that we did not share with Russian scholars some conceptual approaches to regulate corporations and corporate relations, civil law transactions and some other important issues.

The discussion ended with the transformation of the EurAsEC into the Eurasian Economic Union (EAEU). And now I can also say that our conceptual disagreement was based on our intuitive feeling (which now we can express in word using conclusions of Professor Basedow) that in all those efforts to create a supranational framework for civil relations in EurAsEC (and it appears to be also true in the Eurasian Economic Union) existence of horizontal relations has been neglected in many cases, but more reliance has been made to the vertical power and communication. This factor makes to think that the EAEU could be created with the purpose which is a bit different from the declared purpose of it to function as an international organization of regional economic integration only.

5. 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 and further development 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".

At the same time, Professor Basedow 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.

I fully share the idea of the outstanding Dutch historian and culturologist Johan Huizinga, he proposed in 1935, that cultivation and preservation of an international feeling as a high ideal (which by this word itself implies the preservation of nationalities, but nationalities that are capable of getting along with each other and not making a disagreement into disagreements / conflicts) can serve as the basis for an ethic in which the contradiction between collectivism and individualism will disappear, and it can help to save the World and civilization. And I believe, that development of the international feeling should be based on true equality where stronger States would realize their responsibility for preservation and protection of the spirit and state of true internationality and never impose their culture destroying other cultures (especially of weaker nations). Such ethical imperative seems to be crucial to promote equality of all States wishing to transform into the open society. And in such case PIL can offer effective instrumentalities.

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 his aforementioned book.

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". 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.

6. 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 of the instruments of foreign policy. Unilateralism begins to prevail over bilateralism in relations".

It seems that the development of this trend is largely based on the subjective attitude of irresponsible rulers / governors in respect of 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.

On that way of further development, the scientific heritage of Professor Jürgen Basedow serves as a fertile soil for mental and practical activity in the field of development of law, legal doctrine and legal culture.

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