

# EUGEN EHRLICH'S NOTION ABOUT JUSTICE AND CONCEPTS OF JUSTICE IN BRAZIL AND UKRAINE\*

Marcos Augusto Maliska<sup>1</sup>  
Nataliia Kyryliuk<sup>2</sup>

## A CONCEPÇÃO DE JUSTIÇA EM EUGEN EHRLICH E OS CONCEITOS DE JUSTIÇA NO BRASIL E NA UCRÂNIA

**ABSTRACT:** Eugen Ehrlich (1862-1922) conceived the idea of justice in aspects of social statics and social dynamics. According to social static, every right is just an expression of the facts of the existing law. For social dynamics, otherwise, the legal precept not only keeps the existing, but also constitutes society instrument to regulate relations in the associations according to their interests. The great driving forces of this dynamic are the individualism and the community idea. According to Ehrlich the social idea of justice did not eliminate the individualism's ideal of justice, but materialized it. Brazil and Ukraine are part of the third and fourth waves of constitutionalization that occurred after World War II. Both countries show that the formal constitutional renewal did not mean strictly institutional renewal. In Brazil, the lack of citizenship is crucial for the fragility of constitutional values in society and for its effective democratization. The pluralism that marks Brazilian society, a pluralism in a negative sense, because it is characterized by profound inequality of the national society, prevents the necessary consensus to strengthen the Community idea. The Ukrainian case reinforces the independence of the judiciary and the judges as indispensable factor for the realization of justice.

**Keywords:** Ehrlich. Justice. Individualism. Constitutionalism. Community. Brazil and Ukraine.

**RESUMO:** Eugen Ehrlich (1862-1922) concebe a ideia de justiça sob os aspectos da estática e da dinâmica sociais. De acordo com a estática social, todo direito é apenas uma expressão dos fatos do direito existente. Para a dinâmica social, ao contrário, o preceito legal não só mantém o existente, mas também se constitui em instrumento da sociedade para regular as relações no seio das associações de acordo com os seus interesses. As grandes forças motrizes dessa dinâmica são o individualismo e a ideia comunitária. De acordo com Ehrlich a ideia social de justiça não eliminou ideal de justiça do individualismo, mas a materializou. Brasil e Ucrânia fazem parte das terceira e quarta ondas de constitucionalização que ocorreram após a Segunda Guerra Mundial. Ambos os países mostram que a renovação constitucional formal não implica necessariamente renovação institucional. No Brasil, a falta de cidadania é crucial para a fragilidade dos valores constitucionais na sociedade e para a sua efetiva democratização. O pluralismo que marca a sociedade brasileira, um pluralismo em sentido negativo, porque é caracterizado por profunda desigualdade da sociedade nacional, impede o consenso necessário para fortalecer a ideia de Comunidade. O caso da Ucrânia reforça a necessidade de independência do poder judicial e dos juízes como fator indispensável para a realização da justiça.

**Palavras-chave:** Ehrlich. Justiça. Individualismo. Constitucionalismo. Comunidade. Brasil e Ucrânia.

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<sup>1</sup> Professor Adjunto de Direito Constitucional do Programa de Mestrado em Direito do UniBrasil Centro Universitário, em Curitiba. Procurador Federal Coordenador da Divisão de Matéria Administrativa da Procuradoria Federal no Estado do Paraná, órgão da PGF/AGU. Professor visitante permanente na Faculdade de Direito de Francisco Beltrão - Cesul. Foi professor visitante nas Universidades de Bayreuth, Alemanha (2007), Wrocław, Polônia (2008 e 2010), Karaganda, Cazaquistão (2012), Salzburg, Austria (2014) e Lviv, Ucrânia (2015). Mestre (2000) e Doutor (2003) em Direito Constitucional pela Universidade Federal do Paraná, com estudos de doutoramento (Doutorado Sandwich) na Ludwig Maximilians Universität, em Munique, Alemanha (2002-2003). Realizou Pós-doutorado no Instituto Max Planck de Direito Público de Heidelberg, Alemanha (2010-2012).

<sup>2</sup> Yuriy Fedkovych Chernivtsi National University, Department of European Law and Comparative Law, Chernivtsi, Ucrânia. PhD (in Law) Yuriy Fedkovych Chernivtsi National University, Department of European Law and Comparative Law, Ukraine.



## 1 INTRODUCTION

Brazil and Ukraine are part of the third and fourth waves of constitutionalization that occurred after World War II. The first, which directly hit the countries involved in the war, especially Germany and Italy, was also given in the 1940s. In the 1970s with the end of authoritarian regimes, southern Europe carried out the second wave. In the 1980s, it was the turn of the constitutionalization of Latin America after the military regimes. Finally, in the 1990s, with the fall of the Berlin wall, it came the turn of the fourth wave of constitutionalization with countries of the old communist bloc led by the Soviet Union.

The success of the first wave of constitutionalization inspired others. The German "year zero" was certainly a unique experience for the renewal of the German society and politics in the second half of the twentieth century. In Brazil, in which the military rule changed to democracy without institutional breakdown and characters of the authoritarian regime introduced themselves as agents of the democratic regime, the institutional renewal is a slow and gradual process that still occur during the term of the new Constitution. If, on one hand, the orderly transition led to national reconciliation of non-violent manner, on the other, the renewal of constitutional text did not mean directly a deeper institutional renewal of the old regime.

The Ukrainian case, in turn, also shows signs that the formal constitutional renewal did not mean strictly institutional renewal. The institutional instability resulting from a profound crisis promoted by historical review of relations with Russia for closer ties with the West, puts the Ukrainian constitutionalism in a very similar situation to the Brazilian, although the Ukrainian crisis is deeper because the interests of Russia.

This article results of a cooperative effort between the University Center of Brazil – UniBrasil in Curitiba and the National University of Chernivtsi to discuss the realities of two different countries from the perspective of Ehrlich's work. The Ehrlich's notion about justice, especially the individualism and the community idea as driving forces of social dynamics, allows a reflection on both countries and how their courts decide. The text is divided into three topics. The first is a description of the Ehrlich's notion about justice. The

second topic has the conceptions of justice in Brazil and the third topic the conceptions of justice in Ukraine.

## **2 EUGEN EHRLICH'S NOTION ABOUT JUSTICE**

Justice directs all societies, because it influences the creation of the legal precept. The judge finds the norm of decision under its guidance. Justice is the criterion of judgment of a norm, a court decision or a state intervention. Justice is the goal of all political parties, at least according to their convictions publicly manifested (EHRLICH, 1989, p. 188).

For Ehrlich science aims to identify the conceptions of justice, its origins and objectives. It is not the task of science to decide on which one is truly fair. What people consider fair depends on the conceptions that one have of the goals of human aspiration, and this is a task for religious leaders, prophets, practical jurists, judges and politicians. Science can only take what it can prove, i.e., it cannot prove the beauty of a Gothic cathedral, or a Beethoven symphony for someone who does not perceive it as such. These are questions of the emotional dimension of life (EHRLICH, 1989, p. 177).

Ehrlich conceived the idea of justice in aspects of social statics and social dynamics. According to social static, every right is just an expression of the facts of the existing law. For social dynamics, otherwise, the legal precept not only keeps the existing, but also constitutes society instrument to regulate relations in the associations according to their interests (EHRLICH, 1989, p. 204). As a social force, justice must reach those who work in the preparation of the norm of decision and the rules. It is a difficult task for those called upon to decide. He must have enough sensitivity to include not only the present, but of future generations, not only the economic aspect but also the political, moral and cultural. Taking such decisions is one of the most difficult tasks one can assign to a person. Reply demands of justice means to perceive what is happening in society, to sense your needs and to predetermine your order. Justice rests on social currents, but it needs of individual action to become effective. Ehrlich here highlights the role of genius, one who is ahead of his/her time and can see the future. Justice owe society its raw content; its own structure it owe the artist who formulated it. There has been not a single justice or a single beauty,

but in every work of justice, one finds justice, like in every work of art its beauty is showed for mankind. Thus, justice formulated in rules, decisions and literary works is, in its perfect expressions, the result of a brilliant synthesis of the contradictions, as it is all that is extraordinary, created at any time in history (EHRlich, 1989, p. 177--182).

The great driving forces of this social dynamic are for Ehrlich the individualism and the community idea. Judicial decisions and interventions by the authorities have the responsibility to change or eliminate the facts of existing law and thus to move society in a certain direction (EHRlich, 1989, p. 204).

For the individualism every man/woman is an end in himself/herself and is not subject to any power that can use it as a means to achieve its goals. Man or woman is not subject to any rule that submits his/her to a foreign individual will or an association, which does not serve itself, but to the whole. The individualism's ideal of justice focuses on the individual and his/her property. The individual, who freely offers his/her property, does not have another master than the state and he/she is not committed to anything, unless the contracts which he/she freely signed. Ehrlich notes that with individualism breaks up all forms of dependence, slavery, landlord, servitude and at least under significant restriction, legal family power. With the dissolution of the associations to which the individual appears linked, remain as binding links of the individual to society only the property, the contract and the State (EHRlich, 1989, p. 204-205).

The Community idea opposed the individualism in the nineteenth century. For Ehrlich the Community idea as expression of socialism or communism cannot fit in this context, because it did not have influence on the formation of the current law. However other more moderate versions have achieved great significance in all fields of law, particularly in recent decades. The community idea has as a starting point the immense internal contradiction of the individualism, because the individualism has some of the greatest inequalities, especially in relation to goods, despite the effort to treat people with equality. If rich and poor are under the same legal provisions the superiority of the rich becomes greater. Unlike socialism and communism, the social movement, that part of the Community idea, does not seek to abolish inequality, but only reduce its effects. It wants to create a counterweight to the superiority of riches through social institutions and legal

provisions that impose limits to overexploitation of who is in top position (EHRlich, 1989, p. 206-207).

According to Ehrlich the social idea of justice did not eliminate the individualism's ideal of justice, but materialized it. However much the individualism and the community idea fight each other, they will throughout history gradually delimiting the areas, where they seem to be justified. Individualism must give to the community, especially to the state, all that it needs to be fair to the individual. The community idea should also be able to justify the community, promising the individual a gift or at least a better future than he/she could have as an isolated subject (EHRlich, 1989, p. 209).

Justice has limits in the reality. According to Ehrlich a widespread idea of justice is that the work should be equated to property. The biblical passage that says worker deserves his/her salary, recognized this idea; and it found full expression in the socialist law, by recognizing the right to the full product of labor. However, of course, one cannot expect its implementation through legal provisions while there is the current society (EHRlich, 1989, p. 203).

The fair resolution of conflicts finds clear limits on the social expressions of power. Ehrlich refers to an example of his time to reflect on the justice of a decision. It was the conflict between the French and the nomadic Arab tribes to desert border in Algeria and Tunisia. The Arab tribes, owners of huge herds of sheep, camels and horses, required large pastures and, depending on the season, long paths to lead them from one grazing area to another. However, this practice was extremely harmful to agriculture. What interests should prevail? The interests of owners of herds or agriculture? (EHRlich, 1989, p. 180).

Issues such as this, which appears daily to a jurist to be resolved, must be addressed, says Ehrlich, taking into account the interests of society in general. Which of the issues at stake is more important to society? If the decision takes only the interests of the parties, shall prevail the interest of the stronger party. Thus, one will not have a fair resolution of the conflict. Justice of the conflict solution depends of the importance to society of interest to be prestigious (EHRlich, 1989, p. 181).

According to Ehrlich justice cannot be reduced to a formula. Thus, the most famous of formulas, one that Bentham borrowed from Beccaria, "the greatest happiness for the

greatest number”, has never been proven and it also does not belong to those things that become evident without proof. Bentham’s formula will never convince everyone like, for example, the religious ascetic, for whom happiness on earth is worthless; the admirer of the aristocracy, for whom the greatest number of people exist not to be happy, but to work and obey; the patriot, seeking more power and greatness of the fatherland than the individuals who compose it. Bentham and his disciples have referred, with this formula, the popular middle classes and the free realization of individual work forces. However, asks Ehrlich: the largest number is no longer happy when men led it and determine its fate? The largest number is no longer happy when it can live at the expense of others, even if means great hardship? The formula of Bentham, concludes the Professor of Chernivtsi, only has the support of those who believe in its correctness: the conscious Democrats. His formula is located and dated: the English bourgeoisie of the early nineteenth century (EHRlich, 1989, p. 183-184).

Ehrlich portrays the complexity of the justice when he reflects on four different theoretical conceptions. He says, first, that the dominant jurisprudence misunderstands completely when it identify the legal precept with the expression “the will of the legislature” and despises the huge participation of society in this work. The natural law, in turn, had a deeper insight of the legal phenomenon in seeking to justify the right feelings of justice, i.e., to seek support legal precepts, at least indirectly, in the conceptions of justice in society. Savigny and Puchta, through the theory of legal consciousness of the people as the foundation of development of the law, only transposed the ideas of natural law to the law of society. Bentham, with his utilitarian theory, which in terms coincides with the concepts of the end of the law of Jhering, drew attention for the first time and comprehensively, to the concept of general interest, despite having he does often confused with the idea of justice and identified with the bourgeois middle class. Finally, refers Ehrlich to the materialist conception of history saying that it was far beyond the theory of natural law, the historical school, Bentham and Jhering, because it showed, that the law and also the legal precepts are only a superstructure of the economic order and result from the power relations in society. However, says Ehrlich, it focused on an one-sidedness, when it intentionally excludes from its field of analysis the personality, the

conceptions about justice and all non-economic influences of society (EHRlich, 1989, p. 186-187).

### 3 CONCEPTS OF JUSTICE IN BRAZIL

Survey based on representative sample of the population of the metropolitan region of Rio de Janeiro, held in 1996, sought to evaluate the Brazilian political culture within the parameters of three classic versions of Western democratic tradition: (i) liberal concept of citizenship; (ii) the classical republican view (Roman) and (iii) the community version (Aristotle).

In the first version, there is only room for the individual and his/her interests. This is the negative freedom, whose main purpose is to guarantee the freedom of individuals from illegal and institutional constraints to devote themselves fully to private life, to the acquisitive appetite of market utilitarian society (CARVALHO, 2002, p. 105).

The second version differs radically from the liberal and emphasizes the idea of *res publica*, common good, even if it requires the sacrifice of the individual interest. The concern for the common good is a “civic virtue”, a concept introduced by this through. Freedom here has a positive connotation, does not refer to the reaction to the state power, but the availability of citizens to be directly involved in the task of government (CARVALHO, 2002, p. 105).

Finally, the third version is similar to the second, but not to be confused with it. This is the community view of citizenship, in which the feeling of belonging to a political community is very important, which in the old version was the city and the modern version became the nation. This version emphasizes the collective over the individual, but it is not necessarily virtuous, because it lacks the emphasis on political action of citizen in public life. The exclusive emphasis on the community can generate the opposite effect, i.e., the policy compliance or a passive participation (CARVALHO, 2002, p. 106).

The conclusion of the survey showed that the Brazilian political culture does not seem to fit in any of the versions that have marked the Western tradition. To the question about which constitutional rights were the most important, i.e., political rights, civil rights or social rights, 56% of respondents, all literate, did not respond. When respondents could

remember any rights gave preference to social rights such as rights to health, to education, to employment, to housing and to welfare. Civil rights like liberty, property, equality, security appear in distant second place. Political rights, i.e. the right to vote and to be voted and to express political opinion, have been almost completely ignored (CARVALHO, 2002, p. 107-108).

The lack of consideration of their own rights is accompanied by low regard for the rights of others. Survey has shown that 44% of respondents feel that the use of violence by the police to get the suspect's confession is justified; 70% agree with the proposition that criminals should not have their rights respected once that do not respect the rights of others (CARVALHO, 2002, p. 109).

According to the survey, citizenship's view as a community is not found in Brazil. The indicator of the community spirit is in the degree of trust that citizens have in each other. Mutual trust would be an indication of the recognition that all share common values and goals. Survey has shown that 60% of respondents consider the Brazilians as unreliable, a very low rate compared with the stable democracies. According to survey, among the reliable are religious leaders and family, followed by friends and neighbors. Among the unreliable are the union leaders and the president just below the mayors and deputies. The survey concluded that trust exists within the religious world and the primary relationships, not on civil and political world (CARVALHO, 2002, p. 109-110).

Participation in the elections is not a reliable indicator of political participation in Brazil, because voting is compulsory. However, other data show great political apathy. Only 2% of respondents participate in political parties; 5.5% participate in neighborhood associations; 1.7% participate in associations of parents and students and 5.8% participate in philanthropic associations. The highest participation is found in unions (13.6%) (CARVALHO, 2002, p. 111).

When the duties of Brazilians were questioned, the survey indicated that 57% of respondents could not point to any duty. If the payment of taxes was mentioned by some respondents as a duty, 41% of them answered that tax evasion is justified in some cases; 70% of respondents do not talk about politics and 68% have no sympathy for a political party (CARVALHO, 2002, p. 112).



The precariousness of the knowledge of rights, social participation and public spirit coexists with high rates of inclusion into the political-legal system. Almost 92% of respondents have identity cards, 90% have voter registration, 88% have a worker card, 87% have CPF (Register people). Respondents also live with high exposure to media, since 74% of them read newspaper and 91% of respondents watch television news. These data show that low civic culture has little or nothing to do with excluding the legal and institutional world. People live without political participation. There is the consumer without the same time the citizen (CARVALHO, 2002, p. 112).

Thus, one can see that the Ehrlich's notion about justice (individualism – liberal and community idea – republicanism and/or communitarianism) has in the Brazilian reality a very different environment. The popular support for dissemination of audios involving telephone conversation between the current President of the Republic Dilma Rousseff and former President Luis Inácio Lula da Silva, as well as private conversations of the former president's family, shows that large segments of the population, the media and even institutions support the maxim that the end justifies the means. This current finding of contemporary Brazil concludes that the survey described above, held in 1996 still remains largely fully current.

The Brazilian Constitution of 1988 significantly innovated the Brazilian constitutional order when addressed issues that go beyond the democratic functioning of the state organization. This linking of the non-state life to the Constitution broke the formalist and individualist view that prevailed in the legal interpretation.<sup>3</sup> Indicative of this change are the various hedging instruments of collective rights that were strengthened during the new constitutional order. The objective effectiveness of fundamental rights as an interpretation of fundamental rights system that extends the efficacy of the fundamental rights to non-governmental organizations is also a measure of this new constitutional order in Brazil.

Despite the initial pessimistic description, one can see that the Brazilian legal system and judicial decisions are quite sensitive to the Community idea. Thus, “living law” and

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<sup>3</sup> According to Barroso (2011) the Constitution is the center of the entire legal system, which radiates its values and gives unity.

“association” are two Ehrlich’s concepts that can support the constitutional law in the investigation of the relationship between the Constitution and pluralism. By portraying the forces of society, expressed in the production of a living law in the context of the various associations that mold the community life, Ehrlich shows the importance of the non-state life to the Constitution. In this context, appears as appropriate the concept of political community, a broader idea that understands the entire civic life into the Constitution. The political community congregates in this sense the various associations and the state leadership does not remove the characteristic of the state as a social association too.

The constitutional state needs a strong civil society, active, independent, to assume their responsibilities and assert its rights. The Constitution as a document of the political community, the broader concept that includes both the state public sphere (state) as the non-state public sphere (associations, to use Ehrlich’s terminology) and private sphere properly (field of individual freedom), has operated a redefinition of the boundaries of non-state spheres, both the associative spheres and private spheres properly. This is the phenomenon of constitutionalisation of civil law, which now includes the private law under the Constitution (MALISKA, 2015, p. 141).

The Brazilian constitutional jurisdiction is attentive to changes that have occurred in society. In this sense, the judgment of ADI 4277 and ADPF 132, in which the Federal Supreme Court – STF gave interpretation to the art. 1723 of the Civil Code<sup>4</sup> according to the Constitution to exclude any meaning to prevent the recognition of marriage between people of the same sex as a family entity. According to the Court, one cannot discriminate against people on grounds of sex, whether in terms of man/woman dichotomy or sexual orientation of them. Pluralism as socio-political and cultural value guarantees freedom about the own sexuality as category inserted in the fundamental rights of the individual and expression of his/her autonomy. The rights to privacy and private life also integrate the list of fundamental rights protected by entrenchment clause.

When the Court did not apply the state norm that defines stable union only as the union between man and woman, the Court was sensitive to Ehrlich’s idea of law as “an

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<sup>4</sup> Art. 1.723. It is recognized as a family entity the stable union between a man and a woman, set in public, continuous and lasting coexistence and established with the purpose of starting a family.

order of habitual behavior” and recognized the existence of an living law independent from state norm, attributing constitutional legitimacy to this living law.

The synthesis of the negative description of the political participation of Brazilian society in the country's political life and the advances of the Constitution and judicial decisions for citizenship shows that citizenship is not yet spread in society. This diagnosis, which involves both the popular classes and the middle classes, shows that people are still hostage of interests that define the performance of the institutions. If, on the one hand, specific advances are achieved, the system as a whole remains subject to conservative forces that prevent structural changes regarding the formation of a consistent political community.<sup>5</sup> Although this consistency does not mean a substantial integration, it will be more than formal bond of rights that unite citizens negatively in the private branch free of state intervention. If the 1988 Constitution tends to the Community idea described by Ehrlich, citizen political consciousness must tread the same path to create bonds of solidarity between different people. Of course, a difficult task for Brazil, a country that still has huge deficits of citizenship.

#### **4 CONCEPTS OF JUSTICE IN UKRAINE**

While watching the multicultural life of Bukovina, Ehrlich noted that many nationalities lived together: Ruthenians, Romanians, Germans, Jews, Russians, Slovaks, Hungarians and Gypsies. Lawyers with experience could say for sure that all of them had only one the same right, which operated throughout Austria. However, even a superficial view of things would have convinced him that each of the nations followed its own legal bases during the daily routine. The ancient principle of individualism in law continued to live in reality, but it was only in shadow of the territorial principle (EHRlich, 1911a, p. 2; EHRlich, 1911b, p. 129-147; EPЛИХ, 2005).

In Ehrlich`s legal doctrine a holistic concept of justice was not developed, but his understanding of the concept is formally incorporated in the theory of “living law”.

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<sup>5</sup> According to Vianna and Carvalho (2002), the 1988 Constitution brought an institutionally favorable scenario to a republican recreation, although it cannot say that the conservative sectors come endorsing and supporting a perspective that make the law and its institutions an initial access to free and active citizenship.

Syncretic unity of law and justice is manifested primarily in sociological approach to the definition of these concepts. According to Ehrlich, justice is a social force, and speaking of that force, it is always said about its power and if there is enough of this power, to achieve its goals to those who follow the norms of decision laid down in the right of jurists and law (ANTONOV et al., 2011, p. 237).

However, he did not consider the “inner sense of justice of judges” as very important. Ehrlich did not deny the impact of legislation as a source of law on the activities of a judge, but he stressed three essential factors of influence on court decisions and the administration of justice.

The first factor – value of judgments in judicial interpretation. Ehrlich indicates the presence of normative assumptions about the need of "correct" decision. So, he does not agree with those, who deny this factor in legal proceedings.

The second factor – social and historical context of the case. Each case should be examined according to its historical and social context. For the judges the circumstances of each case are “coefficients of social tendency” and therefore the judge must at least partly rely on the prevailing at the time decision tendencies or social conditions. Ehrlich believed that the open recognition of the social and historical aspects of law enables judges to have a better understanding of lack of legal norms in time and space and freed them from “heavy chains” of technicalities.

The third factor – “the identity of the judge”. Ehrlich considered it a significant factor in every justice and in particular in justice of freedom. Freedom, judge`s freedom by Ehrlich is a conservative freedom of responsible attitude to legal development, it is judge`s concern about the proper personality. This “personality” comprehensively considers all factors such as written law, historical and social context, sees “living energy” in law. This aspect is worth looking in more detail.

Today in Ukraine, it is often noted that one of the guarantees of fair justice (judicial independence) is in the funding of the courts, its “special procedure”, “sustainable security” that is part of “a mechanism for protection of the judiciary”. Thanks to the solution of the problems of financing the judiciary and social security, one can hope to ensure the unity of the judiciary. Improving the status of judges, further strengthening of

their independence, increase of legal immunity of judges from undue influence and the development of a democratic society, building legal state are prerequisites for adequate protection of constitutional rights and freedoms of all citizen (АМДЖАДІН et al., 2005, p. 234).

Judicial independence consists first of the independence of justice, being unrelated to any circumstances and other things during the administration of justice, except the law. The guarantee of judicial independence is defined by the Constitution and laws of Ukraine as a necessary condition of an impartial and fair justice and impartial courts should actually be provided. Therefore, reducing of the guarantees of judicial independence in case of adoption of new laws or amendments to existing laws is unacceptable. Expenditures for the maintenance of the courts are separately defined on the State Budget of Ukraine. The agreement of the distribution of funds between the courts and judges, who are worthy of funding, and protection from the pressure of the various branches of government will once and for all solve the problem of real independence of judges.

Believing that “there is no other guarantees of justice, except the personality of the judge”, Ehrlich said that only when the judge is free, one can expect from him/her responsibility for the "injustice". Unlike the technicalities, the free-law school did not remove the judge from his/her responsibility for the decision, appealing to the “correctness” of the legally established legal fictions or “simple” implementation of the intentions of the legislator. The judge, according to Ehrlich, should be responsible for his/her own decisions, which are possible because of his/her freedom.

Now in Ukraine, one can talk about the desire to enable and ensure the independence of courts and judges (financial, ideological, etc.) as noted above. These are the factors of promoting freedom, but are they internal factors? Will they make it possible (and indeed whether there is such a desire and need to) for “more freedom” of judges in judicial decisions? If judges can have “greater freedom”, will depend on “the principles of judicial tradition”, the characteristics of the legal system of Ukraine and, of course, on the level of “personality of the judge”, which Ehrlich was talking about.

According to L.M. Moskvich, knowledge, abilities and skills are the technological basis of personal professional capacity of judges. Without them, he/she could not

successfully carry out professional functions. The development and activation of knowledge and skills are related to the process of creativity. Therefore, the importance of the creative component of professional judges, and therefore in the structure of his/her personal professional capacity is hard to overemphasize. Creativity stimulates judge's desire to achieve excellence in professional activities. As reasonably argued by L.M. Moskvich, creativity of the judge is determined by his/her ability to look at individuality of the case and to be able to find the generality, abstraction and typicality of the legal standards (МОСКВИЧ, 2004, p. 224). Thus, the judge creates a common unity between abstract and concrete. To do this he/she must be active and have the mobility of cognitive processes, intelligence, flexibility of thinking, erudition, analytical and predictive capabilities. After all, if the judge has low mental capacity, no intelligence and cognitive activity, poor memory, no motivation to succeed at work, indifference to the profession, etc., his/her activities will not be creative, and therefore effective

The Constitution of Ukraine recognizes many of components of the principle of fairness in the "General Principles" and in the section "The rights, freedoms and duties of man and citizen". The protection of inalienable rights and freedoms is vested in the court, which is enshrined in the current Court System and in the procedural law, in particular in Article 7 of the Law of Ukraine about the Judicial System and Status of Judges. A fair and impartial review of cases within a reasonable time, which is set by law is a component of the right to judicial protection.<sup>6</sup> Fairness, integrity and reasonable are principles defined by civil law (Art. 3 of the Civil Code of Ukraine). According to Art. 1 of the Procedural Civil Code of Ukraine the objective of the civil justice is to promote a fair and impartial resolution of civil cases in order to protect the violated, unrecognized or disputed rights, freedoms and interests of individuals, the rights and interests of legal entities and state interests. Achieving justice is also task of criminal justice: it must ensure that everyone who committed a crime was prosecuted and no innocent has been punished (art. 2 of the Criminal Procedure Code of Ukraine).

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<sup>6</sup> Про судоустрій і статус суддів : Закон України від 7 липня 2010 р. № 2453–VI // Офіційний вісник України. – 2010 р. – № 55(1). – Ст. 1900 (On judicial system and status of judges, Law of Ukraine on July 7, 2010 r. Number 2453-VI // Official Bulletin of Ukraine. - 2010. - Number 55 (1). - Art. 1900)

The ideas of justice have become essential in the practice of the Constitutional Court of Ukraine. In its judgment on January 30, 2003, Court took into consideration certain resolutions of the investigator and prosecutor that “judgment is acknowledged only if it corresponds to the requirements of justice and provides effective remedy”.<sup>7</sup> In another case of more lenient sentence on November 2, 2004, the Constitutional Court stated, “justice is one of the basic principles of law and it is crucial to defining it as a regulator of social relations, one of the human rights dimensions. ... Justice is manifested by law, in particular, in equality before the law, in the relation between crime and punishment, purposes and means that inform the legislators elected to achieve them”.<sup>8</sup>

In practice, judges often have to deal with gaps in the law. In this regard, the issue of "freedom of judges", "judicial discretion", are transferred from theory to practice. The ideas that were expressed by Ehrlich 100 years ago are more relevant than ever today in Ukraine. An example of the recognition of the so-called "living law" according to E. Ehrlich is application by courts in certain cases of acts of plenum, decisions, circulars, generalizations of jurisprudence of the Supreme Court of Ukraine, which are advisory for judges and other officials, who are applying the law.

Resolutions, decisions and circulars of the Supreme Court and Supreme specialized courts of Ukraine are the only uniform benchmark to application of the law, that allow to fill the gaps in the legal act, to exclude violations of substantive and procedural law and to require courts to hear cases in a timely manner, providing guaranteed protection of rights, freedoms and interests.

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<sup>7</sup> Рішення Конституційного Суду України у справі за конституційним поданням ВС України щодо відповідності Конституції України (конституційності) положень ч. 3 ст. 120, ч. 6 ст. 234, ч. 3 ст. 236 КПК України (справа про розгляд судом окремих постанов слідчого і прокурора) від 30 січня 2003 р. № 3-рп/2003 // Офіційний вісник України. – 2003. – № 6. – Ст. 245. (The decision of the Constitutional Court of Ukraine in the constitutional provision Forces of Ukraine on the constitutionality of Ukraine (constitutionality) of the provisions of ch. 3. 120, p. 6. 234, p. 3. 236 Code of Ukraine (case on court rulings individual investigator and prosecutor) of 30 January 2003 r. Number 3-rp / 2003 // Official Bulletin of Ukraine. - 2003. - № 6. - Art. 245).

<sup>8</sup> Рішення Конституційного Суду України за конституційним поданням ВС України щодо відповідності Конституції України (конституційності) положень статті 69 Кримінального кодексу України (у справі про призначення судом більш м'якого покарання) від 2 листопада 2004 р. № 15-рп // Офіційний вісник України. – 2004. – № 45. – Ст. 2975. (The decision of the Constitutional Court of Ukraine of the constitutional petition the Interior Ministry of Ukraine on the constitutionality of Ukraine (constitutionality) of Article 69 of the Criminal Code of Ukraine (in the case of the more lenient penalty) on November 2, 2004. Rp number 15 // Official Bulletin of Ukraine. - 2004. - № 45. - Art. 2975.)

The concept of “living law” can logically be explained by the decisions of the Constitutional Court of Ukraine, which often changes its position into a reversed one. In January 26, 2012 the Constitutional Court of Ukraine published an interpretation of the law of Ukraine on social payments, under which the Cabinet regulated the social benefits financed by the State budget. Such position of the Constitutional Court of Ukraine can only be explained by changing of the social relations as a result of a dynamic process that reflects the will of the majority of citizens. In this case, Ehrlich`s view about justice that “there is no justice, given once and for all; any justice and so as the written law are the result of historical development” (DOROSH, 2005, p. 168-184) is clearly confirmed.

Therefore, one can say that the jurisprudence is created by court`s decisions on specific cases, resolutions of the Plenary, information letters, etc. and it is considered an additional regulator of social relations, the link between the law and real life, which is just a manifestation of “living law” by Ehrlich.

## **5 CONCLUSION**

From the description of the concepts of justice in Brazil and in Ukraine, one can observe that the differences between the two countries are in the following points. In Brazil, the lack of citizenship is crucial for the fragility of constitutional values in society and for its effective democratization. The pluralism that marks Brazilian society, a pluralism in a negative sense, because it is characterized by profound inequality of the national society, prevents the necessary consensus to strengthen the Community idea. The Brazilian Constitution of 1988 surpassed the individualistic view of law and incorporated the Community idea. However, as the national pluralism prevents a substantial community and individualism sets a very fragile link to the national union, the Community idea as solidarity between different not yet found its way consisting of factor of disintegration and weakening of society. The undeniable advances of the 1988 Constitution were not sufficient for a complete renovation of the country (not only normative).

The Ukrainian case reinforces the independence of the judiciary and the judges as indispensable factor for the realization of justice. Backtracking on gains already secured for this independence are not tolerable. It is necessary to do special mention to the budgetary



autonomy from pressure of other branches of government. The guarantee of justice is also found in the judge's personality and thus the judge's independence is crucial. The importance of standardization of jurisprudential understanding of the law is another factor of justice, because it refers to the ideal of equality, in which is based the legal system. The same factual basis has the same legal understanding, i.e., equal treatment for similar situations.

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