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Administration of justice in Ukraine as an indicator of modern constitutionalism

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■ **Abstract.** The relevance of the study of judicial constitutionalism is explained by the public necessity to restore confidence in the Constitutional Court of Ukraine. The necessity of reforming the regulation of the Constitutional Court of Ukraine is relevant to this study. The purpose of the research is to cover the connection and impact of the results of the administration of justice in Ukraine on the overall state of constitutionalism. In the course of exploring the subject of this work, the authors, use the dialectical method of cognition to clarify the essence of the concept of “constitutionalism”, the formal legal method to analyse the sources of constitutional law relating to the administration of justice and develop recommendations for overcoming the identified systemic problems, the logical and legal method to identify the state of compliance by judges and public authorities with the basic principles of the constitutional order of Ukraine, and the analysis of legal practice, identified differences in understanding the legal content of the rule of law principle in the administration of justice, and thus its unequal application, and identified two systemic problems. One of them emerged as a result of the Supreme Court's ambiguous position that a notary cannot be a defendant in cases of illegally committed executive inscriptions, and the other, on the contrary, is due to the ignoring of decisions of the Constitutional Court of Ukraine and the Supreme Court by public authorities empowered to ensure social protection of the population. The proposed research is the result of the analysis of some specific practical aspects - the results of the judicial proceedings in Ukraine, and the identification of systemic problems in judicial practice which affect the assessment of constitutionalism as a constitutional and legal reality. The authors emphasise the necessity of raising legal culture and legal awareness, both in society in general and among lawyers in particular. It is possible if the educational process combines the acquisition of professional and practical competencies with the education of both human and professional qualities. The practical significance of the work is a comprehensive consideration of current issues of the administration of justice in Ukraine from a practical and theoretical standpoint

■ **Keywords:** constitutional order; judiciary; judicial proceedings; rule of law; judicial practice

■ Introduction

The concept of judicial constitutionalism involves a wide range of issues and provides for a rather thorough analysis and elaboration of its components. In practical terms, the issue of judicial constitutionalism is relevant both for constitutional scholars and for judges of general courts, judges of the Constitutional

Court, and all those who are called upon to ensure the immediate effect of the Constitution of Ukraine. The study of the problems of judicial constitutionalism identified by judicial practice and constitutional justice practice is highly relevant in the context of legal and judicial reform.

The issues of the administration of justice in the context of modern Ukrainian constitutionalism remain relevant and are raised by both constitutional scholars and legal practitioners. It should be emphasised that constitutionalism for the author of the research is, first and foremost, the point where theory and practice, constitutional-legal reality.

The following conclusions are interesting and useful for the research.

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B. Kalynovskyi, K. Sokh, K. Kulchytska, P. Kolomiitsev define constitutional legality as a real system of constitutionalism, a complex phenomenon that consists of strict observance of the Constitution and its provisions during its immediate effect and ensuring the implementation of the law by all public authorities, public organisations, officials of all levels and citizens, courts and is an integral feature of the constitutional order as an integral part of the rule of law [1, p. 114]. In agreement with this approach, it should be supplemented by the fact that constitutional legality should include both strict adherence to the Constitution and correct interpretation of its provisions, their uniform application and using a substantive rather than a formal approach.

The author agrees with the position of O. Kopytova, O. Bratel, T. Kulyk, & N. Kosiak, in their study on the analysis of the judiciary in transitional justice countries belonging to the continental law system note that the rule of law as a guiding principle in judicial activity has a twofold manifestation: in the activity of each judge during law enforcement; in the activity of the highest judicial body in the judicial system – the Supreme Court, when it concludes, particularly on the correct application of substantive law [2, p. 148-149]. Therewith, it should be noted that the rule of law in the administration of justice is applied and interpreted by judges, including the Supreme Court, rather broadly and frequently in the abstract, and a unified approach should be ensured.

The authors of the research on the role of the media as a parallel instrument of justice for crimes against civilians, Y. Bidzilya, L. Snitsarchuk, E. Solomin, H. Hetsko, & L. Rusynko-Bombyk, believe that the involvement of the media in justice for crimes against civilians is possible and important. Considering that this type of crime is an international crime against human rights, the media can perform several non-legal functions to establish justice and punish the perpetrators. The authors of the research proposal to develop a model of media involvement in justice for crimes against civilians, considering the expansion of international and domestic armed conflicts. In particular, it is proposed that the media should: cover and document crimes, including through the latest technologies; provide social support and opportunities for victims to express their views; and coordinate efforts between governmental and non-governmental entities interested in justice for crimes against civilians. The author substantiates the idea that the media are subjects of the prevention of offences against civilians [3, p. 305].

In general, the authors' position has a specific rational basis, but an important aspect is missed: usually, bodies and officials authorised to investigate criminal unlawful actions are representatives of public authorities, who are vested with appropriate powers but are burdened with several obligations and

restrictions that ensure their impartiality, independence, and guarantee the reliability and appropriateness of the evidence they collect. The media belong to the sphere of private law by their legal status, thus, various kinds of influence on their representatives cannot be excluded; in addition, they do not have the appropriate education and practical training to perform such activities, thus, their participation in the process of administering justice for offences against civilians is possible, but cannot be the main one.

The relevance of this research is to identify, analyse and find ways to solve acute human rights problems related to the administration of justice. In addition, the experience of the Federal Republic of Germany, the French Republic and the Republic of Poland are explored to compare the problematic aspects of the administration of justice.

The purpose of this research is to cover the connection and impact of the results of the administration of justice in Ukraine on the overall state of constitutionalism. To achieve this purpose, the author considers it necessary to address the following tasks: – to identify current trends in judicial practice in Ukraine; – to characterise the impact of the results of the administration of justice on the state of compliance with the Constitution and the principles of the constitutional order of Ukraine; – to substantiate the importance of judicial practice in the context of characterising constitutionalism in Ukraine. The scientific originality of the work is a comprehensive consideration of current issues of the administration of justice in Ukraine from a practical and theoretical standpoint, and a perspective on constitutionalism – as a constitutional-legal reality.

■ Materials and Methods

This research consists of two main stages: a dialectical comprehension of the doctrine of constitutionalism and theoretical developments related to the chosen subject, and an investigation of judicial and administrative practice in the context of identifying systemic problems.

The methods used by the authors are conventionally based on the methodology of legal science. Thus, the dialectical method of cognition allowed clarifying the essence of the concept of “constitutionalism” and operating with such categories as “justice”, “judicial practice”, and “judicial power”; the formal-legal method allowed analysing of the sources of constitutional law relating to the administration of justice and formulating recommendations for overcoming the identified systemic problems; the logical-legal method allowed identifying the state of compliance with the basic principles of the constitutional order of Ukraine by judges and public authorities. The analysis of legal practice was performed based on the author's long-term practical activity,

which allowed identifying and theorising systemic problems in the administration of justice in terms of ensuring human and civil rights and freedoms.

Concerning the theoretical component of the work, the authors have analysed relevant scientific publications on constitutional legality as a legal regime for the exercise of state power in countries in transition (post-Soviet states), the rule of law during the transitional period of legislation of transitional justice countries belonging to the continental legal system, justice as a condition for the implementation of Ukraine's European integration course, and constitutionalism as a regime of legal restriction of state power, constitutionalism as a philosophical-legal category and socio-political phenomenon, constitutional law as a transnational science.

■ Results and Discussion

When analysing the administration of justice in European countries, there are no similar problems, which are probably explained by different practices of legal regulation and law enforcement.

Thus, in the Federal Republic of Germany, the General Act on Equal Treatment (AGG) provides for various sanctions for violations of the law, mainly in the form of financial compensation. This Law defines the procedure for compensation for material (financial) and non-material damage. The AGG distinguishes between two alternative situations: remedies in labour law (sections 15-16 of the AGG) and remedies in private relations (sections 19-21 of the AGG) [4, p. 15].

There are several ways to enforce judgments in Germany: by applying for a garnishment to a local court having jurisdiction over the enforcement of a judgment (*Vollstreckungsgericht*), in addition, or a judgment creditor may apply to a bailiff (*Gerichtsvollzieher*) for enforcement of the judgment by levying execution on the debtor's personal property; the judgment can be enforced against the debtor's immovable property by applying for a forced mortgage (*Zwangshypothek*) or forced sale of immovable property (*Zwangsversteigerung*), and if the immovable property generates income, the creditor can apply for forced administration (*Zwangsverwaltung*). There is no time limit for the enforcement of national court decisions in Germany, but claims that are declared final and absolute are subject to a 30-year limitation period [5].

The variety of ways to enforce court judgments and the unlimited period for submitting a judgment for enforcement certainly establish conditions more favourable to the enforcement of court judgments, which in turn guarantees the true efficiency of justice. Thus, the experience of Germany is definitely useful and should be considered by the Ukrainian legislator.

When considering the administration of justice in France, it is interesting to note that the French judicial system is managed by the Ministry of Justice

(Chancellery), which is headed by the Minister of Justice – the Keeper of the Seals. The Ministry of Justice of France is the developer of regulations in the field of justice, determines the national policy in this area, and manages the resources of the judicial system [6].

In the theory and practice of Ukrainian constitutionalism, the legislative, executive and judicial branches of government are characterised separately, thus, it is unusual for a ministry to be at the head of the judiciary. Therewith, in the area of the administration of justice in Ukraine, the judicial flaw is related to the Ministry of Justice, particularly in the enforcement of court decisions.

In addition, in Poland, there is a connection between the government and the judiciary that does not present promising prospects for the efficiency of justice. Thus, at the end of 2019, the Polish Sejm approved a law designed to streamline the structure and functions of the judiciary, allowing the Polish government to dismiss judges or reduce their salaries. The European Union does not approve of such trends, thus, in early 2020, the European Court of Justice ("CJEU") issued an interim decision obliging the Polish government to suspend the activities of the disciplinary chamber to bring judges to disciplinary responsibility [7].

Undoubtedly, the independence of judges is a guarantee of the effective functioning of the judicial system, which is a guarantee of the administration of justice in compliance with the rule of law and human rights. The Polish experience demonstrates that political struggle and attempts to imbalance the system of checks and balances are not unique to Ukrainian constitutionalism.

In this research, the focus is on law enforcement officers, but such requirements are relevant for lawyers. The high personal culture and morality of a particular lawyer are the factors that determine the application of the law in such a way as to comply with the rule of law, legality and the basic principles of constitutionalism.

Summarising the approaches to understanding the concept of "constitutionalism", M. Kozyubra notes that constitutionalism is a doctrine and phenomenon of political and legal life developed based on liberalism as an ideology and its values, including human dignity, inalienable human rights, justice, legal equality, the principle of separation of powers, the rule of law, impartial and fair justice, etc. and the author states that in this respect there are no differences in the three models of constitutionalism (American, English, and European). These three models are based on the same Euro-Atlantic liberal values, with some emphasis being given to the application of these values in the American, English or continental European varieties of constitutionalism (including French and German), which is conditioned upon the

historically specific features of constitutionalism in these countries [8, p. 59-60].

Ukrainian constitutionalism is definitely more inclined to the European model, but it is necessary to consider the historical features of the establishment of statehood in Ukraine, and a particular legacy of the legal system, the fact that Ukraine was reviving its democracy, which has been inherent since the 16th century, after a long period of Soviet rule, which, even as of 2022, still has its echoes in the legal reality.

The author agrees with the position of L. Ostafiychuk, who insists on the importance of ensuring the independence of judges, including pressure from the Supreme Court and its legal positions [9, p. 33].

The idea that legal nihilism should be eradicated primarily among judges, lawyers, prosecutors, investigators, and civil servants is in line with the content of this research, and constitutionalism in Ukraine should be established at the functional level [10, p. 38]. The case law analysed in this research demonstrates the validity of the above thesis.

V. Kovtuniak, exploring the theoretical and practical aspects of the procedures for amending constitutions, concludes that the dynamism of modern social life requires the possibility of modernisation of constitutions [11, p. 50]. For Ukrainian constitutionalism, it is necessary to consider the fact that most of the amendments to the Basic Law were politicised and served as a way to satisfy the interests of particular political forces.

T. Humeniuk notes that for Ukrainian constitutionalism, the experience of France regarding effective interaction between the president, parliament and government, and the experience of Germany regarding the interaction between parliament and government is useful [12, p. 23]. Insist that interaction, the ability to act together to solve the functions of the state between all public authorities and local governments is a determining factor in the effective functioning of the state and effective constitutionalism.

However, the most painful problems in terms of ensuring the rule of law, namely human rights guarantees, are those related to the administration of justice in Ukraine.

Section VIII of the Constitution of Ukraine defines the basic principles of justice in Ukraine, Article 124 of the Basic Law [13] states that in Ukraine justice is administered exclusively by courts and that any legal dispute and any criminal charge are within the jurisdiction of the courts. In cases provided for by law, the courts hear other cases. In turn, Section II of the Constitution guarantees the right to defend one's rights in court, and Article 55 provides that human and civil rights and freedoms are protected by the courts. Therewith, the Basic Law guarantees everyone the right to complain in court against decisions, actions and inaction of public authorities and

their officials and employees; the right to file a constitutional complaint with the Constitutional Court of Ukraine on the grounds established by this Constitution and according to the procedure established by law [13].

Analysing these provisions, they appear to be safeguarding and should provide an effective human rights mechanism. But legal and legislative systems are complex and integrated with several other areas. In practice, unfortunately, they continue to identify legal provisions and precedents that contradict the Basic Law. In addition, the analysis of judicial practice in Ukraine demonstrates several highly controversial trends, which are difficult to identify and generalise due to the specificity of the issues they concern.

Thus, consider the following legislative provisions. According to clause 19 of Article 34 of the Law of Ukraine "On Notaries", notaries make an executive inscription, which is a notarial act [14]. According to Article 87 of the Law of Ukraine "On Notaries", notaries make executive inscriptions on documents establishing debts to collect money or reclaim property from the debtor. The list of such documents under which debt collection is performed indisputably based on executive orders is established by the Government of Ukraine [14].

According to subparagraphs 1.1, 3.1, 3.2 of Chapter 16 of the Procedure for Performing Notarial Acts by Notaries of Ukraine, approved by Order of the Ministry of Justice of Ukraine No. 296/5 of February 22, 2012 [15], notaries perform executive inscriptions on documents establishing debt or on transactions, the foreclosure of property under which is performed based on executive inscriptions, to recover monetary amounts or reclaim property from the debtor.

The law provides that the notary makes writs of execution when the submitted documents state that the debtor is indisputable or otherwise liable to the debtor towards the recoverer. The list of documents that can confirm the indisputability of the debt, which can be collected indisputably based on an executive inscription to a notary, is approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1172 dated 06/29/1999 [16].

On the one hand, this provision is a positive step to reduce the burden on the judicial system, as there is no need to get involved in a long court process if the debt is indisputable, and the notary, according to their legal status, can be the entity that verifies this indisputability. Admittedly, provided that the person is honest. In general, the possibility of such actions by notaries would not pose a threat if it were not for the court practice in this area.

The Supreme Court, composed of the panel of judges of the Third Judicial Chamber of the Civil Court of Cassation, considered case No. 200/3452/17 and established that "a private notary is an improper

defendant in the case since civil liability for an illegally made executive inscription is imposed not on the notary, but on the person who applied for the executive inscription" [17].

The court's reasoning is as follows: "A notary is a public person who is authorised by the state to certify rights and facts of legal significance and perform other notarial acts to give them legal validity. When performing notarial acts, a notary acts impartially and cannot serve the interests of any of the persons involved in the notarial act. The notary does not become a party to civil legal relations between these persons, and therefore cannot violate civil rights that are the content of these relations. There is no procedural interest of the notary in the subject of the dispute and the implementation of the decision" [17].

For some unknown reason, this statement does not consider the fact that a notary can perform their work unprofessionally, irresponsibly or with integrity. Provided that notaries know that they will not be personally liable for violations of the procedure for making executive inscriptions, it is not difficult to predict the relevant actions in this area.

This type of work does not allow for a more extensive analysis, but, evidently, the position of the Supreme Court is not sufficiently substantiated, and it is widely used in court practice, in cases of challenging notaries' executive inscriptions, which ultimately results in violation of fundamental human and civil rights and freedoms.

Notably, one more relevant issue remains unresolved, despite the legal position of the courts. The Law of Ukraine "On the Status of War Veterans, Guarantees of Their Social Protection" [18] provides for the payment of one-time financial assistance to combatants by May 5 each year. In 2007, Article 12 of the Law was amended to specify the amount of this assistance. In particular, that this amount is determined by the Government.

The decision of the Constitutional Court of Ukraine (case on the subject matter and content of the law on the State Budget of Ukraine) of 05/22/2008 No. 10-rp/2008 declared these changes unconstitutional [19]. By the decision of the Constitutional Court of Ukraine dated 02/27/2020 No. 3-p/2020, a separate provision of paragraph 26 of Section VI "Final and Transitional Provisions" of the Budget Code of Ukraine was declared inconsistent with the Constitution of Ukraine (unconstitutional) in the part stipulating that the provisions of Articles 12, 13, 14, 15 and 16 of the Law of Ukraine "On the Status of War Veterans, Guarantees of Their Social Protection" are applied in the manner and amounts established by the Cabinet of Ministers of Ukraine, based on the available financial resources of the state and local budgets and budgets of general funds [20].

Considering the above decisions of the Constitutional Court of Ukraine, the amount of annual lump-sum financial assistance for combatants should be five minimum retirement pensions until May 5, 2020.

A similar application of the Decision of the Constitutional Court of Ukraine dated 02/27/2020 No. 3-p/2020 to the legal relations on the payment of a one-time annual financial assistance until May 5, 2020, in the amount provided for in Article 13 of the Law of Ukraine "On the Status of War Veterans, Guarantees of Their Social Protection" was expressed by the Supreme Court in its decision of 09/29/2020 in the model case No. 440/2722/20 [21].

Therewith, from 2020 to the present day, payments are made in a reduced amount, according to the resolutions of the Cabinet of Ministers of Ukraine (Resolution of the Cabinet of Ministers of Ukraine of 05/07/2022 No. 540, which approved the "Procedure for using in 2022 the state budget funds provided for the payment of annual one-time financial assistance to war veterans and victims of Nazi persecution") [22]. And combatants are forced to go to court, each individually, to receive the full amount of assistance. It raises another problem in the area of enforcement of court decisions. But this aspect will be highlighted in the following publications.

In general, a situation has arisen where the Government and its subordinate executive authorities and local governments, which are vested with powers in the field of social protection and implement these payments explicitly, ignore the decisions of the Constitutional Court, the position of the Supreme Court, and the extensive court practice that sided with citizens. Such a situation is an extremely blatant violation of the rule of law and a manifestation of criminal disrespect for the judiciary and the body of constitutional jurisdiction.

Starting from the subject of research, the primary focus should be on understanding the essence of constitutionalism.

Regarding the current opinions of scholars on Ukrainian constitutionalism, attention can be paid to the position of I. Gordienko identifies five characteristics of this phenomenon. Among them, in particular, it is noted that constitutionalism in Ukraine is based on the desire to ensure the implementation of the principles of constitutionalism enshrined in constitutional legislation, namely: the principle of democracy, the rule of law, constitutional legality, and the priority of human rights [23, p. 93].

Such a position is generally consistent with general scientific approaches to a broad understanding of constitutionalism. But once again, the principle of the rule of law and democracy should be interpreted equally in law enforcement, which is not the case in practice.

The authors of the research on the role of constitutional complaints in the legislative process, N. Brovko, L. Medvid, I. Makhnovskyi, V. Akhmedov & M. Leonenko, conclude that the introduction of the institution of constitutional complaints is one of the main conditions for ensuring the supremacy of the Basic Law and the development of constitutionalism in the system. The authors, after conducting analytical and statistical studies, concluded, however, that the most effective form of human rights protection is the consideration of a constitutional complaint by the Constitutional Court without intermediaries, in particular, courts of general jurisdiction; they propose a full regulatory constitutional complaint as the most effective model of a constitutional complaint [24, p. 848].

In Ukraine, in turn, a constitutional complaint was introduced in 2016 as a possibility to declare unconstitutional the law applied in a court decision in a case, while the right to a constitutional complaint arises after other national legal remedies have been exhausted. The introduction of this institution contributes to the development of constitutionalism in Ukraine, but note that the Constitution of Ukraine [13] explicitly states that it is the law of Ukraine applied in the final court decision in a case that may be recognised as contrary to the Constitution of Ukraine, i.e., a subordinate regulation cannot be the subject of a constitutional complaint.

Therewith, the analysis of law enforcement practice, mostly judicial practice, demonstrates that in the presence of a human-centred Constitution, several serious human rights problems are precisely in the area of interpretation and application of legal provisions, and at the level of adoption of regulations by public authorities at various levels.

And in this regard, the human factor is an important aspect, and in particular the level of professionalism of the relevant specialists involved in the above activities.

The authors of the research devoted themselves to the investigation of the level of self-educational competence of cadets of higher educational institutions with a special learning environment, I. Okhrimenko, R. Perkatyi, H. Topchii, Y. Andrusyshyn & A. Ponomarenko [25, p. 66], believe that the modern world imposes fundamentally new requirements for the qualifications of a modern law enforcement

officer, their moral maturity, general cultural and intellectual level. Thus, the author substantiates the idea that law enforcement officers are subject to such requirements as being educated, highly cultured persons, having deep professional knowledge and skills in various fields, and having the ability to constantly improve their level of knowledge and skills.

■ Conclusions

It can be stated that the administration of justice in Ukraine is an indicator of modern constitutionalism, from the standpoint that courts remain an effective element of the human rights mechanism, and in situations where public authorities are bound by part 2 of Article 19 of the Constitution of Ukraine and act on the principle of formal application of provisions, it is the courts that have the opportunity to apply the principle of the rule of law, the supremacy and effect of the Constitution, justice and doctrinal achievements of constitutionalism when resolving a dispute on the merits.

In the course of this study, two specific problems in law enforcement were identified, described and analysed. Therewith, in the first situation, it means that false statements that have become a model in judicial practice result in the impossibility of full implementation of the right guaranteed by Article 55 of the Constitution of Ukraine. As for the proposals to overcome this problem, the author believes that amending the legislation on executive orders would be wrong, and the problem should be resolved by additional consideration of this issue by the Supreme Court. As for the second situation, it is precisely the case when justice is being done, the courts and the Constitutional Court of Ukraine have made several decisions ensuring the right to social protection for specific categories of citizens, while these decisions have been ignored by public authorities from the highest to the local level.

As a general proposal, to overcome the problems identified in this research and other similar problems existing in Ukrainian constitutionalism, it is necessary to improve legal culture and legal understanding, both in society in general and, first of all, among lawyers. It is possible if the educational process combines the acquisition of professional and practical competencies with the education of both human and professional qualities.

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Здійснення правосуддя в Україні як індикатор сучасного конституціоналізму

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■ **Анотація.** Актуальність дослідження проблематики судового конституціоналізму зумовлена суспільною потребою у відновленні довіри до Конституційного Суду України. Необхідність реформування нормативно-правового забезпечення діяльності Конституційного Суду України актуалізує це дослідження. Метою статті є розкриття зв'язку та впливу результатів здійснення правосуддя в Україні на загальний стан конституціоналізму. У процесі дослідження предмета зазначеної роботи, автори, використавши діалектичний метод пізнання для з'ясування сутності поняття «конституціоналізм», формально-юридичний метод – для аналізу джерел конституційного права, щодо здійснення правосуддя та формулювання рекомендацій для подолання виявлених системних проблем, логіко-юридичний метод – для виявлення стану дотримання суддями й органами публічної влади основних засад конституційного ладу України, та здійснивши аналіз юридичної практики, з'ясували наявність розбіжностей у розумінні юридичного змісту принципу верховенства права під час здійснення правосуддя, а отже, неоднакового його застосування, та виявили дві системні проблеми. Одна з них виникла внаслідок неоднозначної позиції Верховного Суду стосовно того, що нотаріус не може бути відповідачем у справах за незаконно вчинені виконавчі написи, а інша, навпаки, існує через ігнорування органами публічної влади, що уповноважені забезпечувати соціальний захист населення, рішень Конституційного Суду України та Верховного Суду. Запропонована стаття є результатом аналізу виокремлених конкретних практичних аспектів, що є результатами здійснення судочинства в Україні, виявлення в судовій практиці системних проблем, що впливають на оцінку конституціоналізму, як конституційно-правової реальності. Автори акцентують на необхідності підвищення правової культури та правосвідомості не лише загалом у суспільстві, а передусім серед юристів, що можливе за умови поєднання в освітньому процесі набуття фахових і практичних компетентностей з вихованням як людських, так і професійних якостей. Практична значущість роботи полягає в комплексному розгляді актуальних питань здійснення правосуддя в Україні з практичного та теоретичного погляду

■ **Ключові слова:** конституційний лад; судова влада; судочинство; верховенство права; судова практика