

THE LAW OF PUBLIC CONSTRUCTION IN THE COUNTRIES OF THE EUROPEAN UNION: EXPERIENCE OF GERMANY AND ECONOMIC AND LEGAL DIMENSION OF ITS CREATION IN UKRAINE

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Abstract. *The subject of the study.* A new public administration system in Ukraine should be created through administrative reform. The existing system of public administration in Ukraine remains generally inefficient, with an eclectic mix of institutions inherited from the Soviet era and new institutions formed during Ukraine's independence. It is argued that the rapid development of modern social relations naturally causes and is conditioned by the continuous transformation and progress of various sectors of public and state life. Scientific and technological progress, informatization and updating of production methods cause an objective need to revise and adopt fundamentally new legislation, study and implement advanced forms of organization of social relations. It is clear that the construction industry is a component of the national economy, which requires meaningful legal regulation, does not stay away from modern social and state development. The complexity and significance of the construction industry, its multifaceted nature require, in particular, the study and implementation of perfect regulatory mechanisms developed by developed countries with highly developed economies, strong and perfect standards of functioning of the state apparatus, legislation. *Methodology.* The national construction legislation was reviewed in comparison with the experience of the Federal Republic of Germany. It is concluded that the review of the institutional architecture of the construction industry of the Federal Republic of Germany, the basic principles of the formation of German public construction law as a factor of the modern economy, its progressive forms and methods has been carried out. The content of this branch of public law, its impact on economic processes in the state, the formation and change of the main economic indicators are assessed. The conclusion is made about the objective connection between the state and development of national legislation, in particular construction legislation, and the degree of economic development of the state. *The purpose of the study.* By choosing the strategic path of institutional and fundamental reforms, Ukraine also implements the best legal and state experience of modern progressive states with developed democracy, state-building and law-making, developed economy. In the field of law and law-making, improvement of legal education and science the experience of the Federal Republic of Germany has proved its perfection, efficiency and progressiveness for Ukraine. German public construction law is not the only area that has become a model for domestic public law and legislation, in particular, it is worth mentioning the German experience of administrative procedure law and legislation, which was used in the adoption of the Code of Administrative Procedure of Ukraine, and administrative procedure law and legislation, which was the basis for the preparation of the Law of Ukraine "On Administrative Procedure". Thus, the time-tested and experienced German administrative and legal theory has become one of the prerequisites for the creation and development of national branches of public law, including the law of public construction. The economic and legal dimension of public construction law in Ukraine is that the construction industry is a productive sector of the economy, the efficiency and successful functioning of which depends on a simultaneous set of factors, including, in particular, the availability and completeness of national construction and administrative and procedural legislation, the development of the theory of public construction law, transparency and validity of the activities of administrative bodies in the field of construction. *Conclusion of study.* It is concluded that the new branch of

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national special administrative law – public construction law of Ukraine is manifested in three dimensions: the substantive dimension of national public construction law and the prerequisites for its formation and further development; European (foreign) experience of legal regulation of public construction; economic and legal dimension of its creation in Ukraine.

Key words: public construction law, state administration, General Administrative Law, Special Administrative Law, economy, construction, administrative body, administrative act, Construction Code, administrative procedure, administrative discretion, land management.

JEL Classification: K10, K15, Q15

1. Introduction

Ukraine and Ukrainian society at the next stage of the evolutionary development of national state and social institutions faced an objective challenge of reassessment, revision and introduction of fundamentally new principles of organization and functioning of public authorities in the state. As a result, in 1998, in order to ensure the reform of the public administration system in Ukraine, to create conditions for building a democratic, social, legal state in accordance with the Constitution of Ukraine, to establish and ensure human and civil rights, the Concept of Administrative Reform in Ukraine was adopted (On Measures to Implement the Concept of Administrative Reform in Ukraine, 1999).

In particular, it is recognized that an important factor in overcoming the transformation crisis of Ukrainian society is the creation of a modern, effective system of public administration. The need to form a new system of public administration as a tool to overcome the crisis in Ukraine has been underestimated until recently (On Measures to Implement the Concept of Administrative Reform in Ukraine, 1999).

A new public administration system in Ukraine should be created through administrative reform. The existing system of public administration in Ukraine remains generally inefficient, with an eclectic mix of institutions inherited from the Soviet era and new institutions formed during Ukraine's independence. This system is internally contradictory, incomplete, cumbersome and disconnected from the people, as a result of which the existing state administration has become a brake on socio-economic and political reforms (1).

Thus, the content of administrative reform is, on the one hand, a comprehensive restructuring of the existing system of public administration in all spheres of public life in Ukraine. On the other hand, in the development of some public administration institutions that Ukraine has not yet established as a sovereign state (On Measures to Implement the Concept of Administrative Reform in Ukraine, 1999).

The purpose of the administrative reform is to gradually create a system of public administration that will ensure the formation of Ukraine as

a highly developed, legal, civilized European state with a high standard of living, social stability, culture and democracy, will allow it to become an influential factor in the world and Europe. It also aims to form a system of public administration that will be closer to the needs and demands of people, and the main priority of its activities will be to serve the people and national interests. This system of public administration will be controlled by the people, transparent, based on scientific principles and effective. Expenses for the maintenance of administrative staff will be adequate to the financial and economic state of the state (1).

In order to achieve the goal of administrative reform, it is necessary to solve a number of tasks (On Measures to Implement the Concept of Administrative Reform in Ukraine, 1999):

- formation of an effective organization of executive power both at the central and local levels of government;
- formation of a modern system of local self-government;
- introduction of a new ideology of the functioning of the executive branch and local self-government as an activity to ensure the realization of the rights and freedoms of citizens, the provision of state and public services;
- organization on the new basis of public service and service in local self-government bodies;
- creation of a modern system of training and retraining of management personnel;
- introduction of a rational administrative and territorial system.

It also provides for the implementation of administrative reform over a relatively long period, which includes three stages (On Measures to Implement the Concept of Administrative Reform in Ukraine, 1999).

At the preparatory stage of the reform, the Concept of Administrative Reform and the Program of Administrative Reform Implementation should be developed and officially approved. At this stage, priority issues related to the current improvement of elements of the existing public administration system are being addressed.

The second stage introduces the organizational and legal framework for reforming key elements of the public administration system.

At the third stage, transformation processes deepen, new institutions, organizational structures and instruments of public administration are formed.

Therefore, one of the directions of implementation of administrative reform measures in Ukraine was the development and implementation of perfect legal regulation of public relations with the participation of public authorities. The legal basis for the organization and functioning of the participants of relations, in addition to the institutional component, has become a mandatory measure not only of administrative reform, but also a guarantee of successful development of the Ukrainian state, its institutions, the formation of a market economy, the establishment and protection of human rights and freedoms (Article 3 of the Constitution of Ukraine) (Constitution of Ukraine, 1996).

2. Content, features and comparative studies of the state construction industry

The rapid development of modern social relations naturally causes and is conditioned by the continuous transformation and progress of various sectors of public and state life. Scientific and technological progress, informatization and renewal of production methods cause an objective need to revise and adopt fundamentally new legislation, study and implement advanced forms of organization of social relations. It is clear that the construction industry is a component of the national economy, which requires meaningful legal regulation, does not stay away from modern social and state development. The complexity and significance of the construction industry, its multifaceted nature require, in particular, the study and implementation of perfect regulatory mechanisms developed by developed countries with highly developed economies, strong and perfect standards of functioning of the state apparatus, legislation.

Critically assessing such a new branch of national special administrative law as public construction law of Ukraine, it is necessary to pay attention to its dimensions (aspects) and features:

- substantive legal dimension of the national law of public construction and prerequisites for its formation and further development;
- European (foreign) experience of legal regulation of the public construction industry;
- economic and legal dimension of its creation in Ukraine.

Consider these aspects and features of public construction law in turn. It should be emphasized that these dimensions (or otherwise – the disclosure of objectively existing features and patterns of public construction law) are not independent, but are in fact interrelated and determinative. That is, a thorough justification of the content of the Law

on State Construction leads to the adoption of high-quality legislation in the field of state construction, developed on the basis of progressive European experience in the legal regulation of state construction. Instead, a self-sufficient construction industry, enshrined in the current norms of national public construction legislation, is one of the decisive factors in the stability and progressive development of the national economy, the progress of both individual and overall industries, financial and credit and banking systems.

Firstly, as it is known, the whole set of administrative law norms can be divided into general administrative law norms and special administrative law norms. These groups of administrative law norms form, respectively, General Administrative Law and Special Administrative Law (Melnyk, 2014; Melnyk, 2010).

Given the existence of social relations, legal norms that regulate them, and participants in such relations, it is possible to talk about the constant formation and development of numerous branches of special administrative law, which includes the state construction law of Ukraine.

Public Construction Law of Ukraine is an independent branch of Special Administrative Law, which, although almost not substantiated in Ukraine, has all the necessary prerequisites for this (Bevzenko, 2022):

- in the state, construction legal relations that have a public-legal (administrative-legal) nature constantly arise, develop, and terminate;
- participants in administrative-legal construction relations are special subjects – the customer, consulting engineer, executive authorities, the Verkhovna Rada of the Autonomous Republic of Crimea, the Council of Ministers of the Autonomous Republic of Crimea, local self-government bodies;
- Ukraine has adopted national legislation that directly regulates construction relations, in particular, the Laws of Ukraine "On Fundamentals of Urban Planning", "On Liability for Offenses in the Field of Urban Planning", "On General Scheme of Planning the Territory of Ukraine", "On Architectural Activities", "On Construction Regulations", "On Regulation of Urban Planning Activities", state construction regulations, etc.

The Public Construction Law of Ukraine is essentially (Bevzenko, 2022):

- an independent branch of Special Administrative Law;
- a branch of the legislation of Ukraine;
- a branch of legal science;
- an educational subject.

Unlike other public and private branches of national law (criminal, commercial, civil), which also have construction relations as their subject,

the legislation of Ukraine on public construction is characterized by the following (Bevzenko, 2022):

- construction relations are regulated by the norms of administrative law contained in legislative acts and by-laws. Sources of the Public Construction Law of Ukraine (laws, by-laws) form a hierarchical internally-organized system;
- subject of regulation of the Public Construction Law of Ukraine is relations that arise, change and terminate between natural persons, legal entities and administrative bodies in connection with construction;
- administrative bodies in construction legal relations adopt administrative acts within the limits of their powers, administrative discretion and administrative procedure;
- the Public Construction Law of Ukraine contains all concepts and categories of General Administrative Law without exception – in particular, sources, principles and subjects of administrative law, tools of administrative bodies, extrajudicial control over the activities (decisions) of administrative bodies (Grytsenko, 2015; Maurer, 2020).

Thus, Public Construction Law of Ukraine arises in connection with the issuance of administrative acts by administrative bodies (application by these bodies of other instruments of their activities) in order to ensure the rights, freedoms and interests of individuals and legal entities in the field of construction. The existence and boundaries of this branch of special administrative law are determined by administrative and legal relations in the field of construction (Bevzenko, 2022).

Secondly, by choosing the strategic path of institutional and fundamental reforms, Ukraine is also implementing the best legal and state experience of modern progressive states with developed democracy, state-building and law-making, and developed economy. In the field of law and lawmaking, improvement of legal education and science the experience of the Federal Republic of Germany has proved its perfection, efficiency and progressiveness for Ukraine. German Public Construction Law is not the only area that has become a model for domestic public law and legislation, in particular, it is worth mentioning the German experience of Administrative Procedure Law and Legislation, which was used in the adoption of the Code of Administrative Procedure of Ukraine, and Administrative Procedure Law and Legislation, which was the basis for the preparation of the Law of Ukraine "On Administrative Procedure". Thus, the time-tested and experienced German administrative and legal theory has become one of the prerequisites for the creation and development of national branches of public law, including the Public Construction Law.

In modern German Public Construction Law (Öffentliches Baurecht), it is considered that the

concept of "construction law" includes both public and private construction law. Public Construction Law is of primary interest for legal research; in the general sense of the term, it contains rules, technical conditions and restrictions related to the structural use of land plots. The Law of Private Construction, on the contrary, covers the construction use of land in relations between private law entities; it determines whether and to what extent a land plot can be used for construction, subject to the requirements of civil law (Brenner, 2020).

Public Construction Law contains a set of legal norms that relate to the structural use of land, i.e., the permissibility, procedure and facilitation of the construction of structures, their intended use and restrictions. Public Construction Law is a general term for the legal issues of general urban planning law, including urban planning, special urban planning law and construction regulation law (Brenner, 2020).

Therefore, the "publicity" of construction law can be judged by its aggregate presence in construction legal relations:

- norms of Public and General Administrative Law (administrative-legal norms);
- administrative body (administrative bodies);
- acceptance/application by the administrative body of the instrument/instruments of the activity of administrative bodies;
- administrative procedure of acceptance/application by the administrative body of the instrument/instruments of activity of administrative bodies;
- exercise of competence by the administrative body within the limits of its administrative discretion. Administrative discretion will also be checked and will testify the "publicity" of construction law, whether the administrative body has acted with errors (flaws) in the administrative discretion – has not applied it, has acted outside its limits or has acted not in accordance with the prescriptions of legal norms, that is, an illegal (unlawful) exercise of discretion has taken place (Maurer, 2011; Zeller, 2021).

The main legal regulator of public construction relations in Germany is the German Construction Code (Baugesetzbuch (BauGB), paragraph § 1 Tasks, Concepts and Principles of Land Management, which stipulates that (Baugesetzbuch, 2022):

- (1) The task of land management is to prepare and manage structural and other land use in the municipality in accordance with this code.
- (2) Land management projects are a land management project (preparatory land management project) and a territory plan (mandatory land management project).
- (3) Municipalities are obliged to draw up land use plans as soon as possible and to the extent necessary for the development and order in the city; the list may be taken into account, in particular, when

allocating territories for residential development. The right to develop land management projects and urban planning acts is not provided for; a claim cannot be based on a contract either.

(4) Land use plans must be adapted to the objectives of spatial planning.

(5) Land use plans are developed to ensure sustainable urban development that reconciles social, economic and environmental requirements, as well as responsibility to future generations and socially equitable land use that serves the common good, taking into account the housing needs of the population. They should contribute to the creation of a humane environment, protect and develop the natural foundations of life, promote climate protection and adaptation to climate, especially in the field of urban planning, as well as preserve and improve urban design and the image of the city and landscape in terms of the development of building culture. For this purpose, the development of the city should be carried out primarily through internal development measures.

Thus, in the Federal Republic of Germany, the public construction industry is mainly regulated by the Construction Code (Baugesetzbuch (BauGB)), which describes the procedures for the start, duration and completion of construction under the control of administrative bodies authorized to adopt administrative acts and use other tools of activity – planning acts, administrative contracts, acts-actions.

On the other hand, the Ukrainian construction legislation, unlike the German one, is not so codified and is represented by numerous and diverse regulations. Thus, the sources of construction legislation of Ukraine are: 1) codes, 2) laws, 3) resolutions of the Cabinet of Ministers of Ukraine, 4) orders of central executive bodies, 5) state construction regulations, 6) branch construction regulations, 7) national standards that relate to the requirements for the production of urban planning, design, scientific design and work documentation, design methods, construction work processes, test methods, structural and engineering systems.

There is such a hierarchy of sources of the Public Construction Law of Ukraine:

1) Codes:

- Water Code of Ukraine dated June 6, 1995 No. 213/95-BP;
- Land Code of Ukraine dated October 25, 2001 No. 2768-III;
- Air Code of Ukraine dated May 19, 2011 No. 3393-VI;

2) Laws:

- "On Administrative Procedure" dated February 17, 2022 No. 2073-IX;
- "On Mediation" dated November 16, 2021 No. 1875-IX;

- "On Law-Making Activity" dated February 15, 2022;
- "On Construction Regulations" dated November 5, 2009 No. 1704-VI;
- "On Regulation of Urban Planning Activities" dated February 17, 2011 No. 3038-VI;
- "On Fundamentals of Urban Planning" dated November 16, 1992 No. 2780-XII;
- "On Legal Regime of the Territory Exposed to Radioactive Contamination as a Result of Chornobyl Disaster" dated February 27, 1991 No. 791a-XII;
- "On the State Land Cadastre" dated July 7, 2011 No. 3613-VI;
- "On the General Planning Scheme of the Territory of Ukraine" dated February 7, 2002 No. 3059-III;
- "On the Improvement of Settlements" dated September 6, 2005 No. 2807-IV;
- "On Liability for Offenses in the Field of Urban Planning" dated October 14, 1994 No. 208/94-VR;
- "On Alienation of Land Plots and Other Objects of Immovable Property Located on Them in Private Ownership for the Social Needs and on the Grounds of Social Necessity" dated November 17, 2009 No. 1559-VI;
- "On Administrative Services" dated September 6, 2012 No. 5203-VI;
- "On Land Management" dated May 22, 2003 No. 858-IV;
- "On Architectural Activity" dated May 20, 1999 No. 687-XIV;
- "On Motorways" dated September 8, 2005 No. 2862-IV;
- "On the Protection of Cultural Heritage" dated June 8, 2000 No. 1805-III;
- "On Comprehensive Reconstruction of Quarters (Districts) of Outdated Housing Stock" dated December 22, 2006 No. 525-V;
- "On Access to Construction, Transport, and Electric Power Facilities For The Purpose of Developing Telecommunication Networks" dated February 7, 2017 No. 1834-VIII;
- "On Licensing of Types of Economic Activity" dated March 2, 2015 No. 222-VIII;
- "On the Permit System in the Field of Economic Activity" dated September 6, 2005 No. 2806-IV;
- "On the Basic Principles of State Supervision (Control) in the Field of Economic Activity" dated April 5, 2007 No. 877-V;
- "On the Procedure for Allocating in Kind (On-Site) Land Plots to Owners of Land Shares" dated June 5, 2003 No. 899-IV;
- "On Heat Supply" dated June 2, 2005 No. 2633-IV;
- "On Public Procurement" dated December 25, 2015 No. 922-VIII;
- "On Environmental Impact Assessment" dated May 23, 2017 No. 2059-VIII;
- "On Strategic Environmental Assessment" dated March 20, 2018 No. 2354-VIII.

It should be emphasized that this hierarchical list of sources of construction law of Ukraine is not exhaustive, as there are a significant number of other regulations of a subordinate nature, namely: resolutions of the Cabinet of Ministers of Ukraine, regulations (orders, provisions) of central executive authorities, state and sectoral construction standards. The authors are convinced that given such a large number of regulations, the European (German) experience in the construction industry, it is time to discuss, develop and adopt a codified regulatory act (the Construction Code of Ukraine), which should regulate administrative procedures (declarative and interventional procedures) for the start, duration and completion of construction.

It briefly explains why it is necessary to adopt the Construction Code of Ukraine:

1. To organize, unify (codify) and update the construction norms contained in numerous, diverse, contradictory normative legal acts – these are about 3 codes, 25 laws, 24 resolutions of the Cabinet of Ministers of Ukraine, 13 orders of central executive authorities.

2. To clarify the legal regulation of construction, to exclude competition of construction norms of law, which are contained in numerous normative acts of different legal force.

3. For a comprehensive and meaningful settlement of the issues of construction and restoration of construction objects, infrastructure after the victory of Ukraine and the end of the war.

4. To create clear and transparent legislative preconditions for investing in the economy of Ukraine, to provide guarantees of successful business for national and foreign investors.

5. To regulate procedures in the construction industry, to create conditions for quick and convenient access of individuals and legal entities to services provided by administrative bodies (authorities). That is, the adoption of the Construction Code of Ukraine will ensure the establishment and protection of human rights and freedoms, which is the main duty of the state (Article 3 of the Constitution of Ukraine).

6. To create unambiguous legal and transparent conditions for the functioning of administrative bodies (authorities) in the construction industry, to prevent corruption in this area.

7. To prevent the growth of violations of subjective rights, freedoms and interests in the field of construction, to reduce the growing number of administrative disputes involving public authorities.

8. To fully digitalize the provision of services in the construction industry, the introduction of e-government in this area.

9. The adoption of the Construction Code of Ukraine is conditioned by the Law of Ukraine "On

Administrative Procedure" in the norms of which it is stipulated, in particular (On administrative procedure of Ukraine, 2022):

- 1) within 12 months from the date of publication of this Law to submit to the Verkhovna Rada of Ukraine proposals for bringing legislative acts of Ukraine in line with this Law;

- 2) within 18 months from the date of publication of this Law, take measures to adopt and/or update regulatory legal acts of executive authorities arising from this Law, ensuring their entry into force simultaneously with the entry into force of this Law...

And, finally, thirdly, the economic and legal dimension of public construction law in Ukraine is that the construction industry is a productive sector of the economy, the efficiency and success of which depends on a simultaneous set of factors, including, in particular, the availability and perfection of national construction and administrative and procedural legislation, the development of the theory of Public Construction Law, transparency and validity of the activities of administrative bodies in the field of construction. The construction industry ensures the creation of a significant number of jobs, the involvement of low, medium and highly qualified specialists, the formation of a significant share in the national gross domestic product, the saturation of the fiscal and financial and banking systems with circulating, liquid funds. Instead, a stable, predictable and effective economic policy in Ukraine, the production sphere is a factor of success of both the construction industry as a whole and its individual sectors in particular.

3. Conclusions

Therefore, the purpose of the review is to consider the institutional architecture of the construction industry of the Federal Republic of Germany, the basic principles of the formation of German public construction law as a factor in the development of the modern economy, its progressive forms and methods. The content of this branch of public law, its impact on economic processes in the state, the formation and change of the main economic indicators are assessed. The conclusion is made about the objective connection between the state and development of national legislation, in particular construction legislation, and the degree of economic development of the state.

In Ukraine, a branch of Special Administrative Law – Public Construction Law – has been formed for a long time and continues to develop. In this area there are "own" subjects, administrative procedures, tools of administrative bodies, legal regulation. At the same time, the provisions of modern domestic general administrative law are fundamental and

determinative for the construction law of Ukraine. The construction law of Ukraine is characterized by the following:

- construction relations are regulated by the norms of administrative law contained in legislative acts and by-laws. Sources of the Public Construction Law of Ukraine (laws, by-laws) form a hierarchical internally-organized system;
- subject of regulation of the Public Construction Law of Ukraine is relations that arise, change and terminate between natural persons, legal entities and administrative bodies in connection with construction;
- administrative bodies in construction legal relations adopt administrative acts within the limits of their powers, administrative discretion and administrative procedure;
- the Public Construction Law of Ukraine contains all concepts and categories of General Administrative Law without exception – in particular, sources, principles and subjects of administrative law, tools of administrative bodies, extrajudicial control over the activities (decisions) of administrative bodies.

The Public Construction Law of Ukraine arises in connection with the issuance of administrative acts by administrative bodies (the use by these bodies of other instruments of their activities) in order to ensure the rights, freedoms and interests of individuals and legal entities in the field of construction. The existence and limits of this branch of special administrative law are determined by administrative and legal relations of construction.

For proper law enforcement and the formation of quality administrative practice in the field of construction, it is advisable to understand the systemic relationship between Public Construction Law and General Administrative Law. Since these phenomena (Public Construction Law of Ukraine and General Administrative Law) do not exist and cannot exist separately, they mutually influence each other, change and develop.

Thus, General Administrative Law is the fundamental basis of Public Construction Law; within the framework of Public Construction Law, the general provisions of General Administrative Law are used, developed, supplemented by special rules and regulations.

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