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To be born amid war conflict: The right to a legal identity in Ukraine

Abstract

Human rights are an integral part of an open society and a democratic state governed by the rule of law. Among them, the right to a legal identity occupies an important place, however, ensuring its proper implementation in today's difficult conditions of war conflicts has not been an easy task. Not surprisingly, the necessity to provide a legal identity for all, including birth registration,¹ is among the global goals of sustainable development, as this helps a person's recognition before the law and protection of their rights, any of which may be violated unnoticed (right to a health care, education and others).² Proper registration of a person's death also ensures that the rights of that person's heirs can be exercised.

In this article, we examine the Ukrainian experience when ensuring the right of a person to birth and death registration through special civil proceedings. In the conclusions we justify a new approach to protecting the right to a legal identity and the method of its implementation within court procedure,

¹ 17 Goals, <https://sdgs.un.org/goals> [accessed: 23.12.2020].

² SDG indicator metadata, <https://unstats.un.org/sdgs/metadata/files/Metadata-16-09-01.pdf> [accessed: 23.12.2020].

in particular, in military conflicts, residence or permanent stay in temporarily occupied territories, etc. territories in which there are no legitimate public authorities.

Keywords: access to justice, human rights, transitional justice, Ukraine

1. Introduction. The right to a legal identity within war conflict in Ukraine

The existence of a military conflict and occupied territories that are not under the control of the state does not release it from the obligation to ensure the rule of law and access to justice. In this respect, one of the most important issues is the determination of the right for persons living or staying in the temporarily occupied territory to have a legal identity, because regardless of the social or political circumstances, their lives continue.

Ukraine is one of the state-founders of the United Nations (hereinafter – UN)³ and it claims to support the UN Goals of Sustainable Development.⁴ Among these goals there is one to provide legal identity for all persons, in particular, birth registration⁵ in order to ensure their recognition, which gives a person the opportunity to implement their rights, in particular the rights to health care, education and others.⁶

The right of every individual to be recognized as a person before a law is guaranteed by the International Covenant on Civil and Political Rights⁷. This means that human rights cannot be asserted within the national public order without legal existence⁸.

³ See *Member States*, <https://www.un.org/en/member-states/> [accessed: 23.12.2020].

⁴ For more see Ukaz Prezidenta Ukrainy pro tsili staloho rozvytku Ukrainy na period do 2030 roku [Decree of the President of Ukraine on the sustainable development goals of Ukraine until 2030], <https://zakon.rada.gov.ua/laws/show/722/2019> [accessed: 23.12.2020].

⁵ *Goals 17*, op.cit.

⁶ Home United Nations Legal Identity Agenda, <https://unstats.un.org/legal-identity-agenda/> [accessed: 11.03.2022].

⁷ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed: 10.03.2022].

⁸ P.M. Taylor, *A Commentary on the International Covenant on Civil and Political*, Cambridge University Press, Cambridge 2020, pp. 445-457, <https://doi.org/10.1017/9781108689458.019>.

According to the Constitution of Ukraine⁹ all humans are free and equal in dignity and rights, and human rights and freedoms are inalienable and inviolable (Art. 21); citizens have equal constitutional rights and freedoms and are equal before the law (Art. 24); the rights and freedoms of man and citizen are protected by the court (Art. 55). It is noteworthy that there is no similar or identical provision about the legal identity of a person in the Basic Law of Ukraine¹⁰, nevertheless, the idea exists and is protected by the below discussed mechanism.

Legal identity is conceived as the status of having legal personhood which brings with it rights and duties.¹¹ Civil registration is critical to every person because it is the basis for establishing one's legal identity.¹² This is essential to the realization of human rights and accessing basic social protection, and this helps to define who is entitled to rights and services - and who is excluded.¹³

There is no universal indicator used to measure legal identity, so it is difficult to establish the exact number of people lacking one.¹⁴ To be undocumented means to be denied opportunities and possibilities to exercise civil and social rights, in practice, there is no distinction between an undocumented person whose birth was never registered and one whose birth was registered, but who never obtained his or her national identity document.¹⁵ Therefore, the idea of implementing 'Transitional Justice' in Ukraine, which was first introduced in 2018 due to the need to provide access to courts and law enforcement agencies in the territory controlled by the Ukrainian authorities, has recently become extremely relevant for Ukraine.

⁹ Konstytutsiya Ukrayiny [Constitution of Ukraine], WWP 1996, No. 30, p. 141.

¹⁰ See more also in O. Zadorognyi, *Porushennya ahresyvnouy viynoyu Rosiys'koyi Federatsiyi proty Ukrayiny osnovnykh pryntsyviv mizhnarodnoho prava* [Violation of the basic principles of international law by the aggressive war of the Russian Federation against Ukraine], KIS, Kyiv 2015, pp. 300-367.

¹¹ *The right to a legal identity or the right to a legal ID?*, <https://www.statelessness.eu/updates/blog/right-legal-identity-or-right-legal-id> [accessed: 23.12.2020].

¹² L.G. López et al., *Civil Registration, Human Rights, and Social Protection in Asia and the Pacific*, "Asia-Pacific Population Journal" 2014, no. 29(1), pp. 75-99, <https://www.unescap.org/sites/default/files/APPJ-Vol-29-No-1.pdf> [accessed: 10.03.2022].

¹³ Ibid, p. 75.

¹⁴ V. Viala, *Why is Having a Legal Identity Fundamental to Human Rights?*, <https://disblog.thalesgroup.com/government/2019/06/18/why-is-having-a-legal-identity-fundamental-to-human-rights/> [accessed: 23.12.2020].

¹⁵ Ibid.

In the judgments in the case *Tsezar and others v Ukraine*¹⁶ related to access of Ukrainian citizens to the courts, the ECHR clearly confirmed that access to the courts is secured by Ukraine.¹⁷ In the meantime, we may see some challenges that persons who seek to establish their legal identity will face in Ukraine while registering facts of birth or death.

The armed aggression of 2014–2015 against Ukraine led to the occupation of the territory of the Autonomous Republic of Crimea (ARC), as well as the formation of the so-called ‘Luhansk and Donetsk People’s Republics’ (hereinafter - LPR and DPR, respectively). These circumstances caused difficulties in ensuring the legal status of persons residing in the temporarily occupied territory of Ukraine. In order to ensure the rights and freedoms of citizens and regulate the legal regime in the temporarily occupied territory of Ukraine, several laws and other acts were adopted,¹⁸ in particular, two laws were introduced – ‘On Ensuring the Rights and Freedoms of Citizens and Legal Regime in the Temporarily Occupied Territory of Ukraine’ of 15 April 2014, No. 1207-VII,¹⁹ and the Law of Ukraine ‘On Particular Aspects of Public Policy Aimed at Safeguarding State Sovereignty of Ukraine over the Temporarily Occupied Territory of Donetsk and Luhansk Regions’ of 18 January 2018, No. 2268-VIII.²⁰

¹⁶ ECHR judgment on 13 February 2018 in case *Tsezar and Others v. Ukraine*, 73590/14, 73593/14, 73820/14, 4635/15, 5200/15, 5206/15, and 7289/15, Strada Lex. See also ECHR judgment on 25 July 2017 in case *Khlebig v. Ukraine*, 2945/16, HUDOC.

¹⁷ ECHR judgment on 13 February 2018 in case *Tsezar and Others v. Ukraine*, 73590/14, 73593/14, 73820/14, 4635/15, 5200/15, 5206/15, and 7289/15; ECHR judgment on 25 July 2017 in case *Khlebig v. Ukraine*, 2945/16.

¹⁸ Law of Ukraine No. 1207-VII of 15 April 2014 on Ensuring the Rights and Freedoms of Citizens and Legal Regime in the Temporarily Occupied Territory of Ukraine, https://www.legislationline.org/download/id/5489/file/Ukraine_law_%20On%20Securing%20the%20Rights%20and%20Freedom%20of%20Citizens_2014_en.pdf [accessed: 10.03.2022]; *Zakon Ukrayiny pro osoblyvyy poryadok mistsevoho samovryaduvannya v okremykh rayonakh Donets'koyi ta ta Luhans'koyi oblastey* [Resolution of the Verkhovna Rada of Ukraine No. 254-VIII of 17.03.2015 ‘On the recognition of certain districts, cities, towns and villages of Donetsk and Luhansk regions temporarily occupied territories], *Vidomosti Verkhovnoyi Rady* [hereinafter: VVR] 2014, No. 45, p. 2043. See more also R. Kuibida, L. Moroz, R. Smilax, *Justice in the East of Ukraine During the Ongoing Armed Conflict*, “International Journal for Court Administration” 2020, no. 11(2), p. 9, <http://doi.org/10.36745/ijca.341>.

¹⁹ *Zakon Ukrayiny pro zabezpechennya prav i svobod hromadyan ta pravovyy rezhym na tymchasovo okupovaniy terytoriyi Ukrayiny* [The Law of Ukraine No. 1207-VII ‘On Ensuring the Rights and Freedoms of Citizens and Legal Regime in the Temporarily Occupied Territory of Ukraine of 15 April 2014], VVR 2014, No. 26, p. 892.

²⁰ *Zakon Ukrayiny pro osoblyvosti derzhavnoyi polityky iz zabezpechennya derzhavnogo suverenitetu Ukrayiny na tymchasovo okupovanykh terytoriyakh u Donets'kiy*

According to the provisions of these laws, any acts (documents, decisions), issued by the state authorities, local self-government, enterprises, institutions, organizations in conditions of occupation regime are invalid and do not cause legal consequences. Thus, the problem of ensuring the right to a legal identity for persons residing in these territories has come about and is becoming a widespread issue, in particular when concerning births and deaths.

'Namibian exceptions'²¹ as a principle of recognition the documents issued by the occupants' authority with the goal of human rights protection applied in Ukrainian cases. Courts in Ukraine began to use this principle and implement the idea in 2015 due to the lack of any other way to ensure all people have access to justice and human rights protection.

It should be noted that more than one and a half million of the inhabitants of Ukraine²² were forced to leave their homes, and approximately 5 million are living in the occupied territories, accounting for 13% of the total population of Ukraine.²³ According to the data contained in open information sources on the territory of the Autonomous Republic of Crimea, the number of facts

ta Luhans'kiy oblastyakh [The Law of Ukraine No. 2268-VIII 'On Particular Aspects of Public Policy Aimed at Safeguarding State Sovereignty of Ukraine over the Temporarily Occupied Territory of Donetsk and Luhansk Regions' of 18.01.2018], VVR 2018, No. 10, p. 54. See more also in S. Pryluts'kyi, O. Strieltsova, *The Ukrainian Judiciary under 21st-Century Challenges*, „Access to Justice in Eastern Europe” 2020, no. 2/3(7), pp. 78-99, <https://www.doi.org/10.33327/AJEE-18-3.2-3-a000027> and I. Izarova, *Independent Judiciary: Experience of Current Reforms in Ukraine as Regards Appointment of Judges*, [in:] K. Gajda-Roszczyńska, D. Szumilo-Kulczycka (eds.), *Judicial Management Versus Independence of Judiciary*, Wolters Kluwer, Warsaw 2018, pp. 242-263.

²¹ This principle was firstly introduced in 1971 in practice of the International court of UN, case of Namibia on 21 of June 1971: *The Situation in Namibia*, https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/en/sc/repertoire/85-88/Chapter%208/85-88_08-6-The%20situation%20in%20Namibia.pdf [accessed: 10.03.2022]. See more about this principle here N. Ndeunyema, *The Namibian Constitution, International Law and the Courts: a Critique*, „Global Journal of Comparative Law” 2020, vol. 9, no. 2, pp. 271-296, <https://doi.org/10.1163/2211906X-00902005>.

²² According to the data of the Ministry of Social Policy, as of 7 May 2018, 1 502 019 migrants from the Donbas Region and Crimea were taken in account. See *Vnutrishno peremishcheni osoby* [Internally Displaced Persons], <https://www.msp.gov.ua/timeline/Vnutrishno-peremishcheni-osobi.html> [accessed: 23.12.2020].

²³ This information was taken from the speech of the Ministry of Temporary Occupied Territories and Internally Displaced Persons at the Plenary Session of the 74th General Assembly of the UN on 16 December 2019. According to the State Statistics Service of Ukraine as of 1 December 2017 this accounts for 42 403 200 people. *Kompleksni statystychni publikatsiyi / Complex Statistical Publications*, http://www.ukrstat.gov.ua/druk/publicat/kat_u/publ1_u.htm [accessed: 24.12.2020].

of birth was: 22,995 people in 2016, 9,810 people in 2017. At the same time, the number of facts of death in the specified territory was: 28,932 people in 2016 and 14,323 people in 2017.²⁴

In turn, in the territory of the so-called 'DPR' the following were recorded:

- in 2016, 11,771 facts of birth and 34,833 facts of death;
- in 2017, 5,875 facts of birth and 17,866 facts of death.²⁵

To solve this problem, it was not enough to introduce an administrative procedure that would provide an algorithm for state registration of births or deaths originating in the temporarily occupied territory. In order to optimize the process of obtaining birth and death certificates for persons living in the temporarily occupied territory of Ukraine, the legislator supplemented the CPC of Ukraine with a special article, namely Art. 317, which addressed certain procedural issues in cases of establishing the facts of birth and death in the temporarily occupied territory.

The following section of our article is devoted to analysis of how this specific procedure has helped to realize the right of a person to be recognized as a person before the law in Ukraine, for those who are within the temporarily occupied territory. In conclusion some remarks concerning the necessity of the use of the 'Namibian exceptions' in Ukraine are made.

2. Judicial procedure for establishing the fact of birth or death of a person in the temporarily occupied territory of Ukraine

Legislative changes to regulate the judicial procedure for establishing legal facts in the relevant territory are aimed at eliminating inconveniences for persons living in the temporarily occupied territory of Ukraine related to the need to enter the controlled territory of the state, as the birth or death certificate of a person residing in temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, can only be obtained from legitimate authorities.

²⁴ *Analitychnyy zvit. Pereshkody v realizatsiyi prav i svobod osib na okupovaniy Terytoriyi Kryms'koho pivostrova ta tymchasovo nepidkontrol'nykh Terytoriyakh Donets'koyi ta Luhans'koyi obla (reyestratsiya faktiv narodzhennya i smerti)* [Analytical Report: Obstacles to the realization of the rights and freedoms of persons in the occupied territory of the Crimean Peninsula and temporarily uncontrolled territories of Donetsk and Luhansk regions (registration of facts of birth and death)], Lviv 2017, <https://helsinki.org.ua/wp-content/uploads/2018/02/Zvit1t.pdf> [accessed: 24.12.2020].

²⁵ Ibid, p. 6.

This rule (Art. 317 of the CPC)²⁶ defines, among other things, the range of persons who have the right to apply to the court to establish the relevant fact. It also settles the issue of territorial jurisdiction, and secures provisions on the immediate execution of corresponding decisions.

Meanwhile, it should be noted that the lack of a clear and effective court procedure for establishing the fact of birth or death in the temporarily occupied territory can lead to abuses, in particular to avoid criminal prosecution, receive social benefits without legal grounds, for human trafficking and so on. As a result, the state faces a difficult task, as it must create an accessible mechanism for establishing facts in the relevant territory, which, on the one hand, ensures the proper realization of personal non-property and property rights, and, on the other hand, makes it impossible to abuse it to achieve illegal goals.

The shortcomings of the mechanism of establishing the relevant facts in the uncontrolled territory may lead to a violation of the rights of individuals,

²⁶ Art. 317 of the CPC of Ukraine ‘Peculiarities of proceedings in cases of establishing the fact of birth or death of a person in the temporarily occupied territory of Ukraine’ announces:

1. An application to establish the fact of a person’s birth in the temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, may be filed by parents, relatives, their representatives or other legal representatives of the child in any court outside such territory of Ukraine regardless of the applicant’s place of residence.

An application to establish the fact of a person’s death in the temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, may be filed by the relatives of the deceased or their representatives in court outside such territory of Ukraine.

2. Cases establishing the fact of birth or death of a person in the temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, shall be considered immediately from the moment of receipt of the relevant application in court.

3. The decision to establish the fact of birth of a person in the temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, in particular, shall specify the data established by the court on the date and place of birth of the person, his parents.

4. The decision made by the court in cases of establishing the fact of birth or death of a person in the temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, shall be subject to immediate execution.

Decisions in cases establishing the fact of birth or death of a person in the temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, may be appealed in accordance with the general procedure established by this Code. Appealing a decision does not suspend its execution.

5. A copy of the court decision shall be issued to the parties to the case, immediately after the announcement of such a decision, or immediately sent by the court to the body of state registration of civil status at the place of decision for state registration of birth or death.

Verkhovna Rada of Ukraine adopts Law “On amendments to Civil Procedure Code of Ukraine concerning establishment of fact of birth or death in temporarily occupied territory of Ukraine”, <https://www.rada.gov.ua/en/news/News/126003.html> [accessed: 10.03.2022].

so the establishment of the facts of birth and death in a separate proceeding requires a detailed study.

Separate proceedings in civil process are not exclusively a Ukrainian proficiency. Some other states also provide legal regulation at the national level in such a way as to differentiate the judicial procedure according to the nature of the case, thus distinguishing cases of separate proceedings, including the establishment of legal facts relevant to the case. It is obvious that the list of legal facts that can be established in court within the relevant procedures is not and cannot be the same, as each state determines them at its own discretion. In the following part we will give some generalised examples of facts that can be established in a separate proceeding.

For example, the legal facts that can be established in a separate proceeding of the CPC of the Republic of Kazakhstan includes the following: the fact of family relations of persons; the fact that the person is dependent; the fact that the title documents (except for military documents, passports, identity cards and certificates issued by civil registration authorities) belong to the person whose name, patronym or surname, specified in the document, do not match the name, patronym or the name of this person in the passport or identity card, or birth certificate; the fact of an accident, if it cannot be confirmed in another procedure; the fact of death of a person at a certain time in certain circumstances in case of refusal by the civil registration authorities to register the death.²⁷

Alternatively, the Civil Procedural Code of Georgia of 14 November 1997, although not providing for a 'separate proceeding', does provide for an indisputable type of proceeding within which legal facts relevant to the case may be established, in particular the establishment of family ties; establishing the fact of a person's detention; establishing the facts of: registration of recognition of paternity, marriage, divorce, change of name or (and) surname or adoption; establishing the fact that the title documents belong to a person whose name, patronym or surname, specified in the document, does not coincide with the name, patronym or surname specified in the passport or birth certificate; the fact of acceptance of the inheritance and establishment of the place of discovery of inheritance²⁸

²⁷ Graždanskiy Protsessual'nyy Kodeks Respubliki Kazakhstan [Civil Procedure Code of the Republic of Kazakhstan of 31.10.2015 no. 377-V (amended and supplemented as of 07.07.2020)], Zakon RK 2021, No. 84-VII.

²⁸ Graždanskiy Protsessual'nyy Kodeks Gruzii [Civil Procedure Code of Georgia of 14.11.1997], Parlament-Skiye Vedomosti 1997, No. 47-48.

The fact of birth or death of a person in the temporarily occupied territory of Ukraine shall be established in court if: 1) such a fact gives rise to legal consequences, i.e. the emergence, change or termination of personal or property rights of citizens depend on it; 2) the current legislation does not already provide another procedure for its establishment; 3) the applicant has no other opportunity to obtain or recover a lost or destroyed document certifying a fact that has legal significance; 4) the establishment of the fact is not connected with the subsequent resolution of a dispute over a right.²⁹

Accordingly, as rightly emphasized in the decisions of the national courts of Ukraine, the purpose of establishing the relevant fact is important, as it allows to draw a conclusion on whether this fact is a legal one, and whether it has legal consequences.³⁰ As a rule, the purpose of establishing the relevant facts is the need for their further state registration in order to obtain a death (or birth) certificate in accordance with current legislation of Ukraine,³¹ the applicant's desire to inherit or facilitate the procedure of inheritance.³²

If the fact for which a person has applied to the court is not a precondition for changing, arising or terminating the rights of such a person, the application is not subject to separate proceedings, and therefore the court must refuse to open proceedings to consider the application.³³ The court's finding in the open proceedings that the fact which the applicant applied for, does not in any way affect the legal status of the person, results in the closure of the proceedings.³⁴

In view of this, special attention needs to be paid to the harmonization of the principles and the right of a person to a legal identity generally accepted by the international community and to the need to determine the purpose of going to court, although the person's desire for legal identity alone is worth satisfying.

²⁹ Rezolyutsiya Plenum Verkhovnoho Sudu Ukrayiny 5 on 31 March 1995 pro sudovu praktyku v spravakh pro vstanovlennya faktiv, shcho mayut' yurydychne znachennya [Resolution of the Plenum of the Supreme Court of Ukraine no. 5 on Judicial Practice in Cases of Establishing Facts of Legal Significance of 31.03.1995], VVR 1998, p. 0005700-95.

³⁰ Ibid.

³¹ Decision of the Novopetrovsky District Court of the Luhansk Oblast, case No. 942/876/20 of 23 September 2020, <https://reyestr.court.gov.ua/Review/91898150> [accessed: 24.12.2020].

³² Decision of the Malynivsky District Court of the Zhytomyr Oblast case No. 283/1265/19 of 7 June 2019, <https://reyestr.court.gov.ua/Review/82259504> [accessed: 24.12.2020].

³³ Decision of the Kyiv District Court of the city of Poltava, case No. 552/5900/19 of 25 October 2019, <http://www.reyestr.court.gov.ua/Review/85246253> [accessed: 24.12.2020].

³⁴ Resolution of the Supreme Court of the Supreme Court, case No. 536/1039/17 of 23 January 2019, <http://www.reyestr.court.gov.ua/Review/79516806> [accessed: 24.12.2020].

3. National judicial practice on realization of the right to a legal identity, and establishment of the facts of birth or death in the temporarily occupied territory of Ukraine

3.1. The right to apply to the court to establish the facts of birth or death in the temporarily occupied territory of Ukraine

The subjective composition of participants in cases of establishing the fact of birth or death of a person in the temporarily occupied territory of Ukraine is regulated, in particular, by Art. 317 of the CPC. At the same time, the mentioned legal norm does not clearly define which subjects in this category of cases belong to the 'applicants' and 'interested persons.' However, Part 1 of Art. 317 of the CPC of Ukraine provides for the list of persons who can apply for the establishment of the fact of birth or death. These can only be natural persons, as the procedural law does not provide for the possibility of filing an application by a legal entity in this case.

According to paragraph 1, part 1 of Art. 317 of the CPC of Ukraine, the following persons have the right to file an application to establish the fact of birth: parents, relatives, their representatives and other legal representatives. Instead, in accordance with paragraph 2, part 1 of Art. 317 of the CPC of Ukraine, the range of persons authorized to file an application to establish the fact of death in the temporarily occupied territory is narrower. Such persons include relatives of the deceased and their representatives. The above list of subjects of appeal raises many questions, in particular, regarding its justification, the correctness of the legislator when distinguishing certain categories of subjects of appeal, such as 'parents' and 'relatives,' 'representative' and 'other legal representatives' etc.

Analysis of the subjective composition of participants in cases of establishing the facts of birth or death in the relevant territory of Ukraine suggests that the category of 'parents' within the meaning of paragraph 1 of Part 1 of Art. 317 of the CPC of Ukraine should include: a) persons, information about which is included in the record of the birth of a child as a parent, regardless of genetic factors; b) adoptive parents, regardless of whether the information entered in the birth record of the adoptee has been changed. In addition, in the second case, the document confirming the authority of the legal representative will be an adoption certificate issued on the basis of the relevant court decision on adoption.

The next step in the study of the applicants in cases establishing death and birth facts in the temporarily occupied territory is to determine the list of persons covered by the category of ‘relatives.’

Relatives can also be the applicants in cases establishing the facts of birth or death of a person in the temporarily occupied territory of Ukraine. Under Ukrainian law the term ‘relatives’ covers a range of persons who are related to a certain degree of kinship.³⁵

It follows from the doctrine of family law of Ukraine that relatives can be those persons who have kinship. In this case, such kinship is of two types, namely: origin and marriage. One cannot agree with the position that family members are always close relatives, but close relatives will not always be members of the same family.³⁶ For example, a married man and woman are family members and relatives, but they cannot be considered close relatives. Given the above, we believe that relatives within the meaning of Part 1 of Art. 317 of the CPC are not only close relatives, but also other relatives by origin, as well as relatives on the basis of marital kinship. The next group of persons who can apply to the court to establish the fact of birth in the temporarily occupied territory of Ukraine are representatives of parents and relatives.

Part 1 of Art. 317 of the CPC clarifies that representatives must belong to ‘persons who have the right to apply’ in the category of cases analyzed by us. In this regard, we want to emphasize the following points.

Summarizing the study of the subject composition of persons who may apply to the court to establish a legal fact on the basis of Part 1 of Art. 317 of the CPC of Ukraine, we consider it appropriate to express concern about the simultaneous use in paragraph 1 of Part 1 of Art. 317 of the CPC of Ukraine of ‘representatives’ and ‘other legal representatives’ because, as noted above, representation already includes legal representation automatically.

At the same time, in our opinion, it is necessary to explore the possibilities and determine the expediency of granting the right to apply to “other persons for whom establishing the fact of birth (death) may have legal significance” in cases of establishing the fact of birth or death in the temporarily occupied territory of Ukraine. Proceeding, first of all, from circumstances in which

³⁵ Explanation of the National Bank of Ukraine on the practical application of certain requirements of the regulations of the National Bank of Ukraine of 3.04.2008, <https://zakon.rada.gov.ua/laws/show/v4193500-08#Text> [accessed: 24.12.2020].

³⁶ K.A. Karchevskiy, *Rodynnyy kryteriy ponyattya «afiliyovanaosoba» (v konteksti pravovoho rezhymu pravochyniv iz zainteresovanityu)* [Kindred criterion of the concept «affiliated person» (within the context of legal regime of transactions with the interest)], „Visnyk KHNUVS” 2004, nr 1(64), s. 160-171 .

the persons in temporarily occupied territories are placed, including military actions, etc.

Thus, in case No. 265 / 6342/17 the Supreme Court noted that 'since the deceased may not have relatives who can apply for a statement of fact of death, in order to respect the rights and freedoms of persons residing in the temporarily occupied territory, the relevant application may be filed by a family member of the deceased, in particular, by the husband or wife.'

The following conclusions can be drawn from the results of the study. First, the list of persons who have the right to apply to the court to establish the fact of death or birth of a person in the temporarily occupied territory of Ukraine actually provides for the same subjects of application. Secondly, in order to ensure the right of access to a court, national courts have justifiably increased the number of persons who have the right to apply for a death or birth in the relevant territory of Ukraine.

We would like to pay special attention to cases establishing legal facts to protect the rights and interests of minors. Most commonly, in such situations, the submission of a statement of fact is made by parents, guardians or custodians of children in the interests of the minor.³⁷ At the same time, the parents, guardians or custodians act in the manner of legal representation and may not replace the children in whose interests the trial was initiated, who are actually endowed with the procedural status of the applicants. Also, in the interests of minors, a guardianship authority may apply to the court to establish the relevant fact in the temporarily occupied territory of Ukraine, which in accordance with Art. 65 of the Civil Code of Ukraine until the establishment of guardianship or custody and the appointment of a guardian or a custodian independently carries out guardianship or custody of the person.³⁸

³⁷ Decision of Central City District Court of the city of Kryvyi Rih in Dnipropetrovsk Oblast, case No. 16/6250/19 of 9 October 2019, <https://reyestr.court.gov.ua/Review/84837452> [accessed: 27.12.2020]; decision of Energodar City Court of Zaporizhzhya Oblast, case No. 316/1147/19 of 14 June 2019, <https://reyestr.court.gov.ua/Review/82434062> [accessed: 27.12.2020].

³⁸ Decision of Malinovskyi District Court of Odesa, case No. 521/18714/19 of 13 November 2019, <https://reyestr.court.gov.ua/Review/85609625> [accessed: 27.12.2020]; decision of Zhovtnevyi District Court of Mariupol, case No. 263/14640/19 of 15 October 2019, <https://reyestr.court.gov.ua/Review/84927570> [accessed: 27.12.2020].

3.2. Evidence in cases establishing the fact of birth or death in the temporarily occupied territory of Ukraine

The circumstance of proof in cases establishing the fact of birth (death) in the temporarily occupied territory of Ukraine includes circumstances regarding the time and place of birth (death), in addition, such a place must be a 'temporarily occupied territory'; the impossibility of establishing the desired fact out of court; legal consequences caused for the applicant by a legal fact; the existence of family ties between the applicant and the person in respect of whom the fact is established, and in cases establishing the fact of birth - identification of the child's parents.

As for establishing the facts of a birth in accordance with Art. 317 of the CPC, the situation is similar. Thus, analysis of the case law allows us to state that the circumstance of proof in this category of cases is a clearly defined time of birth, which should give rise to legal consequences for the applicant.³⁹ When considering applications to establish the fact of death in the temporarily occupied territory of Ukraine, the courts must check the existence of family ties between the applicant and the deceased, and prove the impossibility of establishing the relevant fact out of court.⁴⁰ Also, when applying to the court with a statement on the establishment of a legal fact, the courts must take into account the purpose of its establishment, because it allows them to conclude whether this fact is really a legal one, and whether it entails legal consequences.⁴¹

In cases establishing the fact of birth or death in the temporarily occupied territory of Ukraine, the burden of proof rests with the applicant. But within the analyzed category of cases, the court is also an active participant, being in the list of the subjects of proof, because Art. 294 of the CPC of Ukraine gives the court significant powers of proof, ranging from the formation of the

³⁹ Decision of the Slavic City District Court of the Donetsk Oblast, case No. 243/7164/19 of 5 July 2019, <http://reyestr.court.gov.ua/Review/82834398> [accessed: 24 December 2020]; decision of the Obolonsky District Court of Kyiv, case No. 756/4979/19 of 10 April 2019, <http://reyestr.court.gov.ua/Review/81259980> [accessed: 24.12.2020]; decision of the Slovyansk City District Court of the Donetsk Oblast, case No. 243/2383/19 of 13 March 2019, <http://reyestr.court.gov.ua/Review/80430608> [accessed: 24.12.2020].

⁴⁰ Resolution of the Kyiv Court of Appeal, case No. 756/3041/20 of 1 July 2020, <http://reyestr.court.gov.ua/Review/90143292> [accessed: 24.12.2020].

⁴¹ Resolution of the Kharkiv Court of Appeal, case No. 645/1211/19 of 16 September 2019, <http://reyestr.court.gov.ua/Review/84342680> [accessed: 24.12.2020].

circumstance in proof, assistance in establishing the circumstances, providing and requiring evidence for their study and evaluation.⁴²

In a number of cases the courts have emphasized that the special nature of cases considered in separate proceedings determines certain features of the evidentiary process, in particular, the lack of adversarial proceedings. This is due to the fact that the only parties involved in the proceedings are the applicant and interested persons. The court plays an active role in the process of proof and, at its sole discretion, in order to comprehensively clarify the circumstances of the case, may require evidence.⁴³

Most commonly, the activity of the court is manifested in the demand from civil registry authorities for information on the presence or absence of a record of death (birth) of a person in respect of whom the relevant fact is established. Meanwhile, when considering cases in accordance with Art. 317 of the CPC, courts also appoint appropriate examinations, for example, forensic and genetic ones.⁴⁴ Finally, the activity of the court may be limited to a formal proposal to the applicant to provide additional evidence to prove the fact in question, which the court states in the decision to open proceedings on claims.⁴⁵

We would like to draw special attention to the peculiarities of the evaluation of evidence in this category of cases, due to the inadmissibility of certain means of proof, given that any act (decision, document) issued by public authorities, local governments, enterprises, institutions, organizations of the occupation regime is invalid and does not create legal consequences.

⁴² K.B. Drogozyuk, *Predmet ta sub'yekty dokazuvannya u tsyvil'nomu protsesi Ukrainy ta Frantsiyi* [Subject of proof in the civil process of Ukraine and France], Odessyjska Yurydycheskaya Akademya, Odessa 2018, <http://dspace.onua.edu.ua/handle/11300/9115> [accessed: 6.12.2021].

⁴³ Decision of the Kramatorsk City Court of Donetsk region, case No. 234/12199/20 of 1 September 2020, <http://reyestr.court.gov.ua/Review/91921144> [accessed: 24.12.2020]; decision of the Selydiv City Court of the Donetsk Oblast, case No. 242/2317/19 of 23 April 2019, <http://reyestr.court.gov.ua/Review/81381139> [accessed: 24.12.2020].

⁴⁴ Ruling of the Zhovtnevy District Court of Mariupol, case No. 263/7330/19 of 11 June 2019, <http://reyestr.court.gov.ua/Review/82430176> [accessed: 24.12.2020]; decision of the Suvorov District Court of the city of Odessa, case No. 523/11553/19 of 5 December 2019, <http://reyestr.court.gov.ua/Review/86205376> [accessed: 24.12.2020]; decision of the Suvorov District Court of the city of Odessa, case No. 523/18599/19 of 13 February 2020, <http://reyestr.court.gov.ua/Review/87583139> [accessed: 24.12.2020].

⁴⁵ The decision of the Slavyansk city District Court of the Donetsk Oblast, case No. 243/8450/20 of 28 September 2020, <http://reyestr.court.gov.ua/Review/91860096> [accessed: 24.12.2020].

In connection with the case law of the national courts of Ukraine, the so-called 'Namibian exceptions' are applied.⁴⁶

At the same time, analysis of the case law allows us to state that the courts currently apply the 'Namibian exception' in different ways when making decisions. Thus, in case No. 490/5054/15-ц on a claim for recovery of insurance indemnity, fines, inflation losses and three percent per annum, the Supreme Court, overturning the appellate court's ruling, stressed that the 'Namibian exception' could be applied only in cases establishing the fact of birth or death of a person in the temporarily occupied territory of Ukraine, and not for the recovery of sums of money.⁴⁷ A similar conclusion was formulated in another ruling of the Supreme Court, within which a citizen of Ukraine appealed to the latter (represented by the Cabinet of Ministers of Ukraine) with a claim for compensation for property damage caused by the anti-terrorist operation.⁴⁸

However, in a similar case, with the same composition, similar subject matter and grounds of action - the Supreme Court reached an opposite decision and concluded that the 'Namibian exception' could be applied to the inspection of the plaintiff's apartment in the temporarily occupied territory. The court confirmed the circumstance of destruction in connection with an artillery strike of the apartment house in which the plaintiff lived.⁴⁹

In case No. 707/1607/16-ц on establishing the fact of death in the temporarily occupied territory of Ukraine, the Supreme Court noted that solely examining the evidence provided by the bodies formed in the temporarily occupied territory, the court was deprived of the opportunity to properly establish death or birth in uncontrolled territory of Ukraine.⁵⁰ National courts were guided by similar motives in other court cases.⁵¹

⁴⁶ *Uvaha: vyznannyam okremym dovidok z ORDLO vladu okupantiv nikhto ne lehalizuye* [Attention: Recognizing separate certificates from SRDLO doesn't mean legalization of the power of the occupiers], <https://www.ukrinform.ua/rubric-society/2806155-uvaga-viznannam-okremim-dovidok-z-ordlo-vladu-okupantiv-nikhto-ne-legalizue.html> [accessed: 24.12.2020].

⁴⁷ Resolution of the CCC as a part of the Supreme Court, case No. 490/5054/15-ц of 24 October 2018, <http://reyestr.court.gov.ua/Review/77473491> [accessed: 24.12.2020].

⁴⁸ Resolution of the CCC as a part of the Supreme Court, case No. 185/9816/16-ц of 1 July 2020, <http://reyestr.court.gov.ua/Review/90349589> [accessed: 24.12.2020].

⁴⁹ Resolution of the CCC as a part of the Supreme Court, case No. 310/1739/17 of 25 March 2020, <http://reyestr.court.gov.ua/Review/88575080> [accessed: 24.12.2020].

⁵⁰ Resolution of the CCC as a part of the Supreme Court, case No. 707/1607/16-ц of 20 December 2018, <http://reyestr.court.gov.ua/Review/78978236> [accessed: 27.12.2020].

⁵¹ Resolution of Zaporizhzhya Appellate Court, case No. 233/6471/18 of 11 June 2019, <http://reyestr.court.gov.ua/Review/82439322> [accessed: 27.12.2020]; resolution of

Thus, from the above it is easy to see that the Supreme Court, whose task is to ensure the unity of judicial practice, itself applies the 'Namibian exception' in different ways, assessing the evidence in the case.

In our view, when assessing evidence in cases of death or birth in accordance with Art. 317 of the CPC, courts should apply the 'Namibian exception' in case of confirmation of the fact by evidence other than that obtained in the temporarily occupied territory. Given that the current legislation does not specify what evidence should confirm the fact of death or birth, examples of such may be agreements on the organization of burials, acts on the provision of funeral services, photographs from the burial place, the testimony of witnesses, acts of medical advisory commissions, forensic and genetic conclusions and other examinations, etc.

4. Conclusions

The results of the study lead to the following conclusions. The use of judicial procedure in Ukraine for the registration of births and deaths is the most effective way to ensure a person's right to legal identity in the conditions of occupation of its territory in order to establish the facts, if: such facts give rise to legal consequences, i.e. the emergence, change or termination of personal or property rights of citizens depends on these facts; the current legislation does not provide another procedure for their establishment; the applicant has no other opportunity to obtain or recover a lost or destroyed document certifying a fact of legal significance; the establishment of the fact is not connected with the subsequent settlement of a dispute on the right. Cases establishing the facts of birth or death in the temporarily occupied territory correspond to the nature of the categories of cases that can be considered within a separate proceeding, and therefore must be heard in the specified type of non-contentious proceedings.

The application of the 'Namibian exception' is lawful only in cases of confirmation of the circumstances of birth (death) by other appropriate, admissible and reliable evidence obtained outside the territory where the occupying authorities operate. In these cases, proper and admissible written evidence in this category of cases are burial agreements, acts on the provision of funeral services, photographs from the burial place, the testimony of witnesses, acts of medical advisory commissions, conclusions of forensic, genetic and other examinations etc.

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