

Artículo de investigación

**Models of legal regulation of spousal separate residence regime
in the countries of the European Union and Ukraine****МОДЕЛІ ПРАВОВОГО РЕГУЛЮВАННЯ РЕЖИМУ ОКРЕМОГО ПРОЖИВАННЯ
ПОДРУЖЖЯ У КРАЇНАХ ЄВРОПЕЙСЬКОГО СОЮЗУ ТА В УКРАЇНІ**

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Written by:

Dr. Verba-Sydor Olga¹ORCID ID <http://orcid.org/0000-0001-9254-9575>**Vorobel Ulyana²**ORCID ID <http://orcid.org/0000-0003-0480-5394>**Dr. Podorozhna Tetiana³**ORCID ID <http://orcid.org/0000-0003-0502-950X>**Dr. Dutko Alona⁴**ORCID ID <http://orcid.org/0000-0001-5622-1046>**Dr. Grabar Nataliia⁵**ORCID ID <http://orcid.org/0000-0001-5533-6765>**Abstract**

The legal regime of separation is a complex institute in which establishment entails several legal consequences for both the spouses and other members of the family and concerns both the property and personal non-property rights of the parties. It is characterized by the features common to a particular model of legal regulation of this institute.

The purpose of the study is to analyze the characteristics of legal regulation of family relations, which arise out of the establishment, operation, and suspension of spousal separate residence regime in the countries of the European Union and Ukraine and their representation from the perspective of correlation of institutes of separation and divorce.

During the study of models of legal regulation of the institute of spousal separate residence, general and special methods of legal phenomena identification were used. In particular, the dialectical method was used to determine the place of the institute of separation in the system of law and its relation with the institute of

Анотація

Правовий режим сепарації є складним комплексним інститутом, установлення якого тягне низку правових наслідків як щодо самого подружжя, так і для інших членів сім'ї та стосується як майнових, так і особистих немайнових прав сторін та характеризується рисами, що притаманні певній моделі правового регулювання цього інституту. Цілями дослідження є аналіз характерних рис правового регулювання у країнах Європейського Союзу та України сімейних відносин, що виникають у зв'язку зі встановленням, дією та припиненням режиму окремого проживання подружжя та їх розкриття через призму моделей співвідношення інститутів сепарації та розірвання шлюбу.

При дослідженні моделей правового регулювання інституту окремого проживання подружжя було використано загальнонаукові та спеціальні методи пізнання правових явищ, зокрема, діалектичний метод

¹ Ph.D., Associate Professor of the Civil Law Disciplines Department, Law Faculty, Lviv State University of Internal Affairs, Lviv, Ukraine

² Lecturer of the Civil Law Disciplines Department, Law Faculty, Lviv State University of Internal Affairs, Lviv, Ukraine

³ Associate Professor, Doctor of Laws, Professor, Department of State and Law Theory, Faculty of Law, Lviv Trade and Economic University, Lviv, Ukraine

⁴ Ph.D., Associate Professor of the Civil Law Disciplines Department, Law Faculty, Lviv State University of Internal Affairs, Lviv, Ukraine

⁵ Ph.D., Associate Professor of the Civil Law Disciplines Department, Law Faculty, Lviv State University of Internal Affairs, Lviv, Ukraine

divorce. The social purpose of this institute was also established. The hermeneutical method helped to interpret the main features inherent in each of the models of legal regulation of separation. Logical-legal and systematic methods were used for the formulation of logically relevant conclusions, and consistent presentation of study materials. The legal comparative method is aimed at comparing the models of legal regulation of the institute of spousal separate residence in the current family law of Ukraine and the legislation of the countries of the European Union.

On grounds of a comprehensive analysis of the legislation and practice of its application regarding the legal regime of spousal separate residence in the countries of the European Union and Ukraine, the features of each of the four models for legal regulation are distinguished.

Keywords: Divorce, the European Union, separation, spousal separate residence regime, Ukraine.

Introduction

The family as the primary and basic center of society is under the special protection of the state. The manifestation of such protection is the creation of a system of guarantees for preserving the integrity of the family by the state, in particular by the legal regulation of those institutes that have to help the spouses preserve their marriage. These institutes include the institute of spousal separate residence, which is internationally more known as separation.

As a rule, the spousal separate residence regime (separation) is the special legal status of the spouses (a certain spousal life order), which is established by a court decision or decision of another competent authority (formal (legal) separation) in case of impossibility or unwillingness of wife and (or) husband to live together and is characterized by several legal safeguards for protecting the interests of both the spouse and their children, or - the actual spousal separate residence without recourse to any authorized body for the registration of such state, which term, however, has legal bearing during the procedure of divorce (actual separation).

використано для визначення місця інституту сепарації у системі права та його співвідношенні з інститутом розірвання шлюбу, а також встановлено соціальне призначення цього інституту; герменевтичний – для осмислення основних ознак, притаманних кожній із моделей правового регулювання сепарації. Логіко-юридичний і системний методи – для формулювання логічно обґрунтованих висновків, а також для послідовного викладення матеріалу дослідження; порівняльно-правовий метод – для співставлення моделей правового регулювання інституту окремого проживання подружжя у чинному сімейному законодавстві України та законодавстві країн Європейського Союзу.

На підставі здійсненого комплексного аналізу законодавства та практики його застосування щодо правового режиму окремого проживання подружжя у країнах Європейського Союзу та України виокремлено риси кожної із чотирьох моделей правового регулювання.

Ключові слова: Європейський Союз, режим окремого проживання подружжя, розірвання шлюбу, сепарація, Україна.

Separation regime is a quite complex institute, the establishment of which by the spouses has some legal consequences for both the spouses and other members of the family and concerns both the property and personal non-property interests of the parties, and is characterized by features common to a particular model of legal regulation of this institute.

The purpose of the article is the research of the characteristics of legal regulation of family relations which arise out of the establishment, operation and suspension of spousal separate residence regime in the countries of the European Union (hereinafter - the EU) and in Ukraine and their representation from the perspective of correlation of institutes of separation and divorce.

Methodology

During the study of models of legal regulation of the institute of spousal separate residence, general and special methods of legal phenomena identification were used. In particular, the

dialectical method was used to determine the place of the institute of separation in the system of law and its relation with the institute of divorce. The social purpose of this institute was also established. The hermeneutical method helped to interpret the main features inherent in each of the models of legal regulation of separation.

Using the historical method, some historical aspects of the origin and development of the institute of separation are explained in the paper. Logical-legal and systematic methods were used for the formulation of logically relevant conclusions, and consistent presentation of study materials. Through the analytical-statistical method, the legislation of the EU Member States concerning the peculiarities of the legal regulation of separation was analyzed, as well as the role of this institute in the family law of Ukraine.

The legal comparative method is aimed at comparing the models of legal regulation of the institute of spousal separate residence in the current family law of Ukraine and the legislation of the countries of the EU.

Results and Discussion

The institute of spousal separate residence (separation) has a long and complicated history. The origins of the institute of separation date back to the 16th century. It is believed that the spousal separate residence regime was initiated in marriage and family relations in Western Europe in 1563, when the Council of Trent of the Roman Catholic Church (canons 863-866, 1378-1382 of the Code of Canons of the Eastern Churches) finally prohibited divorce: "What God has joined together, let no one separate". Instead of a divorce, the separation was allowed, i.e. separate residence («*separation a mensa et thoro*», «*separation athovo et mensa*») – interdiction from the table and bed that was not credited as divorce but allowed the spouses to live separately. At the same time, interdiction from the table meant the termination of property relations between them, in particular, husband's exemption from the obligation to keep his wife. Interdiction from the bed meant the termination of the rights and obligations for sexual relations between the spouses, which started the presumption of "non-paternity" of the husband concerning the child conceived during the period of such separation; i.e. the child conceived during the period of such separation was not considered to be descended from a husband. However, the establishment of such a regime did not give a

couple the rights to remarry (Boyko, 2013; Romovska, 2013; Tsymbaliuk, 2014).

It should be mentioned that the institute of spousal separate residence (separation) is known to many countries including EU member states and also Ukraine. Thus, the institute of formal separation (the spousal separate residence regime is established by the decision of the competent authority (court, prosecutor, public administration) is foreseen and regulated at the legislative level in 14 states out of the 28 EU members. In 12 states there is the institute of the actual separation (spousal separate residence regime when the spouses do not live together willingly and do not apply for registration of such condition to any authorized bodies).

In scientific literature, four models of legal regulation of the spousal separate residence regime in different countries are distinguished:

- I) the model based on the independence of institutes of separation and divorce (The United Kingdom of Great Britain and Northern Ireland, the Republic of Poland);
- II) the model during the use of which the grounds for separation and divorce are not distinguished. It is the spouses who have to choose to which institute to apply (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the French Republic);
- III) the model recognizing the direct dependence of divorce on separation, i.e., the spouse who wants to dissolve the marriage must be in a state of formal separation for some time according to the decision of the competent authority (the Kingdom of Denmark, the Republic of Ireland, the Italian Republic, the Republic of Lithuania, the Republic of Malta) (Bilyk, 2017; Grezlikowski, 2011; Kasprzyk, 1999; Lepekh, 2003; Lezhnieva & Chernop'iatov, 2010; Starchuk, 2012; Tsymbaliuk, 2014);
- IV) the model in which the actual separate residence (actual separation) is one of the statutory grounds for divorce (the Republic of Austria, the Hellenic Republic,

the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Federal Republic of Germany, Romania, Hungary, the Republic of Finland, the Republic of Croatia, the Czech Republic and the Kingdom of Sweden) (Verba-Sydor & Vorobel, 2019).

We will describe the above-mentioned models of legal regulation of separation.

- I. In the Soviet Union, current family law in Ukraine did not contain rules on establishing a spousal separate residence regime (Truba, 2008) since the Soviet ideology considered it to be the canonical norm of the Catholic Church (Onishko, 2010) which prohibited divorce. Thus, the representatives of the new pro-communist government tried to prove the benefits of secular institutes, in particular, divorce (Kasprzyk, 1999).

After proclaiming the independence of Ukraine, the idea of securing the institute of separation at the legislative level was first reflected in the text of the Family Code of Ukraine (hereinafter - the FC of Ukraine) of January 10, 2002 (Articles 119-120).

Therefore, according to Article 119 of the FC of Ukraine, at the request of the spouses or the lawsuit of one of them, the court may render a decision to establish the spousal separate residence regime in case of impossibility or unwillingness of the wife and (or) husband to live together. The separate residence regime is terminated in case of family relations renewal or by court decision based on the application of one spouse.

The legal consequences of the establishment of the spousal separate residence regime, according to Article 120 of the FC of Ukraine are: 1) the property acquired in the future by wife and husband will not be considered as acquired in marriage; 2) a child born by a wife after ten months will not be considered as descended from her husband (Family Code of Ukraine, 2002).

Similarly, the first model of legal regulation of separation based on the independence of institutes of separation and divorce functions in such EU countries as the United Kingdom of

Great Britain and Northern Ireland and the Republic of Poland.

The fact of a spousal separate residence plays an important role in the family law of England, especially when it comes to divorce. In Part 2, Article 1 of the Matrimonial Causes Act (Matrimonial Causes Act, 1973) concerning the cases of divorce, five circumstances are represented. The proof of at least one of them by a plaintiff is evidence of irremediable divorce, which in turn is the grounds for divorce. These circumstances are: 1) the defendant has violated conjugal fidelity and the plaintiff finds cohabitation unacceptable; 2) the defendant behaved in such a way that it is unreasonable to require the plaintiff to live with him; 3) the defendant left the plaintiff at least two years before the date of petition submitting; 4) the parties have been living separately for at least two years before petition submitting, and the defendant does not object to the divorce; 5) the parties have continually lived separately for at least five years (Bilyk, 2017; Harris-Short & Miles, 2011).

According to Part 6 of Article 2 of the above-mentioned Act, it is considered that the husband and the wife live separately provided that they do not live together on the same premises and do not share a common life. English jurists distinguish two aspects of separate residence in the meaning of Article 1: the physical (actual) and mental element.

According to Article 18 (1) of the Act on termination of marriage, one of the consequences of rendering a decision to establish a separate residence regime is that the plaintiff is no longer obliged to cohabit with the defendant (Bilyk, 2017). However, the establishment of separation does not terminate the marriage itself, therefore, the spouses are still obliged to maintain conjugal fidelity and loyalty, which means that the further grounds of the divorce claim may be adultery committed during the separation of the spouses.

Besides, the spouses in separation are obliged to mutual allowance. The establishment of separation excludes mutual inheritance by law but does not exclude inheritance by will. It should be added that the circumstances that justify the separation may further relate to the judicial decision on divorce (Thomson, 1987). If the spouses have resumed their cohabitation, then each of them may require the reversal of the court separation decision (Sylwestrzak, 2017).

In the Republic of Poland, the separation was introduced by a law of 21.05.1990 amending such laws as the Family Code and Caring, the Civil Code, the Civil Procedural Code, as well as some other legislative acts (Kasprzyk, 2006). Now the regulations of Polish family law regarding separation are represented in Article 61¹-61⁶ of Title V of Chapter I of the Family Code and Caring of Poland (hereinafter - FCC of Poland) (Family Code and Caring of Poland, 1964).

The grounds for the establishment of separation according to Article 61¹ FCC of Poland are a complete breakup of life as a couple. According to Article 61² of the FCC of Poland, if one spouse requires separation and the other requires divorce, then the requirement that from a legal point of view leads to more serious consequences should be tried, i.e., the requirement of divorce. If this requirement is justified, the court renders the decision on divorce and refuses to establish separation.

Thus, according to Article 61⁴ FCC of Poland, the couple has a responsibility to further respect and help each other and in the spiritual and financial spheres, if required by the equitable principles. According to Article 72 FCC of Poland, a child descends from a mother's husband if he is born three hundred days after separation establishment.

Concerning the property relations of the spouses, according to Article 54 FCC of Poland, after establishing the separation, the property acquired by the husband and the wife will be considered as separate property of the couple. Besides, the spouses who are in separation cannot enter into a marriage contract that may otherwise regulate their property relationships.

- II) The second model of legal regulation of separation includes the spousal separate residence regime (separation) coexistence with the institute of divorce; the spouses are also given the right to choose which of these two institutes to prefer specifically in their case. This model is used in such EU member states as France, Portugal, and the Benelux countries (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands).

In the French Republic, the rules on separation regulation can be found in both the Civil Code of

France (hereinafter CC of France) (Zahvataev, 2012) and the Civil Procedural Code of France (hereinafter CPC of France) (Zahvataev, 2018). Thus, the CC of France contains a chapter concerning the separate residence regime («*séparation de corps*» - literally - separation of bodies and in fact – spousal separate residence) in the title "Divorce", the rules of which relate to the establishment procedure, some consequences and termination of the spousal separate residence regime (Bilyk, 2017). Regarding the CPC of France, the norms of the procedure for case trial about the establishment of the spousal separate residence regime is enshrined in Chapter V "Procedures in Family Matters" of Title I "Persons" of Book III "Provisions concerning certain categories of cases" of this normative legal act (Zahvataev, 2018).

According to Article 296 of the CC of France, the separate residence regime is established at the request of one of the spouses in the same cases and on the same grounds as divorce, and according to Article 229 of the CC of France, this is the mutual agreement of the parties, the acceptance of the principle of dissolution of marriage, irreclaimable deterioration of marriage or the guilt of one of the spouses. The irreclaimable deterioration of the marriage relationship takes place after the termination of the spouses' life if they had lived separately for two years till the beginning of the trial (Article 238 of the CC of France) (Bilyk, 2017). Procedures of the trial concerning separation are accomplished according to the rules set out for the divorce cases (Hlyniana, 2010).

The Institute of separation, called "judicial separation of individuals and property" (*separação judicial de pessoas e bens*) is regulated by the Portuguese Civil Code (hereinafter the PCC). According to it, if there is a joint agreement for separation, it is established during the claim procedure. In case of the absence of such an agreement, it is established in non-claim procedures (disputable separation). The requirements for the establishment of disputable separation must be justified by one of the legislative grounds identical to the grounds for divorce (Portuguese Civil Code, 1966).

The legal consequences of the separation regime depend on the procedure of the separation establishment. Thus, according to Article 1789 of the PCC, the legal consequences of the establishment of separation by mutual agreement of the spouses begin the day proposed by the spouses and agreed by the court. Instead, the legal consequences of disputable separation

begin *ex nunc*, only once the judgment becomes final. However, in exceptional cases, the court may hold that the legal consequences of the disputable separation will occur *ex tunc*, from the date of termination of the spouses' cohabitation if the related circumstances are proved during the process (Sylwestrzak, 2017).

Separation establishment has legal consequences for the application of the institute of a divorce. Thus, according to Part 1 of Article 1795 of the PCC, after the expiration of one year after separation, one spouse has the right without the consent of the other to go to court with a request for the divorce. However, when both spouses in separation agree to the transformation of the separation into a dissolution of marriage, then the requirement of a one-year expiration date is not required (Part 1, 1795 of the PCC) (Portuguese Civil Code, 1966).

In the Kingdom of Belgium, separation is regulated by the norms of the Belgian Civil Code (hereinafter the BCC), and comes to the extension of some provisions of the divorce institute to the institute of separation, since the grounds for the separation establishment and divorce are the same (Belgian Civil Code, 1804). According to Article 229 of the BCC, the judge renders the decision on divorce in case of an irremediable dissolution of the marriage. The dissolution of marriage is irremediable if the continuation of cohabitation is impossible. All means of evidence can be used to prove the irremediable dissolution of a marriage. Irremediable dissolution is established when the application is filed jointly by the couple after more than six months of an actual separate residence. However, if the divorce is initiated by only one spouse, the separation should last for at least a year (Bilyk, 2017).

In the Grand Duchy of Luxembourg, the procedure of separation establishment is regulated by the norms of Title I "On cases and procedures for establishing the spousal separate residence regime by court" of Chapter IV "On spousal separate residence" of Book VI "Divorce" of the Civil Code of the Grand Duchy of Luxembourg (hereinafter the CC of Luxembourg (Civil Code of Luxembourg, 1803). Thus, according to Article 296 of the CC of Luxembourg, the legal regime of spousal separate residence may be established by a court on the application of one of the spouses on the same grounds and under the same conditions as the dissolution of marriage. In the case of a simultaneous filing of a divorce application and an application for the establishment of a spousal

separate residence regime, the court first handles the divorce application. The judge decides to dissolve the marriage if the conditions for dissolving the marriage are followed. In the absence of the grounds for dissolution of marriage, the judge proceeds to handle the application for the establishment of the spousal separate residence regime. However, if these applications are based on the fault of one of the spouses, the judge must handle them simultaneously and, if established, he has to render a decision to dissolve the marriage with the declaration of the guilt of each spouse (Article 297¹ of the CC of Luxembourg).

The court's establishment of a spousal separate residence regime always entails the separate possession of their property by each of the spouses (Article 302 of the CC of Luxembourg). The establishment of a spousal separate residence regime does not terminate the obligation to keep the spouse in need. In such a case, the court determines the periodicity of payments in the decision on separation establishment or in its further decisions. Besides, such payments are assigned irrespective of the person's fault in establishing such a regime (Article 303 of the CC of Luxembourg) (Civil Code of Luxembourg, 1803).

In Dutch law, the institute of spousal separation is known as "separation from table and bed" (*scheiding van tafel en bed*) and is regulated by the norms of the Book I "Individual and Family Law" of the Civil Code of the Netherlands (*Burgerlijk Wetboek*) (hereinafter the CC of the Netherlands"). The prerequisites for its establishing are the same as the prerequisites for divorce so that the rules of divorce are applied to the spousal separate residence regime as well (Nieper & Westerdijk, 1995). Thus, according to Article 151 of the CC of the Netherlands separation may be established at the request of one of the spouses if there is a prolonged disorder of spousal life, or on the joint application of the spouses if it is based on their common belief about the complete dissolution of the married life, and each of them can withdraw his claim up to the moment of deciding (Article 154 of the CC of the Netherlands) (Civil Code of the Netherlands, 1992).

As a result of separation, the spousal cohabitation obligation ends (Article 168 of the CC of the Netherlands), but the maintenance obligations (Article 158 of the CC of the Netherlands) remain, and the spousal separate property occurs (Sylwestrzak, 2017).

The establishment of separation leads to legal consequences from the moment of making the corresponding entry in the register of matrimonial property (*huwelijksgoederenregister*). The separation record, as in the case of a divorce record, must be made in such a register within six months. However, separation does not require the corresponding entry in the civil register, since marriage is still ongoing (Stolker, 1998).

- III) Such EU Member States as Denmark, Ireland, Italy, Lithuania, and Malta have chosen the third model of legal regulation of separation, according to which there exists the direct dependence of divorce on formal (legal) separation, that is, the spouse who wishes to dissolve the marriage shall be in a state of separation, issued by the judgment of the competent authority, for some time.

In the Kingdom of Denmark, matters relating to marriage and divorce, as well as marriage invalidation, are governed by the Law “On Marriage and Divorce” (*Ægteskabsloven*), together with by-laws and regulations adopted on its basis (Hipeli, 2014).

In 2013, the novelties of a legislative regulation of marriage and family relations; which simplified the divorce procedure in the event of consent to divorce from both spouses, by refusing the need for a previous separation period and indicating the reasons for divorce; were adopted in Denmark (Petelchyc & Skura, 2017). If the alimony obligations are already settled between the spouses, the judgment in such a case can be issued rather quickly (Hipeli, 2014).

In case of disagreement of one spouse on the dissolution of marriage, separation is appointed for a period of 6 months, after the expiration of which each spouse has the right to demand divorce despite the lack of consent of the other spouse on the dissolution of marriage.

As for the legal consequences of separation, they are the same as for divorce, and the only thing that separates the two institutions is that during the separation, no spouse has the right to marry another person (Order of marriage and dissolution law, 2007).

In Ireland, according to Art. 5 (1) of the Family Law (Divorce) Act 1996, the court may decide to dissolve the marriage, if it is proved that at the

time of filing the relevant application the spouses had been living separately for at least four of the last five years; it is unwise to expect reconciliation from them; there are adopted or will be adopted the appropriate, in the court's view, provisions on the conditions existing for the spouse and any dependent family members (Family Law (Divorce) Act, 1996).

Art. 2 of the 1989 Law on Separation and Reformation of Family Law defines the following grounds for establishing separation: 1) if one of the spouses committed treason; 2) if one of the spouses behaves uncleanly or cruelly; 3) if one spouse left the family for a year; 4) if the spouses have not resided together for more than one year and both agree to establish separation; 5) if the spouses have not resided together for more than three years; 6) if the marriage has been severed so that the court can conclude that a normal marriage has not existed for at least a year (Judicial Separation and Family Law Reform Act, 1989).

Under Irish law, the legal consequences of establishing spousal separate residence regime are that the court releases the spouses from the obligation to cohabit while deciding to establish a spousal residence, but the wife can still bear the husband's surname.

The court judgment on separation may be converted *ipso iure* into the judgment on marriage dissolution at the request of one of the spouses, provided the separation lasted at least for three years. In this case, the judge decides on the dissolution of the marriage and its consequences. If separation has been established by a joint statement of the parties, it shall be transformed into a dissolution of the marriage only if the parties jointly file an application on marriage dissolution.

However, it should be noted that on May 24, 2019, a referendum was held in Ireland to liberalize the divorce procedure. It was decided there to exclude from the Constitution the requirement of a four-year separation, which would allow the Irish Parliament (*Oireachtas*) to pass a law on marriage dissolution establishing a shorter period for the spousal separate residence regime.

The legislation of the Republic of Italy pays great attention to the spousal separate residence regime. Separation in Italian law comes from the construction introduced by canon law, “detachment from the table and the bed”. For a long time, the separate residence regime

symbolized the “divorce of Catholics” and was the only legal solution that allowed the husband and wife to terminate cohabitation without conflicting with the principle of marriage continuity.

The Institute of separation is regulated by Chapter Five, “On Divorce and Separation” (*Capo V Dello scioglimento del matrimonio e della separazione dei coniugi*) of the Title Six “On Marriage” (*Titolo VI Del matrimonio*) of the Book One, “On persons and family” (*Libro Primo Delle persone e della famiglia*) of the Italian Civil Code (hereinafter referred to as the Italian CC) (Italian Civil Code, 1942). The Code provides for two forms of separation: judicial (*separazione giudiziale*) and the one by agreement of the parties (*separazione consensuale*) (Article 150 of the Italian CC). Along with them, there is a third form that has not been comprehensively regulated but is defined by the research papers as “temporary separation” (Auletta, 2000). It may exist in the course of proceedings for invalidation or dissolution of marriage, or separation. These three hypostases of separation are referred to as formal (legal) separation, in contrast to the actual separation that results from the decision of the parties themselves without any court intervention (Sylwestrzak, 2017).

According to Art. 151 of the Italian CC, the possibility of applying for a separate residence regime exists when the continuation of cohabitation is unacceptable or could cause serious harm to the upbringing of children. If the inadmissibility of cohabitation arises because of the guilty conduct of one of the spouses, which gives rise to the non-fulfillment of the marital obligations, the other spouse may demand the guilty plea of the former when establishing the separate residence regime by a court. The admission of a spouse as guilty has negative proprietary consequences for him/her for the maintenance and inheritance (Part 2 of Art. 151 of the Italian CC) (Bilyk, 2017). Separation can also be established in case of conviction of one spouse to life imprisonment, imprisonment for a term of more than five years or in case of permanent loss of the right to public service (Art. 152 of Italian CC) (Italian Civil Code, 1942).

If both spouses wish to establish a separate procedure, only a court appeal is required to confirm the fact of separation (Art. 150 of the Italian CC). In this case, the court has the power to investigate and evaluate the arrangements reached by the spouses for the children, to point out the necessary changes in the interests of the

children, and to refuse to confirm the separation if its consequences could be negative (Bilyk, 2017).

The Civil Code of Lithuania (hereinafter referred to as the CC of Lithuania) regulates in detail the issue of the separate residence regime, which plays an important role in the family law of the country.

According to Lithuanian laws, a spouse can go to court to approve the separation if, due to certain circumstances that may depend on neither spouse, their cohabitation becomes intolerable or may adversely affect the children, and also when the spouse is no longer interested in living together.

The court should take measures to encourage reconciliation. At the request of one of the spouses or on their own initiative, the court may set a term of conciliation of up to six months. After the deadline set for reconciliation has expired, the case is resumed. If within the year after the beginning of the prescribed period for reconciliation none of the spouses has filed the respective application, the case shall not be resumed.

While deciding whether to establish a separate residence regime, the court shall determine the spouse with whom the children will reside, the procedure for the maintenance of the children and the participation of the single parent in the upbringing of the children.

According to Art. 3.73 of the CC of Lithuania, the couple may file a joint application to the court for approval of the separation, provided that they have entered into agreement on the effects of their separation concerning the place of residence, maintenance, and education of their minor children, as well as the reconciliation of their property and mutual maintenance.

According to Lithuanian laws, the legal consequences of establishing a separate residence regime are that the court, when deciding upon its establishment, exempts the spouses from the obligation to cohabit, but other rights and obligations of the spouses are not terminated except in cases expressly provided by law. In particular, Art. 3.77 of the CC of Lithuania under the title “Legal Consequences of Separation”, identifies the main ones (Bilyk, 2017).

The Civil Code of Malta (hereinafter referred to as the CC of Malta) provides for two ways of

acquiring the right to a spousal separate residence: 1) at the request of one of the spouses on the grounds specified by the CC of Malta, in a judicial manner (*contentious separation*); 2) on the basis of mutual consent of the spouses with the permission of the family court (court in family matters) (*consensual separation*) (Civil Code of Malta, 1870).

Grounds for establishing separation at the request of one of the spouses are provided at the legislative level. Thus, Art. 40 subsection 3 of the CC of Malta provides the following circumstances, which entitle one spouse to initiate this procedure: 1) marital treason; 2) violence, abuse, threats, grievous bodily harm or grievous harm on the part of the defendant in the case of the plaintiff or children; 3) if 4 or more years have passed since the marriage - in case of irreparable breakup of marriage and unwillingness of spouses to live together; 4) if one spouse left the other without sufficient reason (without good reason) for a term of more than two years, and other (Bilyk, 2017; Arutjunjan, 2011). It follows from the case-law of Malta that, although an application for the establishment of a separate residence regime may be based on one or more grounds, proving at least one of them is sufficient for the court to reach a decision and establish the above regime (Bilyk, 2017).

In order to be entitled to a separate residence, each spouse shall undergo a reconciliation procedure (*mediation*) provided by the state on a royalty-free basis or by commercial entities on the basis of a contract. The petitioner or the legal representative initiates the separation procedure by means of a letter sent to the Registrar of Civil Courts containing information about the parties and an application for reconciliation of the parties. The importance of this procedure and, accordingly, the role of the appointed mediator is, first of all, in the attempt to resolve the conflict between the spouses and their reconciliation. If reconciliation is not possible, the mediator encourages the parties to resort to a mutual agreement procedure. Finally, if the mediator is unsuccessful in the course of a month in the matter of obtaining mutual consent of the spouses to establish separation, he or she sends a note to the court requesting the completion of the judicial reconciliation procedure (Art. 59 of the CC of Malta) (Arutjunjan, 2011).

According to Art. 59 of the CC of Malta, if the separation took place by mutual agreement of the spouses, the court only agrees to such separation, which is to be formalized in an official document

(contract). Before approving the separation, the court shall explain to the parties the consequences of such a regime, make an attempt to reconcile the parties, and may repeal, amend or supplement the provisions of the parties' agreement as necessary. This agreement has the force of a court ruling establishing separation.

In case of such an agreement, the court shall indicate in the judgment the spouse who will look after the children. Any arrangement between the spouses regarding child custody may be terminated at any time by the appropriate court at the request of any spouse or relative of any of them if the interests of the child so require.

Establishing a separate residence regime terminates the cohabitation obligation and has legal effects from the date of the civil court's judgment on separation (in the case of *contentious separation*) its approval by a court ruling (in the case of *consensual separation*) (Bilyk, 2017).

- IV) Such EU Member States as the Republic of Austria, the Hellenic Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Federal Republic of Germany, Romania, the Republic of Hungary, the Finnish Republic, the Republic of Croatia, the Czech Republic and the Kingdom of Sweden chose the fourth model of legal regulation of the separation institute, namely: the model for which actual separate residence (actual separation) is one of the legally prescribed grounds for dissolution of marriage.

The legislation of the Republic of Austria does not provide for an institute for judicial separation, however, under § 55 of the Marriage Act, in the case of a separate residence of the spouses for more than three years, each spouse may request the dissolution of the marriage due to its complete and irreparable destruction (Law to standardize the right of marriage and divorce in the country of Austria and in the rest of the Reich, 1938).

According to Art. 1439 of the Greek Civil Code, each spouse submit to the court a claim for dissolution of marriage in the case of their separate residence for more than two years since in such circumstances the destruction of the marriage is considered irreparable (Greek Civil Code, 1946).

In the Republic of Estonia, a court may terminate the marriage when the marriage relationship is permanently terminated. Marital relations are considered terminated if the spouses no longer have cohabiting relationships and there is a reason to believe that they will not resume the cohabitation (Part 1 of Art. 67 of the Family Law Act) (Family Law Act, 2009). And Part 3 of Art. 67 of the Family Law Act provides for an additional presumption that marital relationships are considered terminated: if the spouse has lived separately for at least two years (Dubowski, 2017).

Art. 27 of the Marriage Law of Cyprus defines the separation of spouses of at least four years as one of the reasons for divorce (Marriage Law of Cyprus, 2003).

According to the Civil Law of the Republic of Latvia, one of the spouses may demand the dissolution of the marriage if the other: is absent for at least one year (Art. 72), became ill with a hardly curable mental or infectious disease (Art. 73), committed a criminal offense or immoral act (Art. 74). Marriage can also be terminated in the event of a lasting breakdown of the relationship, living separately for three years (Art. 76) (Civil Law of the Republic of Latvia, 1937).

The procedure for divorce is set out in Title IV of Book IV of the German Civil Code, according to which marriage can be terminated by application of one or both spouses on the basis of the actual termination of the marriage in the case of separate residence of the couple for at least one year if the continuation of marriage is extremely cruel for the applicant. Marriage is considered to be finally broken up if the couple has been living separately for three years, and then the marriage may be terminated regardless of the consent of another spouse. Marriage is also considered to be terminated if the couple has been living separately for at least one year and both are suing for divorce or either spouse agrees to the divorce application filed by the other spouse (Onishko, 2010).

According to Art. 373 of the Civil Code of Romania, divorce in court order at the request of one of the spouses may occur in the following cases: 1) if there has been a complete and irreparable breakup of the marriage and the spouse does not see the possibility of its continuation; 2) if the actual separation (*separate în fapt care*) lasts more than two years; 3) at the request of one spouse whose health condition prevents him or her from continuing to be married (Civil Code of Romania, 2009).

Art. 4:21 “Divorce” Section III “Marriage Termination” Part 2 “The Institute of Marriage” Book 4 “Family Law” of the Civil Code of Hungary as of 26.02.2013, which came into force on 15.02.2014, provides that the court rules to dissolve a marriage at the request of one of the spouses in the event of destruction of marriage due to differences of character (irreconcilable differences). Marriage should be considered broken if the marriage relationship is broken and there is no real reason to expect reconciliation, judging from the events that led to the destruction of cohabiting as a couple or judging by the length of separation (Civil Code of Hungary, 2013).

In Finland, either one spouse or both can file an application for divorce. Moreover, neither of them is obliged to state the reasons for their decision, and the court does not examine the relations between the spouses when considering such a case. Finnish law has taken the *repudium* form of divorce, and the expression of at least one spouse on the termination of marriage is sufficient to dissolve the marriage (Dubowski, 2017). The dissolution of a marriage is only possible after the expiry of a six-month time-limit for conciliation, during which the parties may change their decision to terminate the marriage. In order for the divorce to be finalized after the expiry of this period, one of the spouses or both of them shall reapply to the inferior court for divorce. However, such an application can be made by any spouse, regardless of whether he or she was the applicant at the first stage of the divorce process (Khitrukhin, 2014).

The requirement for an expiration date for reconciliation is not sufficient if the couple has been living separately for two years (Art. 25 of the Marriage Act) (Marriage Act of Finland, 2001).

Croatian family law does not establish the institute of formal (legal) separation, but according to the rules of the Family Law of Croatia (*Obiteljski zakon*), one of the reasons for the dissolution of marriage is the termination of marriage (*prestanak bračne zajednice*). Thus, according to Art. 51 of Family Law of Croatia, a court announces the dissolution of a marriage if the marriage union is terminated for at least one year. The termination of a marriage union can be said when all the relationships that bind a couple in such a union have been severed, in particular, when the couple no longer wishes to live together or stay in a special unity that is characteristic of such a union (for example, termination communication, leaving the joint premises) (Family Law of Croatia, 2015).

In Sweden, the procedure for registration and dissolution of marriage, as well as the related legal relationship, is governed by the Marriage Code (*Äktenskapsbalk* (1987-230)). If the couple has lived separately for at least two years, the court may decide to dissolve the marriage immediately without giving any time for reflection, even if they have children under the age of 16 (Marriage Code of Sweden, 1987). Separate accommodation is confirmed by the extracts from the Tax Office on accommodation in different locations and written testimony of at least two witnesses (Reznik, 2014).

Conclusions

On the basis of a comprehensive analysis of legislation regarding the legal regime of spousal separate residence in the EU and Ukraine and the practice of its application, the features of each model of legal regulation can be distinguished.

- I. Thus, an analysis of the legal provisions of the United Kingdom of Great Britain and Northern Ireland, the Republic of Poland, which recognize the independence of separation institutions from the dissolution of marriage, allows distinguishing the following features inherent in this model of legal regulation of separation:
 - 1) separation is aimed at preserving the family, not dissolving it;
 - 2) reasons for establishing separation are objective (factual) and subjective circumstances, which led to a long-term breakdown of the relationship between the spouses;
 - 3) spouses do not reside together temporarily and do not maintain a marital relationship but do not break the marriage;
 - 4) establishment of separation does not terminate the marriage itself, and therefore each of the spouses is obliged to maintain marital fidelity;
 - 5) Separation excludes mutual inheritance by law, but does not exclude inheritance by will;
 - 6) also, separation blocks two legal presumptions: joint ownership and paternity.
- II. An analysis of the laws of the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic,

the French Republic, in which the spousal separate residence regime exists in parallel with the institute of divorce, allows to distinguish the following five features inherent in the separation regime:

- 1) grounds for separation and dissolution of marriage are the same;
- 2) requirement for the establishment of a separate residence regime is considered in the same manner as the requirement for divorce;
- 3) divorce application takes precedence over the requirement to establish a separate residence regime: if both applications are submitted to the judge at the same time, the judge first examines the divorce application and satisfies it, if such satisfaction is possible in the circumstances of the case, otherwise, the judge considers the request for separation;
- 4) the spouse who has filed a lawsuit for dissolution of marriage can at any stage of the case replace it with a lawsuit to establish the regime of separate residence, but the reverse replacement is not allowed;
- 5) the obligation of cohabitation and retention is terminated after the separation of spouses is established, but the obligation of mutual assistance, as well as marital fidelity, remains.

Separation of spouses always entails separate ownership of each spouse of their property, and the legal consequences of separation are identical to the legal consequences of divorce.

- III. From the analysis of the legislative provisions of the Kingdom of Denmark, the Republic of Ireland, the Italian Republic, the Republic of Lithuania and the Republic of Malta, in which the divorce is directly dependent on the formal (legal) separation, the following features inherent in this model of legal regulation of separation emerge:
 - 1) the primary purpose of securing the separation institute in the laws of these states is to give the couple time to determine the future for their marriage: divorce or reconciliation;
 - 2) the separate residence regime may be established by the decision of the competent authority (court, prosecutor, state administration) by mutual

agreement of the couple or at the request of one spouse, despite the objection of the other;

- 3) the existence of a clear list of grounds in the legislation for establishing separation at the request of one of the spouses;
- 4) the existence of consequences of the separate residence regime is connected with proving the guilt of one or both spouses in establishing the separate residence regime on any basis;
- 5) the establishment of separation leads to the termination of the regime of the communion of the property of the married couple, termination of the marriage contract, except for the provisions on the separate residence regime and termination of the presumption of paternity.

IV. The peculiarity of the fourth model of legal regulation of the separation institute, which is inherent in the legislation of the Austrian Republic, the Hellenic Republic, the Republic of Estonia, the Republic of Cyprus, the Latvian Republic, the Federal Republic of Germany, Romania, the Republic of Hungary, the Finnish Republic, the Republic of Croatia, the Czech Republic and the Kingdom of Sweden is that the actual separation is one of the factors that are taken into account in the legislative regulation of the divorce procedure.

References

Arutjunjan, G. (2011). Regulation of the Partial Termination of Marriage in the Republic of Malta. *Family and housing law*, 5, 32–35.

Auletta, T. (2000). *The family*. Torino, Giappichelli.

Belgian Civil Code. (1804, March 21). Retrieved from http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?DETAIL=1804032130%2FF&caller=list&row_id=1&numero=11&rech=14&cn=1804032130&table_name=LOI&nm=1804032150&la=F&dt=CODE+CIVIL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&trier=promulgation&chercher=t&sql=dt+contains+%27COD E%27%26+%27CIVIL%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=34&imgcn.y=10

Bilyk, O. (2017). Institute of separate living of spouses in the family law: comparative legal aspect: *Doctor's thesis*. Kyiv.

Boyko, I. (2013). *Legal regulation of civil relations in Ukraine (IX-XX centuries)*, Kyiv, Atika.

Civil Code of Hungary. (2013, February 26). Retrieved from http://njt.hu/translated/doc/J2013T0005P_20180808_FIN.pdf

Civil Code of Luxembourg. (1803, March 5). Retrieved from <http://legilux.public.lu/eli/etat/leg/code/civil/20181101>

Civil Code of Malta. (1870, February 11). Retrieved from <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580&l=1>

Civil Code of the Netherlands. (1992, January 1). Retrieved from <https://wetten.overheid.nl/BWBR0002656/2019-01-29>.

Civil Code of Romania. (2009, July 17). Retrieved from <http://legislatie.just.ro/Public/DetaliuDocument/175630>

Civil Law of the Republic of Latvia. (1937, January 28). Retrieved from <http://ekubirojs.lv/wp-content/uploads/2016/02/civil-law.pdf>

Dubowski, R. (2017). *Material and legal grounds for divorce - critical analysis and de lege ferenda postulates*. Yuzefuw: Institute of Public Activities.

Family Code and Caring of Poland. (1964, February 25). Retrieved from <http://prawo.legeo.pl/prawo/kodeks-rodziny-i-opiekunczy-z-dnia-25-lutego-1964-r/>

Family Code of Ukraine. (2002, January 10). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-iii>

Family Law Act. (2009, November 18). Retrieved from <https://www.riigiteataja.ee/en/eli/530102013016/consolide>

Family Law (Divorce) Act. (1996, November 27). Retrieved from <http://www.irishstatutebook.ie/eli/1996/act/33/enacted/en/html?q=Divorce>.

Family Law of Croatia. (2015, September 18). Retrieved from <https://www.zakon.hr/z/88/Obiteljski-zakon>

Greek Civil Code. (1946, February 23). Retrieved from <http://www.ministryofjustice.gr/site/kodikos/Evpepēpio/ΑΣΤΙΚΟΣΚΩΔΙΚΑΣ/tabid/225/language/el-GR/Default.aspx>

Grežlikowski, Ya. (2011). Institution of separation in European law. *Wloclawek Studies*, 13, 81–95.

- Harris-Short, S. & Miles, J. (2011). *Family Law: Text, Cases, and Materials*. Oxford University Press.
- Hipeli, L. (2014). Forms of family relations and their reflection in law in Denmark. *Rights of compatriots of Northern Europe*, 2, 19–28.
- Hlyniana, K. (2010). Comparison Analysis of a Legal Separation under Legislation of Ukraine and Some Foreign Countries. *Actual Problems of State and Law*, 53, 204–211.
- Italian Civil Code*. (1942, March 16) Retrieved from <http://www.altalex.com/documents/news/2014/11/10/dello-scioglimento-del-matrimonio-e-della-separazione-dei-coniugi>
- Judicial Separation and Family Law Reform Act*. (1989, April 19). Retrieved from <http://www.irishstatutebook.ie/eli/1989/act/6/enacted/en/html>
- Kasprzyk, P. (1999). *The institution of marital separation in the light of the Act of May 21, 1999*. Lublin, Sandomiesh.
- Kasprzyk, P. (2006). The institution of separation under polish law. Analysis of the provisions, an attempt to assess its functioning. *Visnyk of Lviv University. Law Series*, 43, 180–191.
- Khitrukhin, I. (2014). Family Law in Finland. *Rights of compatriots of Northern Europe*, 2, 45–53.
- Law to standardize the right of marriage and divorce in the country of Austria and in the rest of the Reich*. (1938, July 6). Retrieved from <https://www.jusline.at/gesetz/eheg>
- Lepek, S. (2003). Separation Institute: problems of application. *Law of Ukraine*, 3, 128–130.
- Lezhnieva, T. & Chernop'iatov, S. (2010). The concept and content of judicial separation. *Law and Society*, 6, 117–121.
- Marriage Act of Finland*. (2001, December 13). Retrieved from <https://www.finlex.fi/fi/laki/kaannokset/1929/en19290234.pdf>
- Marriage Code of Sweden*. (1987, May 14). Retrieved from http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/aktenskapsbalk-1987230_sfs-1987-230
- Marriage Law of Cyprus*. (2003, July 25). Retrieved from http://www.cylaw.org/nomoi/enop/non-ind/2003_1_104/full.html
- Matrimonial Causes Act 1973*. (1973, May 23). Retrieved from <https://www.legislation.gov.uk/ukpga/1973/18>
- Nieper, F. & Westerdijk, A. S. (1995). *Niederländisches Bürgerliches Gesetzbuch* (Dutch Civil Code). München, Beck.
- Onishko, O. (2010). The regime of separate residence of spouses in family law of Ukraine. *Customs business*, 3 (69), 2, 26–29.
- Order of marriage and dissolution law*. (2007, January 15) Retrieved from <https://www.retsinformation.dk/Forms/R0710.aspx?id=206338#idce842498-75bf-4ef5-963b-273318857cb4>
- Petelchyc, J. & Skura, M. (2017). *Maintenance obligations for children in Denmark and the United Kingdom*. Warsaw, Senate Chancellery.
- Portuguese Civil Code*. (1966, November 25). Retrieved from http://www.pgdlisboa.pt/leis/lei_mostra_articula.do.php?id=775&tabela=leis
- Reznik, V. (2014). Forms of family relations and their reflection in the legislation of Sweden. *Rights of compatriots of Northern Europe*, 2, 32–39.
- Romovska, Z. (2013). Ukraine Creates European Family Law. *Law of Ukraine*, 10, 9–29.
- Starchuk, O. (2012). Divorce and regime of spouse separation: determination of the content and correlation of the notions. *Uzhhorod National University Herald. Law*, 20, 1, 2, 126–128.
- Stolker, C. J. J. M. (1998). *Book 7 Special agreements title 7 section 5*. In: Persons - a family law. Text & Comments. J. Nieuwenhuis, C. J. J. M. Stolker, W. L. Valk, M. J. C. Koens, A. P. M. J. Vonken (Eds.). Deventer, Kluwer.
- Sylwestrzak, A. (2017). *Legal effects of spouses separation*. Warsaw, Wolters Kluwer Poland.
- Thomson, J. M. (1987). *Family Law in Scotland*. London.
- Truba, V. (2008). Problems of legal regulation and prospects of development of establishin the regime of separation of spouses. *Odesa National University Herald. Jurisprudence*, 13, 10, 40–47.
- Tsybaliuk, V. (2014). Current issues of legal regulation for separation of spouses in family law of Ukraine. *International Humanitarian University Herald. Jurisprudence*, 10-2, 1, 164–166.
- Verba-Sydor, O. & Vorobel, U. (2019). Institute of separation in the family law of France, Portugal and the states of Benelux. *Social Legal Studios*, 3 (5), 21–29.
- Zahvataev, V. (Ed.). (2012). *French Civil Code* (Napoleon Code). Moskva, Infotropik Media.
- Zahvataev, V. (Ed.). (2018). *Code of Civil Procedure of France*. Kyiv, Alerta.