

[THIS IS DRAFT FOR POSTING ON SSRN “WORKS IN PROGRESS” SITE.]

THE RIGHT TO DIVORCE: ITS DIRECTION, AND WHY IT MATTERS

Ram Rivlin*

Abstract

Following the last decades’ ‘no-fault divorce revolution’, it is now common in western legal regimes that a spouse may unilaterally obtain divorce upon demand. Moreover, various courts, as well as legal commentators, claim that people have a ‘right to divorce’, namely that limitation on one’s right to unilaterally divorce infringes a basic, or even a constitutional, right. However, the nature of this alleged right has yet to be characterized.

This paper aims at clarifying the nature of the right to divorce, utilizing the analytic tools of general theory of rights. Rights come to the normative world with a direction: one’s right imposes a duty (or other normative relation) on someone else. There is a need to inquire, then, whose duty correlates with the right to divorce, or – in other terms – what the *direction* of this right is.

The answer is more complicated than it seems at first glance. Drawing on careful examination of the reasons behind the move to unilateral no-fault regime, I argue that this right should be construed as directed towards the state, or the legal order, rather than towards the other spouse to whom the right-holder is married. I demonstrate that while one might have a valid claim for a no-fault divorce regime, such a claim should not impose any direct duty on one’s spouse. I then show the implications of this analysis on pressing doctrinal questions which relate to the possibility of civil remedy in cases of violations of the right to divorce (including cases which involve religious law). The right to divorce, I contend, is a consequence of state-regulated marriage and divorce. This, in turn, opens the door to a better understanding of the role of regulating family relations and its normative ramifications.

* LL.B, LL.M & LL.D., Hebrew University of Jerusalem. Lecturer, Hebrew University of Jerusalem Faculty of Law, and fellow at The Edmond J. Safra Center for Ethics, Tel Aviv University (2012-2013). I am grateful to Alon Harel, Shahar Lifshitz, Ofer Malcai, Sean Williams, James Dwyer, Scott FitzGibbon, Robin Fretwell Wilson and an anonymous reviewer for helpful comments on earlier versions of this article.

This article is forthcoming in Volume Four of the International Journal of the Jurisprudence of the Family.