

HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

27 - THE AGUNAH CRISIS AND PRENUPTIAL AGREEMENTS

PART 2 - SOLUTIONS

OU ISRAEL CENTER - SUMMER 2016

A] COERCION BY BEIT DIN

See Part 1 for a discussion on when and how Beit Din is able to bring pressure on a recalcitrant spouse to give a get.

B] CIVIL ACTION

- Civil Legal Action for damages It may be possible to sue in the secular courts for damages for emotional and psychological abuse.¹ Even where the suit is successful and damages awarded, as with all such cases it is often difficult to enforce. If the other party is very rich or very poor it may not be a deterrent. Ultimately if the other side does not pay and is found to be in contempt of court and jailed, this may cause a major problem as it may constitute coercion by a no Jewish court and render the get a גט מעושה.
- Injunctive relief Any kind of injunction from a Secular Court requiring the giving of a get will be halachically invalid as the get will be a גט מעושה.

C] BEIT DIN CLAIM FOR MEZONOT

If the husband is delaying giving the get after the couple have separated, the wife could bring a claim in Beit Din for mezonot, so that the delay is costing the husband money. The problem with this is that, after the separation, the wife is only entitled to mezonot if HE left her. If SHE left him, she loses the right. Since most separation situations will be grey and unclear, and since the halachic onus of proof is upon her to prove her entitlement (המוציא מחברו עליו הראיה), it will be very difficult to succeed in practice.

D] SECULAR LEGISLATION - 'GET LAWS'

D1] THE 1983 LAW

- The 1983 NY State Get Law required the judge in a civil divorce to withhold the divorce until 'the party who filed for divorce removes all barriers to remarriage'. Many senior poskim - including Rav Moshe Feinstein, Rav Yosef Henkin, Rav Yaakov Kaminetzky, Rav Shimon Schwab and others - ruled that this was not coercion in halacha. There is no 'right' to receive a civil divorce which is being denied to the husband and any refusal by the Courts of the civil divorce is a side issue to the get. Nothing forces the husband to grant the get.
- The problem with this law is that it did not help in cases where the husband was not bothered about receiving a civil divorce. Also, it did not work if the wife filed for divorce first. It could thus be avoided by the husband by simply delaying and not filing for divorce.

1. It may also be possible for to sue an abusive spouse in Beit Din for emotional stress, although, given some of the challenges and vagaries of pursuing claims through Beit Din, it is not clear how practical this would be as an effective solution to many Agunah cases. For a detailed article, see *Spousal Emotional Stress: Proposed Relief for the Modern-day Agunah*, R. Dr. Yehuda Warburg, Journal of Halacha and Contemporary Society LV p49

D2] THE 1992 LAW

- The law was subsequently amended to allow the judge to take into account the effect of either side's refusal to remove barriers to remarriage (in other words, to give receive a get) when dividing the couple's property and establishing the sum of alimony. Thus the husband could be required by the Court to pay much more money if he does not give a get.
- Halachic opinion on this was divided. IF the financial payment was construed as a penalty requiring the husband to give the get, all poskim agreed that the get would be invalid. But IF the payment was construed as a means of financial support for the wife (*demai mezonot*) then Rav Moshe ruled that the get was valid. US judicial opinion was divided on which interpretation of the law was correct.
- Other poskim - Rav Eliashiv and Rav Shlomo Zalman Auerbach - ruled that the 1992 Get Law rendered the get invalid in any event. Some poskim have gone so far as to question whether the 'background coercion' of the threat of the Get Law could actually bring in to questions the validity of ALL gittin in NY! The husband could claim that he gave the get partially due to coercion by the State. Most poskim have rejected this on the basis that Get Law does not in any way mandate the giving of the get.

E] PRENUPTIAL AGREEMENTS

Can the couple sign an agreement before (or after - a post-nuptial agreement) they are married which avoids the problems of contentious divorce and abuse of the get process? Is it not possible to deal with the issues when the couple are loving and friendly?

אמר לון רבי מנא אייתון פרנה נקריינה. אייתון פרנה ואשכחון כתוב בגווה 'אין הדא פלגית תסבי להדין פלוני בעלה ולא תיצבי בשור פותיה תהוי נסבה פלגות פרן' (קרצן העדכשם - הציאו הכתובה ומלאו כתוב צב אם אשה הלזו תקח לאיש הלזב לצעל ולא תרלי בחזרותיה ידיה כלומר שתכא עכבה ממנה תקח חלי כתובה)	1.
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תלמוד ירושלמי (וילנא) מסכת כתובות פרק ז הלכה ו

There is precedent in the Yerushalmi for the prenuptial agreement. In this case a Ketubah was written including a special clause that if the wife initiated and required a get she would still be automatically entitled to payment of half the ketubah sum.

E1] PRE-AGREEMENT TO GIVE A GET

- Can the couple sign an agreement saying that in the event a civil divorce is granted they will give and accept a get?
- This does not work since:

(a) it may be a 'kinyan dvarim'

הדברים שאין בהן ממש אין הקנין מועיל בהן. כיצד? הרי שכתב בשטר וקנינו מפלוני שילך בסחורה עם פלוני, או שיחלקו השדה שביניהם, או שישתתפו שניהם באומנות, וכיוצא בדברים אלו כולן, הרי זה 'קנין דברים' ואינו מועיל כלום, שהרי לא הקנה לחבירו דבר מסויים וידוע, לא עיקר ולא פירות עיקר הידוע	2.
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רמב"ם מכירה הרמב"ם מכירה ה הלכה יד

If a contract provides for the parties to do something in the future but without the transfer of any actual existing object or right which currently exists, this will be deemed to be a 'kinyan devarim' - a mere verbal intent and not a binding contract.

(b) it may render the get a מעושה as he is now coerced by the agreement to give the get.

E2] PRE-AGREED PENALTY IN THE EVENT OF NOT GIVING A GET

In 1984 it was suggested that the parties could pre-agree a penalty for not giving the divorce, just like in Tenaim the couple pre-agree a penalty if they break the shidduch. Just as the threat of the penalty may induce them to marry, yet does not constitute coercion and invalidate the kiddushin, so too the threat of the penalty should not invalidate the get.

3. אם נשבע הבעל ליתן גט צריך שיתירו לו קודם שלא יהא דומה לאונס הגה: וכו' הדין אם קבל קנין לגרש. אבל אם קבל עליו קנסות אם לא יגרש, לא מקרי אונס, מאחר דתלה גיטו בדבר אחר, ויוכל ליתן הקנסות ולא לגרש (ב"י בשם תשובה וכן הוא במהרי"ק שם בפסקים). ויש מחמירין אפילו בכחאי גוונא (שם בתשובת הרשב"א) וטוב לחוש לכתחלה ולפטרן מן הקנס. אבל אם כבר גירש מפני זה ואפילו גירש מכה שצוה ששעה מעלמו לגרש, הגט כשר....

שר"ע אה"ע קלד סעיף ד

The Rema records a dispute on the question of whether a financial penalty to procure a get constitutes coercion. His conclusion is to be strict where possible.

On this basis some suggested that in the Agunah scenario, which is extremely pressing and bedeviled, it is entirely reasonable to rely on the lenient opinion. The problem with this is that, unlike kiddushin, the potential downside for gittin is very serious with potential adultery and mamzerut.

E3] THE RCA/BDA PRENUPTIAL AGREEMENT

- In the 1980's the RCA devised a Prenuptial Agreement which specified that failure to give or accept a get causes damages to the injured party. The agreement quantified those damages in advance. Although the agreement did not specifically coerce the husband to give the get but only imposed damages, nevertheless some poskim were concerned that it could result in a מעושה גט.

- In the early 1990's² a new and quite different Prenup was devised³ in the US and promoted by the Rabbinical Council of America (RCA) and the Beit Din of America (BDA). It has received the *haskama* of many leading poskim not only in the YU and Modern Orthodox world⁴ but also in the wider charedi halachic community, including Rav Ovadia Yosef, Rav Zalman Nechemia Goldberg⁵ and Rav Osher Weiss⁶. The agreement has also been upheld as binding in the US Courts.⁷

- The RCA passed a number of resolutions supporting this Prenup, including in 2006, when it resolved that: *"since there is a significant agunah problem in America and throughout the Jewish world, the Rabbinical Council of America declares that no rabbi should officiate at a wedding where a proper prenuptial agreement on get has not been executed."*⁸

- The RCA Prenup⁹ effectively does two things:-

(i) It constitutes a binding Arbitration Agreement specifying that, in the event of a serious dispute in the marriage, the parties agree in advance to go to a specific Beit Din (usually but not necessarily the BDA). This will avoid the problem of a recalcitrant husband seeking out an unscrupulous Beit Din which he knows will help him use the get as a tool to manipulate the negotiations.¹⁰ The Arbitration Agreement can then be enforced by a Civil Court with no concern of a מעושה גט as the Civil Courts are simply instructing the parties to listen to the Beit Din.

(ii) A husband has a halachic requirement to support his wife during the marriage, in exchange for which he is entitled to (at least some of) her earnings. After the couple separate this obligation will often cease (see section C above). In the Prenup the husband waives his right to her earnings and agrees to pay a quantified sum (currently \$150 per day, index linked) to the wife from the date of their separation until the get is given. If she fails to co-operate with the Beit Din process those payments cease. So too, the wife agrees to pay to the husband \$150 per day, unless he fails to cooperate with the Beit Din process. On this basis, once either of the parties cease to cooperate with the get process, it starts to cost them \$150 per day in maintenance.

2. Based on ideas floated by R' Eliakim Ellinson in the early 1970s. See Rabbi J David Bleich, Contemporary Halakhic Problems Volume 1 p154 ff.

3. Largely formulated and promoted by Rav Mordechai Willig, Rosh Yeshiva in YU.

4. See http://www.theprenup.org/pdf/YU_Roshei_Yeshiva_Prenup_Letter.pdf for the endorsement of over 20 senior YU Rabbanim.

5. See <http://www.theprenup.org/rabbinic.html>

6. See <http://www.theprenup.org/pdf/Rabbi%20Asher%20Weiss%20Prenup%20Letter.pdf> for R' Weiss's detailed letter of analysis and support of the RCA Prenup.

7. There is a special version of the prenup for use in California which takes account of different CA law on prenups.

8. A new resolution was just past in September 2016 strengthening further the resolve of the RCA to require its Rabbis to use a Prenup. The wording of this new resolution will shortly be released to the public.

9. Which can be downloaded at <http://www.theprenup.org/prenupforms.html>

10. Rav Moshe Feinstein in EH 4:107 supports the halachic validity of such a pre-nuptial Arbitration Agreement. He did not specifically comment on the RCA Prenup, which was devised after his passing.

- Halachically, since this payment obligation relates to maintenance¹¹ and not to the giving of the get, it will not constitute coercion¹². In the classical case, if the husband was in jail for non-payment of a debt unrelated to the divorce and the wife agreed to pay off that debt and get him out of jail in return for the husband giving the get, this was not considered coercion.
 - The question of 'Asmachta' is addressed. In halacha, if a party agrees to an obligation which he never expected to pay¹³, that obligation may not be binding. So too, one could argue that the parties never expected to divorce so the parties never intended to have to pay. To deal with that, the agreement contains specific wording¹⁴ to avoid this. Also, the \$150 per day is a reasonable estimation of maintenance.
 - The agreement can also be signed as a 'post-nup' after the wedding.¹⁵
 - The success rate for the RCA Prenup has been outstanding, with many of those involved with the agreement claiming a 100% success rate. However it is still not used broadly outside the YU/MO world¹⁶. Why?
- (a) All new innovations in world of halacha are rightly regarded with suspicion. There must be a concern for the integrity of the halachic system as a whole and stiff resistance to those who wish make sweeping changes to halacha under the banner of modernization. On the other hand, the needs of individuals (and even more so entire groups) in the kehilla are also important. Thus there needs to be a balance between the degree of halachic innovation and the need for that innovation. Many consider that in this case the innovation is limited and supported by heavyweight poskim, and the need is acute.
- (b) Some argue that it is not appropriate to discuss such matters before the marriage, especially when it may involve lawyers. In response it is pointed out that the ketuba discusses very similar issues and is totally accepted as in keeping with the romance of pre-marriage discussions.¹⁷ People now ignore the implications of the ketuba and sign it as standard. This could be done with the Prenup too.
- (c) Unquestionably, although rarely admitted, there is an element of hashkafic politics involved. A project supported by the YU and MO community will often be opposed on principle by others. Hopefully, people will see the inappropriateness of allowing communal politics to unnecessarily perpetuate the plight of Agunot!
- (d) More seriously, there have been other senior poskim who were unhappy with the RCA Prenup. Rav Moshe Sternbuch has written¹⁸ firmly against it on the grounds that he considers the \$150 per day mezonot payment to render the get a גט מעורשה. Even if the payment is not formally linked to the giving of a get, his view is that this does not help, especially since the husband never really intended to pay it when he signed the agreement. He also feels that the Prenup encourages divorce in scenarios where marriages could be saved. Rav Elyashiv was also against the earlier version of the RCA prenup and it is debatable whether he would have accepted the changes made in the current version.
- (e) Rabbi J. David Bleich, a very senior Rav in the YU world, has expressed significant concerns with the RCA Prenup.¹⁹

E4] THE ISRAELI TZOHAR PRENUP

- An Israeli version²⁰ of the RCA Prenup (with some modifications) is endorsed and encouraged by Tzohar.
- Like the RCA prenup it contains two main elements - (i) a binding Arbitration Agreement and (ii) a mutual maintenance obligation (6000 shekels per month, index linked) which can be triggered on 6 months notice by either party in the event of marital breakdown. It also contains a provision whereby either party can require the couple to attend marriage counselling.

11. The Nachalat Shiva (17C Poland), a classic collection of halachic legal forms, provides for a similar formula (9:14) for a pre-nuptial agreement whereby the husband agrees to pay a fixed sum of mezonot if the couple end up in Beit Din. He claims that this was from Takanat Shu'm in the Middle Ages. Some poskim (even those supportive of the RCA Prenup) question whether the Nachalat Shiva's case is comparable - see the letter of R. Asher Weiss ob cit.

12. Based on the Netivot in Torat Gittin 134, brought in Pitchei Teshuvot 134:9.

13. We discussed this in depth during the shiur on gambling.

14. That the agreement is made מעכשיו and before a בית דין חשוב

15. Which is actually in some ways halachically preferable as the husband will then be waiving rights which he has already acquired following the marriage. The strong preference to use a Prenup is due to civil law requirements of 'consideration' to make the agreement binding.

16. See <http://jewinthecity.com/2015/03/historic-backing-of-halachic-prenup-by-haredi-rabbis/> for an interesting recent review of haredi poskim who are apparently supporting the RCA Prenup. It is also recommended to read the comments at the bottom of that post challenging some of the statements made.

17. Indeed, the ketuba has become beautified as a symbol of the romance and hangs on the walls of many Jewish homes. Maybe people will one day do this with their prenups!

18. <https://www.scribd.com/doc/273292099/Rav-Moshe-Sternbuch-condemns-prenuptial-agreements?>

19. Rabbi Bleich has written scores of articles of the subject, many published in Tradition Journal. One of his students, R. Shalom C. Spira, has produced a 110 page analysis of Rabbi Bleich's position - see <https://www.scribd.com/document/176990434/Prenuptial-Agreements>. He states that the article was written 'under the general and detailed guidance' of Rabbi Bleich.

20. See http://www.tzohar.org.il/heskemeahava2/wp-content/uploads/heskem_english.pdf

F] REJECTED SOLUTIONS

Over the last century a number of solutions to the agunah issue have been suggested but rejected by the Orthodox halachic consensus:-

F1] HAFKA'AT KIDDUSHIN

4. ומי איכא מידי דמדאורייתא בטל גיטא, ומשום מה כח ב"ד יפה שרינן אשת איש לעלמא? אין, כל דמקדש אדעתא דרבנן מקדש, ואפקעינהו רבנן לקידושין מיניה. אמר ליה רבינא לרב אשי: תינח דקדיש בכספא, קדיש בביאה מאי איכא למימר? שויה רבנן לבעילתו בעילת זנות!

גיסין לג.

Chazal discuss a scenario of 'hafka' at kiddushin', where notwithstanding the lack of a valid get, the Rabbis can retroactively annul the marriage.

5. אדעתא דרבנן מקדש - לכן אומרם בשעת קידושין כדת משכ וישראל

תוספות מסכת כתובות דף ג עמוד א

This is why the chatan announces that the kiddushin is carried out 'according to the law of Moses and Israel'

- The possibility of using hafka'at kiddushin has been raised many times by different rabbinic figures over the past 100 years.²¹
- It has however generally been rejected as a solution on a number of grounds:-
 - there is considerable debate in the Rishonim whether this concept applies independently to annul the marriage retroactively or if it is effective only in conjunction with an accompanying get.
 - most poskim have taken the view that the few cases in the Gemara where this principle was invoked are sui generis and cannot be extrapolated to wider scenarios.

F2] KIDDUSHEI TA'UT

- Another suggestion is to invoke the principle of Kiddushei Ta'ut. This is parallel to mekach ta'ut in a purchase. If an object transacted turned out to be significantly different from that which the buyer expected, or was defective in some material way, the buyer can annul the sale on the basis of fundamental mistake. Can this be applied to a marriage contract?
 - Rav Moshe Feinstein was prepared to apply the principle in very limited situations where:-
 - (i) The unknown factor must have existed already at the time of marriage.
 - (ii) The unknown factor only came to the other party's attention after the marriage had already taken place.
 - (iii) The previously unknown factor fundamentally affected the essence of the marital bond (e.g., impotence), or is was major defect that made it impossible to live with the affected partner (mental incapacity).
 - (iv) The unknown factor is a matter that would seriously bother most people and deter them from marrying the affected partner had they known about the matter from the outset.
 - In the 1970s R. Emmanuel Rackman suggested that this be expanded to cover less fundamental defects in the husband's character that, had the woman known about before the marriage, would have stopped the marriage from proceeding. This was also extended further to cover defects that only arose after the marriage. R. Rackman later set up a Beit Din - The International Beit Din L'Inyanei Agunot - which acted in hundreds of cases to release Agunot.
 - The International Beit Din and R' Rackman's proposals and methodology were fiercely opposed by almost all Orthodox Rabbis²² including Rav Soloveitchik.²³

21. Starting in the late 19C with proposal from the French Rabbinate following the introduction of secular divorce in France. Most recently, Rabbi Shlomo Riskin has called for the establishment of a Beit Din under the Israeli Rabbanut which will be empowered to use hafka'at kiddushin in the most intractable of Agunah cases. See his detailed proposal at: <https://static1.squarespace.com/static/52a75d36e4b06a3e88b21253/t/52af67aae4b09af7f3cc0bf5/1387227050586/Hafka%27at+Kiddushin+Rabbi+Shlomo+Riskin.pdf>

22. Recent attempt have been made to explain and justify R. Rackman's methodology. See R. Michael Broyde's essay refuting this and explaining the underlying halachic problems with kiddushei ta'ut at http://www.edah.org/backend/journalarticle/4_2_broyde.pdf

23. For a detailed articles setting out the halachic reasoning against Kiddush Ta'ut and other ineffective proposals to solve the Agunah problem see *Gittin Sheloh K'dat Moshe v'Yisrael*, R. Chaim Malinowitz, Journal of Halacha and Contemporary Society Vol XXXVI p5.

I have to discharge a duty. Believe me, I do it with sadness in my heart. You know me; I never criticize anybody. I've never attacked anybody. I have never set myself up as a judge or arbiter who approves or disapproves of statements made by people. But today, בלוי כל הקציר, I feel it is my duty to make the following statement...

I also was told that it was recommended that the method of אפקעינהו רבנן לקידושין מיניה be introduced [i.e. the Beth Din will be able to annul a marriage retroactively without consent of the parties]. If this recommendation were accepted — I hope it will not be accepted — then there'll be no need for a *get*. We'll be able to cross out the mishna of קונה את עצמה בגט. Every Rabbi will be able to suspend *Kiddushin*. If such a privilege exists, why should it be monopolized by the Chief Rabbinate in Eretz Yisroel? Why shouldn't the Rabbinical Assembly [Conservative] do it as well as the Chief Rabbinate?

Do you expect to survive as Orthodox Rabbis, do you expect to carry on the מסורה under such circumstances? Chaos will replace the Torah.

I hope those gathered here will join me in objecting to such discussion and debates at a Rabbinical convention. I cannot imagine a Republican National Convention or Democratic National Convention where a symposium would be held as to whether communism should replace democracy in the United States.

To speak about changing *halochos* of Chazal is at least as nonsensical as discussing communism at a Republican National Convention. It is discussing methods of self-destruction and suicide.

Rav Yosef B. Soloveitchik speech to the RCA. Surrendering to the Almighty Light #116, 17 Kislev 5736

F3] GET ZIKUI

- It has been suggested that the *get* could be written and given by the Beit Din on behalf of the man, without his consent - a 'Get Zikui'. This has been rejected outright on the basis that the man (or his agent) must freely give the *get*. It is possible to accrue benefit to someone else (*zechut*) without their consent but never detriment.²⁴ The *get* is significantly to the husband's detriment and must be given by him.

F4] KIDDUSHIN AL TENAI

- Another old proposal²⁵ was for *kiddushin* to be entered into conditionally. The chatan would say to the kallah: 'Behold you are wed to me. However, if the judges of the State shall divorce us and I not give you a Jewish divorce, the marriage will be retroactively invalid'. This was put to R. Yitzchak Elchanan Spector in 1893, who rejected it entirely on the basis that Jewish marriage is (certainly following *nisu'in*) fully unconditional. The rejection of *Kiddushin Al Tenai* was supported by the European rabbinate in a sefer published in Vilna in 1930 - *Ain Tnai bi'Nisuin*.

- This suggestion was revived by R. Eliezer Berkovitz in the 1960's. It was again rejected by the Orthodox world but accepted by the Conservative movement.²⁶

F5] GRANT OF AGENCY TO THE WIFE

- In the 1930's a proposal was made by the Conservative movement in the US that the husband on marriage should appoint his wife to be his agent to execute a divorce on his behalf. This was rejected by R. Moshe Soloveitchik as flawed as the cohabitation of the couple would effectively undo the agency to granted to the wife. Again, Jewish marriage cannot be in anyway conditional. The agency, even if it survives the marriage, is practically ineffective as it can be revoked at any time by the husband.

24. There are limited cases where the Beit Din may accept a *get* on behalf of the wife.

25. Also put forward by Rabbi Michael Weil of Paris in the late 19C.

26. There was some significant politics at the time concerning whether R. Berkovitz's proposal had the support of his Rav the Seridei Eish - R. Yaakov Weinberg.

F6] THE LIEBERMAN CLAUSE

• In 1954 Prof Shaul Lieberman proposed the addition the following clause to the ketuba whereby the couple accept the authority of the Beit Din in an arbitration and added:

'We recognize the Bet Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of Jewish law of marriage throughout his or her lifetime. We authorize the Bet Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.'

The Orthodox response was negative. Apart from its non-acceptance of the authority of JTS, the clause was rejected as been halachically unenforceable as *asmchata* - too vague and indeterminate.

F7] DINA D'MALCHUTA DINA

7. וכן מלך שגזר שכל מי שיתן מס הקצוב על האיש ישמע בדברו וכן, ובא ישראל ונתן המס שעל ישראל זה העני, הרי זה עובד בו יותר מדאי, שדין המלך דין, אבל אינו עובד בו כעבד. הגה: הנושא אשה במקום שדין דיני עובדי כוכבים, ומתה אשתו, לא יוכל אבי אשתו או שאר יורשיה לומר: 'כל הנושא אשה על דעת המנהג הוא נושא' ונדון הדבר דיני עובדי כוכבים דאם מתה לא יורשה בעלה או כדומה לזה. וליכא בזה משום דינא דמלכותא (צ"י צסימן כ"ו צסס תשובת הרשב"א), דלא אמרינן דינא דמלכותא אלא בדבר שיש בו הנאה למלך או שהוא לתקנת בני המדינה, אבל לא שידונו דיני עובדי כוכבים, דאם כן בטלו כל דיני ישראל (מהרי"ק שורש קפ"ח קפ"ח).

שו"ע חו"מ שס"ט:יא

In the 19C the Reform movement adopted the position that Jewish divorce should be based on the Law of the Land on the basis of 'dina d'malchuta dina'. This is not legitimate in halacha. The principle of 'dina demalchuta' is only relevant to financial and tax matters and perhaps laws regulating the general welfare of society (eg traffic laws). It does not impact in any way on Jewish ritual issues eg marriage, status, and in this case even inheritance.