Takkanot “In the interests of peace” in Talmudic Literature – When a Halakhic ‘Truth’ Meets Interpersonal Relationships

The *halakhic* system is a legal mechanism by which the sages of the Mishnaic-Talmudic period regulated all aspects of the life of the individual and the society. This system derived and rested on the earlier tradition of Biblical commandments that were recognized as *Torath* *Chaim*, a code for living that ought to be actualized. In the dialogue that arose between the Torah and "Life", the sages had to deal not only with disputes and conflicts that possibly arose from struggles about rights, resources, or feelings of injured honor, but also had to cope with the arena of common existence that was divided among social groups holding different ideas. Indeed, the heterogeneous nature of the community produced a variety of dilemmas and conflicts for which there were in fact clear *halakhic* answers, whereas strict adherence to the *Halakhah* would have exacted a drastic social price, expressed in rancorous animosities within the community and between the community and its neighbors

Research today provides a number of diverse approaches to the question of rabbinic dominance in the Jewish society of the period of the Mishnah and the Talmud. Catherine Hezser provides an example of a particularly minimalist approach.[[1]](#footnote-1)

One should note that in various places in the Talmudic literature the Sages reveal their inability to bind the public to their views. So, for example, they admit their limited power over the *Cohenim* – because the *Cohenim* have their own judiciary, or because of their strong position within Jewish society which rested on the traditions of the Torah and the religious and social conditions that had existed in the days of the Second Temple (e.g. Mishnah, Eduyot 8:3). Another example that reflects the Sages’ understanding that the halakhic system was not always adequate for changing well-rooted norms in society, is discernible in Talmudic sources describing the behavior of leading Sages trying by their personal example to institute desired norms in society.[[2]](#footnote-2)

I deem that when we ask ourselves what can be learned from the rabbinic sources about the tie between the halakhic discourse and the reality in which the Sages operated, especially when we examine their utilization of “*taqqanot*”, one should take into consideration two additional points: The first derives from the character of the *taqqanot* as legislation intended as a solution to a contemporary need – demonstrating an actuality.[[3]](#footnote-3) The second rests on the aspiration of the Sages to endow their concepts and precepts to the general society, even though this aspiration was never fully realized. From this aspect, even if we suppose that *taqqanot* “ways of peace”, which I will discuss below, were not implemented by all members of the community, it is still proper to relate to them as a suitable platform for examining different approaches of the Sages for coping with actual challenges stemming from reality, and not just reflections of an internal theoretical discussion (*pilpul*) that existed in the world of the academy of the Sages. [[4]](#footnote-4)

In the Mishnah, Tractate Gittin, one finds a group of *taqqanot* whose decisions are justified by the term “In the interests of peace”.[[5]](#footnote-5) This justification clearly conveys that the considerations that guided the sages in their decision did not always stem from the internal logic of the subject of the *Halakhah* under discussion, but from other considerations altogether; in this case, the consideration of the expected ramifications of a *halakhic* decision on the behavior of people towards one another.

The preference for a social consideration – “peace” between a person and his fellow – above a preference for actual *halakhic* logic, raises key questions regarding concepts and principles of the *halakhic* system, and its relation to social reality and its respective challenges.[[6]](#footnote-6)

In recent years, there is a vigorous debate regarding the question “can one point to a ‘meta-*Halakhah’*?; [[7]](#footnote-7) Is there any different between “meta-*halakhic*” consideration and non- *halakhic* consideration?[[8]](#footnote-8) Or between meta-*Halakhah* and the philosophy of *Halakhah*?;[[9]](#footnote-9) And what is the contribution of those concepts from varied disciplines to our understanding of the Sage’s thoughts on the one hand, and the *Halakhic* system on the other?[[10]](#footnote-10)

For the notion of 'Meta *Halakhah'* I base this article on definitions found in the *halakhic* work of Eliezer Goldman.[[11]](#footnote-11)

“Meta *Halakhah* is the unearthing of the mechanism that is found in the *halakhic* literature. These are value statements sown in the *halakhic* discourse, while at the same time they are not part of the logical principles of the *Halakhah*. Despite their marginal status, they have the power to direct the course of the decisions and overcome the correct logical *halakhic* judgements at critical points of decision in which the judgement reaches *halakhic* conclusions that are problematic in their content.”

In contrast to the thinkers Yeshayahu Leibovitz and Rabbi Solvetchik, who can be seen as thinkers holding a formalistic conception of the *halakha*[[12]](#footnote-12) by which the *halakha* is a normative *a priori* ideal system that in not mandated on actuality, Goldman holds that the *halakha* is not founded on the basis of a single meaning context. In his view the *halakha* is based on an approach related to the different meanings in which human practice operates, because the Torah was given to particular humans who always live a concrete existence and hold a particular value system. The significance of this is that serving the Lord [i.e., applying the Torah on reality by using *halakhot*. S.M.] must be done through that reality.[[13]](#footnote-13) The meta-*halakhot* norms are the mechanism that bridges between *halakha* and reality. These norms guarantee the religious significance of the *halakhic* system and the practical human suitability. The meta-*halakhic* foundation is therefore the one that identifies the connections other than the inherent logic in any specific *halakha* that is relevant to a *halakhic* norm decision. [[14]](#footnote-14) In Goldman’s words:

The main task of meta-*halakhic* norms is to annex a *halakhic* matter to a specific context. If the matter belongs in a context, then the characteristics of that context, the standards operating within it, and the value judgments it uses to decide by are relevant for a halakhic determination. This contention also applies to legislation within the framework of the halakha as well as to judgements and teaching.[[15]](#footnote-15)

Building on Goldman’s definition I will first try to show that ‘ways of peace’ is a ‘value concept’, that reflects the judgement of R. Jehuda the Prince and his coterie (that edited the corpus of ‘ways of peace’ *Takkanot* in the Mishnah).[[16]](#footnote-16) As such, ‘ways of peace’ was brought to the act of judgement and diverted from the path of narrow logic, which ostensibly reflects the proper path of adjudication, to other *halakhic* results. As I will demonstrate, diverting the path of judgement from one *halakhic* result to another is sometimes apparent from the Mishnah itself, and at times from alternate suggestions found in the Talmuds. Although, even if one treats *Takkanot* ‘ways of peace’ as based on meta-*halakhic* principles there is still room to ask additional questions regarding the place of these principles within the *halakhic* system. One question touches on the essence of the meta-*halakhot* principle: If this principle, as a value judgement stands as an ‘absolute value’ reflecting a correct situation (ethical or social), in the *halakhic* system?

Perhaps the opposite is true: the meta-*halakhic* principle as “ways of peace” was considered the best among a number of bad solutions to a complex social reality in which people were at times motivated by emotions and impulses and not by rational considerations. Alternatively, occasionally they were guided by concepts of normative interpretations that did not fit with those of the sages themselves. As such, these regulations should be treated as “beyond the strict letter of the law” and not as true *Halakha*. Therefore, it was thought that their employment should be restricted and minimized as much as possible.

Another question is if decisions based on a meta-*halakhic* principle was more significant to later decisors than ‘regular’ decisions (in keeping with the logical relevance of the taqqana)? In other words – if a decision based on a meta-*halakhic* principle born of a specific historical social and cultural connection was considered binding also by decisors operating in a different historical milieu?

In the following sections I will present examples that illustrate the above questions, whilst trying to point out the key approaches toward judgements that appear ‘meta-*Halakhic*” among the Sages themselves and adjudicators of later periods. From the examples brought here one can, to my thinking, point to two principal approaches toward it by the Sages and the *poskim* (decisors, arbiters) in tow . One approach sees the common life in a community framework –inevitability alongside various 'others' – along with its assorted challenges (emotional or ideological) as not necessarily a bad thing. On the contrary, this approach held that it was correct to perceive different *Halakhot* that were decided in regard to decisive issues as suitable to be justified by the meta-*halakhic* principle of the welfare of the society, and not by some specific subject. On the other hand, we will see a different approach towards ‘ways of peace’. Those holding to this approach believe that the *meta-Halakhot* ‘ways of peace’ should be limited. The adherents to the other approach do not necessarily reject ‘ways of peace’ as a fitting moral value which a society rightfully aspires to. This notwithstanding, it is doubtful if they saw a justification for a meta-*halakhic* level in the *halakhic* structure. In other words, to their thinking a meta-*halakhic* principle, if indeed had a role in the Halakhic system, should be limited to the area of the Halakhic theoretical discourse but not for the adjudication which is direct the practice life.

**The context of the lemma “in the interests of peace” in the Mishnah**

“in the interests of peace” is a justification for eleven *taqqanot* whose purport is “*tikun* *olam*” (literally “repair of the world” although variously translated) that belong to a textual unit found in chapters four and five of tractate Gittin in the Mishnah. These chapters can be viewed as a textual unit which in turn is made up of three clusters, each comprising sources from different periods.  In the main cluster (mGittin 4:4-5:4) we find *taqqanot* and disputes that employ the rationale 'for the sake of *tiqqun ‘olam*.' The two additional clusters, although they do not mention *tiqqun ‘olam* explicitly, may also be added to this collection. The first of these additional clusters includes *taqqanot* with various rationales, that resemble the *tiqqun ‘olam* *taqqanot* both in syntax and semantic field (mGittin 5:5-7): “the *taqqana* about the return of the value of stolen property (mGittin 5:5 *taqqanat hashavim*)," *“siqqarikon"* (mGittin 5:6)." and “for the altar (mGittin 5:5 *tiqqun  ha-mizbeah*).”  The second of these additional clusters contains *halakhot* that employ the rationale “in the interests of peace (*darkei shalom*)" mGittin 5:9–10.

The concept of “*tiqqun* ‘*olam*” originated around the end of the Second Temple period. The first element of the concept was a widening of the personal legal status of individuals in the Jewish community, and the entrance of women and emancipated slaves. It ensured that they would be able to establish families according to the *halakhah*, and to bring children (who would not be considered *mamzerim*) into the world in order to populate it. This conception began to change during the Ushah period. At the time, ensuring a viable birth-rate was still regarded as the central facet of *tiqqun* ‘*olam*, and the critical importance of this issue must be understood against the background of the needs of Jewish society in Palestine after two wars. [[17]](#footnote-17) However, the continuing existence of this society was not seen as being solely dependent on the size of its population. Other measures were required in order to ensure its survival, and it is clear that the rabbis gave a relatively great weight to favorable economic conditions.The main change came at the end of the Mishnaic period, with the editing of the *tiqqun* ‘*olam* unit by R. Judah haNasi and his disciples.  The earlier determination that‘*olam* referred to Jewish society, brought about a continuing extension of the areas to which the idea of *tiqqun* should be applied.  At this point, *tiqqun* was perceived as an expanding field of measures to ensure the existence of Jewish society as a culture of settlement with very clear and well-defined religious and national characteristics.  As a result, regulations and *halakhot* that were enacted by different rabbis at different times were removed from their original contexts and edited in the unit of mGittin, together with the term “*mipnei* *tiqqun* ‘*olam*”. In the new context they were endowed with a new ideological bias, which viewed the concrete confrontations reflected in them as representations of a broader aim, in accordance with Rabbi and his disciples’ perceptions of *tiqqun* ‘*olam.* All of these together would bring about the flourishing of Jewish settlement in the Land of Israel, thus strengthening the civilization which had the responsibility of populating the world.

As a result of the changes in the perception of *tiqqun* ‘*olam*, its central significance became the primary tier of the concept about the logical priority of the conditions required to ensure the existence and growth of Jewish society; however, other layers were added. These additional layers reveal a gradual move from conditions assuring the basic survival of the community, towards the assurance of humane living conditions within it. Finally, there were *halakhot* that occupied the place between the formal area of *halakhah* and the informal area of community life. The purpose of these *halakhot* was to prevent disputes between members of the community and to ensure friendly relations between neighbors as a means of promoting social solidarity. [[18]](#footnote-18)

The corpus of *halakhot* ‘in the interests of peace’ in Mishnah, Gittin 5:9-10 includes the following *halakhot* :[[19]](#footnote-19)

The following rules were laid down in the interests of peace

1. A priest is called up first to read the law and after him a Levite and then a lay Israelite, in the interests of peace.
2. An ‘*Erub* is placed in the room where it has always been placed, in the interests of peace.
3. The pit which is nearest the [head of the] watercourse is filled from it first, in the interests of peace.
4. [Taking] objects founding by a deaf-mute, an idiot, or a minor is reckoned as a kind of robbery – in the interests of peace. R. Jose says: it is actual robbery.
5. [The taking of] beasts, birds and fishes from snares [set by others] is reckoned as a kind of robbery - in the interests of peace. R. Jose says: it is actual robbery.
6. If a poor man gleans on the top of an olive tree, [to take the fruit] that is beneath him us counted as a kind of robbery. R. Jose says: it is actual robbery.
7. The poor of the Heathen may not be prevented from gathering gleanings, forgotten sheaves, and the corner of the field, in the interests of peace.
8. A woman may lend to another who is suspected of not observing the *Sabbatical* year a fan or sieve or a hand mill or a stove, but she should not sift or grind with her.
9. The wife of a *Haber* may lend to the wife of an *‘Am Ha-Aretz* a fan or sieve and may winnow and grind and sift with her, but once she has poured water over the flour she should not touch anything with her, because it is not right to assist those who commit a transgression. All these rules were laid down only in the interests of peace.
10. Heathens may be assisted in the *Sabbatical* year but not Israelites.
11. and greeting may be given to them, in the interests of peace.

The corpus includes three groups of *halakhot*. The first deals with relations between neighbors and the incidents that develop from the meeting of individuals in the public space of the community (synagogues or public areas). The second deals with the conflicts arising from divergent *halakhic* observance of the *chaverim* in the community (*am-haaretz*, *chaverim*; observers of the sabbatical year, transgressors of the sabbatical year). The third group reflects the increase in interpersonal connections and deals with the relations between Israel and the gentiles.

One can see that the conception that guided the judgement of the sages was the desire to prevent hostility between neighbors, and different groups in the community. The editors of the corpus saw interpersonal conflicts as disturbing events that could bring about the social dissolution of the community and plunge it into a primitive chaotic state. The ‘ways of peace’ rules therefore create an additional tier to strengthen the community (i.e. ‘*tikun ha'olam*’.) Ostensibly one can suppose that those who employed this approach ‘in the ways of peace’ saw the rules as a compromise (perhaps tolerant yet painful) that they had to make with ‘others’ of various types living next to them in order to guard the integrity of the Jewish community.[[20]](#footnote-20) Another way of seeing this approach is by model refers to the overlapping concepts of the 'right' and the 'good'. Dorrf distills those concepts: "Judgments of the 'right'…are assertion of *what must be done to advance the basic need of the society* at that society envisions them… The 'good', in contrast, is a declaration of *the less basic needs* *or the ideals of the society".[[21]](#footnote-21)* The right, he continues*,* "must be defined in terms of the needs of human survival *as a particular society sees them*". [[22]](#footnote-22)

However, it is possible to point to a different approach which guided the sages and that saw the ‘ways of peace’ as a value in and of itself. If so, then possibly *halakhot* ‘ways of peace’ did not arise only from pragmatic thinking, but came to fix a wrong or deficient *halakhic* situation – a lacuna - with the intent of bringing it into accord with appropriate absolute values or morals.

We now turn to a discussion of a number of *halakhot*. These are discussed according to the societal connection that is deliberated within them, whether as individuals within a Jewish community, or as individuals belonging to a strata of society that was observant of the *halakhot*  (as they were understood and fashioned by the sages) but in a different manner, or whether between Jews and Gentiles.

1. ***Halakhot*  relating to theft among Israel**[[23]](#footnote-23)
2. [Taking] objects founding by a deaf-mute, an idiot, or a minor is reckoned as a kind of robbery – in the interests of peace. R. Jose says: it is actual robbery.
3. [The taking of] beasts, birds and fishes from snares [set by others] is reckoned as a kind of robbery - in the interests of peace. R. Jose says: it is actual robbery.
4. If a poor man gleans on the top of an olive tree, [to take the fruit] that is beneath him us counted as a kind of robbery. R. Jose says: it is actual robbery.

These three *halakhot*  are connected by subject , and they include a dispute between the Tannaitic tradition that quotes the *Halakhah* (*'Tanna* *Kama'*) and the opinion of R. Yose.[[24]](#footnote-24) The *halakhot* arrange the property rights in the cases in which the property ownership is considered within the “grey” area. *Halakhah* 4 deals with people – a deaf-mute, an idiot or a minor – who in many instances were found by the sages to be incompetent to stand within *halakhic* norms (bear witness, marry, and other actions), and among them was the entitlement to hold property.[[25]](#footnote-25) Whereas *halakhot* 5 and 6 speak about situations in which a person acts to obtain some object – by placing traps to catch various animals, or by shaking the olive branches to gather the olives that fall from the tree (please note that we refer to the *halakhah* concerning the poor gathering *Peah* or forgotten fruit and not the actual owner of the tree) – but has yet to obtain it. Hence, according to the usual laws of property he has not yet acquired ownership of the object.[[26]](#footnote-26) In this liminal phase the object has been taken by another person. Now the question arises did this person steal an object belonging to another, or is he now the legal owner? In all three of these cases the sages, including R. Yose decide that the object belongs to the first person, even if he is not competent to hold various property rights, or that he has not yet obtained ownership of the item. The taking of an object by another - finding[[27]](#footnote-27) an animal or olives – is considered theft. However, the justification ‘for the sake of peace’ indicates that the sages did not consider the taking forbidden because the item was owned by the first person –i.e. as a result of the essence of the legal status of the object itself - but rather it was forbidden because of the harsh consequences that might evolve in regard to interpersonal relationships within society that might rise to physical violence as one can see from the justifications in Mishnah, Pe’ah 4:4 regarding the distributions of the Pe’ah to the poor following very violent incidents and the damage that might be inflicted on the general ‘welfare of society’. R. Yose disputes the reasoning of the sages, viewing the acquisition of the item according to the laws of regular theft. In other words, the sages reasoning strays from the general rules of *halakhah* in the subject of property, reaches a conclusion “beyond the strict letter of the law”. By determining that the object belongs to the same person by implementing meta-*halakhic* judgement – ethical, or in public policy – the sages see the *Halakhah* as having a role in creating social justice and social solidarity. Whereas, R. Yose holds that there is a *halakhic* prohibition, deriving from the laws of property themselves, hence announcing these cases as ‘theft’ is simply a general law for all intents and purposes, inherent to the *Halakhah* and not needing outside justification.

The dispute between the sages and R. Yose illustrates questions that I posed above regarding the relations between *Halakhah* and meta-*Halakhah*. Apparently there were cases in which the judgements of the sages were guided by what would be the impact on interpersonal relations and not by the inherent law. In these cases, the decision was justified by reason of ‘in the interest of peace’. However, examination of the Talmudic discussion of these rules[[28]](#footnote-28)reveals that “expanding the rule’, based on transforming a case that is “beyond the strict letter of the law” into the law, brings with it dilemmas of principle and of practice – if the punishment for an action not prohibited by law should be identical to the punishment for an action that is forbidden by law?[[29]](#footnote-29) Perhaps it is this dilemma that motivated R. Yose to decide that the taking is absolute theft,[[30]](#footnote-30) hence one applies the usual rules on theft and the sanctions that accompany them, and not pronounce that it is ‘in the interest of peace’’ so it seems that practical sanctions were not applied, but only moral (that were expressed in a determination that the act was theft). Therefore, it appears that at least some of the sages held that meta-*halakhic* principles did not have more validity than the key *Halakhot* themselves (and perhaps vice versa), even if their ethical (or pragmatic) intention was worthy. [[31]](#footnote-31)

**2. Contact with those suspected of violating the Sabbatical Year and with ‘Am-HaAretz’**

1. A woman may lend to another who is suspected of not observing the *Sabbatical* year a fan or sieve or a hand mill or a stove, but she should not sift or grind with her.
2. The wife of a *Haber* may lend to the wife of an *‘Am Ha-Aretz* a fan or sieve and may winnow and grind and sift with her, but once she has poured water over the flour she should not touch anything with her, because it is not right to assist those who commit a transgression. All these rules were laid down only in the interests of peace.

These *halakhot* deal with the relationships between neighbors who do not observe the *Halakhah* to the same extent. *Halakhah* 8 considers different levels of observance of the sabbatical year, while *Halakhah* 9 considers levels of observance of eating in purity.[[32]](#footnote-32) These *halakhot* also are found in Chapter 5 of Tractate Shevi’it, along with other *halakhot* dealing with contact with those ‘suspected of Shevi’it’ and shape the manner of dealing with them. Among others we learn:

1. These are the implements which the craftsman may not sell in the Seventh Year: a plough and whatever pertains thereto, a yoke, winnowing fan or mattock. But he may sell a sickle or a scythe or a wagon and whatsoever pertains thereto. This is the general rule: any implement is forbidden whose sole use is one that transgresses, but it is allowed if its use may be either one forbidden or one permissible.
2. The potter may sell five oil-jars and fifteen wine-jars, since a man is accustomed to get so much from the ownerless produce; and if he gets more it is permitted . The potter may sell to gentiles with Land and to Israelites outside the Land.
3. The School of Shammai say: A ploughing heifer may not be sold to a man in the Seventh Year. But, the School of Hillel permit it since he may perchance slaughter it. One may sell him produce even in time of sowing; even it is known that he has a threshing-floor one may lend him a *seah*-measure; and one may give him small money in change even if it is known that he employs laborers. But if [it is known that these are required] expressly [to transgress the law of the Seventh Year] they are forbidden.
4. A women may lend a sifter, sieve, handmill, or oven to her neighbor that is suspected of transgressing the law of the Seventh Year, but she may not winnow or grind corn with her. The wife of a *chaver* may lend a sifter or sieve to the wife of an *am-haaretz* and may winnow, grind or sift corn with her; but when she pours water over the flour she may not draw near to her, since help may not be given to them that commit transgression. All these have been enjoined for the sake of peace. Gentiles may be helped in the Seventh Year, but not Israelites. Moreover, greetings may be offered to gentiles for the sake of peace.

One asks in what sense are the *halakhot* in Mishnah 9 more singular than the *halakhot* in Tractate Shebi’it, that they alone were brought into the area of ‘ways of peace’?[[33]](#footnote-33) Apparently, the difference in understanding between these *halakhot* and others appear from the ‘*oqimta*’ – A concept that means a new approach on a Tannaitic source that turns it into a particular example differing from the accepted decision[[34]](#footnote-34) - to the *halakhah* that deals with a suspected transgressor of the sabbatical year, fixed by R. Zaira in order to fit the rules of Tractate Shebi’it.[[35]](#footnote-35)

R. Zeira asked in the presence of R. Mana: The Mishnaic passage concerns a case in which it is not known [whether the woman suspected of transgressing the restrictions of the Sabbatical year wishes to borrow the utensils for a permitted or forbidden purpose].

But if the borrower made explicit that the utensils were needed for a forbidden purpose, the other individual may not [lend them to her].

[Disagreeing, Mana] said to him, now [since these utensils only purpose is the preparation of flower and bread,] is not a case in which it is not made explicit [that the borrower wishes to use them for that purpose] comparable to a case in which it is made explicit?

R. Zeira responded [to him]: I can reason: A sifter, to count coins; a sieve, to sift sand; a millstone, to grind medicines; an oven, to store bundles of [wet] flax.

(Palestinian Talmud, Shebi’it 5, 9, 36a; translation: *The Talmud of the Land of Israel* [Vol. 5], Chicago, 1991, 190)

* This does not follow the Hebrew completely.

R. Zaira bases the *halakhah* that speaks of one suspected of transgressing the Sabbatical on the rule found in Mishnah 8 of Tractate Shebi’it. In his opinion the Mishnah permits lending those utensils to the suspected transgressor because she did not state for what purposes she borrowed them (= undefined, unknown). In this case, one can interpret the purpose of borrowing in different ways which may be permitted. However, if the borrower categorically stated that she needed the instrument in order to prepare bread (from the grain suspected from the “after-growth” that sprouted in the field after the beginning of the Sabbatical year, or grain that was not removed [i.e. removed from the home and distributed generally. S.M.] one may not lend her utensils. This was because one may not aid in committing a transgression, as stated at the end of Shebi’it 5:8: “they are forbidden. This ‘*oqimta*’ R. Manne disputes, 'now [since these utensils only purpose is the preparation of flower and bread,] is not a case in which it is not made explicit [that the borrower wishes to use them for that purpose] comparable to a case in which it is made explicit?'. in other words, why categorically state what the intended use is? Is there a purpose possible other than preparing the grain? In reply R. Zaira suggests other possible uses of those same utensils, ‘A sifter, to count coins’ etc. That is to say, in the absence of a clear statement of the intended use of the utensils, the lender may hold that the borrower will utilize them for permitted needs.

The halakhic discourse on these halakhot, during which a legal step is taken to fit the a specific *halakhah* to the internal logic of the Sabbatical Year permissions, clearly reveals the moment that the halakhic decision was so diverted from its inherent and proper direction as to result in a new *halakhic* result: The permission to lend in all cases utensils to neighbors, and not only in cases in which the woman clearly declared to what use she would put them. Moreover, even if one could see the *halakhic* result of the judgements as identical (the permission to lend utensils) – i.e. basing the *halakha* on “ways of peace” ostensibly does not change the final *halakhic* result since in both cases lending the utensils to the neighbor suspected of infringing the Sabbatical rules is permitted – indeed once can clearly see how the Sages endeavored in later periods to remove from the rule the justification provided by the Mishnah. Instead of basing the decision on “ways of peace” they preferred to base their justification on the rule:

'any implement is forbidden whose sole use is one that transgresses,

but it is allowed if its use may be either one forbidden or one permissible'.

One should note that although both justifications base an individual halakhah on a more general rule, they do not function in the same way in the *halakhic* system. The general rule set down in Tractate Shevi’it regulates a narrow assortment of cases (comparatively), that are all tied to the same subject: Defining the criterion for determining prohibition and permission for utensils in the sabbatical year (criterion that can be formulated according to the gamut of potential uses of the utensils). As such this rule fits the definition of ‘legal rule’ as it is defined in the doctrine of law and the philosophy of law.[[36]](#footnote-36) Contrarily, the justification ‘ways of peace’ fits the concept of ‘legal principle’ (and the *halakhic* concept it parallels ‘*halakhic* principle’), since it is based on a general value, that does not in of itself regularize an individual case, but determines a judicial value by which individual decisions are reached. [[37]](#footnote-37)The legal process of R. Zeira gave us the possibility to identify which of the justifications is functioning as a *cconcrete halakha*, which as a *halahaik-rule* and which as a meta-*halakhaic* principle. This classification justifies the identification of the reason ' In the interests of peace' as a meta-halakhic principle

המהלך המשפטי של ר' זעירא נתן לנו את האפשרות לזהות איזו מבין ההצדקות מתפקדת כ- *concert halakha*, איזו כ- *halahaik rule* ואיזו כ- *meta-halahaic principle*. סיווג זה מצדיק את זיהויו של הנימוק 'מפני דרכי שלום' כעיקרון מטה-הלכתי.

This observations abought the Talmudic discourse brings me to the conclusion that original justification for the *taqqana* 'A women may lend a sifter, sieve, handmill…' did not stem from the permissions found in Tractate Shevi’it, but that one has to seek for another cause. The difference between it and those preceding it, stems, I believe, from the character of the relationships described within. In contrast to the preceding *mishnayot*, which are based on common economic interests – merchant, craftsman, buyer, and such – Mishnah 9 deals with relations based on the friendship of neighbors. This interpersonal intimacy is reflected in three ways: First, the Mishnah clearly states “A woman lends to her neighbor”; second, from fact that the suspected transgressor requests daily use of the household utensils, “a sifter, a sieve, a handmill, or an oven”; the third is apparent from the Mishnah’s description of the work with these utensils as performed together by women in a neighborhood, and as echoed in the phrase “she may not winnow or grind corn with her”. Hence, it is no wonder that the Mishnah concludes that the two women are close. The request for the utensils indicates a relationship of trust and confidence between the lender and the borrower; as do perhaps the fact that each accepts the other as they are, without enumerating the religious differences that separate them from those who strictly observe the *halakhot* of the Sabbatical Year. Therefore, although one can base the permission to lend utensils on the grounds that the request was not even detailed, as does R. Zaira (as in the other Sabbatical *mishnayot*), the justification of this Mishnah is the desire to guard the relationships discernible within it, in contrast to relationships founded on common economic interests and supported by them.[[38]](#footnote-38)

Similarly, one can also interpret the passage “wife of an *am-haaretz*”. Yair Furstenberg[[39]](#footnote-39) expounded on the changes that developed in the sages perception of the *am-haaretz* from the end of the Second Temple till the end of the Mishnaic period. He points out that in the earlier period[[40]](#footnote-40)

Severe social separation is attributed to the *chaver*, encompassing an extreme curb on any social and commercial contact with an *am-haaretz*, and thanks to which he is recognized as devoted. Evidently, in the tradition, who were distinct in their life style and their strict observance of purity, and by its nature lent itself to wide and blurred borders, as well as bringing into existence different levels of keeping one’s distance from the polluted environment […] By means of complete isolation from those who do not observe purity […] in complete contrast to the earlier characteristics of membership, the set of obligations appearing in Tosefta Demaii 2,3 does not include a component of isolation from an *am-haaretz* [..] the *Chaver* continues to maintain personal contacts with the *am-haaretz*. He must only be cautious that in his meeting with him he does not further pollute his purity. This situation fits Mishnah *Teharot* of the Sages of Usha, which assumes that the *am-haaretz* is present in the home of the *chaver*, and that the *chaver* can even place his utensils and clothing in the home of the *am-haaretz*.

So, the societal situation apparent from the tradition ‘ways of peace’ completely fits the conceptions of membership of the Usha generation. In the Mishnah there is no isolation or social distancing from the *am-haaretz*. On the contrary, wives of *chaverim* and wives of an *am-haaretz* dwell as neighbors, have personal contacts with each other, and lend utensils to one another. Furthermore, the two women can even enjoy their daily tasks together, while the only obligation the sages lay on the wife of the *chaver* is to be careful that the wife of an *am-haaretz* does not pollute her purity.[[41]](#footnote-41) Therefore, they mark the precise moment when the food might become polluted – the point when water is poured into the flour forming the dough.[[42]](#footnote-42) The *Mishnayot* on these subjects - conflicts that possibly arose from common existence with other social groups that holding a different ideas abought the manner (or the severity) that one should behave toward the religious obligation - reflect therefore the importance the sages attached to developing neighborly relations between people living in close proximity with each other.

In opposition to the interpretation that characterizes the formulistic approaches to halakhah, I hold that in the view of R. Judah the Prince and his circle good neighborly relations rooted and existing in human reality do not contravene the halakhic system. Instead, one should see them as a source for legal principle derived from a theological conception of the present – a notion that expresses itself in ideas found at the core of the concept ‘tiqqun olam’ – that delineate ‘the proper community’.

The examination of the *halakhot* in this section demonstrates that the concept ‘ways of peace’ should be viewed as a meta-*halakhic* concept, in the sense that it is employed as a value concept whose role is to bridge between a theological view (tiqqun olam) and a human reality upon which it supposedly applies through the medium of concrete halakhot. [[43]](#footnote-43) In Goldman’s formulation: A concept that enables serving G-d in a way suitable to human reality. [[44]](#footnote-44)

1. **Relations with Gentiles**

In the examination of *halakhot* in this section I will try to answer the additional fundamental questions that I posed at the beginning of this article specifically regarding *takkanot* ‘ways of peace’, and meta-*halakhic* principles in general: Does a meta-*halakhic* principle, as a ‘judicial value’ have standing as an ‘absolute value’, reflecting the ‘proper situation’ (ethically or socially) that the creators of the halakhah wish to achieve with the aid of their taqqana? [[45]](#footnote-45) Another question that I will examine is whether the decision arrived at within a specific social historical cultural and made according to the meta-*halakhic* *principle* was seen as binding by adjudicators operating in a different historical context?

Gleanings, The Forgotten Sheaf, and *Peah* are part of the biblical *halakhot* for the sake of the impoverished of Israel.[[46]](#footnote-46) Although the rule does not permit distribution of the ‘gifts to the poor’ also to gentiles, but it does determine that one cannot prevent the gentile poor who enter the field from also taking what has been left. But one wonders why is it necessary to ordain consent if there is no encouragement to actively give to the gentiles? In all probability because while there is no *halakhah* here that allows a clear constraint, the permission granted to gentiles to gather the Forgotten Sheaf, the Gleanings and the *Peah* could decrease the portion of the Israelite poor, and that would be theft from the poor.[[47]](#footnote-47) Hence the sages saw the necessity of anchoring it in a ruling.

The parallel Tosefta Gittin 3:13-14, adds more obligations:

‘ A city that has Israel and gentiles the leaders tax Israel and the gentiles ‘in the interest of peace’;

Provide for the gentile poor with the Israelite poor ‘in the interest of peace’;

Eulogize and bury dead gentiles ‘in the interest of peace’;

Comfort the mourners of the gentiles ‘in the interest of peace’

(Vienna Codex., Lieberman ed. p. 259)

Later we also find the *baraita* in the Palestinian Talmud, Gittin 5:9, 47c[[48]](#footnote-48)

We learn, that a city that has gentiles that Israel appoints a gentile treasurer and an Israelite treasurer and collects taxes from both the gentiles and from Israel. It also provides for the poor of the gentiles and the poor of Israel.

Visits the sick of the gentiles and the sick of Israel.

Buries the dead of the gentiles and the dead of Israel

And gives solace to the mourners of the gentiles and the mourners of Israel

And cleans the utensils of the gentiles and the mourners of Israel.[[49]](#footnote-49)

In the interest of peace

The Babylonian Talmud Gittin 61a also brings a *baraita* (that comprises the ‘question’ on this Mishnah) that mentions some of the obligations noted in the *halakhot* of the Tosefta and in the Palestinian Talmud:

The Rabbis have taught, provide for the poor of the gentiles with the poor of Israel

Visit the sick of the gentiles with the sick of Israel

Bury the dead of the gentiles with the dead of Israel

For the sake of peace

It appears that the authorization of the Mishnah was expanded in the *baraita* to other activities – that have an active operational facet (‘arise and do’ rather than ‘sit and do not do’) – up to the creation of general city arrangements. The difference between the version in the *baraita* appearing in the Babylonian Talmud, in which it is written ‘ provide for the poor of the gentiles with the poor of Israel’, and the version in the *baraita* in the Tosefta and the Palestinian Talmud, in which the actions are joined with the conjunction ‘and’ – ‘appoint a gentile treasurer and an Israelite treasurer’ – sharpen the question if *halakhot* ‘ways of peace’ were perceived as pragmatic arrangements, stemming from the demands of life alongside gentile communities, or as an absolute value that one should live by? Saul Lieberman, in bringing the parallel in Tractate Semahoth ‘The gentile and the slave – one does not deal with them in any case’ (Semahoth 1:9) claims ‘We have already seen that Tractate Semahoth chapter 1 interprets that one does not involve oneself with a gentile. Apparently there the law was communicated, but here the *halakhah* was ‘in the interest of peace’.[[50]](#footnote-50) In other words, the sages preferred to deflect from the law in order to create good neighborliness with the gentiles.

This subject was raised by the commentaries of the Rishonim as in the examples to follow. Rashi interprets in this manner:

“With the dead of Israel” – Not with the graves of Israel but to deal with them if they are found with Israel.

The ‘*Rashba’* (Rabbi Shlomo ben Aderet) in Hidushei HaRashba on B.Gittin 61a, explains the statement of Rashi. According to *Rashba’s* understanding of Rashi, the rule is limited in its scope and relates only to a situation in which the gentile is present at the time of the occurrence. In this circumstance, enmity might arise, since the gentile will resent the discrimination by an Israelite who only takes care of a deceased (or impoverished) Israelite. To prevent the hostility (in the interest of peace) one should make the same actions for the gentile. But, in situations in which no gentile is present by the side of an Israelite there is no need for “in the interest of peace”, and therefore one should observe the *halakhot* of purity and avoid making oneself unclean by contact (with the deceased). Hence, one gathers that this approach sees the “in the interest of peace” as a way to prevent enmity and hostile actions by the gentiles. Consequently, one should not see “in the interest of peace” as a representation of values that are suitable and definitive and of the *halakha* as 'it should be', but on the contrary, they are a tolerated as a “necessary evil”, stemming from several necessities that evolve as the result of living alongside gentiles.

The Rashba, contrary to Rashi, rests on the Tosefta and Palestinian Talmud versions, and presents an opposite approach. The language “with” that appears in the *baraita* of the Babylonian Talmud is interpreted by the Rashba as an analogy – ‘as one buries Israelites, so one buries gentiles’. He finds his proof in the Palestinian Talmud which has a conjunctional “wav” between Israelite and gentile, and the Rashba understands this as an instruction to do “this and that also” without reservations or discriminating between actions for an Israelite or actions for a gentile. So also the *baraita* in the Tosefta, which speaks of eulogy and condolence for gentiles without any reference to Jewish mourners.[[51]](#footnote-51)

From the above it is difficult to judge whether the enactors of these rules (at the Mishna period) saw them as an expression of an absolute value or a necessary condition for a reasonable existence alongside gentiles. I deem that it is difficult to depend on the different versions – whether the Tosefta manuscripts[[52]](#footnote-52), among which there are variations or whether the *baraitot* in the Talmud – in order to base a claim that among the sages there were different approaches to how to act towards the gentiles. However, if indeed Lieberman is right in this assumption that the general *halakhah* in Tractate Semakhot, that forbids dealing with the burial of a gentile, is the ideal law, and therefore *halakhot* “in the interest of peace” stray from it because of a complicated reality of living alongside gentiles, then my supposition becomes better grounded that “in the interest of peace” reflects the preference of the sages for developing neighborly relations within the Jewish community and between it and it neighbors. That is to say, the judicial process in which the meta-halakhic principle diverted the *halakhic* decision from the ‘correct’ path would have ostensibly produced another result had the Sages decided according to the internal logic of *the* particular *Halakhah*.

Understanding this taqqana as stemming from the preference of the Sages for altering the judgement from ‘meta-*halakhic’* considerations is strengthened in light of the fact that in the parallel from Tractate Semachot 1:9 noted above, which forbids eulogizing Gentiles and slaves, a different stand is quoted, that of R. Jehuda, and his disagreement with the Sages:

The same is the case with a gentile or a slave, nevertheless they may exclaim over him: "Woe, lion lion! Woe, hero!

R. Jehudah said: (it may be said also:) Woe, trusted man! Woe lived by his labor![[53]](#footnote-53)

They said to him: if so, what is there left to say of the upright?

He rejoined: If he was righteous why should tis not be said of him?

No consolation is needed (on the death of) male and female slaves.

One can see that according to R. Jehuda’s reasoning, one should not determine whether to eulogize a person on the basis of his ethnicity or personal status. A person is entitled to a eulogy regardless of religious differences, sex or social standing, and only on the basis of his actions throughout his life. This value, that judges all persons in their own right on the basis of their actions alone, stands in contradiction to the ethnocentric view[[54]](#footnote-54) on the one hand of the Sages as demonstrated by their response ‘if so, what is there left to say of the upright' i.e what differentiates Jews from non-Jews?; On the other hand, one sees that R. Jehuda does not justify his determination with the reason ‘in the interests of peace’. Once again we see that even if the outcome of a halakhic judgement is identical – one may eulogize a Gentile (or a slave), whether according to the reason of R. Jehuda in Tractate Semachot or by the method of the Sages in the Tosefta it may stem form a different rationale. Indeed, by R. Jehuda’s method the *halakhic* decision stems from a rationale inherent in the question: What is the correct criterion to determine who is suited to be eulogized? (The answer: The criterion is the proper/improper behavior of the deceased). Contrariwise, the creators of the rule in the Tosefta base their decision on systematic consideration – on the positive neighborly relations with Gentiles – which are not tied to the behavior of the departed himself.

Be that as it may, it is difficult to conclude from this discussion which view the Sages meant by the term “in the interest of peace”: Was this a justification for an absolute value representing the 'good' in their eyes; or the opposite: just declaring compromise that was needed as a result of living beside Gentiles.

Compared to the lack of clarity regarding this subject, the answer to the additional question I posed – was the judgement from the use of a meta-*halakhic* principle seen as more binding than judgement from a specific topical justification, is no clearer. It seems to me that the fact that Rashi in his commentary on the Mishnah chose to ignore this, and instead chose to consider only the *beraita* in the Talmud Babli (‘And bury the Gentile dead’) while reducing to the word ‘with” – reflects the fact that commentators and decisors (since the interpretation creates *halakhic* decisions that might have been different from the spirit of the Mishnah) did not grant *halakhot* arising as a result from decisions according to a meta-*halakhic* principle preference above *halakhot* that arose from *halakhic* rules (or from specific individual judgements). It seems that the opposite is true. In fact, because the *halakhic* principle is a ‘value concept’, it can be rejected in the face of other values, that are preferable in the eyes of the decisors who operated within a different reality (geographical or historical). This conclusion joins the picture made apparent in the first part of this article in which a legalistic interpretation of the *halakha* (of R Zaira) rejected its establishment on meta-*halakhic* value and instead was founded it only on ‘Legal – *halakhic* rule’

**Conclusions:**

The justification ‘in the ways of peace’ primarily reflects the importance the Sages placed on developing good relations between people living in proximity to each other, and who share a common public space. This conclusion is based on the *halakhot* of the corpus not analyzed in this article and that organize the precedence within the various common spaces (common courtyard, synagogue or division of common water resources), and on *halakhot* that I did analyze above (relations with neighbors suspected of transgressing the Sabbatical Year, Am-HaAretz, and even Gentiles).

This approach arises from the decision of the editor(s) of the Mishnah to create a complete corpus of *Halakhot* whose purpose is to generate peaceful and comradely interpersonal relations, which to his thinking are indispensable to the building of a healthy structure for the community – as is apparent from the placement of the section on ‘*tikun olam*’ within the Mishnah. This perception also arises from the decisions of the (most) sages regarding the wife of an *am-haaretz* and the suspicion of violating the sabbatical rules. As we saw, the sages of Usha did not strive to be separated from other levels of the Jewish community, on the contrary, it is evident that there were instances in which they narrowed the ‘area of danger’ with regard to infringement of the *Halakhah*, to the minimum possible. This was in order to nurture friendly relations between neighbors, resulting from concern for the needs of the ‘other’ (lending utensils) and together performing the routines of daily life (women’s household chores). It appears that to those holding this approach, the common life in a community framework – and inevitability alongside various ‘others – along with its assorted challenges (emotional or ideological) was not necessarily a bad thing. On the contrary, this approach held that it was correct to perceive different *Halakhot* that were decided in regard to decisive issues (such as observing the Sabbatical Year), as suitable to be justified by the welfare of the society and not by some specific subject.

Ostensibly, we have seen, a different approach towards ‘ways of peace’. This approach is reflected in the judgement of R. Yose on ‘regular theft’ and not ‘theft in the interest of peace’; and later in the Talmud a legal action (‘*oqimata*’) by R. Zaira to the *Halakhah* that sets the relations between the wife of a *chaver* and one suspected of offending the Sabbatical Year stipulations. It appears in the approach of the Babylonian Amoraim who explained the difference between ‘theft in the interest of peace’ and ‘regular theft’ by the punishments that they incurred. It is tempting to assume, that those holding to this approach believe that the utilization of *Halakhot* ‘ways of peace’ should be limited. R. Zaira cancelled the need ‘in the interest of peace’ by justifying the *Halakhah* on the basis of *halakhic* rules derived from the internal logic of the Sabbatical Year *Halakhot*; Babylonian Amoraim for the most part concluded that no sanctions should be applied to acts judged as theft ‘in the interest of peace’. But one should note that not only did the various interpreters of the *Halakhah* act in different periods and geopolitical realities, but their considerations did not necessarily stem from the same theoretical source. Perhaps one might point to at least two perceptions which inspired the attitudes regarding the proper connection to actual life and the aims and methods of the *halakhic* structure. It seems to me that according to the thinking of the first approach the *halakhic* structure has meta-*halakhic* principles, which in part grew out of life. These principles justify limiting the specific law, diverging from it, or the opposite, applying it to ‘beyond the strict letter of the law’ in order to actualize the value intrinsic in the meta-*halakhic* principle ‘peace between a man and his fellow’. On the other hand, adherents to the other approach do not necessarily reject ‘ways of peace’ as a fitting moral value which a society rightfully aspires to.[[55]](#footnote-55) This notwithstanding, it is doubtful if they saw a justification for a meta-*halakhic* level, which gives priority for external consideration of the halakha under discussion. As we saw in several cases, there were among the sages those who set their rulings on a more narrow level of the judiciary – i.e. 'legal rule' – as 'any implement is forbidden whose sole use is one that transgresses etc.', or (as said R. Jhudah): 'If he was righteous why should tis not be said of him?', instead to put it on more broad (social) considerations which embodied in a 'legal principle' (as 'in the interest of peace'). In other cases we saw the power of meta-*halakhic* principle is limited to a theoretical *halakhic* clarification[[56]](#footnote-56) - For example to create *halakhic* definitions in grey areas in which there are *halakhic* lacuna – but the full practical significance of a specific law on what is in principle beyond the law cannot apply, especially when dealing with the severity of the punishments.

Nevertheless, one must admit that one cannot in all cases find in the *halakhic* literature the reason (or the approach) that brought a decisor to his decision.[[57]](#footnote-57) In fact, in conceiving of the *halakha* as containing meta-*halakhic* norms that are employed by the decisors bridging mechanism between *halakha* and reality, and for the researcher as a base that identifies the ‘other’ connections – that are outside the inherent logic of any specific *halakha*, but relevant to the determination of that *halakha* – it is difficult (perhaps impossible) always to decide how the decisor himself grasped the logic of his decision. Such was the case in which we tried to examine the stands of Rashi and Rashba regarding the *taqqana* dealing with the burial of Gentiles. As we saw above, the version of the Rabbinic sources that lay before the commentators made possible different interpretations. Hence, we were prevented from drawing certain conclusions regarding the motivation that guided the Sages in enacting these *halakhot* (if these enactments that organized contact with Gentiles in various circumstances were seen as ‘good’ from the moral standpoint or ‘proper’ from a practical standpoint), and as we have seen, to a great extent, what among many factors, was the one that motivated the later commentators in their decisions.

In summary I hold that the concepts with whose aid we analyzed the *halakhot* ‘ways of peace’, and primarily the distinction between the different levels in which the *halakhic* system operates did give the possibility to cast more light on most of the *taqqanot* ‘ways of peace’, their purpose and their proper ramifications in the view of their creators and interpreters. At the same time our investigation showed that one must be careful of assuming that individual concepts have the power to totally clarify each and every point in the *halakhic* system or place it systematically on one all-encompassing organizing principle.

1. Catherine Hezser*, The Social structure of the Rabbinic Movement in Roman Palestinian*, Tubingen 1997. But, see the critique of this approach in Lee I. Levine, *Jewish Quarterly Review* 90 (2000), pp. 483–488.

   For a recent survey and critique see: Ishay Rosen-Zvi , 'Rabbis and Romanization: A Review Essay', in: *Jewish Cultural Encounters in the Ancient Mediterranean and Near Eastern World* (Eds. M. Popovic', M. Schoonover & M. Vandenberghe), Leiden & Boston 2017, pp. 229–230 and note 55. I agree with the arguments of Rosen-Zvi, regarding the testimony of the Mishnah about the aspiration of the Rabbis: 'It [the Mishna, S.M.] legislates and regulates a Jewish "Empire" which rules all Jews wherever they may be'. [↑](#footnote-ref-1)
2. See: Sagit Mor, 'The Status of Female Captives on their Return to the Jewish Community in the Talmudic Literature', *Jewish Studies* 42 (2003-4) [Hebrew], pp. 95–106. [↑](#footnote-ref-2)
3. Ephraim Elimelech Urbach, *The Halakha: Its Sources and Development*, (Masada, Yad la-Talmud, 1984) [Hebrew], pp.69-70 and Chapter 2; Menachem Elon, *Jewish Law*: *: History, Sources, Principles*, (Jerusalem, 1992) [Hebrew], pp. 391–392; Christine Hayes, 'The Abrogation of Tora Law: Rabbinic *Taqqanah* and Praetorian Edict', in: *The Talmud Yerushalmi and Greco-Roman Culture* Vol. 1 (ed. Peter Schafer), Tubingen 1998, pp. 643–647. [↑](#footnote-ref-3)
4. As for example the mode of dialectal discourse and terminology that developed in the yeshivas of Babylonia. See, Jeffrey L. Rubenstein, *The Culture of The Babylonian Talmud*, Baltimore & London 2003, pp. 39–53. [↑](#footnote-ref-4)
5. Mishnah, Gittin, 5:9-10. [↑](#footnote-ref-5)
6. In its theoretical formulation the discussion of the relationship between halakha and reality resembles the discussions of the relationship between law and reality (discussions that forge formalistic and positivistic conceptions of the law). A formalist conception of the halakha, according to which there is no direct relationship between the outward reality and the halakhic result, indeed the halakha is a closed system, i.e. the social an economic conditions on the one hand, and the moral, cultural, and social values on the other hand, cannot be employed as an operant factor in the process of basing its judgement, and are not legitimate within it is its characteristic of the thinking of Yeshayahu Leibovitch and Rabbi Joseph Ber Soloveitchik according to Avi Sagi. See Avi Sagi, 'Rabbi Soloveitchik and Professor Leibovitch as Theoreticans of the Halakhah' , *Da'at* 29 (1992), pp. 131–148 ; Idem, *A Challenge:* *Returning to Tradition*, (Hebrew; Ramat Gan; 2003), pp. 2260–281; Idem, *Halakhic Loyalty: Between Openness and Closure*, Chapter 5 : Halakhic Jurisprudence and Halakhists: Between Formalism and Discretion, (Hebrew; Ramat Gan 2012), pp. 116–148, Chapter 6: Halakhah and Meta-Halakhah: A Critical Study of Eliezer Goldman's Thought, p. 155. [↑](#footnote-ref-6)
7. See: Aviezer Ravitzki and Avinoam Rosenak, *New Streams in Philosophy of Halakah* (Hebrew; Jerusalem, 2008); Avinoam Rosenak, Halakha, *Meta-Halakhah and Philosophy: A Multi-Disciplinary Perspective* (Hebrew; Jerusalem, 2011). For a survey of different perceptions of the concept “meta-*Halakhah*” and the need to employ it in the research on *Halakhah* see Avinoam Rosenak, 'Meta-*Halakhah*, Philosophy of *Halakhah* and Joseph Shwab' ,in *Halakah, Meta-Halakhah,* 17-26. [↑](#footnote-ref-7)
8. In 'non-*halakhic* consideration' I mean ideological, political, societal or cultural consideration. See, Benjamin Porat, 'The Philosophy of Jewish Law: Methodological Reflection' [Hebrew], *Dine' Israel* 30 (2015), p. 180 n. 6. [↑](#footnote-ref-8)
9. Sagi, *Halakhic Loyalty*, Chapter 1: Challenges and Fallacies in the Philosophy of the, pp. 27–42; Porat, The Philosophy, pp. 179–180. [↑](#footnote-ref-9)
10. See above, note 8 and 9. [↑](#footnote-ref-10)
11. See Eliezer Goldman, 'Expositions and inquiries: Jewish thought in past and present', in Daniel Statman & Aviezer Sagi (eds.), *Expositions and Inquiries* (Hebrew ; Jerusalem, 1997), 13-14; idem, 'Meta-*Halakhic* basis for *halakhic* decisions' in: Ravitzki and Rosenak, *New Streams*, pp. 259-278. A similar approach, regarding the legal system, but applicable to the *halakhic* system, claims that the legal system includes principles that do not relate to norms outside the judicial system, but are integral to the system itself. See Yair Lorberbaum, *In God's Image: Myth, Theology, and Law in Classical Judaism*, New York 2015, p. 80. For conceptual clarification of the theories in legal philosophy and their adaption to the world of *halakha*, see there, pp. 76-86. It seems to me that the *'Halakhic* principle' functions for Lorberbaum in parallel to the “meta *halakhic*” principle for Goldman. [↑](#footnote-ref-11)
12. Sagi, Halakahic Loyalty, p. 121. [↑](#footnote-ref-12)
13. Goldman, 'Expositions and inquiries', p 367: ‘Serving God by observing the commandments expresses the fact that man can only serve God within human existence. The covenant is God’s grace and enables worship within this reality’. To compare the thought of Leibovitch, Soloveichik, and Goldman, see Avi Sagi, *Halakhic Loyalty*, Chapter 6, pp. 149–168; Gili Zivan, *Religion Without Illusion - Facing A Post-Modern World*, Tel Aviv 2005. [↑](#footnote-ref-13)
14. Sagi, *Halakhic Loyalty*, pp. 166–167. [↑](#footnote-ref-14)
15. Goldman, 'Expositions and inquiries', p. 305. [↑](#footnote-ref-15)
16. See below on the textual unit of Takkanot “*tikun* *olam*” and its place in the corpus of Takkanot ‘in the ways of peace’. [↑](#footnote-ref-16)
17. The Great Revolt and the destruction of the Second Temple in 70 CE and the Bar Kokhba Revolt of 132-135 CE. [↑](#footnote-ref-17)
18. For a presentation of the idea of ‘*tikun olam*’ with examples see: Sagit Mor,"'Tiqqun ‘Olam' (Repairing the World) in the Mishnah: From Populating the World to Building a Community", *Journal of Jewish Studies* 62 (2011): 262–283. [↑](#footnote-ref-18)
19. The Hebrew text of the mishnah is taken from the Kaufman manuscript.  English translations of Mishnah and Babylonian Talmud are based on the Soncino Press Edition, (CD-ROM Judaica Press, N.Y.); H Danby *Mishnah* (Oxford, 1933). Hebrew Bible: *Tanakh: The Holy Scriptures*, (Philadelphia/Jerusalem, 1985), CD-ROM edition. [↑](#footnote-ref-19)
20. For the place of the ‘tolerant’ approach see, Avi Sagi, 'On the tension between religiosity and secularity: between discourse of rights and discourse of identity', in Nahem Ilan (ed.) *A Good Eye, Dialogue and Polemic in Jewish Culture* (Hebrew; Tel Aviv 1999), pp. 408–430; For a different conceptions concerning the rational and aims of these *takkanot* see: Jonathan K. Crane, 'Because…: Justifying Law/Rationalizing Ethics', *Journal of the Society of Christian Ethics* 25 (2005), pp, 55–77; Christine Elizabeth Hayes, *Between the Babylonian and Palestinian Talmuds: Accounting for Halakhic Difference in Selected Sugyot from Tractate Avodah Zarah (*New York & Oxford, 1997), p. 238 n. 46. [↑](#footnote-ref-20)
21. Elliot N. Dorff, *To Do The Right and The Good: A Jewish Approach to Modern Social Ethics*, 1st ed., Philadelphia 2002, p. 249. Emphasis in original. [↑](#footnote-ref-21)
22. Ibid, p. 253. Emphasis in original. [↑](#footnote-ref-22)
23. In different Mishnah manuscripts the order of these *halakhot*  varies, consequently the passages regarding them in the Talmud~~s~~ are also not identical in their order (both in the Babylonian and in the Palestinian Talmud). Similarly, the opinion of R. Yose is missing in *halakhah* 4 of the Kaufman manuscript, but it is found in other manuscripts. See David HaLivni, *Sources and Tradition: A Source Critical Commentary on Seder Nashim* (Hebrew; Toronto, 1968), 678. [↑](#footnote-ref-23)
24. Ibid. [↑](#footnote-ref-24)
25. For the responsibility of property concerning deaf-mutes, idiot, and minors see Mishnah, Baba Kama 4:4; 6:4. [↑](#footnote-ref-25)
26. For property laws that deal with obtaining ownership of various objects see Mishnah, Kiddushin 1:4-5. [↑](#footnote-ref-26)
27. For a law similar in respect to finding see Tosefta Hullin 10:13 (Zuckermandel, Jerusalem, 1970), 512: 'The pigeons of a dovecot and the pigeons of an attic require to be sent forth, and the prohibition of robbery applies to them, because of the paths of peace'.

    [↑](#footnote-ref-27)
28. Palestinian Talmud, Gittin 5:8, 47a-b (*The Academy of the Hebrew Language* edition; Jerusalem; 2001), 1078, Eruvin 7:6, 24c (idem, 485); Babylonian Talmud, Tractate Gittin 61a. [↑](#footnote-ref-28)
29. The new *halakhic* question that developed reflects the efforts to develop the *Halakhah*, as pointed out by Moshe Halbertal, 'The History of the Halakhah and the emergence of Halakhah' [Hebrew], *Dine' Israel* 29 (2013), p. 17. [↑](#footnote-ref-29)
30. Although we can suppose that R. Yose does not hold that these cases are in the ‘grey area’, i.e., that the finding is the property of the deaf-mute, the idiot, and the minor, and that the actions to obtain ownership of an item put the case out of the boundaries of 'intent’ only and transfer it to ‘action’ that purchases the item (at least there was more than one who did nothing active to buy it). For this reason some of the Babylonian Amoraim so interpreted the decision of R. Yose, and formulated his rationale in the following manner: ‘Sages made what was unentitled to entitled’. Meaning that according to the method of R. Yose we have here property ownership deriving from the rules of the sages, therefore one who takes from the entitled is an absolute thief and hence one might apply to him the Biblical laws of theft (see Babylonian Talmud, Gittin 30a, Bekhorot 18a, Bava Metz’ia 12a-b). [↑](#footnote-ref-30)
31. The dispute between the sages and R. Yose, expressing the principal question – if a determination of ‘in the interest of peace’ brings with it legal sanctions or if it operates as a social sanction (ethical-moral) only – is discussed in the Talmud~~s~~. In general one can see that in the Babylonian Talmud, R. Yose’s view is interpreted as mirroring the conception that ‘ways of peace’ was a social-moral justification for the purposes of the rule, and does not serve as a *halakhic* definition of ‘theft’, and as such does not carry actual sanctions. In the Palestinian Talmud, on the other hand, it is suggested that the ‘ways of peace’ is the justification for the rule and does determine its *halakhic* quality. Therefore theft according to the rule ‘in the interest of peace’ is identical to ‘regular theft’ in regard to legal sanctions. Eliezer Bugard contends that the approach which sees ‘in the interest of peace’ as a moral sanction only is rooted in the idea that ‘ways of peace’ rules are based on piety, which does not demand normative obligations of the general society. For an examination of the interpretations in the Talmud see Sagit Mor, *'Tikkun* *Olam'* in the Thought of the Sages, PhD diss.,( Hebrew; Hebrew University, 2003), pp. 226–231; For Eliezer Bugard see, 'Mipenei Darchey Shalom', M.A Thesis, (Hebrew; Bar Ilan University), 1977. [↑](#footnote-ref-31)
32. On the subject of eating in purity see: Yair Furstenberg, *Purity and Community in Antiquity*, (Hebrew ;Jerusalem, 2016). For the impurity of an am-haaretz see pp. 208-255, 313-359; and see Furstenberg, *'Am Ha-Aretz* in Tannaitic Literature and Its Social Context' [Hebrew], *Zion* 78 (2013), pp. 287–319. [↑](#footnote-ref-32)
33. See Yehuda Feliks, *Talmud Yerushalmi, Tractate Shvi'it* [vol. 1] (Hebrew; Jerusalem, 2000), pp. 357–358 (in, and footnote 261: 'The commentators already have reasoned that the question [brought in discussion in the Palestinian Talmud, S.M.] 'The issue is which allowances? R. Yose Bar Hannina asked, was this stated concerning the entire passage or only concerning this [particular] law?', and the answer 'From the fact that these [other rules in M. Sheb. 5: 6-8] are not taught in Gittin, [it is clear that M. Sheb. 5:9 applies] only to this [particular] law [at M. Sheb. 5:9…'. The version according to *Tractate Shebi'it* (translation: *Jacob Neusner [dir.] The Talmud of the Land of Israel* [Vol. 5] (Chicago and London, 1991), p. 191 . [↑](#footnote-ref-33)
34. For an exact definition of the expression ‘*oqimta*’ see Menachem Fisch, ‘Forced Readings and Binding Texts: The Amoraic *Uqimta* and the philosophy of the *Halakhah*’ in Ravitzki and Rosenak, *New Streams*, p. 323 ftn. 24; and see Leib Moscovitz, *The Terminology of the Yerushalmi: The Principal Terms* (Hebrew; Jerusalem, 2009), p. 462. [↑](#footnote-ref-34)
35. These rules are marked here by an underline. [↑](#footnote-ref-35)
36. Regarding the distinction between rules and principles see R. Dworkin, *Taking Rights Seriously*, Cambridge 1977, pp. 22–31; And see the critique of J. Raz, 'Legal Principles and the Limits of Law', *Yale Law Journal* 81 (1972), p. 834. [↑](#footnote-ref-36)
37. For parallels to these concepts in the philosophy of law and their application in the *halakhic* systems see: Y. Lorberbaum, Ibid note 11 , pp. 77–78. See also his words (p. 77): 'Legal principles, like halakhic principles, may be abstract to a greater or lesser degree. The same applies to legal rules, making it impossible to draw a sharp a distinction between them […] There is a continuum among the different levels of generality of any particular set of rules, or of any particular set of principles. A similar continuum exist with regard to the levels of generality of the rules of the law and it's principles, but characteristically a distinction may be made among them'. [↑](#footnote-ref-37)
38. This question also perturbed some of the ‘*Rishonim*’, See *Tosafot*, s.v. משאלת אישה לחברתה by Rabbeinu Tam; Another attempt towards a solution is the view of the Rambam in his commentary to the Mishnah. From the two justifications he creates an harmony. [↑](#footnote-ref-38)
39. See Furstenberg, *Purity*, pp. 208-255, 313-359. [↑](#footnote-ref-39)
40. Furstenberg, ‘Am-HaAretz’, pp. 309-311. [↑](#footnote-ref-40)
41. See the *baraita* in Babylonian Talmud 61b (=BT Hullin 6,2; Tos. Teharot 8:4) “We learn that the wife of a *chaver* grinds with the wife of an *am-haaretz* when she is polluted, but not when she is pure; R. Shimon son Elazar says even when she is polluted she does not grind since her friend feeds her”. [↑](#footnote-ref-41)
42. On the strict monitoring of moist foods compared to dry see, Furstenberg, '*Am-haAretz*', p. 309. [↑](#footnote-ref-42)
43. Sagi, *Halakhic Loyalty*, pp. 166–167. [↑](#footnote-ref-43)
44. Goldman,Expostitions; Sagi, *Halakhic Loyalty*, p. 166. [↑](#footnote-ref-44)
45. See also the observations of Dorff between the 'right' and 'good', above, around notes 21, 22. [↑](#footnote-ref-45)
46. Lev. 19:9-10, 23:22; Deut. 14:28-29, 29:19-22, 26:12. [↑](#footnote-ref-46)
47. See Eliav Shochetman, ‘Relations between Jews and Gentiles’(Hebrew), *Mechanayim* 1 (1992),p. 55. See also his reference (ibid. n. 5) to Rashi’s answer to a similar situation in which he determines that one who during Purim gives gifts to poor gentiles is stealing from the (Jewish) poor. Regarding gifts to the gentile poor during Purim see Eliav Shochetman, ‘On the custom of giving gifts to the gentile poor on Purim’ (Hebrew), *Sinai* 100.2 (1987), p. 852. [↑](#footnote-ref-47)
48. And also Palestinian Talmud, Demaii 4:6, 24a; Avodah Zara 1:3, 39c. See Saul Lieberman, Tosefta Ki-Fshutah, Gittin (Hebrew; New York; 1993), p. 849. [↑](#footnote-ref-48)
49. In the parallels in Demaii and Avodah Zara it states : ‘And bring in the utensils of the gentiles and the utensils of Israel’. Possibly the letter ‘nun’ replaced the letter ‘bet’ because of their orthographic similarity. Alter Hilevitz, ‘Examination of the question ‘in the interest of peace’ regarding gentiles’, *Sinai* 100 (1987) [Hebrew], p. 340, maintains that the correct version is “bring in gentile utensils”, since there it would incur a loss in funds which does not occur in the version “clean”. [↑](#footnote-ref-49)
50. Saul Lieberman, *Tosefta Ki-Fshutah*, p. 850. [↑](#footnote-ref-50)
51. For further analysis of the statements of the *Rishonim* see Jonathan K. Crane, 'Jews Burying Gentiles', *Review of Rabbinic Judaism* 10 (2007), p. 151–154. Crane suggests that the differences between them stem from differing geopolitical background circumstances of the French-Ashkenaz and Spanish communities. He states that in the northern French-Ashkenaz Jewish communities the Jews prospered (except for the periods of the Crusades) and maintained close commercial relations with the gentiles. Consequently, Rashi and the other Ashkenazi rabbis (such as “the Kol-bo”, attributed to R. Aharon ben Yaakov haKohen of Narbonne, 13th century) did not need “in the interest of peace” or the avoidance of enmity with them. This in contrast to the Jewish communities of Spain, especially during the period of the Catholic conquest of the Iberian Peninsula, who knew long periods of hostility and persecution, and hence needed “in the interest of peace” in order to improve their political situation and their daily life in such an alienated environment. I concur with Crane that one cannot see the existence of an ethical-universal conception in the interpretation of the Spanish Jews. Nonetheless, the preference for the Eretz-Israel version (Tosefta and Palestinian Talmud), in which there are *halakhot* relating to gentiles without a parallel relating to the Jews, might reflect a conception that views life together not as a “tolerated situation” which must be improved out of an existential Jewish need, but as a value that should be fostered. [↑](#footnote-ref-51)
52. For a discussion of the differences among the Tosefta manuscripts see: Adiel Scheremer, *Le-Mesoret Nusah Ha-Tosefta: Iyyun Reshoni be-Ikvot* Shaul Lieberman' (Hebrew), *JSIJ* 1 (2002), p. 11–43; Haya Nathan, 'The Linguistic Tradition of Codex Erfurt of the Tosefta', Ph. D Dissertation (Hebrew; Hebrew University of Jerusalem, 1984), pp. 1–34. For a summary of opinions regarding manuscript variants see Michael Matthew Pitkowsky and his conclusion that variants do not necessarily arise from differences in approach, but from the process of transmission and differing traditions: Michael Matthew Pitkowsky, *'Mipeney Darkey Shalom* ("Because of the Path of Peace") and Related Terms: A Case Study of How Concepts and Terminology Developed from Tannaitic To Talmudic Literature', Ph.D. Dissertation, JTS, 2011, pp. 137–143. [↑](#footnote-ref-52)
53. For the Hellenistic background of those idioms see Saul Liberman, *Greek and Hellenism in Jewish Palestine* (Hebrew;, Jerusalem; 1984), pp. 57–59. [↑](#footnote-ref-53)
54. A definition for an 'Essentialist Approach', see Sagi, On tension, p. 415. [↑](#footnote-ref-54)
55. I deem that it is incorrect to view R. Yose’s decision on ‘regular theft’ as a total rejection of ‘ways of peace’, but rather as an application of practical sanctions of the laws of theft on what is not by law clearly theft. If I am correct then the dispute between the general view and R. Yose is not about values but about formalities. See Benjamin Brown, “Formalism and Values: Three Examples”, in Ravitzki & Rosenak, *New Streams*, pp. 233-258. [↑](#footnote-ref-55)
56. See Halbertal, The History , p. 22, on one of the actions that led to the dissemination and expansion of the halakhic organism ‘From an independent matter in the concept, without connection to it application' (in this case the concept of ‘property’). [↑](#footnote-ref-56)
57. See Porat, The Philosophy, pp. 187–189. [↑](#footnote-ref-57)