

An Ethics of Sustainability and Jewish Law?

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Abstract

This article titled “An Ethics of Sustainability and Jewish Law?” at first addresses the issue why it is important to ask for ethical responses to questions of sustainability and an ethics of an open future, and why the technocratic approach as practiced in most Western countries is not ‘sustainable’ enough, meaning not sufficient in the long term.

Secondly it is examined what a religious perspective has to offer for the discourse. In particular this is the perspective of Jewish Law (*Halakhah*), today a mere niche subject, a law system without territory and primarily based on the tradition of a religious group that makes up for less than 0.2% of the world population. It is argued why despite these facts it is worth to take a closer look at the Jewish legal system, as it offers a rich and unique tradition of more than 3,000 years of discussion and thought that still gives revealing insights. Two Jewish legal principles, *Bal Tashchit* and *Migrash*, are to exemplify this claim, before an outlook on possible future contributions is given.

Keywords: Jewish law, sustainability, theological ethics, *Halakhah*, *Bal Tashchit*, *Migrash*.

I. Introduction

First, why should we ask for ethical responses to questions of sustainability? Is the technocratic approach as practiced in most Western countries not sufficient?

And second, what has a religious perspective to offer for the discourse? Especially the perspective of Jewish Law, a mere niche subject, a law system without territory¹ and primarily based on the tradition of a religious group that makes up for less than 0.2% of the world population. Why should we look there to find an open ethics for a more sustainable world tomorrow?

1. Ethics and Sustainability?

The answers to these questions are manifold. We might ask for ethical responses because we are not satisfied with the answers politics, economy, society, and science offer. Many human beings seem to feel a lack of confidence in their motivation to transform to a more sustainable way of living, and to convince others to follow their example. Perhaps they long for the feeling to be part of something bigger, at least a community, or a movement: In the relatively individualized Western world oftentimes the only remaining communities are families, the company one works for, or in some cases the local sports club. Politics all too often seem far away, e.g. in the case of the European Union. While the EU is continuously gaining political power, people feel unconnected. So, where are places remaining that allow people on the one hand to share thoughts and discuss visions and feelings, and on the other hand to put them into action, to become a voice in the social as well as in the political discourse? Although we live in the age of communication, in the public perception actual communication about the shape of the future seems to diminish,² and as a matter of fact subsequent individual as well as collective action too. It is an apparent problem that in our Western democracies the average citizen is relatively powerless with his single vote or voice compared to the lobbies and associations of an industry that not always, but often is primarily concerned with the maximisation of its profits. Ethics allow us to take a critical view on these circumstances. And religious communities can and do serve as places for this ethical discourse.

If we take a look at which effects the practical implementation of the idea of sustainability may have on us, our everyday life, and our political and economic institutions we have to distinguish between two major approaches how to reach more sustainability. The first and most common approach in the Western hemisphere is a technocratic one, the second a more ethical or psychological one. The technocratic approach sees at its core engineering, i.e. the development of green technology replacing our current more polluting ones. In the beginning and the short term the effects of this first approach will be most noticeable in rising costs for the public (e.g. energy turn in Germany with higher prices for electricity or energy consumption in general). While the humans do not have to refrain too much from and question their current standard of use of energy the risk of a rebound effect exists. The second, more neglected ethical approach aims at changing not the material circumstances but the level below: the underlying thinking and values. According to this approach people are supposed to act sustainable because of inner conviction. Thus, ethics can help to substantiate the current efforts, and by this strengthen them. If people are convinced in their innermost, the success of the development of a more sustainable world is much more realistic. Still at the

¹ Of course, countries like Israel, Morocco etc. where only marriage and family law are religious, but state law rules otherwise do not count as countries of Jewish law.

² For example when being compared to the times of rise of socialist movements during the first half of the 20th century.

moment ethics are more a satellite to than an essential part of the debate.³ While certainly both approaches have their pros and cons, a combination of both would be most preferable as this article will show.

2. *Theological Ethics and Sustainability?*

While religious responses indeed focus on the second approach,⁴ one still has to ask: why exactly theological ethics? In my opinion it is worth (re-)considering theological ethics because religion for a very long time has been a highly influential part of the daily political discourse in the Western world, fundamentally shaping it, and – despite some dark corners in its history – most of the time representing certain values and an orientation. People might look for that again, and in asking themselves what they can do for the environment and future generations could feel the urge to take a look at what our forefathers thought about these issues. Judaism and thus Jewish law are predestined for this endeavour: Jewish Law is the world's oldest continuous legal system with a rich tradition of more than 3,000 years, offering a unique documentation of thoughts and discussions, as well as a vast collection of principles developed from them.⁵ Though not only but especially due to WWII the position of Judaism and Jewish law has often been forgotten, overseen and therefore neglected in large parts of Western Europe for the past decades. For instance in Germany this used to be different at the beginning of the 20th century when Jewish positions even had a notable impact on parliamentary discussions concerning criminal law, land law, and much more.⁶ Today, although the parts of the population that are Jewish (or even consider themselves as observant Jews) might be small in most countries – aside from Israel (75%) and the US (1.7%) –, the ideas of this tradition can still be inspiring. And interest in it has shown a permanent growth in recent years.

Since this Jewish approach has been neglected for so long and has not yet been able to develop its full impact it is worth taking a deeper look into its motivations to discover forgotten or even new ways to create a more sustainable world based on ethical values. Jewish law is particularly suited to function as an ethical foundation and for developing not only a Jewish, but even a more general ethics for an open future. In its tradition ethics have always played an important role: Jewish law has the aim to make the people observing it morally and above all ethically 'better' – according to divine will and values of course. And when working with Jewish law, dealing with ethical questions is pretty much unavoidable as there is no strict separation between ethics and law. This separation is a relatively recent phenomenon of secularism.⁷ And especially due to its historic non-territoriality, the diaspora, Jewish law was able, maybe compelled to develop primarily as a system of ethics: Because neither physical force nor state pressure could keep this legal system alive and working, but legal commandments needed – despite their divine origin granting authority – not for all, still for many Jews more and more an ethical or philosophical basis to be persuasive and to prevent

³ Although there are a few examples where ethics play a role in politics: In Germany the chancellor Angela Merkel appointed an ethics commission on the secure supply of energy after the nuclear incidents in Fukushima, Japan in 2011.

⁴ Lawrence Troster, *From Apologetics to New Spirituality: Trends in Jewish Environmental Theology* (November 2004, online at http://www.coejl.org/_old/www.coejl.org/scholarship/jetheology.pdf, accessed 2013-11-11).

⁵ For an overview see: Elliot N. Dorff and Arthur I. Rosett, *A Living Tree: The Roots and Growth of Jewish Law* (Albany, NY: State University of New York Press, 1988); Louis Jacob, *Jewish Law* (New York: Behrman House, 1968).

⁶ Access to the respective material has been simplified by large digitalization projects in recent years. Such as the compact memory project. See: <http://www.compactmemory.de/>.

⁷ Alan Mittleman, *A Short History of Jewish Ethics: Conduct and Character in the Context of Covenant* (Malden, Mass.: Wiley-Blackwell, 2012), p. 5.

migration to competing religions or cults. Especially as the advance of science, particularly when informed by Aristotelian philosophy,⁸ led to an increasing questioning of the literally meaning and authority of substantial parts of the classic Jewish texts and their interpretations. This ethical, and more rationally derived basis developed through lengthy and controversial discussions led by scholars and rabbis on the major documents of Jewish Law. Due to the relevance of tradition and the authority of the founding documents people who work with Jewish legal material always have to respect, cite and thus come back to the original sources, therefore also to the themes and topics discussed; the tradition requires a dialogue between basically all periods which also includes the respect of dissenting or minority opinions. These are passed on over the generations and not simply removed by the majority opinion, and by this are allowing a deep intergenerational and –periodical dialogue. Due to its dialogue character Jewish law furthermore was able to think in long terms; and thinking in long terms definitely is one of the key aspects of sustainability. It is characteristic for this dialogue that the *telos* of the older sources has to be applied to the new circumstances of modernity which happens through interpretation. And because the *telos* of the religious commandments has to be revealed and flexibly applied continuously it appears almost as of a solely rational or abstract character,⁹ thus even secular people or atheists can take the results of this revelation which is mostly free from mere religious rituals and use it for their reflection on topics like climate change, sustainability and an ethics of an open future. In this wider adaptation process it is not about the specific obligations of Jewish law that may be copied, integrated, or adopted to secular law systems. It is about the *telos*, the principles. In Jewish law there are many principles that have the potential to contribute to the discourse on sustainability. Later in this article (paragraph IV.) two of them will be presented: One is the famous principle *Bal Tashchit* (the prohibition of wanton destruction) which – due to its extensive interpretation – has become somewhat difficult to grasp. The second one is the urban planning principle *Migrash*.

These principles are most of the time based on ethical considerations which are discussed openly in the texts of Jewish law. Of course, the intermingling of ethics and law has become somewhat uncommon in secular legal systems of the Western world as the concept of freedom generally recognizes ethics as being a matter of the individual, not of the collective or legal realm.¹⁰ But is it not important to bring back ethics to the public and secular debate, not necessarily incorporating them as positive law, but at least discussing them? Relying on a purely technocratic or instrumental approach and language might work, but to have a ‘sustainable’ shift to more sustainability people – politicians as well as citizens – have to be convinced of what they are doing.

II. What is Jewish Law?

But before giving more attention to specific Jewish legal principles and comparing them to secular laws, a brief answer to the question “What is Jewish law?” shall make understanding easier.

⁸ This happened during the Middle Age and probably was the second significant shift from a purely religious/theological reading and understanding to a more scientific, philosophical, secular reading and understanding of the *Halakhah*. The interpretation and claiming of authority by the rabbis by arguing that God’s direct contribution to law ended with giving the *Torah* to Moses being the first shift.

⁹ One of the best known figures of this – within Judaism not undisputed – movement is *Moses Maimonides* (1135-1204). While still respecting the canonical material and its authority at the core of the system he approached the classical sources more scientifically and philosophically; trying to harmonize his belief in God, thus religion, and science/philosophy.

¹⁰ One can argue about the question of morality though which might well be a part of our legislation, especially our jurisdiction.

1. The Basics of Jewish Law

Not surprisingly: Jewish law is the religious legal system of the Jews.¹¹ It is also known under the term *Halakhah* which is derived from the Hebrew word *halakh* (to go, to walk). A more literal translation of *Halakhah* would be "the path to walk". This already tells much about the character of the Jewish legal system: It is conceived as a moral framework and an ethical guide to its observants, giving them a concept of how to act and live their lives according to the divine will. Furthermore it is important to notice that the area of application of law in Judaism is much wider compared to modern secular systems: The *Halakhah* embraces almost every aspect of life, e.g. diet and rituals. In contrast to the legal part of Judaism, there is the *Aggadah* which is the narrative or mystical part of Jewish tradition, but will not be further examined in this article.

To get a grasp of Jewish law it is necessary to comprehend its structures. These are as follows:¹² At first, one has to differentiate between primary and secondary legal sources. According to the tradition, within the primary sources one again has to distinguish between originally written and oral law, while the secondary sources are all extensions of the oral tradition. At the top of the Jewish legal system is the *Torah* as the primary written source of law, or the 'constitution of Jewish law'.¹³ The *Torah* is the law Moses received from God at Mt. Sinai.¹⁴ It is legal text and narrative at the same time; this blending of different types of texts might feel unfamiliar and thus might be confusing for readers used to Western law codes or case law collections. According to rabbinic tradition the *Torah* originally contains 613 commandments¹⁵, the so called *Mitzvot*. Due to the emergence of new problems and the change of circumstances these *Mitzvot* needed adaptation which happened through interpretation. As a result a strong oral tradition evolved. Out of this tradition further legal texts resulted, *inter alia*: the *Midrash Halakhah* which is basically a line-by-line commentary on the *Torah*, and the *Mishnah* which is the textualisation of the further oral tradition of the Jews around 220 CE and basically the founding document of rabbinic Judaism.¹⁶ Though for a long time the practically most important legal document was the *Talmud*. In the *Talmud* rabbis and scholars (the *Gemarah*) commented on the *Mishnah*, the text of the *Mishnah* thus is reprinted in the *Talmud*, and defines its structure. There are two versions, the *Jerusalem* and the *Babylonian Talmud* which have been compiled around 400-500 CE with the *Babylonian Talmud* being the more authoritative one. As secondary sources the *Responsa* (legally binding answers of rabbinic authorities), commentaries, and especially codifications are to mention (like Moses Maimonides' *Mishneh Torah*, the *Tur* by Jacob ben Asher (1269-1343), or the most relevant legal code in Judaism, the *Shulkhan Arukh* by Yosef Karo (1488-1575)). Also very important in order to understand the *Halakhah* is the periodization system, i.e. the Jewish

¹¹ In this article for reasons of easier understanding there will be no differentiation between the existing differences of the various movements of Judaism (orthodox, conservative, reform etc.). For an introduction to Jewish law either in German or in English see: Moris Lehner, "Alttestamentarisches und talmudisches Recht: Eine Einführung in das jüdische Recht", *JURA* 1, 1999, pp. 26-31; Walter Homolka, "Das Jüdische Recht: Eigenart und Entwicklung in der Geschichte", *Humboldt Forum Recht* 17, 2009, pp. 251-282; Jacob, *Jewish Law*.

¹² Homolka, "Das Jüdische Recht", pp. 251-282.

¹³ Justus von Daniels, *Religiöses Recht als Referenz. Jüdisches Recht im rechtswissenschaftlichen Vergleich* (Tübingen: Mohr Siebeck, 2009), p. 21.

¹⁴ The *Torah* is also known as the Old Testament (from a Christian perspective) or Five Books of Moses or *Pentateuch*. See: von Daniels, *Religiöses Recht als Referenz*, p. 21; The *Torah* again is part of the *Tanakh* or Hebrew Bible that contains besides the *Torah* the *Nevi'im* ("Prophets") and *Ketuvim* ("Writings").

¹⁵ Divided into 365 negative and 248 positive commandments.

¹⁶ Tsvi Blanchard, "Can Judaism Make Environmental Policy? Sacred and Secular Language in Jewish Ecological Discourse", *Judaism and Ecology: Created World and Revealed Word*, edited by Hava Tirosh Samuelson (Cambridge, Mass.: Harvard University Press for the Center for the Study of World Religions, Harvard Divinity School, 2002), pp. 423-448 (428).

legal tradition can be divided chronologically into periods. So far there are at least six different periods¹⁷ which in the end always relate to major legal documents of Judaism (basically the above mentioned). Certainly every primary source of Jewish law could build a legal system of its own; being that Biblical, *Mishnaic* or *Talmudic* law. Still the closer a period is to the *Torah* the more authority it has which once more emphasizes the relevance of tradition. The challenge is to conceptualize the fragments to a coherent system; this still has to happen in terms of ecological or sustainability issues where there has all too often been a quite selective reading, picking out mostly single *Mitzvot* out of their systematic or historic context that seemed to support the intentions of the author. Surely, developing a coherent system of obligations of sustainability within Jewish law is a task requiring great diligence, but the Jewish legal history has a tradition of concerning itself with such tasks. Maybe this could be one of the major contributions of the current period of the *Acharonim* (1563 until present).¹⁸

A further significant characteristic of the *Halakhah* is its conception as an obligation, and not a rights-based legal system.¹⁹ By this the Jewish legal system theoretically differs from the notion of most contemporary Western legal systems and their philosophical justifications which emphasize the concept of natural, human or basic rights as the legal manifestation of the protection of individual freedom. Of course, in most cases rights regularly correspond to obligations or duties, and *vice versa*. And the covenantal obligations of humans to God most of the times practically result in corresponding rights of other human beings or living creatures. The *Halakhah* practically knows rights and claims as well and thus there are less practical differences as one would expect. But the mind-set is a different one. And – as mentioned before – this does matter as the mind-set will decide about how successful the idea of sustainability will be in the long run.

2. Rights versus Obligations?

As will be shown the obligational character is of highest relevance to the functioning of the *Halakhah*. And the self-perception of being part of a covenant with God plays – next to social pressure – a major role for the enforcement, not only individually but also collectively. In contrast, in the secular Western world legal objectives are almost entirely enforced by a rights-based system. The emergence of rights as we know them today in the Western world is closely linked to liberalism and the respective state theories: These are mostly based on social contract theories of philosophers like Thomas Hobbes (1588-1679) or John Locke (1632-1704). The following chapter is thus dedicated to the relationship of rights in a modern liberal sense and obligations, and their application on sustainability issues. As sustainability is by nature an assessment of present actions and their future impact, there is a strong (secular) debate on the protection of the supposed interests of future generations as well as of animate and inanimate nature. Assumed – to have a basis to start from – there is an agreement on the relevance of this issue and on the need of active protection, the subsequent question would be how this protection can be realized most efficiently. In the legal area there are basically two theoretical concepts: The first concept focuses on rights attributed to future generations and nature.²⁰ It is frequently claimed that future generations already have certain inherent human

¹⁷ These being: Tannaim, Amoraim, Savoraim, Geonim, Rishonim, Acharonim.

¹⁸ There are some notably contributions to a wider view though: Lawrence Troster, “Judaism”, *Berkshire Encyclopedia of Sustainability. The Spirit of Sustainability*, edited by Willis Jenkins and Whitney Bauman (Great Barrington, MA: Berkshire Pub. Group, 2010-), pp. 254–257.

¹⁹ Robert M. Cover, “Obligations: A Jewish Jurisprudence of the Social Order”, *Journal of Law and Religion* 5:1, 1987, pp. 65–74.

²⁰ Klaus Bosselmann, Christian Calliess, Michael Schröter and Prue Taylor, *Ökologische Grundrechte: Zum Verhältnis zwischen individueller Freiheit und Natur* (Baden-Baden: Nomos, 1998).

rights that do not need to be attributed to them anymore. Whereas the second and also *Halakhic* approach focusses on obligations of current to future generations.

In the context of this article there are basically two levels where these two different approaches might clash: The first level is the basic level of self-conception of human nature or of the respective legal system itself. Either one sees humans as endowed with (natural) rights from a certain point of time on (e.g. birth, majority) or one follows the other approach and takes – in the case of Judaism the covenant, therefore – obligations (to God) as the (theoretical) ground to start from and for constructing a coherent system. This first level addresses the why of becoming active. On the second level which builds on the theoretical fundamentals of the first level it has to be determined how and when these rights or obligations can be realized most effectively in practice. Within the second level one has to further distinguish at least between present and future situations. Therefore, when for example addressing the question of intergenerational justice, thus a future situation, one might come to a different result compared to questions of justice between present generations.

Focusing on the second level, ascribing rights to future generations – which is the most obvious reaction from a Western secular perspective – appeared to have some flaws in regard to practice (e.g. the representative model). Therefore contemporary legal scholars are looking for new ways to get out of this dilemma and to better protect future generations. This is increasingly resulting in the insight that obligations are pretty much inevitable for this purpose. Surely, rights in fact do have advantages, e.g. when it comes to restraining the state. But these advantages mainly relate to present, not future citizens. And if one takes a closer look at contemporary legal norms dealing with sustainability, it shows that even when these are formulated as rights, in our Western legal cultures these norms de facto already are more duties than rights. This is logical as future generations and nature cannot claim their rights on their own and are basically dependent on the good will and the self-imposed rules, thus of obligations of the present generation.

This obligation orientation offers a connecting factor between secular and Jewish law. Jewish law for the major part of its history did not have to deal with protecting citizens against the abuse of state power, as it is not that elaborate in terms of rights. It has much to offer when it comes to obligations. Due to its long tradition and deep knowledge of how to formulate and establish a system of obligations in a legal context the current secular legal implementation of ideas and concepts of sustainability could benefit from this considerably. Besides being less dependent on possible representatives or political interests, obligations do have further advantages. One to mention is clarity: It is in the nature of obligations that they generally have to be more specific and concrete than rights when being established. Of course, rights can be extremely specific as well, and also obligations have to be filled with content, but they start from a more detailed level. For example when Moses received the *Torah* at Mt. Sinai it was a) clear who was addressed and b) by the commandments' directive form the addressees right away had a sense of what they owed to God and to each other. Certainly, later adjustments and explanations were necessary, and most noticeable took place in the *Mishnah* and the *Talmud*. Also one might argue that obligations are more restrictive to (individual) freedom – which in a way they are. So how might these policies affect our individual freedoms and basic or human rights (which ultimately are and probably will be at the core of the Western legal systems in the long view)? Secular Westerners in general are very sensible when these are restricted in any way. Thus a compromise has to be sought. And to make the grade: A combination of both approaches is the only, but at the same time the most preferable option to strengthen the role of obligations in the secular legal systems of the West, and by this improving the protection of future generations and nature based on a consistent theory.

III. Jewish Law and Ecology/Sustainability

So, before we take a closer look at specific *Halakhic* laws and their suitability for secular implementation, the question should be asked: How and when did Jewish law and ecology ‘meet’ each other?

1. *The Critique on the Worldview of Genesis 1:28*

This can basically be traced back to the late 1960’s when the article *The Roots of Our Ecological Crisis* by the US American historian Lynn White Jr. was published in the *Science* magazine.²¹ In his article White accused the Judeo-Christian worldview of being responsible for the contemporary ecological crisis, thereby especially referring to Genesis 1:28 where God is said to have given man dominion over nature.²² Others joined White in his view, e.g. the British historian Arnold Toynbee who wrote an article suggestively titled “The Genesis of Pollution” which was published in 1973.²³ Since these times Jewish literature tried to find responses to this accusation as well as to the question how Jews should behave in regard to the ecological crisis. Parallel to Christian authors they developed the so called stewardship model which is based on Genesis 2:15 and sees humans as caretakers to conserve God’s creation. Thus already in the chapter next to Genesis 1 there is a concept that contradicts or at least limits the extensive interpretation of White *et al.* This Biblical understanding of the role of humans as stewards was extended in the theological context even to such an extent to the opposite of White’s accusations that a re-sacralisation of nature was claimed; of course bringing the position somewhat close to a pagan view. This position is often connected to a critique on the secular language of Enlightenment as being too scientifically, thus too ‘disenchanted’.²⁴ Seen in a wider context of sustainability which exceeds its ecological roots there is in fact some important vocabulary not much pronounced in Enlightenment language. Examples are sacrifice, solidarity, or community.

2. *The Development of a Jewish Position*

Nevertheless it took a while until one could speak of a unique ‘Jewish position’. At first there was sheer defence only and Jewish authors picked (especially Biblical) passages and verses quite selectively and used almost every *Mitzvah* dealing with plants or nature as an argument for the ecological orientation of the Bible, thus warping *Mitzvot* and detaching them from their context as well as their underlying concepts. But the Bible did not have in mind global ecological problems. So, at first there is a problem of historical context: “Although traditional Jewish texts provide important conceptions of the natural world and of the human relationship to it, they were never meant as a response to the world-threatening ecological problems we face today. We simply do not find a sense of ecological crisis in traditional Jewish texts.”²⁵ Therefore a new and openly communicated exegeses and philosophical re-reading is necessary. Slowly, a still on-going process of such re-interpreting of the sources started, at first referring mostly to the Bible, but then taking a turn to focus more on rabbinic texts. This is consistent for a Jewish position because this literature has been so influential and still dominates the understanding of the *Torah*. More recently even *Aggadic* sources are used.

²¹ Lynn White Jr., “The Historical Roots of Our Ecological Crisis”, *Science* 155, 1967, pp. 1203–1207.

²² Interestingly *White* in his article never mentions Genesis 1:28 explicitly though.

²³ Arnold J. Toynbee, “The Genesis of Pollution”, *Horizon* 15:3, 1973, pp. 4-9. An even more perceived excerpt was published in the *New York Times*: Arnold J. Toynbee, “The Genesis of Pollution”, *New York Times*, 16 September 1973).

²⁴ Blanchard, “Can Judaism Make Environmental Policy?”, pp. 424-425.

²⁵ Blanchard, “Can Judaism Make Environmental Policy?”, p. 424.

Despite being inaccurate in speaking of one Jewish position, a practical anthropocentrism based on a theoretical theocentrism developed, some may call it a ‘weak anthropocentrism’. The respective *Mitzvot* were no longer solely seen as ecological norms, but as more complex commandments in a wider context. Although, Jewish law of course does not know the term sustainability, if we take our contemporary understanding of this term and try to connect it to originally Jewish laws and principles or interpret them from a perspective of sustainability, it becomes clear that Jewish law addresses almost every aspect of this area, e.g. environmental protection (water, soil, air), urban planning, noise control, waste management, recycling, intergenerational justice, warfare, budget management, animal protection and ethics, diet, and consumption in general. Characteristic for Jewish laws of sustainability thus is the mixture of ecological, social and economic interests: the three columns of the most popular contemporary definition of sustainability. Still it has to be stated that the impetus to this re-reading from a perspective of sustainability came from the ‘outside’, the secular society in form of the ecological movement. But maybe now society can profit from Jewish law in return.

IV. Legal Comparison

In the following paragraph a brief and exemplary legal comparison of how sustainability issues are handled in German basic law on the one, and Jewish law on the other hand will give an idea of the practical implications of the theoretical foundations discussed above.

1. Western Legal Culture as Exemplified by German Basic Law Article 20a (GG)

The central aspect of German basic rights is human dignity which is guaranteed in Article 1 (1) of the Basic Law/Grundgesetz (GG). It is the duty of all state authority to respect and protect this good. This duty is followed by the statement in paragraph two that human rights are to be acknowledged as the foundation of every community, peace and justice. Future generations, the environment, or even sustainability are not mentioned explicitly in the beginning of the German Basic Law until the relatively recent Article 20a. By Article 20a of the Basic Law the sustainability issues are addressed as follows:

Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

Although Article 20a GG is part of the basic law, it is not part of the basic rights. It is a *Staatszielbestimmung* (state objective) that was introduced in 1994 (for environmental protection) and 2002 (for animal protection).²⁶ Still it is of importance for interpretation of legal norms and weighing of interests. It also includes a mandate for action of the state (not its people); still specific content and extent of the duty to protect the above mentioned foundations is left open.²⁷ Article 2 (1) GG is already construed to guarantee an ecological subsistence level, therefore Article 20a GG has to require more than this.

Today Article 20a GG is interpreted in a way that the German basic law not only demands to implement the idea of protecting the environment and animals by specific laws, but also via educational measures.²⁸ Furthermore the duty of the German state to foster a more sustainable behaviour is not to end at its borders; it is seen as a mandate to development

²⁶ Stefan Huster and Johannes Rux, “Art. 20a”, *Beck’scher Online-Kommentar GG*, edited by Volker Epping and Christian Hillgruber (München: C. H. Beck, 18th edition, 15 May 2013), para. 1.

²⁷ Huster and Rux, “Art. 20a”, para. 28.

²⁸ See: Umweltinformationsgesetz (UIG), Huster and Rux, “Art. 20a”, para. 34.

policy.²⁹ The mentioning of “in accordance with law and justice” means that environmental and animal protection do not *per se* overrule other objectives of the constitution.³⁰ The weighing in regard to other *Staatszielbestimmungen* is conceptually quite similar in German and Jewish law. But explicitly taking into account ecological matters is pretty recent in Western law (although it *de facto* took place earlier than 1994). As a result nowadays it is always a balancing of social, economic and ecological aspects³¹ – as it already can be seen in classical Jewish law.³²

The German federal law obliges the state (foremost the legislator, but also the executive and judicative) as the democratic representative of its people to take action and develop a more sustainable environment. But the duty itself is formulated quite ‘open’ and needs to be filled with content; also it is a somewhat weak ‘*shall* obligation’. In Jewish law one will hardly find such a generalist *Mitzvah*. This openness of Article 20a GG certainly bears a risk of an abuse of legal flexibility. Furthermore – as mentioned above – it again does not address the German people directly. This might lead to (an unconscious) delegation of responsibility as many might think that it is the duty of the state to take care of a more sustainable world, not theirs.

2. Environmental and Sustainability Principles in Jewish Law

After having presented the structural as well as conceptual basis of Jewish law, and given an example of Western secular law dealing with sustainability issues in the form of Article 20a GG, in the following paragraph there will be two examples for Jewish legal principles that in their contemporary interpretation fit our current understanding of sustainability.

Jewish law knows many examples for principles that address issues of ecology and/or sustainability, but due to the limits in length of this article in the following only two of them will be discussed briefly: *Bal Tashchit* (the prohibition of wanton destruction, Deuteronomy 20:19-20), and *Migrash* (green belt or urban planning principle, Numbers 35:1-15, Leviticus 25:34).

3. *Bal Tashchit*, Deuteronomy 20:19-20

The first example to be introduced was a Biblical law of warfare in the beginning. It prohibits the cutting down of fruit trees³³ while besieging a city in times of war. The complete passage reads:³⁴

19 When thou shalt besiege a city a long time, in making war against it to take it, thou shalt not destroy the trees thereof by forcing an axe against them: for thou mayest eat of them, and thou shalt not cut them down (for the tree of the field is man' life) to employ them in the siege:

20 Only the trees which thou knowest that they be not trees for meat, thou shalt destroy and cut them down; and thou shalt build bulwarks against the city that maketh war with thee, until it be subdued.

By rabbinic interpretation the field of application of this *Mitzvah* was extended and developed to the rabbinic legal principle *Bal Tashchit*, the (general) prohibition of wanton

²⁹ Huster and Rux, “Art. 20a”, para. 38.

³⁰ Huster and Rux, “Art. 20a”, para. 1.

³¹ Because of this balancing some commentators of the German basic law speak of an eco-social market economy as the modern German state model; see for example: Huster and Rux, “Art. 20a”, para. 41; Rupert Scholz, Rupert, “Art. 20a”, *Grundgesetz-Kommentar*, edited by Theodor Maunz and Günter Dürig (München: C. H. Beck, 69th supplement 2013), para.16.

³² Huster and Rux, “Art. 20a”, para. 41.

³³ While it is permitted to cut down trees that do not bear any fruit.

³⁴ King James Version.

destruction. The most cited classic rabbinic authorities and interpreters of *Bal Tashchit* in contemporary Jewish environmental literature are Rashi (1040-1105), Moses Maimonides, and Samson Raphael Hirsch (1808-1888).

This principle became one of, if not the most popular ecological principle in contemporary Jewish environmental ethics. Especially after the accusations of Lynn White Jr. *et al.*, when Jewish authors sometimes desperately were searching for seemingly ecological precepts to invalidate criticisms. So, one of the first direct respondents from a Jewish background back then was Eric G. Freudenstein. In 1970 his article *Ecology and the Jewish Tradition*³⁵ was published. The article starts with the citation of: Deuteronomy 20:19-20. Although only the 19th verse is printed and not the 20th (this being methodically a bit dubious already), Freudenstein in his article means to disprove the arguments of White *et al.*, and a) wants to show what ecological concern especially *Torah* and *Talmud* contain and b) what the reasons are that ecological aspects seem to have been forgotten in Judaism. For the first point a) he cites *Bal Tashchit* and other principles. The second point b) he ascribes to the diaspora, thus the divorce from land, and that before – during Biblical and *Talmudic* times – there was no threat of an ecological crisis; but that actually nature was a threat to the human survival. Freudenstein thus quotes quite selectively and names Deuteronomy 20:19 “the general prohibition against destroying the environment”. For this selective citing he got criticized with good reason³⁶ – just as White did get criticized for focusing too much on the first chapter of Genesis.

Without any doubt one has to consider how Jewish legal texts work in their wider context. In general there is nothing to say against extending the area of application of a law, and Jewish legal tradition is particularly famous for this. But although Freudenstein explains “According to Hirsch, the *Torah* will select a particular law for inclusion in its code in order to demonstrate the validity of a fundamental principle by showing how that principle must apply even under extraordinary conditions”,³⁷ and recurs to the point that *Bal Tashchit* was meant to emphasize the importance of the protection of the environment.³⁸ The context, especially the *Talmudic* sources provide a very different picture. *Bal Tashchit* is in fact much more a rational, utilitarian law. It is basically a prohibition of wasting things that can be useful to humans (examples are garments, even the human body). It tries to warn of focusing only on short-term goals. Furthermore the rabbinic environmental policy dealt primarily with more local issues, such as fairness and risk management;³⁹ and not with a global protection of nature. This has to be kept in mind as a warning of too enthusiastically ‘over-interpreting’ the area of application and content of Mitzvot.

4. *Migrash*, Leviticus 25:34, Numbers 35:1-15

The Biblical principle of *Migrash* differs fundamentally from *Bal Tashchit* in terms of content, structure and development. As mentioned in the beginning of this article it primarily is a principle of urban planning or land law. And our relationship to land is one major example for dealing with ecological, social, and economic interests at the same time. The *Migrash* principle is based on several Biblical passages, i.e. Leviticus 25:34 or Numbers 35:1-15. Originally the law was applied on Levitical cities only, but later it was extended to all

³⁵ Eric G. Freudenstein, “Ecology and the Jewish Tradition”, *Judaism* 19 (1970), pp. 406-41 (411); see alternative reference: Eric G. Freudenstein, “Ecology and the Jewish Tradition” (1970), *Judaism and Human Rights*, edited by Milton R. Konvitz (New York: Norton, 1972), pp. 265–274.; on page 273 he directly refers to the criticism.

³⁶ For instance by David Nir, “A Critical Examination of the Jewish Environmental Law of Bal Tashchit – “Do Not Destroy””, *Georgetown International Environmental Law Review* 18:2 (2005), pp. 335–354 (354).

³⁷ Freudenstein, “Ecology and the Jewish Tradition” (1972), p. 266.

³⁸ Freudenstein, “Ecology and the Jewish Tradition” (1972), p. 266.

³⁹ Blanchard, “Can Judaism Make Environmental Policy?”, p. 424.

(Jewish) cities (again by famous commentators like Rashi, Maimonides and Nahmanides (1194-1270)).⁴⁰

First of all the translation of the term *Migrash* bears some difficulties. It was for example translated as pasturelands, open land, green belt, or common.⁴¹ There are lengthy discussions on what might be the proper English term for it. In regards to its content the principle of *Migrash* states that a city has to be designed from its inside to its outside in the following way: a) inner city, b) common, c) fields and vineyards.⁴² Furthermore it embraces different prohibitions that sometimes are closely intertwined. There are basically three of them at the core of the *Migrash* principle: (1) a prohibition of changes in size (there are specific measurements for instance in Numbers 35 – although it is argued that these have to be understood relatively as the city would be rather small if the Biblical measurements would be applied directly), (2) a prohibition of changes in use, and (3) a prohibition of selling (to gentiles; see Leviticus 25:34). Samson Raphael Hirsch in this context mentions that “all future times have equal claim to it, and in the same condition that it has been received from the past is it to be handed on to the future.”⁴³

Despite this layer of prohibition there are also other aspects which could be named as intentions, a more psychological or physical (health) level. According once more to Hirsch in his commentary on the Pentateuch, the *Migrash* had to serve the psychological well-being of the inhabitants of the city as it was supposed to establish a connection of sophisticated urban dwellers to nature – for him this was the ideal city; probably heavily influenced by the Romantic Movement in Germany around his time. Physical recreation was furthermore a fact already mentioned by Rashi. It was also Rashi who in his commentary on Numbers 35:2 refers to aesthetical reasons, i.e. that *Migrash* should serve to beautify the city. Furthermore it served simple practical reasons as the *Migrash* was to be used for animal keeping and laundry (Numbers 35:3, and Babylonian *Talmud Nedarim* 81a).⁴⁴ Finally disease prevention played a role as cemeteries had to be situated outside of the area.

Astonishingly, it is possible to draw a line from the Hebrew Bible and the *Migrash* principle to land law concepts like Henry George's (1839-1897) single tax,⁴⁵ over to early 20th century land reform movements in Germany, to works like Garrett Hardin's *The Tragedy of the Commons* (1968), and even to current urban planning. For example urban planners in Seoul (Republic of Korea) in their plans to create a green belt refer to the so called *Garden City Movement*. And it was without any doubt the *Migrash* principle that inspired this movement that became popular around the turn of the 19th to the 20th century. For example Frederic Osborn (1885-1978) – besides Ebenezer Howard (1850-1928) one of its most influential representatives – directly referred to the respective Biblical passages in his works. As all this development can be traced back to this Biblical (legal) source and concept, this might serve as another argument why to ask for theological responses and religious perspectives. These – like *Migrash* shows – still can have a relevant impact and be a force for change, especially as our present land law needs to be questioned and should not be seen as ‘given’ while despite its positives effects (stabilisation etc.) it all too often leads to social, ecological, and economic injustice at the same time. Of course, the Biblical rules cannot be adopted literally, but their *telos* can as it still has the meaning and substance to suit and to inspire us. That is why we should take a look at how Jewish law and ethics can be used to

⁴⁰ More on the process of ‘extension’ of Jewish laws: Ruth N. Sandberg, *Development and Discontinuity in Jewish Law* (Lanham, MD: University Press of America, 2001).

⁴¹ James Barr, “Migras in the Old Testament”, *Journal of Semitic Studies* XXIX (1) (1984), p. 15.

⁴² Freudenstein, “Ecology and the Jewish Tradition” (1972), p. 268.

⁴³ Freudenstein, “Ecology and the Jewish Tradition” (1972), p. 268.

⁴⁴ The principle is further discussed in the *Babylonian Talmud* (*Arakhin* 33b for instance).

⁴⁵ Henry George, *Progress and Poverty: An Inquiry into the Cause of Industrial Depressions and of Increase of Want with Increase of Wealth: the Remedy* (Cambridge: Cambridge University Press, 2009 (1881)).

develop criteria of provision that can be applied in the secular Western world. And it opens a platform for inter-religious discourse too as it is not as emotionally charged as other, more theological topics in religion.

V. Conclusion

So where a ‘new’ German basic law like Article 20a GG in the beginning is quite general due to its conceptualisation, Jewish law is per se much more specific. And this specificity of obligations is needed to accelerate actions in regard to climate change, sustainability, and intergenerational justice as it is well known that the clock is ticking.

But how can the insights gained, i.e. the concept of obligations but also the weighing of interests, be implemented practically? To tackle this task it is recommended to distinguish between three levels: a) the intra-religious, b) the interreligious, and c) the secular level. In the case of c) many observant Jews might face what one could call a “dilemma of double commitment”, as they might feel committed to their sacred texts and rituals, and for instance to actively engage in environmental protection on a secular level at the same time. Therefore there has to be a compromise found to get both commitments together and find a single non-religious voice to speak as the environmental protection discourse is noticeably secular.⁴⁶

Due to these circumstances Judaism has to respect the dominant secular language and thinking as well as the technical-rational argumentation to become part of the debate. Although the *Halakhic* concepts have to be made adaptable and comprehensible in a secular environment,⁴⁷ this does not mean the erosion of their content. Jewish legal history has already proven this.

As a common language is one of the key factors; therefore at first a more technical principle like *Migrash* may prove useful to begin with when using classical Jewish texts and examining them in the light of the current ecological crisis.⁴⁸ If this whole language dilemma is considered thoroughly and principles are put into their historical, systematic, and teleological context, Judaism can make influential environmental policy, like it has influenced policies in the past.

1. Action Levels

Coming back to the three above mentioned levels where action needs to be taken: On a) the intrareligious level Jewish law on sustainability first of all urgently needs systematisation. Especially as the next step has to be done to move onward from writings and articles on ecological issues to the broader more complex questions of sustainability of which ecology is an important, but still just one part besides at least social and economic issues. More awareness has to be created in communities and schools and other public occasions. Environmental organizations need further ideal and especially monetary support as the financial crisis has led to severe cuts of their budgets. On b) the interreligious level there has to be a discourse between different religions to develop a perceptible religious voice. Of course, the ‘religions of the book’ have a somewhat common ground to start from in regard to tradition, sources, and language. A critical elaboration of similarities and differences is

⁴⁶ Blanchard, “Can Judaism Make Environmental Policy?”, p. 426.

⁴⁷ Blanchard sees basically three difficulties for this operation: (1) Classic Jewish texts were crafted in a time when an ecological crisis was not foreseeable (historic context), (2) classic Jewish texts were designed for a limited number of addressees (the Jews), and (3) the language used is religious or theological. In regard to difficulty (3) Blanchard speaks of three possible models to deal with it. His favoured model employs both religious and secular language at the same time, but does this explicitly. Linking, but not merging the different languages as an approach seems preferable to him; see: Blanchard, “Can Judaism Make Environmental Policy?”, p. 426.

⁴⁸ Blanchard, “Can Judaism Make Environmental Policy?”, p. 425.

necessary. Finally on c) the secular level religious concepts have to be contributed to the secular discourse, e.g. by publications, presenting Jewish positions at interdisciplinary conferences, and looking for a dialogue with politicians.

2. *Types of Action*

Here are two further examples of – especially with regards to Judaism promising – types of action that can or should be taken: Education and stories. Foremost education offers an opportunity to realize the objectives of a more sustainable world. Religion can be a major educational multiplier. It can educate its communities and spread ideas; therefore it is crucial to carefully carve out the religious values and principles, and in the case of Jewish law to openly re-read and to re-interpret the Biblical, *Mishnaic*, and *Talmudic* sources from a perspective of sustainability within the communities. Besides that education in general is something the Jewish religion is famous for: The imperative of education is a central aspect of Jewish law, and had a major impact on the development of Jewish ethics, as well as the people and the character of the religion itself.⁴⁹ This can and has to be used for sustainability issues too as education can be considered as the most important step on the journey to a more sustainable world.

Furthermore in addition to the more rational educational part we need inspiring, shining examples, i.e.: stories that move us – which is always a critical and risk-bearing act of balancing as history has taught us. Yet if ideas of sustainability are connected to famous (historic) religious figures and narratives they can serve as a model and guide for (observant) people. Judaism offers a very rich and unique tradition of stories to which can be referred to. And would not a successful contribution of Jewish ethics to a more sustainable world be another good story to be written?

⁴⁹ Maristella Botticini and Zvi Eckstein, “From Farmer to Merchants, Conversions and Diaspora. Human Capital and Jewish History”, *Journal of the European Economic Association* 5:5 (2007), pp. 885–926.

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