

An Ethics of Sustainability and Jewish Law?

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This article addresses the issue of 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 might not be sustainable. Second, it examines 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 minority. It is argued that despite these facts the Jewish legal system should be taken into account, as it offers a rich and unique tradition of more than 3,000 years of discussion and thought that still provides revealing insights. Two Jewish legal principles, bal tashchit and migrash exemplify this claim, before an outlook on possible contributions is given.

This article revolves around two connected sets of questions: First, why should we ask for ethical responses to questions of sustainability? Is the technocratic approach as practiced in most Western countries not sufficient? Subsequently and second, what has a religious perspective to offer for the discourse? Especially, what can be gained by taking the perspective of Jewish Law, a mere niche subject, a law system without territory and primarily based on the tradition of a religious group that makes up less than 0.2 per cent of the world's population?¹ Why should we look there to find an ethics for a more sustainable world?

Ethics and Sustainability?

The answers to these questions are manifold. We might ask for ethical responses to questions of sustainability because we are not satisfied with the answers the economy, politics, society, and science are offering. Many human beings seem to feel a lack of confidence in their motivation to adapt to a more sustainable way of living, and to convince others to follow their example. Perhaps they long for the feeling of being part of something bigger, at least a community, or a movement. In the relatively individualised

¹ In countries like Israel and Morocco religious groups are free to elect to be governed by religious law in certain fields of law (e.g. marriage and family law). Still these countries do not count as countries of Jewish law *sensu stricto*, as secular state law is obviously predominant.

Western world oftentimes the only remaining communities are families, the company one works for, or the local sports club. Politics all too often seems far away, *e.g.* in the case of the European Union (EU). While the EU is continuously gaining political power, people feel increasingly unconnected. So where do places remain that, on the one hand, allow people 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 eyes of the public actual communication about the shape of the future seems to diminish.² As a matter of fact subsequent individual as well as collective action seems to decrease too. It is an apparent problem in Western democracies that the average citizen is relatively powerless with a single vote or voice, compared to the lobbies and associations of an industry that not always, but quite often, is primarily concerned with the maximisation of its profits. Ethics allow us to take a critical perspective on these circumstances.

If we take a look at what 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 to seeking to increase 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 has at its core engineering, *i.e.* the development of green or more efficient technologies replacing our current more polluting ones. In the short run, the effects of this approach can be noticed in rising costs for the public. For instance, the energy turn in Germany led to higher prices for electricity and energy consumption in general, as it required major investments in research and infrastructure projects.³ But soon prices will decrease again as technology advances.⁴ As a result people will not have to refrain from – and especially not have to question – their standard of use of energy in the long run.⁵ In contrast, the second, more neglected ethical approach aims at changing not the material circumstances but something more fundamental: their underlying thinking and values. According to this approach people are supposed to adopt sustainable action 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 thinking, the success of the development of a more sustainable world is a much more realistic prospect. Still, at the

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

³ In Germany the rising prices are not the result of efficient technologies being intrinsically more expensive, or of the premature displacement of inefficient capital equipment alone, but foremost of political decisions. In particular, political decisions regarding the specific design of incentives to foster the production of renewable energy (*e.g.* the promotion of solar energy by a relatively high statutory feed-in compensation) on the one hand, and the heavy subsidisation of fossil and nuclear fuels in the past as well as in the future (*e.g.* disposal, dealing with the consequences of pollution) on the other hand.

⁴ Or – as discussed in Germany right now – by passing on parts of the costs of the energy turn to future generations by drawing on credits to lower the high energy prices in the present.

⁵ This even bears the risk of a rebound effect, *i.e.* the reduction of marginal costs when replacing inefficient equipment by more efficient equipment. For example, it is cheaper to heat a well-insulated house, so the thermostat setting might be increased.

moment ethics is more a satellite to than an essential part of the debate.⁶ While certainly both approaches have their pros and cons, a combination of both would, as will be shown below, be preferable.

Theological Ethics and Sustainability?

While religious responses focus on the second approach,⁷ one still has to ask: why theological ethics? One answer is that it is worth (re-)considering theological ethics because religion has been a lasting and highly influential part of the daily political discourse in the Western world, fundamentally shaping it. Despite some dark chapters in its history, religion represented and continues to represent certain values. That is an attractive feature that people might look for again. And in asking themselves what they can do for the environment and future generations they might feel the urge to take a look at what our forefathers thought about these issues. Judaism and thus Jewish law are well suited for this endeavour: Jewish law is the world's oldest continuous legal system with a rich tradition spanning more than 3,000 years. It offers a unique documentation of thoughts and discussions, as well as a vast collection of principles developed from these discussions.⁸ Though not only, but especially due to World War II, the position of Judaism and Jewish law has often been forgotten, overseen and therefore neglected in large parts of Western Europe in the past decades. For instance, in Germany, this can be contrasted with the beginning of the 20th century when Jewish positions had a notable impact on parliamentary discussions concerning criminal law, land law, and much more.⁹ 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 per cent) and the US (1.7 per cent) –, the ideas of this tradition are still inspiring, and interest in Judaism has seen a consistent growth in recent years.

Because the theological, and especially the Jewish approach has been neglected for so long and yet has not been able to reach its full impact, it is worth taking a deeper look at 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 a more general ethics for an open future. In its tradition ethics have always played an important role: Jewish law aims to make the people observing it morally and above all ethically 'better' – according to the divine will and values. When working with Jewish law nowadays, dealing with ethical questions is pretty much unavoidable as there is no strict separation between

⁶ 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 2011 nuclear incidents in Fukushima.

⁷ 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).

⁸ 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), and Louis Jacob, *Jewish Law* (New York: Behrman House, 1968).

⁹ Access to the respective material has been simplified by large digitalization projects in recent years, such as the compact memory project: <http://www.compactmemory.de/>.

ethics and law. This separation is a rather recent phenomenon of secularism.¹⁰ Especially due to its historic non-territoriality (the diaspora), Jewish law was able – maybe compelled – to develop primarily as a system of ethics. Neither physical force nor state pressure was available to keep the system alive and working. Therefore Jewish legal commandments needed another basis. As for many Jews a simple reference to divine origin and authority proved to be intellectually unsatisfactory, this situation finally resulted in the emergence of a sophisticated rationalistic or philosophical interpretation of the sacred writings, preventing the possible demise of Jewish law. In particular, the advancement of science led to an increasing questioning of the literally meaning and authority of substantial parts of the classic Jewish texts and interpretations.¹¹ This ethical and more rationally derived basis developed through lengthy rabbinical debates. These debates lie at the core of many of the major post-Talmudic documents of Jewish Law. Yet, due to the relevance of tradition and authority there is a deep connection to the founding documents of Judaism. Working with Jewish legal material always includes the duty 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 for dissenting and minority opinions. These are passed on over generations and not simply replaced by the majority opinion. This has led to a unique intergenerational and interperiodical dialogue. Furthermore, due to its dialogical character, Jewish law was conceived in a long term perspective: one of the key aspects of sustainability. It is characteristic for this dialogue that the *telos* of older sources is applied to analogous modern circumstances by certain exegetical rules. Because the respective *telos* of the religious commandments has to be continuously revealed and flexibly applied, it has frequently been reduced to its rational or abstract core,¹² thus even secularists or atheists can take the results of this revelation which is mostly free from mere religious rituals, and use it in 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 adapted 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 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 commonly based on ethical considerations which are discussed openly in the texts of Jewish law. In Western secular legal systems the

¹⁰ Alan Mittleman, *A Short History of Jewish Ethics: Conduct and Character in the Context of Covenant* (Malden: Wiley-Blackwell, 2012), p. 5.

¹¹ Particularly when informed by Aristotelian philosophy as it happened during the Middle Ages. This period of time marked the second significant shift from a purely religious/theological reading and understanding to a more scientific, philosophical, and secular comprehension 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.

¹² 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 religion and his belief in God with science and philosophy.

intermingling of ethics and law has become somewhat uncommon as the concept of freedom generally recognizes ethics as being a matter for the individual, not for the collective or legal realm. Thus it is 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 that what they are doing is ethically right.¹³

What Is Jewish Law?

Before turning to specific Jewish legal principles and comparing them to secular laws, a brief overview of the basics of Jewish law will make understanding easier.

The Basics of Jewish Law

Unsurprisingly, Jewish law is the religious legal system of the Jews.¹⁴ 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 says much about the character of the Jewish legal system: it is conceived as a moral framework and offers its observants an ethical guide on 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, such as diet and rituals. In contrast to the legal part of Judaism, there is the *aggadah* which is basically any part of rabbinic literature which does not deal with law. Besides narratives the *aggadah* includes theology, ethics, and morality and to a certain extent also mysticism. It will not be further examined in this article however.

To better understand Jewish law it is necessary to comprehend its structures:¹⁵ 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.

¹³ See Yehuda L. Klein and Jonathan Weiser, 'Jewish Environmental Ethics', in *The Oxford Handbook of Judaism and Economics*, edited by Aaron Levine (New York: Oxford University Press, 2010), Ch. 20. They argue that a theocentrally orientated perspective on the environmental discourse would reduce tensions between the anthropocentric and the ecocentric approach by allowing a dialogue between them. This dialogue specifically could be based on the linear conception of the Hebrew Bible. The linear conception starts with creation and leads to a specific end according to God's will and laws. It could function as a corrective framework to both the focusing on the present needs by the anthropocentric view and the negligence of the fact of development by the ecocentric approach. Furthermore a predestined subordination of any need would be avoided as all needs principally are of equal value to God in the first place.

¹⁴ In this article, I will not differentiate between the various movements of Judaism (orthodox, conservative, reform etc.). For an introduction to Jewish law, see Jacob; Walter Homolka, 'Das Jüdische Recht: Eigenart und Entwicklung in der Geschichte', *Humboldt Forum Recht* 17 (2009), pp. 251-282; Moris Lehner, 'Alttestamentarisches und talmudisches Recht: Eine Einführung in das jüdische Recht', *JURA* 1 (1999), pp. 26-31.

¹⁵ Homolka, pp. 251-282.

At the top of the Jewish legal system is the *Torah* as the primary written source of law, or the 'constitution of Jewish law'.¹⁶ The *Torah* is the law Moses received from God at Mt. Sinai.¹⁷ 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 legal codes or case law collections. According to rabbinic tradition the *Torah* originally contains 613 commandments, the so-called *mitzvot*.¹⁸ Due to the change of circumstances and the emergence of new problems these *mitzvot* needed adaptation which foremost 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 also the founding document of rabbinic Judaism.¹⁹ Though for a long time the most important legal document practically was the *Talmud*. In the *Talmud* rabbis and scholars (the *Gemarah*) commented on the *Mishnah*; hence the text of the *Mishnah* 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 ought to be mentioned (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 important in order to understand the *halakhah* is the periodization system, *i.e.* the Jewish legal tradition can be divided chronologically into periods. So far there are at least six different periods which in the end always relate to major legal documents of Judaism (basically the above mentioned).²⁰ 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, emphasizing once more 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. Single *mitzvot* have been simply picked out of their systematic or historic context 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.

¹⁶ Justus von Daniels, *Religiöses Recht als Referenz. Jüdisches Recht im rechtswissenschaftlichen Vergleich* (Tübingen: Mohr Siebeck, 2009), p. 21.

¹⁷ The *Torah* is also known as the Old Testament (from a Christian perspective), or Five Books of Moses, or *Pentateuch* (von Daniels, 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').

¹⁸ These were further divided into 365 negative and 248 positive commandments.

¹⁹ Tsvi Blanchard, 'Can Judaism Make Environmental Policy? Sacred and Secular Language in Jewish Ecological Discourse', in *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, 2002), pp. 423-448, at p. 428.

²⁰ These periods being *Tannaim*, *Amoraim*, *Savoraim*, *Geonim*, *Rishonim* and *Acharonim*.

Maybe this could be one of the major contributions of the current period of the *Acharonim* (1563 until present).²¹

A further significant characteristic of the *halakhah* is its conception as an obligation, and not a rights-based legal system.²² In this the Jewish legal system theoretically differs from most contemporary Western legal systems and their philosophical justifications. Those generally emphasize the concept of natural, human or basic rights and the protection of individual freedom which is to be guaranteed by the legal manifestation of these rights. Of course, in most cases rights regularly correspond to obligations or duties, and *vice versa*. Hence the covenantal obligations of humans to God most of the time practically result in corresponding rights of other human beings or living creatures, *i.e.* the *halakhah* knows rights and claims as well and thus there are less practical differences as one would expect. But still 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.

Rights versus Obligations?

As will be shown the obligational character is of highest relevance to the functioning of the *halakhah*. Next to social pressure, the self-perception of being the obligated party of a covenant with God plays a major role for compliance, not only individually but also collectively. In contrast, in the secular Western world legal objectives are almost entirely gained by claims in rights-based systems. 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 section 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 definition an assessment of present actions and their future impact, there is a strong (secular) debate on the protection of the assumed interests of future generations as well as of animate and inanimate nature. On the hypothesis that 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 field of law there are basically two theoretical concepts: The first concept focuses on rights attributed to future generations and nature.²³ Whereas the second and also *halakhic* approach focuses on obligations of current to future generations without granting the latter specific ‘rights’ in the classical sense.

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 conceptions of human

²¹ There are some notable contributions to a wider view though: Lawrence Troster, ‘Judaism’, in *Berkshire Encyclopedia of Sustainability. The Spirit of Sustainability*, vol. 1, edited by Willis Jenkins and Whitney Bauman (Great Barrington: Berkshire, 2010), pp. 254–257.

²² See Robert M. Cover, ‘Obligations: A Jewish Jurisprudence of the Social Order’, *Journal of Law and Religion* 5:1 (1987), pp. 65–74.

²³ For instance, see Klaus Bosselmann, Christian Calliess, Michael Schröter and Prue Taylor, *Ökologische Grundrechte: Zum Verhältnis zwischen individueller Freiheit und Natur* (Baden-Baden: Nomos, 1998); Jörg Tremmel, ‘Institutionelle Verankerung der Rechte nachrückender Generationen’, *Zeitschrift für Rechtspolitik* 37:2 (2004), pp. 44–46; for an extensive discussion, see Herwig Unnerstall, *Rechte zukünftiger Generationen* (Würzburg: Königshausen & Neumann, 1999).

nature or of the respective legal system. Either one sees humans as endowed with (natural) rights and thus also with the possibility of directly or indirectly asserting claims. Or one follows the other approach and takes obligations as the theoretical foundation for constructing a coherent system; in the case of Judaism this foundation is represented by the covenant with God. This first level addresses the 'why' of becoming active in the interest of someone else: because a claim is filed, or an obligation exists. 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. Within the second level one has to further distinguish between present and future situations. Therefore, when for example addressing the question of intergenerational justice – involving 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 legal perspective – appeared to have some flaws in regard to practice, especially to the question of standing, *i.e.* determining who has the legal authority to bring a cause of action on behalf of future generations.²⁴ Therefore contemporary legal scholars are looking for new ways to get out of this dilemma and to better protect future generations. This increasingly often results in the insight that obligations are pretty much inevitable for this purpose. Surely, rights do have advantages, for instance when it comes to restraining the state. But these advantages mainly relate to present, not future citizens. If one takes a closer look at contemporary legal norms dealing with sustainability, it shows that even when formulated as rights, in our Western legal cultures these norms are *de facto* already closer to duties than to rights. This is only 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; the obligations of the present generation.

This obligation orientation offers a connecting factor between secular and Jewish law. While Jewish law for the major part of its history did not have to deal with protecting citizens against the abuse of state power, and thus is not particularly elaborated 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 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 obligations also have to be filled with content. But obligations start from a more detailed level. For example, when Moses received the *Torah* at Mt. Sinai it was clear who was addressed, and by the commandments' directive form the addressees had a sense of what they owed to God and to each other right away. Certainly, later adjustments and explanations were necessary. Most noticeably this took place in the *Mishnah* and the *Talmud*.

²⁴ Different approaches based on representation have been developed; see Tremmel, p. 46; for a critical perspective on the concept of rights of future generations see: Oliver Marc Hartwich, 'The Rights of the Future?', *Policy Magazine* 25:3 (2009), pp. 3-8.

One might argue that obligations are more restrictive of (individual) freedom – which in a way they are. An obligation-based legal system might significantly and more drastically affect our individual freedoms and basic or human rights, and secular Westerners in general are very sensitive when these are restricted in any way. Thus a compromise has to be sought. In my opinion, a combination of both approaches, *i.e.* strengthening the role of obligations in the secular legal systems of the West, is the only, but at the same time the most preferable, option to improve the protection of future generations and nature.

Jewish Law and Ecology/Sustainability

Before taking a closer look at specific *halakhic* laws and their suitability for secular implementation, it should be examined how and when Jewish law started concerning itself with ecological issues.

The Critique on the Worldview of Genesis 1:28

This trend can 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 journal *Science*.²⁵ In his article White accuses the Judeo-Christian worldview and its anthropocentrism of being responsible for the contemporary ecological crisis. To substantiate his allegation he refers to Genesis 1:28 in particular, where God is said to have given man dominion over nature.²⁶ Others joined White's position; one example being the British historian Arnold Toynbee who wrote an article suggestively titled 'The Genesis of Pollution', published in 1973.²⁷ Since then Jewish scholars have tried to find responses to these allegations as well as to the question how Jews should behave in regard to the ecological crisis.²⁸ Parallel to Christian authors they developed the so-called 'stewardship model', based on Genesis 2:15 and which sees humans as caretakers obligated to conserve God's creation. Thus, already in the chapter immediately following upon Genesis 1 there is a concept that contradicts or at least limits the extensive interpretation of White *et al.* To oppose White's accusations, this Biblical understanding of the role of humans as stewards was extended in the theological context even to such an extent that a re-sacralisation of nature was claimed, 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, too 'disenchanted'.²⁹ Seen in a wider context of sustainability which

²⁵ Lynn White Jr., 'The Historical Roots of Our Ecological Crisis', *Science* 155 (1967), pp. 1203–1207.

²⁶ However, White mainly addresses Christianity in its Western medieval form. Moreover, and interestingly, White never mentions or cites Genesis 1:28 explicitly in his article. He does write, however that 'God planned all of this explicitly for man's benefit and rule: no item in the physical creation had any purpose save to serve man's purposes.' (White, p 1205)

²⁷ Arnold J. Toynbee, 'The Genesis of Pollution', *Horizon* 15:3 (1973), pp. 4-9; an excerpt of which was published in the *New York Times*, 16 September 1973; Saul Berman, 'Jewish Environmental Values. The Dynamic Tensions between Nature and Human Needs', Jewish Virtual Library, online at <http://www.jewishvirtuallibrary.org/jsource/Environment/berman.html> (accessed 2014-02-06).

²⁸ For instance, see David Vogel, 'How Green Is Judaism? Exploring Jewish Environmental Ethics', *Business Ethics Quarterly* 11:2 (2001), pp. 349–363, at p. 349.

²⁹ Blanchard, pp. 424-425.

exceeds its ecological roots there is in fact some important vocabulary not much pronounced in Enlightenment language; examples of which are 'sacrifice', 'solidarity', and 'community'.

The Development of a Jewish Position

Nevertheless it took some time until one could speak of a unique 'Jewish position'. At first most Jewish authors reacted with sheer defence. They selectively picked (especially Biblical) passages and verses 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. In this way the role of environmentalism within traditional Judaism was clearly exaggerated.³⁰ Traditional Biblical laws did not deal with global ecological problems, but rather addressed local issues. That is, first, why there is a problem of historical context. Because:

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.³¹

Therefore a new and openly communicated exegesis and philosophical re-reading was 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.³²

Disregarding the inaccuracy 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 originally, Jewish law of course does not know the term sustainability. But if we take the contemporary understanding of this term and try to connect it to Jewish laws and principles, or interpret them from a perspective of sustainability, it becomes clear that Jewish law addresses almost every aspect of this field; e.g. environmental protection (water, soil, air), urban planning, noise control, waste management, intergenerational justice, warfare, budget management, animal protection and ethics, diet, and consumption in general. Jewish laws can be applied to problems relevant from a modern perspective of sustainability. This perspective is the mixture of ecological, social and economic interests: the three columns of the most popular contemporary definition of sustainability (also known as 'triple bottom line'). Still it has to be stated that the impetus

³⁰ In fact, most often Jewish law puts necessary human needs before the protection of the environment, e.g. in regard to animal experimentation or (temporarily) permitting the consumption of meat. Another major example of such misinterpretation is the *bal tashchit* principle (see below). For further examples, see Ruth N. Sandberg, *Development and Discontinuity in Jewish Law* (Lanham: University Press of America, 2001), p. 243, n92.

³¹ Blanchard, p. 424.

³² Lawrence Troster, 'The Book of Black Fire. An Eco-Theology of Revelation', *Conservative Judaism* 62:1 (2010), pp. 134-136.

to this re-reading from a perspective of sustainability came from the 'outside', *i.e.* the secular society in form of the ecological movement. But now society could profit from Jewish law in return.

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 hand, and Jewish law on the other hand will give an idea of the practical implications of the theoretical foundations discussed above.

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

Generally, 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 basis of every community, of peace and of justice in the world.' Whether future generations are included as legal entities in the scope of Article 1 GG is disputed however.³³ Until the relatively recent Article 20a GG future generations, the environment, or even the idea sustainability are not mentioned explicitly in the beginning of the German Basic Law. Thus it is appropriate to refer to Article 20a GG for an exemplary comparison of how German Basic Law and Jewish law are dealing with issues of sustainability in a broader sense. By Article 20a of the Basic Law 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).³⁴ Still it is of importance for the interpretation of legal norms and the weighing of interests. It also includes a mandate for action of the state. However, the specific content and extent of the duty to protect the above mentioned foundations are left open. ³⁵ But as Article 2 (1) GG is already construed to guarantee an ecological subsistence level, Article 20a GG has to require more than this.

Today Article 20a GG is interpreted in a way so 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.³⁶ Furthermore the duty of the German state to foster a more sustainable behaviour is not to end at its borders. Thus an extraterritorial responsibility is also placed on the state: indirectly by the duty of taking

³³ For example, see Unnerstall.

³⁴ Stefan Huster and Johannes Rux, 'Art. 20a', in *Beck'scher Online-Kommentar GG*, edited by Volker Epping and Christian Hillgruber (München: C. H. Beck, 18th edition, 15 May 2013), para. 1.

³⁵ *Ibid.*, para. 28.

³⁶ *Umweltinformationsgesetz (UIG)*; see Huster and Rux, 'Art. 20a', para. 34.

account of the development of more efficient technologies and slowing down population growth; directly by the mandate to development (aid) policy.³⁷

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.³⁸ The weighing in regard to other *Staatszielbestimmungen* in German law is conceptually quite similar to the balancing of interests in Jewish law. But explicitly taking into account ecological matters is rather recent in Western law (although it *de facto* took place earlier than 1994). As a result nowadays it is always a consideration of social, economic and ecological aspects – as it already can be seen in classical Jewish law too.³⁹

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 legally it is a somewhat weak directory provision. In Jewish law one will hardly find such a generalist *mitzvah*. This openness of Article 20a GG certainly bears a risk of abuse of legal flexibility. Furthermore it does not address the German people directly. This might lead to (unconscious) delegation of responsibility as many might think that it is the duty of the state – not theirs – to ensure a more sustainable world.

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 of Jewish legal principles that in their contemporary interpretation focus on current problems of sustainability.

Jewish law provides many examples of principles that address issues of ecology and/or sustainability, but here only two 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).

Bal Tashchit, Deuteronomy 20:19-20

The first example to be introduced was originally a Biblical law of warfare. It prohibits the cutting down of fruit trees while besieging a city in times of war. The complete passage, in the King James Version, reads:

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:

³⁷ See Huster and Rux, para. 38.

³⁸ *Ibid.*, para. 1.

³⁹ 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, para. 41; Rupert Scholz, 'Art. 20a', *Grundgesetz-Kommentar*, edited by Theodor Maunz and Günter Dürig (München: C. H. Beck, 69th supplement 2013), para.16.

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.

Through rabbinic interpretation the field of application of this *mitzvah* was extended and it was eventually developed into the rabbinic legal principle *bal tashchit*, the (general) prohibition of wanton 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). The *bal tashchit* principle became one of, if not the most popular ecological principle in contemporary Jewish environmental ethics. Especially after the accusations of White, when Jewish authors sometimes desperately searched for seemingly ecological precepts to invalidate criticisms. At that time, one of the first direct respondents from a Jewish background was Eric G. Freudenstein. In 1970 his article 'Ecology and the Jewish Tradition' was published.⁴⁰ The article starts with the mentioning of Deuteronomy 20:19-20,⁴¹ and Freudenstein then attempts to disprove the arguments of White and others. For this purpose, he wants to show the ecological concern of *Torah* and *Talmud* in particular, and also the reasons why ecological aspects seem to have been forgotten in Judaism. For the first aim he cites *bal tashchit* and other principles. The forgetting of ecological concerns he then ascribes to the *diaspora*, thus the divorce from land, and to the historic context; *i.e.* during Biblical and *Talmudic* times there was no threat of an ecological crisis. Rather, nature actually was a threat to human survival. But Freudenstein makes selective use of his sources and by naming Deuteronomy 20:19 'the general prohibition against destroying the environment' his argument remains too superficial.⁴²

Without any doubt, one has to consider how Jewish legal texts work in their wider context. In general, extending the area of application of a specific law and deriving a general principle from it is an acceptable and common method. And Jewish legal tradition is particularly famous for this. As 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.⁴³

He then recurs to the point that *bal tashchit* was meant to emphasize the importance of the protection of the environment.⁴⁴ However, the context, especially the *Talmudic* sources, provides a very different picture. *Bal tashchit* is in fact much more a utilitarian law,

⁴⁰ Eric G. Freudenstein, 'Ecology and the Jewish Tradition' [1970], in *Judaism and Human Rights*, edited by Milton R. Konvitz (New Brunswick, NJ: Transaction Publishers, 2001), pp. 265–274; on page 273 he refers directly to the critique.

⁴¹ Although methodically dubiously only the 19th verse is quoted, not the 20th; *Ibid.*, p. 265.

⁴² Just as White was criticized for focusing too much on the first chapter of Genesis, Freudenstein got criticized for his selective citing with good reason, 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, at p. 354.

⁴³ Freudenstein, p. 266.

⁴⁴ *Ibid.*

allowing the cutting down of a tree for all kinds of constructive purposes:⁴⁵ It is rather a prohibition of wasting things that can be useful to humans (later extended to garments, or even the human body).⁴⁶ 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, and not with global protection of nature.⁴⁷ This has to be kept in mind as a warning of too enthusiastically 'over-interpreting' the area of application and content of this and other *mitzvot*.

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.⁴⁸ As mentioned in the beginning of this article it is primarily a principle of urban planning or land law. Thus it belongs to a field of law of major importance in regard to sustainability, as our legal relationship to land is a classic example for dealing with ecological, social, and economic interests at the same time. The *migrash* principle is based on several Biblical passages, primarily on Leviticus 25:34 or Numbers 35:1-15. Originally the law was applied on Levitical cities only, but later it was extended to all Jewish cities (again by famous commentators like Rashi, Maimonides and Nahmanides (1194-1270)).⁴⁹

In regard 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: inner city, commons, and fields and vineyards.⁵⁰ Furthermore it embraces different prohibitions that sometimes are closely intertwined. There are basically three of them at the core of the *migrash* principle: a prohibition of changes in size,⁵¹ a prohibition of changes in use, and a prohibition of selling.⁵² Samson Raphael Hirsch adds 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.'⁵³

Despite these prohibitions there are other aspects which represent a more psychological or physical (health) level. According to Hirsch's 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. Physical recreation was furthermore a fact

⁴⁵ For specific examples of such constructive purposes, see Moshe Gartenberg and Shmuel Gluck, 'Destruction of Fruit-Bearing Trees', *Journal of Halacha and Contemporary Society* 36 (1998), pp. 86–99.

⁴⁶ For instance, see David Vogel, 'How Green Is Judaism? Exploring Jewish Environmental Ethics', *Business Ethics Quarterly* 11:2 (2001), pp. 349–363, at p. 359.

⁴⁷ Blanchard, p. 424.

⁴⁸ First of all the translation of the term *migrash* bears some difficulties. It has, for example, been translated as pasturelands, open land, green belt, or commons. There are lengthy discussions on what might be the proper English term for it; see James Barr, 'Migras in the Old Testament', *Journal of Semitic Studies* XXIX (1) (1984), p. 15.

⁴⁹ For more on the process of 'extension' of Jewish laws, see Ruth N. Sandberg, *Development and Discontinuity in Jewish Law* (Lanham: University Press of America, 2001).

⁵⁰ Freudenstein, p. 268.

⁵¹ 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 literally.

⁵² Leviticus 25:34.

⁵³ Freudenstein, p. 268.

already mentioned by Rashi, who in his commentary on Numbers 35:2 refers to aesthetical reasons, *i.e.* that the *migrash* should serve to beautify the city. Moreover, the *migrash* served simple practical purposes as it was to be used for animal keeping and laundry (Numbers 35:3, and Babylonian *Talmud Nedarim* 81a).⁵⁴ Finally, disease prevention played a role as cemeteries had to be situated outside of the *migrash* area.

Astonishingly, it is even 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,⁵⁵ 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 refer to the so-called *Garden City Movement* in their plans to create a green belt. Without any doubt the *migrash* principle inspired this movement that became popular around the turn of the 19th 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 work.⁵⁶ 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 – as the example of *migrash* shows – can still 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'. Because despite of 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 *teloi* can. They still have 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 develop criteria of provision that can be applied in the secular Western world. Furthermore it might open a platform for inter-religious discourse that is not as emotionally charged as other, more theological topics.

Conclusion

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 it is this specificity of obligations that is needed to accelerate actions in regard to climate change, sustainability, and intergenerational justice, as the environmental 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, we should distinguish between three levels: (i) the intra-religious, (ii) the interreligious, and (iii) the secular level. In the case of (iii) many observant Jews might face what one could call a 'dilemma of double commitment', as they feel committed to their sacred texts, rituals, and language, and, for instance, to actively engage in environmental protection on a secular level at the same time. Therefore a compromise is needed to get both

⁵⁴ The principle is further discussed in the *Babylonian Talmud* (for instance, *Arakhin* 33b).

⁵⁵ 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]).

⁵⁶ For instance, see Frederic J. Osborn, *Green-Belt Cities* (New York: Schocken Books, 1969), pp. 167-170.

commitments together and to find a single non-religious voice to speak in as the environmental protection discourse is noticeably secular.⁵⁷

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,⁵⁸ it does not entail the erosion of their content however, as Jewish legal history has already proven. A common language is one of the key factors. Therefore a more technical principle like *migrash* may prove useful to begin with when examining classical Jewish texts in the light of the current ecological crisis and bringing the results to secular discourse.⁵⁹ If this 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.

Coming back to the three above mentioned levels where action needs to be taken: On the intra-religious level (i) Jewish law on sustainability urgently needs systematisation and especially so since the next step has to be to move onward from writings and articles on ecological issues to broader and more complex questions of sustainability. Ecology is an important, but still just one part of the idea of sustainability, next to social and economic components. An increased awareness has to be created in communities and schools and other public domains. Environmental organizations need further idealistic and especially monetary support as the financial crisis has led to severe cuts in their budgets. On the interreligious level (ii), there has to be a discourse encompassing different religions to develop a perceptible religious voice, including a critical elaboration of similarities and differences.⁶⁰ Finally, on the secular level (iii) – besides solving the language dilemma – religious groups should be encouraged to contribute their concepts to the secular discourse more actively, for instance by publications presenting Jewish positions at interdisciplinary conferences, and looking for a dialogue with potential partners like politicians or NGOs.

In addition, two further types of action should be taken, which are promising in relation to Judaism in particular: education and stories. Education is foremost in offering an opportunity to realize the objectives of a more sustainable world.⁶¹ Religion can be a major educational multiplier. It can educate in its communities and spread ideas; therefore it is crucial to carefully carve out religious values and principles, and in the case of Jewish law to re-read and re-interpret the Biblical, *Mishnaic*, and *Talmudic* sources from a perspective of sustainability within the communities. Education is central to the Jewish religion: the imperative of education is a central aspect of Jewish law, and has had a great

⁵⁷ Blanchard, p. 426.

⁵⁸ *Ibid.* Blanchard sees three basic difficulties for this operation: (1) the 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, is suggested as the preferred approach.

⁵⁹ *Ibid.*, p. 425.

⁶⁰ Of course, the 'regions of the book' already have a common ground to start from in regard to tradition, sources, and language.

⁶¹ For example, see Berman.

impact on the development of Jewish ethics, as well as on the people and the character of the religion itself.⁶² This can and has to be used for sustainability issues too, since education can be considered as the most important step on the journey to a more sustainable world.

Furthermore, in addition to the more rational contribution of education, we need inspiring, shining examples, or stories that move us. If ideas of sustainability are carefully connected to famous religious figures and narratives, these can serve as models and guides for observant as well as non-observant people. Judaism offers a very rich and unique tradition of stories to be referred to.

The argument of this article is that a *halakhic* contribution, and thus an ethical response to questions of sustainability, is possible on various levels. On a more technical level of legal methodology (obligations) and content (specific concepts, such as *migrash*), the *halakhah* has much to offer as a productive social, political, and ethical discourse on sustainability issues.

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⁶² 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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