



JIMS DP 23062009

Kahal as Spontaneous Order

Joseph Isaac Lifshitz

Kahal as Spontaneous Order

Joseph Isaac Lifshitz

1. Introduction

Neither the Torah nor the Talmud specifies any rules of order of the polity; the same way that they don't deal with the question of what is the best political regime. The Torah doesn't teach us about any system of organization of the tribes, nor about how to elect the elders.¹ The Talmud has few minimal passages about the relationship of kings and the judicial system,² and about the rights of citizens of the city to decide their lives on their own,³ but nothing about the way they should vote, or how should they elect or choose their leadership. This fact wouldn't be so puzzling in the context of ancient law (except in the case of the Greeks), but because of the extensive legal material of the Torah, the void demands an explanation. As a matter of fact, both the bible and the Talmud seem to portray the polity as an amorphous entity, whose existence is independent of any regime. For example, according to the Torah, the Jewish people received the Torah as already, in some fashion, existing, then wandered forty years in the Sinai desert and conquered the Canaanite land, all without any discernable description of a form of its political organization.

The Bible is clear in evidently insistent upon this conceptual quandary: in some way "Israel" existed before receiving the law at Sinai, just as it also existed before the anointing of Saul. Despite its extensive legal corpus, the Torah tells us very little about

¹ About the elders in the bible see Michael Walzer, "Biblical Politics: Where Were the Elders?" *HPS*. 3, pp. 225-238.

² BT Sanhedrin, 18a-b.

³ BT Baba Batra 8b.

Israel's political structures during those and other periods. Why? Surely, we ought not to be satisfied with answers that amount to an evasion of this quandary, namely, the ancient Israelites were, unlike the Greeks, politically immature. Rather, irrespective of the historical reality behind these biblical descriptions, there appears to be a conceptual insistence in the Torah and subsequently about what may be tentatively called "the evolutionarily self-ordering" of Israel that requires elucidation, and especially so for its implication for politics. One way to address this quandary is to examine the use of the biblical category *Kahal*.

One description of the people of Israel is *Kahal*, a category that the Talmud is also concerned with. This category was further employed later in the middle ages, and was given to the Jewish community, although some times with a little twist, the *Kehila*. This paper will focus mainly on the question of the formation of the *Kahal* as a large political body in the Bible and in the Talmud, and explore the political implications that can be derived from it. By doing so, light will also be shed on the character of the smaller political body, the *Kehila*.

The description of the creation of the Jewish nation in the Bible is one of a process: beginning with the forefathers, and continuing to its existence as slaves in Egypt, to its redemption, receiving of the laws and a covenant with God, wandering in the desert, and finally to its arrival to the holy land. It is a description of a slow process, seemingly an evolution, but not an organization that resulted of one act. If one were to consider one, decisive act, it would be the covenant before entering the land of Israel. However, it was the covenant with God that formed the Israelites not as a corporate body but as a *holy* nation, a kingdom of priests. It is this sort of covenant that the Bible is concerned with, and not a covenant between the people out of which a regime is organized. The crux of our problem is this: the covenant presumes the existence as the people who enter into it. To define that people as a people, as distinct from a holy

nation, a kingdom of priests, no organizing principle or order appears to have been necessary. At least according to the biblical account, it appears that a spontaneous order will suffice. In fact, we can plainly state that the Torah and the Talmud do not bother themselves with questions of the best regime, but they do assume the existence of the people. Determining what regime is best was left to the people. Nevertheless, to the question of what the political body is, we are given at least one answer, but one which should be understood as a pre-condition for political organization – the corpus of all Jews living in the land of Israel. Now, it is true that the Talmud discusses the laws of *Kahal*, but it does so also as pre-condition for establishing a judicial system. In that discussion, there is already a corporate assumption for the *Kahal*: the spatially circumscribed corpus of all the Jews who live in the land of Israel. The Talmud does not discuss how a *Kahal* should organize itself. Thus, it seems that the *Kahal* evolves spontaneously; as the Israelites did in the biblical descriptions in both Genesis and *Exodus*, and that the rules of this political organization are left to the discretion of its members.

If there is merit to this argument, then the *Kahal* as a spontaneously-defined, non-organized political body must be clarified. To this end, I will borrow theoretical frameworks of Friedrich Hayek and Michael Polanyi. According to Hayek, there are two forms of social order – a *spontaneous order* and an *organization*. The *spontaneous order* is an unintended consequence of individual human actions that have no such end in mind, and as such, it is a self-generating order. In contrast, the *organization* is an artificial order; that is, a social order that is intentionally constructed through rules and laws. As Evans-Pritchard says, an order is: “a state of affairs which a multiplicity of element of various kinds are so related to each other that we learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at last

expectations which have a good chance of proving correct”.⁴ In contrast, *organization* is an order whose elements relate to each other through rules and laws. *Spontaneous order* is a natural form of organization where the elements are related through their being, spatially or temporally, parts of the same whole. Many social structures are effects of a *Spontaneous order*, and in fact Hayek understood Adam Smith’s idea of the invisible hand as a type of *spontaneous order*.⁵ What Hayek left out is an explanation why some spatial and temporal conditions generate order and some don't. This paper will be an attempt to answer this question by adding an element of destiny to the conception of spontaneous order. In my opinion, spontaneous orders are generated when the people in certain spatial and temporal conditions have a common purpose or destiny, even though—and this is crucial—the purpose may be indifferent to any particular form of political organization.

The theoretical idea of spontaneity in politics was developed throughout the 19th century, as an expression of the Romantic Movement. Ideas of spontaneity in the development of the physical element of the polity—the idea that institutional order may rise spontaneously—enhanced appreciation of spontaneity in law as well. Von Savigny claimed that law, like language, develops naturally, and his theory drove him to oppose the legislation of new laws, because this would be artificial and hence illegitimate. While Savigny looked for the roots of modern German law in Roman law, Otto Gierke held that its roots were in fact Germanic. In Gierke’s thought, Germanic law is more fitting to modern law, because unlike Roman law, which is individualistic, the Germanic tradition has firmly rooted elements firmly rooted in the tradition of the corporation, and the idea

⁴ E. E. Evans-Pritchard, *Social Anthropology*, London, 1951. p. 49; see FA Hayek, *Law, Legislation and Liberty*, Chicago, 1973, p. 36, n. 4.

⁵ It is important to note that Hayek was not the first to talk about the *spontaneous order*. See for instance Michael Polanyi Science, *Faith and society*, Chicago, 1946, 63-84. I am grateful to Professor Steven Grosby for pointing Polanyi’s contribution to me.

of corporation is deeply connected to the idea of the mystical body, hence the physical and the spiritual are intertwined.

Somewhat similar to the arguments of Savigny and Gierke, we may observe a perspective of a Jewish spontaneous order, or at least legitimacy for a spontaneous order within the Jewish textual tradition, and claim that the idea is elaborated on in Jewish thought and *Halacha*. I do not pretend to claim that a *theory of spontaneous order* exists in the history of Jewish philosophy nor that there is any awareness of one. The contrary is the case. Medieval ideas of rationality did not permit much appreciation for spontaneity. For Maimonides, for instance, wisdom equals order and control. Yet my claim is that spontaneity existed as a stowaway, as a hidden reality within Jewish political theory, and it constitutes an assumption not only in the Bible but also one that Talmudic law can't do without.

It is worth noting, also, that while the *theory* of spontaneous order is modern, and while there was no conscious idea of spontaneous order expressed in Jewish philosophy through the Talmudic and Medieval periods, the *idea* of the political as an organically emerging, harmonic corpus of tradition is not new. It existed in non-rational political thought already in the Middle-Ages, when Christian theologians described the polity as a mystical body, and included the state and the church as one unit. Engelbert of Volkersdorf (1250-1311) used the term “Body Moral and Politic”,⁶ and Ptolomaeus of Lucca (1227-1327) pursued the thought that the life of the state is based upon a harmony analogous to that of harmony of organic forces.⁷ From the perception of the political as

⁶ Otto Gierke, *Political Theories of the Middle Age*, tr. Frederic William Maitland, Cambridge, 1968 (first ed. 1900), p. 24. In the *De Ortu, Progressu, et Fine Romani Imperii Liber* (c. 2) In these writings Engelbert of Volkersdorf shows the origin of all *regna et principatus* to have been in a *pactum subjectionis*. There he expresses the importance of civil contract and of delegated sovereignty.

⁷ Otto Gierke, *Ibid*, p. 25.

one unit, medieval theologians developed an idea of the privet and his relationship with the political body. That spontaneity was an underlying option for Jewish political philosophy, then, may not be as anachronistic as it seems.

In this paper I would like to suggest, that the *Kabal* should be defined mainly as a *spontaneous order*. Of course, *Kabal* is not meant to organize itself only spontaneously; rather, the *spontaneous order* refers to a condition, a platform upon which the political body arranges itself in an organized fashion. Only after we recognize that the Torah assumes a *spontaneous order* may we ask whether the Torah also requires any sort of specific regime, or alternatively whether the Torah left the specific form of any regime to the discretion of the members of the political corpus. I claim that the latter is correct, thus, the political theory of the Torah is necessarily very lean. Its main concern is that there ought to be a people; a *spontaneous order* that is based on some minimal pre-conditions. While this "leanness" has been acknowledged by the sages, and the spontaneous approach to politics exists in their writings, *spontaneous order* is not an issue that has gained the requisite attention that it deserves.

2. The Formation of the Jewish Nation – A Covenant of Destination

As historians of the Bible point out, in early Israelite history there is no description of either permanent leadership or political organization. The tribes simply rallied around the Ark of the Covenant.⁸ This idea of a common ideal, in this case the covenant with God, is obviously very powerful, and is elaborated on in several places in the Bible. The most explicit statement of this sort is a passage from the Torah that was quoted before, the passage that announces the time when the children of Israel became a nation:

⁸ John Bright, *A History of Israel*, Philadelphia, 1959, p. 143f.

Moses and the levitical priests spoke to all Israel, saying: Silence! Hear, O Israel! Today you have become the people of the Lord your God (Deuteronomy, 27:9).

This special foundational moment took place when the covenant with God was established, as the Torah says later:

These are the terms of the covenant, which the Lord commanded Moses to conclude with the Israelites in the land of Moab, in addition to the covenant, which He made with them at Horeb (Deuteronomy, 28:69).

The decisive moment at which the Israelites became a people of the Lord is the moment the covenant was accepted. The covenant is the only *order of organization* that the Torah demand, but, as already mentioned, this *order of organization* is between the Jewish people and God. It is not an agreement between the people themselves, as it presumes their existence as a people prior to it. To define the Jewish people as a people, no organizing principle or order is necessary; evidently, spontaneous order suffices. The covenant is, therefore, a covenant of destination, as Rabbi J. B. Soloveitchik defines it,⁹ designating the peoples' end, rather than its beginning. One shouldn't conclude from the fact that because this people existed prior to the covenant, this people were without destination. On the contrary, the destination was not decided upon at the moment of the covenant; rather, the destination was in the hearts of the people from the very beginning of the Jewish nation, represented biblically in the promise to Abraham. However, once again, this destination did not imply, let alone embody, any obvious form of political organization.

The Jewish nation is described as being descended both from the forefathers—Abraham, Isaac, and Jacob—and the Israelites assent to the covenant with Moses. What constituted the people of the Lord was the covenant or covenants with God. That is the

⁹ Rabbi J. B. Soloveitchik,

reason why belonging to the Jewish nation is not a matter of race. It is a matter a special relationship between God and the Jewish people, and of a covenant with the forefathers, Abraham, Isaac and Jacob. As the Torah states:

It is not because you are the most numerous of peoples that the Lord set His heart on you and chose you – indeed, you are the smallest of peoples; but it was because the Lord favored you and kept the oath He made to your fathers that the Lord freed you with a mighty hand and rescued you from the house of bondage, from the power of Pharaoh king of Egypt.¹⁰

The source of this relationship is God's love and favor towards the Jewish nation; it is a relationship that one can never escape.

But a nation that is formed through covenant, even a covenant of destination, is not solely a derivation of a single act. It is not only the covenant that formed the Israelites as a nation but a slow evolution of one destiny – the worship of God. Thus, one should not view the covenant at Mt. Sinai as the founding, constitutional moment of the polity of Israel. The destination of the Israelites had started already with the forefathers as the people of the Lord, and continued with the redemption from Egypt. The story that is portrayed in Genesis is a story of a family of which some continued the dynasty and some left. The members that stayed are the once that continue to be connected with God and obey his moral obligations. This covenant did not cease to affect the children of Abraham. Already in Egypt, when Moses demanded that the Israelites will be let go from Egypt, he did not demand a national freedom but the liberty of worship. As God requested from Moses to demand from Pharaoh: "And say to him, 'The Lord, the God of the Hebrews, sent me to you to say, 'Let My people go that may worship Me in the wilderness'" (Exodus 7:16). The request that God demanded was not

¹⁰ Deuteronomy, 7:7-8. for an early covenant see for instance the covenant of "Brit Bein HaBetarim" the covenant of the halves (Genesis 15).

only to let the people go, but to let them go "that may worship God in the wilderness". It is for this destiny that the Hebrews left Egypt, and it is this destiny that formed them into a holy nation. The covenant was only a crucial moment of a very long process of a destiny that crystallized in time. It may be noticed that Moses never demanded from Pharaoh to let the people go so that the Israelites may live in the land of Israel. It so happened, but it wasn't the destiny specified at that time. Nevertheless, being in the land of Israel was a formative element, as we are going to see.

3. Kahal, Eretz Israel, and the Institutions of the State

According to Hayek, before any organizational order can be established, a *spontaneous order* must exist. This *spontaneous order* has internal rules and evolves in space, and while the rules are difficult to locate, the space must be defined. In Jewish law, the spatial element of *Kahal* is very clear: in order to become *Kahal* the Jewish people must live in Eretz Israel. This spatial pre-condition is applied in two cases – to both the judicial system and the kingship. Although it seems that the spatial element is independent, I would like to show that this element embodies a destination as well.

The Judicial System

Maimonides holds that the obligation to establish a judicial system exists only in the land of Israel,¹¹ and as such it may be seen as one implication of applying the principle of *Kahal*. The source of this contention is talmudic, as the Talmud says: "[t]hey (the settlers of the land of Israel) are called *Kahal*. Others are not called *Kahal*."¹² Crucial for the argument of this paper is to recognize that the law that contains the definition of *Kahal*

¹¹ Rambam, Sanhedrin, 1:2. On the other hand see also bt Makot, 7a; Nachmanides, Deuteronomy 16:18.

¹² *Babylonian Talmud*, Horayot, 3a.

does not specify any necessary rules of organization. It does not matter whether the corpus of the people has a formal leader, or even whether the people organize themselves formally at all. The only feature of any consequence is that they, as a *Kahal*, settle within the same land.

As David Henshke pointed out, Maimonides' definition of the Jewish nation is strongly connected to Eretz Israel.¹³ As he had shown, Maimonides derived his idea from the Talmudic rule that only the Jews living in Eretz Israel are considered *Kahal*. This requirement is raised in the context of a Talmudic discussion on the authority of the Sanhedrin. The Torah states that when the whole Jewish nation sins, there is a national obligation to offer a special sacrifice:

If it is the whole community of Israel that has erred and the matter escapes the notice of the congregation (*Kahal*), so they do any of the things that by the Lord's commandments ought not to be done, and they realize their guilt – when the sin through which they incurred guilt becomes known, the congregation shall offer a bull of the herd as a sin offering, and bring it before the tent of meeting.¹⁴

The Talmud elaborates on this, teaching that the error of the whole community of Israel is necessarily an error assisted by the community's teachers. A multitude escapes noticing a law only due to inadequate instruction by the institution in charge of teaching the laws – in this case the Sanhedrin. The collective may, of course, err on its own accord, but since we assume that the masses are not intellectually self-sufficient, and that they rely

¹³ David Henshke, "The Legal Source of the Concept 'Nation': Between Maimonides and Ramban", *Shenaton Ha-Mishpat Ha-Ivri* vol. XVIII-IXX, ed. Eliav Shochetman, Shmuel Shilo, Jerusalem, 1992-1994, pp. 177-197.

¹⁴ Leviticus 4:13-15.

upon the teaching of the Sanhedrin, we assume that the errors of the collective are caused by the latter.

According to the Talmud, the Sanhedrin is assumed to be the official judicial body of the *Kahal*, and the Sanhedrin receives its authority from the *Kahal*. That is why the Sanhedrin's rulings are valid only if they are followed by the *Kahal*.¹⁵ It is therefore essential to understand what *Kahal* is, and Talmud therefore proceeds to define the *Kahal* as the community of the Jewish people who live in Eretz Israel:

Rav Asi says: Judgment depends on the majority of the settlers of the land of Israel... they (the settlers of the land of Israel) are called *Kahal*. Others are not called *Kahal*.¹⁶

The *Kahal*, for these purposes, is comprised only of Jews who live within the borders of the land of Israel.¹⁷

¹⁵ Note that what come out of this rule is that there is a linkage between the Sanhedrin and the *Kahal*, and it goes both ways: The authority of the Sanhedrin is dependent on the people that follow them. Every judgment that is made by the Sanhedrin is dependent on the *Kahal*, and receives its authority from this *Kahal*. According to Maimonides, a decree of the Sanhedrin is dependent for its validity on the question of whether or not the Jewish people follow it: "Indeed if the court made a decree and thought that that the majority of the people will be able to follow it, and after their decree the nation had doubts and the decree did not reach the [following of the] majority of the people, the decree is annulled and they [the Sanhedrin] are not permitted to compel it" (Maimonides, *Mishne Torah*, Hilkhhot Mamrim, 2:6.).

¹⁶ *Babylonian Talmud*, Horayot, 3a.

¹⁷The spatial element is not its only defining characteristic. As the Talmud says, not every Jew who lives within the borders of the land of Israel counts as a member of the *Kahal*. A member of the *Kahal* must be an observer of the laws: "[If any person from the] populace unwittingly incurs guilt by doing [any of the things which by the Lord's commandments ought not to be done and he realized his guilt]" (Leviticus, 4:27), except of a Mumar". *Babylonian Talmud*, Horayot, 2a. The laws of offering a sacrifice for atonement are meant for observers of the laws.

The linkage between *Kabal* and Sanhedrin goes both ways, as Maimonides contends, not only is the *Kabal* the corpus that confirms the judgment of the Sanhedrin, but it is the *Kabal* who appoints the Sanhedrin:

And I hold that if there will be an agreement of all the students and sages to appoint a man in the Yeshiva, meaning, to make from him a head, and on the condition that it will be in the land of Israel, as we said in the introduction, this man will have a yeshiva and will be authorized, and will appoint any one he pleases.¹⁸

Unlike the common tradition assuming that *Semikha*, the authority to judge and deliver rulings, is from above, from teacher to student, Maimonides asserts that it can be administered from below. A rabbi can be appointed by election of the students and sages in the land of Israel. They may decide who the authorized Rabbi will be, and their decision is equal to granting *semikha*. Appointing a rabbi is therefore a democratic act. Maimonides says elsewhere that the reason for the condition that only students and sages from the land of Israel can appoint a head is that only the Jews that live in the land of Israel count as *Kabal*.¹⁹ This idea of Maimonides' became very famous in the sixteenth century when R. Yaakov Bey Rav appointed himself as a head of the rabbis, and after being accepted by Tzfat's rabbis and the majority of the rabbis in Israel, he appointed other rabbis as *Semuchim* (R. Yoseph Karo was among them)²⁰. His action prompted strong opposition by the Jerusalemite rabbi – R. Levi Ibn Chabib, which is known as the controversy over the *Semicha*.²¹

¹⁸ Rambam's commentary to the Mishna, Sanhedrin, 1:3. See more Rambam, Sanhedrin, 4:11.

¹⁹ Rambam's commentary to the Mishna, Bechorot, 4:3; Horayot, 1:3.

²⁰ R. Yaakov Bey Rav, Shut Mahari Bey Rav, 63.

²¹ R. Levi Ibn Chabib, *Sbut Maharalbach*, S' 147, Kuntres HaSmicha 1, Jerusalem, 2008, pp. 483-578. On the dispute over the Smicha see: Eliav Shochetman, "Renewal of the Semicha According to Maimonides", *Shenaton Ha-Mishpat Ha-Ivri* vol. XIV-XV, ed. Mordechai A. Rabelo and Shmuel Shilo, Jerusalem, 1988-

It is important to note another ramification of the link between *Kahal* and the land of Israel. According to Maimonides, the existence of a Jewish calendar depends on the existence of certified Rabbis. For him, the Jewish calendar does not exist automatically, but rather it is a product of the judgment of the Sanhedrin, which is based either on astronomical observations or on astronomical calculations. However, Maimonides adds that without the existence of Jewish people in the land of Israel, there is no Jewish calendar.²² As Henske has shown, the awareness of the Jewish calendar in the eyes of the Jewish people in the land of Israel is the decisive for the constitution of the Jewish calendar. The reason for that is, once again, that the only factor that is decisive for becoming the Jewish people as a people is being in the land of Israel. Henshke, therefore, considers this part of Maimonides' argument to be a decisive.²³ As he claims, only if one holds, as Maimonides does, that it's only the Jews that live in Eretz Israel are considered a people and not mere individuals, only then can one link the existence of the calendar to the Jews living in Eretz Israel.

I have shown so far how both the judicial system of the *Kahal* and its calendar are dependent on a spatial character of the *Kahal*. What needs to be asked is whether or not the *Kahal* has any *political* significance, and not only judicial.²⁴ The question of whether or not there is any idea of spontaneous political order in Halacha still requires elucidation.

1989, pp. 217-243; Chaim Zalman Dimitrovski, "Shte Teudot Chadashot al vicuach hasmicha bitzfah", *Sfunot* 10, 1966, pp. 192-193; Meir Bnayahu, "Chidusha Shel Hasmicha Bitzfah", *Sefer HaYovel Lyitzhak Ber*, 1961, pp. 248-269.

²² Maimonides, *The Book of Mitzvot, Positive Commandment* 153.

²³ Henshke, *ibid.*

²⁴ Maimonides calls the king's heart: "the heart of all Khal Israel" (Kings, 3:6). This sort of locution may prove that the king as a political entity is connected to the political idea of *Kahal*; however, but one may

Kahal and kingship

At this point, focusing on the positive obligation to establish political leadership, and other obligations that pertain to the Jewish people in the land of Israel, may help us to understand better the relationship between *Kahal* and the land. In Talmudic law, no national obligation applies to the Jewish people until it is situated in the land of Israel. For instance, the Talmud says that three commandments were given to the Israelites when they entered Eretz Israel – to appoint a king, to destroy the Amalekites and to build the temple,²⁵ and these commandments are also repeated in Maimonides' writings.²⁶ The commandment to appoint a king is not valid in the Diaspora despite the fact that this may have been possible, and that some sort of kingship did exist in exilic history. The Jews in Persia during the Talmud throughout the Geonic period had a leader, the Exilarch who served as the Jewish minister in the Persian court.²⁷

Now, it is worth noting that the obligation to appoint a king is valid only when the existence of a nation, a people in its land, can be assumed. We know this from the way the sages treat the obligation to appoint a king. They argue whether this is a positive obligation or whether it is just a deterrent.²⁸ The Rabbis can certainly imagine a nation without a king. Their argument is about whether this obligation is a positive value for the nation or not, and yet it is clear to all that the appointment of a king does not constitute

very well say that Maimonides refers to the religious side of the nation that the king expresses, not the political.

²⁵ *Babylonian Talmud*, Sanhedrin, 20b.

²⁶ R' Moses ben Maimon, *Mishneh Torah*, Kings and Wars, 1:1.

²⁷ BT, Horayot, 11a-b. On the post of the exilarch see Isaiah M. Gafni, *The Jews of Babylonia in the Talmudic Era*, Jerusalem, 1990, pp. 92-104.

²⁸ BT, Sanhedrin, 20b.

the nation, just as destroying the Amalekites or building the temple do not constitute the nation.²⁹

As we see so far, the two institutions, the judicial system and kingship, both are conditioned with a spatial element, the situation of the nation in Eretz Israel. We may still ask why is this spatial element so important, and whether it is only spatial.

4. The case of the *Kehila*

The case of the *Kehila* -- the Jewish community, is very similar to that of the *Kabal*. *Kehila* like the *kabal* suffers from a lack of organizational order; nonetheless, it is considered holy as well, as *Kehilat Kodesh*.³⁰ Of course it is the sanctity of the *Kabal* that inspired the Jews in the Middle-Ages to attribute this sanctity to the *Kehila*. However, not surprisingly,

²⁹ Nissim b. Reuben, *Derashot* (Sermons), ed. Leon A. Feldman, Jerusalem, 1973, Derasha 11. Rabbi Nissim Gerondi (Barcelona, 1320-1380) distinguished between the law of the Torah and the law of the king. The law of the Torah is the corpus of political laws that exist in the Torah. The law of the king is the civil law that is legislated in every political entity. The purpose of the laws of the Torah is not to create a just state. For this purpose civil law, the law of the king suffices. The laws of the Torah, on the other hand, are intended mainly for religious purposes. According to my description, the laws of the Torah apply to the religious corpus of people, the corpus that evolves spontaneously. The laws of the king are relevant only to an organized order that already assumes the existence of the people. The Torah does not relate to this latter type of organizational order. Organizational, political order is completely voluntary. The Torah relates to *spontaneous order* only. But these two sets of laws are not separate. I would claim that without Jewish law, civil law has no basis. The justification for civil law is as religious as the religious law itself, since only a set of principles that is founded on the basis of religious law can provide moral basis for civil law. Once there exists a religious law, there is no room for natural law. The distinction between civil law and religious law is therefore artificial

³⁰ On *Kehilat Kodesh* see Jeffery R. Woolf, "'Qehillah Qedoshah': Sacred Community in Medieval Ashkenazic Law and Culture", in *Holy People: Jewish and Christian Perspectives on Religious Communal Identity*, eds. Marcel Poorthuis and Joshua Schwartz, Brill, Boston, 2006, pp. 217-235.

Kehilat Kodesh, like *Kabal*, is organized spontaneously. There is no need for a formal method of organization in order to form a *Kehila*. Living in a space, albeit not Eretz Israel, for one month suffices to obligate one with communal responsibilities, such as those to do with religion or welfare.³¹ But the spatial element is not the core decisive element that creates the *Kehila*. Apparently without a covenantal element there is no *Kehila*. The assumption is that all the members of the *Kehila* may be united by a religious faith. Without this faith, the *Kehila* will not be a political entity, merely a commercial unit. The name *Kehilat Kodesh* already conveys that there is a religious element that creates the political corpus that we call *Kehila*.

The way Jews organized themselves historically, shows indeed the importance of spontaneous order, and contradicts usual categories of regimes. Yet, one might expect that will find a very developed theoretical discussion over the best regime of the *Kehila* but alas. Except for discussions on the authority of the elected representatives and leaders of the *Kehila*, there are very rare discussions on the question of what is the best way for a community to organize itself. The Halachik definition of *Kehila*, suffers from the same absence of a theory of organizational order. The Halachik definition of the *Kehila* accords much more to a spontaneous order. Some describe the polity as a partnership or association, as bound with a *social contract*, based upon the tacit consent of liberated people to accept rules and leadership. Others like to emphasize the authoritative element – kingship or the judicial court – *Beit Din*. Still, neither *social contract* nor *Beit Din* seem to explain fully the concept of *Kehila*. In fact, we will see that the existence of *Kehila* is prior to the creation of *Beit Din* of any deliberate social contract. In the Talmud *Kehila*

³¹ Tosefta, Bava Metzia, 11:23; TB, Bava Batra, 8a; Rambam, Matnot Aniyim, 9:12; Shulchan Aruch, Yore Dea, 256:5.

exists without any pre-organization, neither of *social contract* nor of *Beit Din*. Its existence is just assumed.³²

Beit Din and *association* as Halachik models indeed have their Talmudic roots, but what is left out is the model of the Caravan. According to the Talmud, people who get together to cross the desert, are bound as an association by a tacit consent:

The rabbis taught: "A caravan that was attacked by robbers and one of them succeeds in saving some goods from them, this must be divided among the passengers; if, however, he said to them, 'I will try to save for myself,' it is of avail." Let us see how the case was. If each of them could do the same, but he preceded them even if he has said, "I will save for myself," he must not do so. (It is not of avail because all of them have not renounced the hope of regaining it.) And, on the other hand, if it was impossible for them to save their goods, and the one succeeded nevertheless in saving some, why must he divide among the caravan? (They have already renounced their hope of regaining.) Said Rami bar Hama: "It means when they were partners, and in such a case a partner may separate himself against the will of his partner; therefore if he said, *I will do so*, he is separated; but not if he did it

³² See Yitzhak Fritz Baer, "The origins of Jewish communal organization in the Middle Ages" *Binab* 1 (1989) pp. 59-82; Shalom Albeck, "The origins of Jewish communal organization in Spain until the Ramah", *Zion* 25 (1960), pp. 87-93; Samuel Morel, "The Constitutional Limits of Communal Government in Rabbinic Law," *Jewish Social Studies* 33 (1971), pp. 87-119; Menachem Elon, "Authority and Power in the Jewish Community: A Chapter in Jewish Public Law" *Shenaton Ha-Mishpat Ab-Ivri* III-IV, (1976-1977), pp. 7-34; Abraham Grossman, "The Relationship of the Early Sages of Ashkenaz to the community sovereignty", *Shenaton Ha-Mishpat Ab-Ivri* II, (1975), pp. 175-199; Haym Soloveitchik, *The Use of Responsa as Historical Source*, Jerusalem, 1990; Gerald Jacob Blidstein, "Individual and community in the Middle Ages : "halakhic" theory", *Kinship and Consent*, ed. Daniel J. Elazar, Jerusalem (1981) 215-256.

silently." R. Ashi, however, says: "The case was that they could save only with great trouble.

If he did it silently, he must divide; but if he said, *I will take the trouble on myself*, it is of avail."³³

This quotation was used since the 12th century as a source for the power of the community over the individual. The Jewish community in the middle-ages perceived itself as caravan, struggling to survive in a "non-friendly" environment. The emphasis on the fact that such an association is done tacitly is crucial here. It means that the community as an association is not created in a deliberate fashion but tacitly, or in other words, as a spontaneous order.

What is the reason for the absence of an organizational order theory in Halacha? The importance of a common destiny can give a good answer to the question, but there is also a practical one – the definition of the *Kehila* aroused from answers of rabbis to members of the *Kehila*, who questioned the legitimacy of their leadership. The questioners never asked for instructions a priori, how a Jewish community should organize itself in the future. The questions are always a posteriori, after the community is already in existence, only then, they asked for legitimacy. This sort of procedure is not surprising. The place of Jewish law is not to constitute the communal organization but to regulate it (a distinction developed by J.R. Searle and John Rawls).³⁴ Jewish law does not try to constitute a community anew but to qualify and to regulate the rules of an already existing community. And this leads to even a stronger claim, from a meta-halachik point of view – Halacha itself is developed spontaneously within an evolving tradition. The lack of an organized constitutional framework resulted in a system that is much more spontaneous, just like the common law system, where laws are developed through

³³ BT Baba Kama, 116b.

³⁴ J. R. Searle, *Speech Acts*, The University Press, Cambridge, 1969, pp.33-42. John Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge Mass. 1971, p. 56, n. 2.

discussions and decisions of jurists, and not by official legislators. No wonder why such a spontaneous organizational system of law does not develop an organizational political order. A spontaneous legal system produces a spontaneous political system.

6. Conclusion

As we have seen, *spontaneous order* both exists in Jewish political theory and plays a very important role. Political institutions such as government (or kingship) and the judicial system (or the Sanhedrin) depend on the pre-existence of a *spontaneous order* that is based upon a spatial condition of Jewish peoples settled in the land of Israel, destined to worship the Lord. The organized bond is the existence of a covenant between the Jewish people and God – a covenant insufficient by itself to constitute nationhood. The assumption is that when the Jewish people settle the land of Israel, there is a unique corpus with added spiritual value that deserves God’s attention. As the rabbis say, the Divine Presence sets only in the land of Israel.³⁵

As we have mentioned, it is not only modern Jewish Philosophy that has failed to address the idea of *spontaneous order*. Medieval Jewish philosophy did not appreciate *spontaneous order* at all, especially when the subject is intellectual power. The intellect is always organized. Thus Maimonides depicts God’s intellect as the intellect of an architect, the great planner of the world. God’s plans are detailed and organized. This sort of intellect, referred to as God, is not qualitatively different from man’s intellect; for man’s intellect is only inferior to that of God because man arrived in the world after its creation.³⁶ Maimonides is not interested in describing God as a free artist who permits chance in his artistry. He can’t accept a type of creation that evolves organically through

³⁵ Mechilta, Bo, 1; Ramban, Numbers, 21:21.

³⁶ Maimonides, *The Guide for the Perplexed* III, 17.

trial and error, despite the way that the Torah itself describes creation. A description of God as a spontaneous artist would be a disgrace for Maimonides's. Like Maimonides, Maharal also describes the intellect as the source of organization. Torah for Maharal is the mind (*sechel*), and the mind is order. Everything in the mind is in order without exception. A Torah scholar has to be organized and even his clothing must express his organized nature.³⁷ It would appear that any attempt to seek appreciation of spontaneous order in the writings of Chazal would amount to an anachronism.

To the Talmudic eye, however, the cognitive power of the politician is described in a manner that seems more spontaneous:

And Rava the son of Mechasia said in the name of Rav Chama the son of Guria who said in the name of Rav: if all the waters will be ink, and all the canes will be quills, and the sky parchment and all the peoples clerks, they will not be able to write the volume of the mind of the politician.³⁸

Here, it appears that we have a description of the politician's mind as approaching the greatness of God's mind, as one can neither speculate about it nor imagine its extent. Yet the God-like description of the politician's mind was not meant only to augment the appreciation of the politician. It is not about how great his mind is; it is about how infinite it is. By being infinite, the Talmud achieves a non-linear definition, or in other words, spontaneous order.

³⁷ Rabbi Yehuda Lowe B'r Bezalel (Maharal from Prague), *Netivot Olam*, Netiv Hatora, 13; *Derech Chaim*, 5.

³⁸ BT Shabbat, 11a.