

The Place of Developmental Self-Ordering in Judaism: *Kahal* as Spontaneous Order

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Jewish political thought expresses itself primarily through law, rather than through the typical Greek search for the best political regime. A result of this common difficulty is identifying and formulating the principles that are clearly, in some way, at work. This article focuses on the legal concept of the *kahal*, the Jewish name for the political body. The main definition of the *kahal* is spatial—the community of Jews living in the Land of Israel—rather than structural or organizational. Indeed, the *kahal* can best be understood as a spontaneous order (in Hayek’s sense) and not as an order of organization. This *kahal*, though it comes into being in a spontaneous way, also serves as a platform on which the political body can also be arranged in an organized fashion.

Introduction

Neither the Torah nor the Talmud specifies any rules of order of the polity—the same way that they do not deal with the question of what is the best political regime. The Torah does not teach us about any system of organization of the tribes nor about how to elect the elders.¹ There are few Talmudic references about the relationship of kings and the judicial system,² about the rights of citizens of the city to decide their lives on their own,³ and nothing about the way they should vote or how they should elect or choose their leadership. This fact would not 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 existing. Then they wandered forty years in the Sinai desert and conquered the Land of Canaan without any discernable form of its political organization.

The Bible provides little explicit clarification of this 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 Israel's political structures during those and other periods. Why? Surely, we ought not be satisfied with answers that amount to an evasion of this quandary, namely that the ancient Israelites were, unlike the Greeks, politically immature. Rather, irrespective of the historical reality behind these biblical descriptions, there appears to be an insistence in the Torah and about what may tentatively be called "the evolutionary self-ordering" of Israel that requires elucidation, 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 the Talmud is also concerned with. This name was employed in the Middle Ages and given to the Jewish community, though sometimes with a little twist, as the *Kehila*. This article focuses mainly on the formation of the *Kahal* as a large political body both in the Bible and in the Talmud. We will also explore the political implications that can be derived from it. By doing so, we will shed light on the character of the smaller political body, the *Kehila*.

The description of the creation of the Jewish nation in the Bible is the description of a process: beginning with the forefathers and continuing to its existence as slaves in Egypt, to its redemption, to its receiving of the laws and a covenant with God, to its wandering in the desert, and to its arrival in the Holy Land. It is a description of a slow process, seemingly an evolution, but not as an organization that was the result of one act. If one were to consider one decisive act, it would be the covenant before entering the Land. 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, and it is this covenant that the Bible is concerned with—not a covenant out of which a regime is organized. The crux of our problem is this: The covenant that God formed presumes the existence of the people who entered into it. No organizing principle or order appears to have been necessary to define that people as a people, as distinct from a holy nation, a kingdom of priests. According to the biblical account, it appears that this was a spontaneous order, that the Torah assumes the existence of the people, and that it included the corpus of all Jews living in the Land of Israel. While it is true that the Talmud also discusses the laws of *Kahal*, it does so as a precondition for establishing a judicial system and assumes the corpus of all the Jews who live in the Land.

Thus, both the Kahal and the Israelites evolve spontaneously and that the rules of this political organization were left to the discretion of its members.

If there is merit to the argument that the Kahal is a spontaneous, nonorganized political body, then the argument must be clarified. To this end, I will borrow theoretical frameworks from 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. It is a self-generating order. In contrast, the organization is an artificial order—a social order that is intentionally constructed through rules and laws. As Evans-Pritchard says, an order is “a state of affairs [in] which a multiplicity of elements of various kinds are so related to each other that we learn from our acquaintances with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct.”⁴ 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 for why some spatial and temporal conditions generate order and some do not. In an attempt to answer this question, we will add an element of destiny to the concept of spontaneous order. In my opinion, spontaneous orders are generated when the people within 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 nineteenth century as an expression of Romanticism. 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 they would be artificial and illegitimate. While Savigny looked for the roots of modern German law in Roman law, Otto Gierke held that law’s roots were in fact Germanic. In Gierke’s thought, Germanic law is more fitting to modern law because, unlike individualistic Roman law, the Germanic tradition’s elements are firmly rooted in the tradition of the corporation, and the idea 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 is the argument of a Jewish spontaneous order within the Jewish textual tradition and 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 in Talmudic law that cannot be done 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 throughout the Talmudic and Medieval periods, the *idea* of the political as an organically emerging, harmonic corpus of tradition is not new. It existed in nonrational political thought as early as 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 terms *Body Moral* and *Politic*,⁶ and Ptolomaeus of Lucca (1227–1327) pursued the thought that the life of the state is based on a harmony analogous to that of the harmony of organic forces.⁷ From the perception of the political as 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.

I suggest that the Kahal should be defined mainly as a “spontaneous order.” However, Kahal is not meant to organize itself only spontaneously; rather, the spontaneous order refers to a condition, a platform on which the political body arranges itself in an organized fashion.⁸ 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, and, as a result, 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 preconditions. 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.

The Formation of the Jewish Nation— A Covenant of Destiny

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.⁹ The 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 when the children of Israel became a nation: Moses and the priests, who are Levites, said to all Israel, “Be silent, O Israel, and listen! You have now become the people of the LORD your God” (Deut. 27:9 NIV). 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 the LORD commanded Moses to make with the Israelites in Moab, in addition to the covenant he had made with them at Horeb” (Deut. 29:1).

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 organization that the Torah demands, but this organization is between the Jewish people and God. It is not an agreement among the people themselves because it presumes their existence as a people prior to it. The covenant is, therefore, a covenant of destiny, as Rabbi J. B. Soloveitchik defines it,¹⁰ designating the peoples’ end rather than their beginning. One should not conclude from the fact that because this people existed prior to the covenant, this people were without a destination. On the contrary, the destination was not decided on at the moment of the covenant; the destination was in the hearts of the people from the very beginning of the Jewish nation, represented biblically in the promise to Abraham, though not an 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 their covenants with God. Thus, belonging to the Jewish nation is not a matter of race. It is a matter of a special relationship between God and the Jewish people and of a covenant with the forefathers. 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.¹¹

The source of this relationship is God’s love and favor toward the Jewish nation—a relationship that one can never escape.

However, a nation that is formed through covenant, even a covenant of destination, is not solely a derivation of a single act. Not only did the covenant form the Israelites as a nation but so did 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, which had started with the forefathers, continued with the redemption from Egypt. The story that is portrayed in Genesis is the story of a family wherein some continued the dynasty and some left. The members who stayed were those who continued to be connected with God and to obey his moral obligations. When Moses demanded that the Israelites be let go from Egypt, he did not demand a national freedom but the liberty of worship: “Then say to him, ‘The LORD, the God of the Hebrews, has sent me to say to you: Let my people go, so that they may worship me in the desert’” (Ex. 7:16 NIV). It is for this destination that the Hebrews left Egypt, and it is this that formed them into a holy nation. The covenant was but one crucial moment of a very long process that crystallized in time. It must be noted that Moses never demanded that Pharaoh let the people go so that the Israelites could live in the Land of Israel. It happened thus, but it was not specified at that time. Nevertheless, being in the Land of Israel was a formative element, as we are going to see.

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 even though 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 precondition is applied to the judicial system and to 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,¹² and, as such, it may be seen as one implication of applying the principle of Kahal. The source of this contention is talmudic: “[t]hey (the settlers of the Land of Israel) are called Kahal. Others are not called Kahal.”¹³ It is crucial for our argument that the law that contains the definition of Kahal 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.¹⁴ Maimonides derived his idea from the Talmudic rule that only the Jews living in Eretz Israel are considered Kahal, and 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.¹⁵

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 because we assume that the masses are not intellectually self-sufficient and that they rely on 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 it receives its authority from the Kahal. That is why the Sanhedrin's rulings are valid only if they are followed by the Kahal¹⁶—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."¹⁷ The Kahal, for our purpose, is comprised only of Jews who live within the borders of the Land of Israel.¹⁸

Not only is the link between Kahal and the Sanhedrin found in the Talmud, it is also found in the writing of Maimonides. The Kahal confirms the judgment of the Sanhedrin, and the Kahal 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."¹⁹

Unlike the common tradition that assumes that *Semikha*, the authority to judge and deliver rulings, is from above and 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 elsewhere says 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 who live in the Land of Israel count as Kahal.²⁰ This idea of Maimonides' became very famous in the sixteenth century when R. Yaakov Bey Rav appointed himself as 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 among them).²¹ His action prompted strong opposition by the Jerusalemite rabbi—R. Levi Ibn Chabib, known as the controversy over the Semicha.²²

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; 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.²³ As Henske has shown, the awareness of the Jewish calendar in the eyes of the Jewish people in the Land of Israel is decisive for the constitution of the Jewish calendar. Henshke, therefore, considers this part of Maimonides' argument to be decisive²⁴ because it is only the Jews living in Eretz Israel who are considered to be a people and not mere individuals. Thus, one can 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 now needs to be addressed is whether or not the Kahal has any *political* significance.²⁵ The question of whether or not there is any idea of spontaneous political order in halacha still requires elucidation.

Kahal and Kingship

At this point, our focusing on both the obligation to establish political leadership and other obligations that pertain to the Jewish people, may help us to understand 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 commands were given to the Israelites when they entered Eretz Israel—to appoint a king, to destroy the Amalekites, and to build the temple.²⁶ These commands are also repeated in Maimonides' writings.²⁷ The command 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 Talmudic throughout the Geonic periods had a leader, the Exilarch, who served as the Jewish minister in the Persian court.²⁸

It is important to note 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.²⁹ 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, yet it is clear to all that the appointment of a king does not constitute the nation, just as destroying the Amalekites or building the temple do not constitute the nation.³⁰

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

The Case of the Kehila

The case of the Kehila—the Jewish community, is very similar to that of the Kahal. Kehila, like the kahal, suffers from a lack of organizational order; nonetheless, it is considered holy as well, as *Kehilat Kodesh*.³¹ Of course, it is the sanctity of the Kahal that inspired the Jews in the Middle Ages to attribute this sanctity to the Kehila. However, not surprisingly, Kehilat Kodesh, like Kahal, 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 dealing with religion or welfare,³² 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 the importance of spontaneous order and contradicts usual categories of regimes. One might expect to find a very developed theoretical discussion over the best regime of the Kehila. However, except for discussions on the authority of the elected representatives and leaders of the Kehila, there are very rarely any discussions of 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; it accords much more to

a spontaneous order. Some describe the polity as a partnership or association bound with a *social contract* and based on 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* seems 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*, as seen in the Talmud—its existence is just assumed.³³

Beit Din and association also 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 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.”³⁴

This quotation has been used since the twelfth century as the 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 nonfriendly 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 as a spontaneous order.

What is the reason for the absence of an organizational order theory in halacha? The importance of a common destiny is a good answer to the question, but there is also a practical one—the definition of the *Kehila* given by 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 did they ask for legitimacy. This sort of pro-

cedure is not surprising because 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),³⁵ Jewish law also does not constitute a community anew but qualifies and regulates the rules of an already existing community, which 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 discussions and decisions of jurists and not by official legislators. No wonder such a spontaneous organizational system of law does not develop an organizational political order. A spontaneous legal system produces a spontaneous political system.

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 preexistence of a spontaneous order that is based on 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. The divine presence sits only in the Land of Israel.³⁶

It is not only modern Jewish philosophy that has failed to address the idea of spontaneous order. Medieval Jewish philosophy also did not appreciate spontaneous order, especially when the subject was 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; man's intellect is only inferior to that of God because man arrived in the world after its creation.³⁷ Maimonides is not interested in describing God as a free artist who permits chance in his artistry. He cannot accept a type of creation that evolves organically through 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. 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.³⁸ 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 quells, and the sky parchment and all the peoples clerks, they will not be able to write the volume of the mind of the politician.”³⁹

Here it appears that we have a description of the politician’s mind as approaching the greatness of God’s mind—one can neither speculate about it nor imagine its extent. Yet, the Godlike 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 nonlinear definition; in other words, a spontaneous order.

Notes

1. About the elders in the Bible see Michael Walzer, “Biblical Politics: Where Were the Elders?” *HPS* 3, no. 3 (2008): 225–38.
2. *BT*, Sanhedrin, 18a–b.
3. *BT*, Baba Batra, 8b.
4. E. E. Evans-Pritchard, *Social Anthropology* (London, 1951), 49; see F. A. Hayek, *Law, Legislation and Liberty* (Chicago: University of Chicago Press, 1973), 36n4.
5. It is important to note that Hayek was not the first to talk about spontaneous order. See for instance, Michael Polanyi, *Science, Faith and Society* (Chicago: University of Chicago Press, 1946), 63–84. I am grateful to Professor Steven Grosby for pointing out Polanyi’s contribution.
6. Otto Gierke, *Political Theories of the Middle Ages*, trans. Frederic William Maitland (1900; repr., Cambridge: Cambridge University Press, 1968), 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, 25.
8. Hayek himself is explicit that a constitution is in the regime of organization and not in the regime of spontaneous order.

9. John Bright, *A History of Israel* (London: SCM Press, 1959), 143–44.
10. Rabbi J. B. Soloveitchik, *Fate and Destiny: From Holocaust to the State of Israel* (Hoboken, N.J.: Ktav, 2000), 42.
11. Deuteronomy 7:7–8. For an early covenant, see for instance the covenant of “Brit Bein HaBetarim” the covenant of the halves (Gen. 15).
12. Rambam, Sanhedrin, 1:2. On the other hand, see also *BT*, Makot, 7a; Nachmanides, Deuteronomy 16:18.
13. *BT*, Horayot, 3a.
14. David Henshke, “The Legal Source of the Concept ‘Nation’: Between Maimonides and Ramban,” *Shenaton Ha-Mishpat Ha-Ivri*, ed. Eliav Shochetman and Shmuel Shilo (Jerusalem: The Institute for Research in Jewish Law, 1992–1994), 18–19:177–97.
15. Leviticus 4:13–15.
16. Note that what comes out of this rule is that there is a link 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).
17. *BT*, Horayot, 3a.
18. The 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.
19. Rambam’s commentary to the Mishna, Sanhedrin, 1:3. See more Rambam, Sanhedrin, 4:11.
20. Rambam’s commentary to the Mishna, Bechorot, 4:3; *BT*, Horayot, 1:3.
21. R. Yaakov Bey Rav, Shut Mahari Bey Rav, 63.

22. R. Levi Ibn Chabib, *Shut Maharalbach*, S' 147, Kuntres HaSmicha 1 (Jerusalem: Reem Fund, 2008), 483–578. On the dispute over the Smicha see: Eliav Shochetman, “Renewal of the Semicha According to Maimonides,” *Shenaton Ha-Mishpat Ha-Ivri*, ed. Mordechai A. Rabelo and Shmuel Shilo, (Jerusalem: The Institute for Research in Jewish Law, 1988–1989), 14–15:217–43; Chaim Zalman Dimitrovski, “Shtei Teudot Chadashot al vicuach hasmicha bitzfah,” *Sfunot* (Jerusalem: Yad Ben-Zvi, 1966), 10:192–93; Meir Bnayahu, “Chidusha Shel Hasmicha Bitzfah,” *Sefer HaYovel Lyitzhak Ber*, ed. Shmuel Etinger, Haim Bienart, Menahem Stern (Jerusalem: The Zalman Shazar Center, 1961), 248–69.
23. Maimonides, *The Book of Mitzvot*, Positive Commandment, 153.
24. Henshke, “The Legal Source,” 177–97.
25. 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, one may very well say that Maimonides refers to the religious side of the nation that the king expresses, not the political.
26. *BT*, Sanhedrin, 20b.
27. R’ Moses ben Maimon, *Mishneh Torah*, Kings and Wars, 1:1.
28. *BT*, Horayot, 11a-b. On the post of the exalarch see Isaiah M. Gafni, *The Jews of Babylonia in the Talmudic Era* (Jerusalem: The Zalman Shazar Center, 1990), 92–104.
29. *BT*, Sanhedrin, 20b.
30. 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 because only a set of principles that is founded on the basis of religious law can provide the 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.

31. 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*, ed. Marcel Poorthuis and Joshua Schwartz (Boston: Brill, 2006), 217–35.
32. Tosefta, Bava Metzia, 11:23; TB, Bava Batra, 8a; Rambam, Matnot Aniyim, 9:12; Shulchan Aruch, Yore Dea, 256:5.
33. See Yitzhak Fritz Baer, “The origins of Jewish communal organization in the Middle Ages,” *Binah* 1 (1989), 59–82; Shalom Albeck, “The origins of Jewish communal organization in Spain until the Ramah,” *Zion* 25 (1960), 87–93; Samuel Morel, “The Constitutional Limits of Communal Government in Rabbinic Law,” *Jewish Social Studies* 33 (1971): 87–119; Menachem Elon, “Authority and Power in the Jewish Community: A Chapter in Jewish Public Law,” *Shenaton Ha-Mishpat Ah-Ivri* III–IV (1976–1977): 7–34; Abraham Grossman, “The Relationship of the Early Sages of Ashkenaz to the Community Sovereignty,” *Shenaton Ha-Mishpat Ah-Ivri* II (1975): 175–99; Haym Soloveitchik, *The Use of Response 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: Ramat Gan, 1981), 215–56.
34. *BT*, Baba Kama, 116b.
35. J. R. Searle, *Speech Acts* (Cambridge: The University Press, 1969), 33–42. John Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap Press of Harvard University Press, 1971), 56n2.
36. *Mechilta*, Bo, 1; Ramban, Num., 21:21.
37. Maimonides, *The Guide for the Perplexed*, III, 17.
38. Rabbi Yehuda Lowe Bar Bezalel (Maharal from Prague), *Netivot Olam*, *Netiv Hatora*, 13; *Derech Chaim*, 5.
39. *BT*, Shabbat, 11a.