

Majority Rule in the Jewish Legal Tradition

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The principle of majority rule is considered to have deep roots in Jewish tradition. The present article reexamines its development as a principle of decision-making and as a political principle as well. The article takes the reader on a legal-historical journey from late antiquity, when the foundations of the Jewish community were laid down, through the Middle Ages, when these foundations evolved and crystallized, until the late Middle Ages, when the principle of majority rule was widely accepted.

The foundations of Jewish communal government are rooted in the encounter between Jewish and Greco-Roman traditions. The talmudic “people of the city” were organized under the influence of the Roman *polis*, and its democratic nature is still visible in the city’s legal structure. But this democratic nature had become almost completely eradicated by the early Middle Ages. The halakhic authorities of that period confirmed the oligarchic structure of the communities and the “majority” was counted among a thin leadership layer of the community. Only during the thirteenth century was the principle of the majority extended such that a wider group of community members took part in its decision-making. This development was influenced by an external European process through which the leadership of the cities took shape and corporations were founded. Jewish legal authorities continued to argue about the nature of majority rule and about the precise mechanism whereby to implement it, but by the late Middle Ages majority rule was widely accepted as the main political principle of Jewish public domain.

Introduction

The principle of majority rule is considered to have deep roots in the Jewish legal and political tradition. It is already mentioned in the Talmud, which argues that it is derived from the biblical law “to tend after the many” (Exod 23:2). In medieval halakhic sources, the principle of majority decision is mentioned numerous times, and many historians think that the method of arriving at decisions in Jewish communities was usually based upon this principle.¹

¹ K.R. Stow, *Alienated Minority: The Jews of Medieval Latin Europe* (Cambridge, Mass.: Harvard University Press, 1992) Chapter 8; also, cf. the works mentioned in note 2.

Because of this, major scholars of Jewish law have described the self-government of medieval Jewish communities as democratic in nature.² However, it is important to distinguish between decisions based upon a majority and “majority rule.” It is possible to base decisions upon a majority even in small bodies that do not represent the public and may even rule over the public in a despotic manner. By contrast, “majority rule” implies broad participation on the basis of political equality (“one man one vote”). In order to argue that the making of decisions on the basis of a majority reflects majority rule, one must demonstrate that public decisions were made by a majority of the members of the community.³ This being so, the key question is not whether use was made of the principle of majority but rather who was counted towards this majority. In this paper, I shall examine anew the role and development of the principle of majority in the Jewish legal tradition. The main focus will be the process of decision-making in the local community and especially its authority to enact or to legislate. This perspective requires that we first examine the extent of the public’s legislative authority. Only thereafter may we examine the question as to whether the application of this authority was based upon the principle of the majority.

The use of the term “legislation” requires a certain clarification. Legislation indicates the establishment of a general norm of conduct as opposed to a localized decision, such as a judicial judgment (or halakhic ruling). Legislation is usually promulgated by a recognized body that maintains the authority to do so, such as a political ruler or legislature. The history of Jewish law is generally characterized by the lack of such a central authority. Nevertheless, it has recognized some legislative authorities.⁴ During the early period, talmudic

2 I. Agus, *Rabbi Meir of Rothenburg* (Philadelphia: Dropsie College, 1947); Agus, “Democracy in the Communities of the Early Middle Ages,” *JQR* 43 (1952) 153–76; Y. Baer, “The Foundations and Beginnings of Jewish Community Organization in the Middle Ages,” *Zion* 15 (1950) 1–41 [Heb.]; D. Elazar, “Covenant as the Basis of Jewish Political Tradition,” in *Kinship and Consent* (Washington: University Press of America) 21–51 [Heb.]. The democratic interpretation of the principles of community rule stand out particularly strongly in the writing of Menachem Elon; see his *Jewish Law: History, Sources, Principles*, trans. B. Auerbach and M. Sykes (Philadelphia: Jewish Publication Society, 1994) 678–779; Elon, “On the Nature of *Takkanot haKahal* in Jewish Law,” in *Legal Studies in Memory of Avraham Rosenthal*, ed. G. U. Tedeschi (Jerusalem: Magnes Press, 1964) 1–54 [Heb.]; Elon, “Authority and Power in the Jewish Community: A Chapter in Jewish Public Law,” *Shenaton ha-Mishpat ha-Ivri* 3–4 (1976–1977) 7–34 [Heb.].

3 In the medieval context, this of course refers to all adult males. It would be anachronistic to expect gender equality in communities that existed in antiquity or in the Middle Ages. One may argue that this already rules out the very possibility of majority rule in those periods; but if one is prepared to be forgiving towards the historical reality that preceded the twentieth century, one may nevertheless see at least a partial fulfillment of majority rule in such conditions.

4 See the long review by Elon, *Jewish Law*, 477–93.

sources assume the existence of a central court that maintains legislative power.⁵ These sources also recognize the legislative power of local communities. During the Middle Ages, halakhic sources no longer assume the existence of a central legislative authority.⁶ Halakhic rulings were accepted depending upon the personal prestige and communal recognition of those who issued them. Nevertheless, halakhic sources continue to use terms suggestive of legislation such as תקנה (regulation, enactment) and התקין (enacted) in various cases to indicate the act of introducing a general norm, usually by a prominent authority or by a convention of Sages.⁷ Legislation was frequently promulgated on the local level by the community, which functioned as a legislative body establishing general norms regarding its own members and their way of life.⁸ It is this communal authority whose power and means of decision-making we seek to explore.

The public's legislative authority is not self-evident from the standpoint of classical Jewish law, as the sources for the behavioral norms applying both to the individual and to the public lies in the Torah. Sages and legal authorities are the authorized interpreters of the Torah and are thus those authorized to determine the behavioral norms of the public. Those factors, which do not act by virtue of the power of the Torah, do not, on the face of it, enjoy any legislative authority. This attitude is reflected in the fact that, in the classical legal sources, the king is without any significant legislative authority. Scripture recognizes the king's executive authority but not his legislative authority.⁹ Likewise, according to talmudic law, the king does not enjoy legislative authority; his prerogatives are limited to the executive realm alone.¹⁰ Hence, the community's legislative

5 Historians debate the reality behind this institution: was it rabbinic court, rabbinic academy, or patriarchal council? See n. 11 below.

6 There are few notes on legislative actions of the *geonim*. Robert Brody mentions only two pieces of formal legislation on their part; generally speaking, they did not function as legislators. R. Brody, *The Geonim of Babylonia and the Shape of Medieval Jewish Culture* (New Haven: Yale University Press, 1998) 62–66.

7 Note for example the תקנות attributed to Rabbenu Gershom Me'or ha-Golah and to others; see L. Finkelstein, *Jewish Self-Government in the Middle Ages* (New York: Phillip Feldheim, Inc., 1964) 111–17.

8 Elon, *Jewish Law*, 678–779.

9 Deut 17:8–20. The Book of Deuteronomy stipulates that, in a case in which there is a need to clarify some legal question, the decision is made by means of the Great Court, which sits in the Temple. The king does not appear there as a deciding factor in the realm of law and legislation but rather as one who is himself subject to it. See S.R. Driver, *Deuteronomy*, International Critical Commentary (Edinburgh: T&T Clark, 1985) 210; B.M. Levinson, *Deuteronomy and the Hermeneutics of Legal Innovation* (New York: Oxford University Press, 1997) 138–43.

10 *m. Sanh.* 2:2–4. The king has extensive punitive powers beyond those fixed by law but does not appear as a legislative factor per se. For an up-to-date discussion on the status of the king, see Y. Lorberbaum, *Disempowered King: Monarchy in Classical Jewish Literature* (London: Continuum, 2011), and the bibliography mentioned there. In this respect, the approach of Rabbenu Nissim

authority is by no means self-evident. Yet, the Jewish legal tradition recognized this authority, whose development I will describe in what follows. The basis for the community's authority is found in talmudic literature, but its main development, as has already been shown by scholars, only occurred in the Middle Ages. I shall concentrate here on the question of the identity of those bodies within the community that are allowed to legislate. I shall thereafter turn to the main questions: What was the manner of arriving at decisions within the community? Were the decisions made by the majority? And, finally, who was counted within this majority?

The first section of this paper will deal with talmudic literature. I will initially examine whether the talmudic Sages acknowledged the legislative authority of the public at all and the relation between the authority of the public and that of the Sages. The discussion will focus upon the stature of the court of Sages as opposed to that of the people of the city. I shall then examine the manner of making decisions regarding public issues and the use of the principle of the majority. In the second section, I will discuss the legislative authority of the community during the Middle Ages, when the legal authorities evidently significantly extended the legislative authority of the community. The question I wish to examine is: Who was the "public" that was granted such extensive legislative authority, and did this term refer to the entire community or to its leadership alone? In doing so, I shall analyze the halakhic justification for the authority of the public and demonstrate that it was based upon the authority of the court rather than upon any autonomous category of the community. In the third section, I shall discuss the development of the principle of majority rule in the Middle Ages. Continuing the argument made in the second section, I shall demonstrate that, until the thirteenth century, the principle of majority was not implemented in community decisions. Insofar as we hear of the use of the principle of majority, it only refers to reliance upon a silent majority, which supports the oligarchic leadership of the community. Only during the course of the thirteenth century, in wake of certain developments within European society, did a broader use of the principle of majority develop. From that point on, one may discern a process of expansion in the circle of those considered part of the majority and, from a legal viewpoint, a process of democratization as a way of making decisions in the community.

of Gerona, who sees the "law of the king" as a kind of alternative legal system, is a great innovation. See on this A. Ravitsky, "On Kings and Statutes in Jewish Thought in the Middle Ages: From R. Nissim Gerundi to R. Isaac Abravanel," in *Culture and Society in Medieval Jewry*, ed. M. Ben-Sasson, R. Bonfil & J. Hacker, *H.H. Ben Sasson Memorial Volume* (Jerusalem: Shazar Center, 1989) 469–91 [Heb.].

1. *Talmudic Literature*

Did talmudic law recognize the legal and legislative authority of the local community and, if so, to what extent? The perspective from which I wish to explore this question here is juristic and not historical; that is, I will examine the way the law, as expressed in the Mishnah, the Tosefta, and the Talmuds, relates to the community and not the actual power maintained by certain communities during this period. This perspective will enable us to present the principles of talmudic law and to set the stage for comparison with the medieval law to be discussed later. This does not mean that the picture proposed will ignore the reality to which the law relates. To the contrary, I will try to discuss the legal status of the community in social and historical context and show varying approaches towards it.

According to the basic approach of the Rabbis, the Torah and the law derived from it (*halakhah*) determine the way of life of the Jewish people. The *halakhah* encompasses the ritual and the legal, the civil and the criminal areas of life. It pertains to the life of the individual, of the family, and of society. The Rabbis saw themselves as the authorized interpreters of the Torah, and they therefore enjoyed a special status in determining the norms of behavior for both individuals and the community. In terms of institutions, the Sages' legislative activity occurred within the framework of the court, which also functioned as a legislative institution. The Rabbis anchored their legislative power in Scripture that refers to the High Court that sat in the Temple precincts (Deut 17:8–13). They extended this power to the rabbinic court established in Yavneh after the Destruction and, ultimately, to all legislative activity of the Rabbis.¹¹

Thus, from a jurisprudential viewpoint, the court is considered the main body authorized to determine public norms of behavior. Its legislative au-

¹¹ See *Sifrei Devarim*, §153, ed. Finkelstein, 206, and Elon, *Jewish Law*, 481–85. The nature of the central rabbinic court and its influence is disputed among historians. For the traditional view, see G. Alon, *The Jews in their Land in the Talmudic Age* (Cambridge, Mass.: Harvard University Press, 1989) I. 206–52, II. 461–79. For revisionist approaches, see L.L. Levine, *The Rabbinic Class of Roman Palestine in Late Antiquity* (Jerusalem: Yad Ben Zvi, 1989) 76–83; D. Goodblatt, *The Monarchic Principle* (Tübingen: Mohr and Siebeck, 1994) 232–76; S. Schwartz, *Imperialism and Jewish Society* (Princeton, NJ: Princeton University Press, 2001) 103–28. Levine disputes the existence of a central court following the Bar Kochba revolt and describes rabbinic activity as occurring only within the academy. Goodblatt extends this picture to the early period of Yavneh. Both Levine and Goodblatt attribute legal and political power to the patriarch. S. Schwartz marginalizes both the Rabbis and the patriarch. For a similar tendency regarding the social status of the Rabbis, see S.J.D. Cohen, “The Rabbi in Second Century Jewish Society,” *Cambridge History of Judaism*, vol. 3 (Cambridge: Cambridge University Press, 1999) 922–90. On the court of Yavneh, see also H. Shapira, “The Court in Yavneh: Status, Authority and Functions,” in *Studies in Jewish Law*, ed. Y. Habba and A. Radzyner (Ramat-Gan: Bar-Ilan University, 2007) 300–304 [Heb.].

thority is extensive and may in some cases even override the law of the Torah itself.¹² The court enjoys particularly great power in the areas of civil law and criminal law. In the area of civil law, the Talmud states the principle, הפקר בית דין הפקר (expropriation of the court is valid) meaning that the court is allowed to expropriate money or property belonging to an individual, whether through judicial action or legislation. By means of this principle, the convention was accepted that, in matters of civil law, the court may enact rules or regulations that are opposed to the laws of the Torah.¹³ In the area of criminal law, the Talmud fixes the principle that “The court may impose corporal and other punishments not according to the Torah” – that is to say, the court is permitted to execute punishments in a manner that deviates from Torah law. In this case, it seems that talmudic sources are concerned only with judicial decision, and only during the Middle Ages was this expanded also to legislation.¹⁴

A number of scholars see the court’s legislative authority as an expression of the authority of the public.¹⁵ One of the main proofs for this approach is the talmudic principle according to which, if the public has not accepted a given act of legislation, it is not valid. “Every edict [גזירה] that the Court imposes, which the majority of the public do not accept upon themselves, is not an edict.”¹⁶ According to this view, majority rule is already inherent within this principle, as one is speaking here of “the majority of the public.”¹⁷ In practice, however, talmudic law does not require, or even recognize, any consultation of the public

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- 12 On all areas of *halakhah*, including religious law (in which the authority of the court is relatively limited), see Y.D. Gilat, “A Rabbinical Court May Decree the Abrogation of a Law of the Torah,” in his *Studies in the Development of the Halakhah* (Ramat Gan: Bar-Ilan University Press, 1992) 191–204 [Heb.], and the brief summary by Elon, *Jewish Law*, 414.
- 13 *y. Pēah* 5:1 (18b); *y. Sheqal*. 1:2 (46a); *b. Moēd Qat.* 16a; *b. Yevam.* 89b; *b. Git.* 36b. The rule originally referred to the realm of adjudication, but already in the Talmud it was also interpreted as referring to legislation. See G. Blidstein, “Notes on *Hefker Bet Din Hefker* in Talmudic and Medieval Law,” *Dinei Israel* 4 (1973) 35–50; A. Radzyner, “The Court has the Power to Expropriate” in *Talmudic Sources*, *Sidra* 16 (2000) 111–33 [Heb.].
- 14 *b. Yevam.* 90b; *b. Sanh.* 46b; *y. Hag.* 78a. See Elon, *Jewish Law*, 421–25; H. Ben-Menahem, *Judicial Deviation in Talmudic Law: Governed by Men, Not by Rules* (New York: Harwood Academic Publishers, 1991); A. Kirshenbaum, *Jewish Penology* (Jerusalem: Magnes Press, 2013).
- 15 H. Chernowitz, *תולדות ההלכה*, 1 (New York: Author’s publication, 1945) 142; A.H. Freimann, “Ways of Legislation in Israel,” *Yavneh* 1: 2–3 (1946) 42 [Heb.]; Chernowitz, “Majority and Minority,” *Yavneh* 2:4–6 (1948) [Heb.]; S. Albeck, *Courts of the Talmudic Period* (Ramat Gan: Bar-Ilan University Press, 1981) 62–64 [Heb.].
- 16 *y. Avod. Zar.* 2:9 (41d) and, in slightly different phrasing, *b. Avod. Zar.* 36a: “One does not impose an edict upon the public unless a majority of the public is able to stand up to it.” The two formulae are cited in the name of R. Eleazar b. R. Zaddok (second century) and are variants of the same tradition. In a similar spirit, it is stated in *t. Sotah* 15:11 that “the court cannot make an edict upon the public involving things to which they are unable to stand.”
- 17 A similar argument has already been raised by a number of medieval authorities who wished to

prior to legislation, just as it does not recognize any procedure through which the public ratifies legislation retroactively. Hence, contrary to this scholarly view, the court's activity ought not to be seen as an expression of the position of the public. Rather, the court acts by virtue of the law and not through the power of the public; it expresses the Rabbis' view and not that of the public. The court is required to take consideration of the public and not to burden it excessively. Nevertheless, the public will is not expressed through any formal procedure but rather through its being observed in practice.¹⁸

The public's stance is particularly taken into account with regard to public issues, albeit here, too, it is the court which represents the public; the public itself does not act in a direct way. It is stated in the Tosefta: "Rabban Shimon ben Gamaliel and Rabbi Eleazar ben Zaddok said: 'One does not intercalate the year and one does not perform any of the needs of the public except on condition that the majority of the public accept them.'"¹⁹ This passage speaks of activities that fall under the rubric of "needs of the public," which specifically require the agreement of the public – but there was no fixed procedure by whose means the stance of the public was ascertained in advance. Rather, the acts were performed by the court with the understanding that the public would accept them. In another instance, the Babylonian Talmud contains special instructions regarding the appointment of a leader: "Rabbi Yitzhak said: 'One does not appoint a *parnas* [official] over the public unless one goes to the public'" (*b. Ber.* 55a). According to this statement, the public must be consulted prior to appointing someone to fulfill a public function. But even according to this, it is not the public that actually appoints the *parnas*, but rather some other entity (whose identity is not explicitly stated here). Moreover, it seems highly doubtful whether such an instruction had any concrete force or expression in reality. From known sources about public life during the talmudic period, it would appear that *parnasim* and other office-holders were appointed primarily by the leadership of the city and at times by the central authority (the *Patri-*

establish a basis for the principle of majority decision, such as R. Eliezer b. Yoel Halevi and R. Meir b. Baruch from Rothenburg (see the discussion below in the second section of this article).

18 The principle that the validity of a legislative act depends upon its acceptance by the public is not as such intended to assure the influence of the public over the court, for if such were the case it would have been preferable to establish a mechanism of representation or voting, which would bring about a clear influence of the public upon the court. Rather, it seems to be connected to a jurisprudential viewpoint that demands the effectiveness of a norm as a precondition of its validity. According to this approach, a legal norm that is not observed or applied in practice is not in fact valid, even if it has been properly ratified with the proper legal authority. See H. Kelsen, *The Pure Theory of Law* (Berkeley: University of California Press, 1967) 11.

19 *t. Sanh.* 2:13 (ed. Zuckerman, 418).

archate), but not by an assembly of the people.²⁰ In brief: from the perspective of talmudic law, the court of the Rabbis is the central body involved both in legislation and in supervising matters related to the public. The court is required to take into consideration the needs of the public and to act on its behalf, but the authority of the court per se derives from the law and not from the public.

It is against this background that we shall explore the community's authority. Talmudic law, already in tannaitic sources, recognized the authority of the local community to regulate the life of its inhabitants, including the right to engage in legislation. What was the extent of this authority and what was the relationship between the community's legislative authority and that of the court? In the talmudic period, the organized community found expression in the persona of the people of the city.²¹

In late antiquity, the city was the central locus of public life in both Greco-Roman and Jewish society.²² The status and organization of the Jewish city were influenced by the Hellenistic and Roman *polis*, but there were a number of significant differences between the two.²³ One of these pertains to the definition of a city: the *polis* was organized within an official framework, whose status was fixed by Roman rule. The Jewish city, by contrast, was not dependent

20 Z. Safrai, "The Local Jewish Community in the Period of the Mishnah and the Talmud," in *Kehal Yisrael – Jewish Self-Rule Through the Ages* vol. 1, ed. I. Gafni (Jerusalem: Shazar Center, 2001) 150–51. On the office of *parnas*, see Steven. D. Fraade, "Local Jewish Leadership in Roman Palestine: The Case of *Parnas* in Early Rabbinic Sources in Light of Extra-Rabbinic Evidence," *Halakha in Light of Epigraphy (Journal of Ancient Judaism, supplement 3, 2010)* 155–73.

21 It is interesting to note that the term *kehillah* in the sense of community does not appear in talmudic literature. The closest reference to it is קהלא קדישא דבירושלים (the holy community in Jerusalem) mentioned in several places; see S. Safrai, "קהלא קדישא דבירושלים," *Zion* 22 (1957) 183–93. More common is the use of the term ציבור (public), but that does not indicate an organized community.

22 See S. Safrai, "The Jewish City in Palestine During the Age of the Mishnah and the Talmud," in *העיר והקהילה* (Jerusalem: Israel Historical Society, 1968) 227–36 [Heb.]. For a comprehensive description of the city and the community, see Z. Safrai, *The Jewish Community in the Talmudic Period* (Jerusalem: Shazar Center, 1995) [Heb.]. On the definition of the concept and the distinction between city and village, see *ibid.*, 29–49. *Contra* this view, S. Schwartz has argued that one cannot speak of "Jewish cities" in the talmudic period, as Jewish identity had disintegrated totally after the failure of the First and Second (70 and 135 CE) revolts against the Romans; see his *Imperialism*, 129–61. I do not share this view, but a full discussion is not in place here. In any event, from a legal point of view, there is no doubt that talmudic sources are concerned with Jewish cities and set norms for them.

23 Terms taken from municipal administration – such as *boulei*, *strategos*, *archon*, and others – are routinely used in talmudic literature. For discussion of some of these, see G. Alon, *Studies in Jewish History in the Times of the Second Temple, the Mishna and the Talmud* (Tel Aviv: Ha-Kibutz Ha-Meuhad, 1976) II: 74–92. For a comparison between the *polis* and the Jewish city, see Z. Safrai, *The Jewish Community*, 352–54 [Heb.].

upon its definition by Roman law, but rather upon an internal definition. It is worth citing in this context the definition given in the Mishnah: “What is a large city? Any place in which there are ten בטלנים (idlers). Less than that is considered a village” (*m. Meg.* 1:3). The idlers referred to here are individuals who did not engage in labor and were free to be involved in the needs of the public.²⁴ According to the Mishnah, a city is thus a place of habitation in which there are organized public services.

The people of the city were organized within the framework of an official body known as “the assembly of the people of the city,” a public assembly similar to the *demos* of the *polis*.²⁵ The city was headed by a civil leadership, consisting generally of seven people and referred to in the Talmud as “the seven good people of the city.”²⁶ In addition, mention is made of other titles, such as ראשים (heads), זקנים (elders), and פרונסים (officials), all of whom were people who had executive tasks and operated alongside the civic leadership.²⁷ The assembly of the people of the city was the supreme body, whose status was similar to that of the analogous body under the constitution of the *polis*. We must nevertheless remember that, during this period, the democratic nature of the *polis* existed on the legal and declarative level alone. In practice, the *polis* had long since ceased to be true democracy.²⁸ The Roman *polis* was an aristocratic framework in every respect: it provided services to the wealthy, which were likewise paid for by the wealthy alone. The *polis*’s educational system only taught the children of the wealthy, who were able to afford tuition, while all public offices were

24 The Mishnah speaks of ten people who are always to be found in the synagogue and thereby facilitate the reading of the *megillah* on weekdays. In both Talmuds, adjacent to this *mishnah*, there appears the comment, “ten people who are idle from labor for the synagogue” (*y. Meg.* 1:3 [70b]; *b. Meg.* 5a). However, it would appear that these people fulfilled public tasks in the city. Thus, it is stated in *Sefer Halakhot Gedolot*: “Our Rabbis taught: It is forbidden for a scholar [תלמיד חכם] to live in a city in which there are not ten idle people: i.e., three judges, a clerk of the Court, two charity beadles, one who divides the money, a scribe, a *hazan*, and a teacher of small children.” *Halakhot Gedolot*, ed. Hildesheimer (Jerusalem: Mekitzei Nirdamim, 1972) 1:475, with a textual variation according to Version B [MS. Vatican, 142] [Heb.]; and, cf. the discussion of Z. Safrai, “The Jewish Community,” (above n. 22) p. 51, n. 2.

25 G. Alon, *The Jews in their Land*, 1, 176–84. It is interesting that this body is mentioned specifically in the *Bavli* (indeed from a tannaitic source), but it is clear that it belongs to the milieu of the land of Israel (*b. Meg.* 26a–b; *b. B. Metzi'a* 78b, 106b).

26 Already Josephus mentions a group of seven people who led the city. “Every city shall be ruled by seven people of good character who are consistent in ensuring justice” (*The Jewish Antiquities* 4.8.14). These seven are also mentioned on *y. Meg.* 3:2 (74a), as well as on *b. Meg.* 26a.

27 G. Alon, *The Jews in Their Land*; Z. Safrai, “The Jewish Community,” 243–67. On the function of *Parnasim*, see again Steven Fraade, “Local Jewish Leadership,” 155–73.

28 A.H.M. Jones, *The Greek City from Alexander to Justinian* (Oxford: Oxford University Press, 1940) 157–219. Also see his words on p. 170: “Democracy had in these ways ceased by the beginning of the second century BC to be a living reality, but it remained a popular ideal.”

similarly filled by members of the higher classes alone. The Jewish city was a more popular, folk framework, which collected taxes from all the inhabitants and maintained a system of popular education as well as a system of charity intended for all of the inhabitants.²⁹ In this respect, one may say that the Jewish city preserved the democratic tradition more faithfully, but even within it this idea did not find full expression.

The prerogatives of the people of the city are discussed in tannaitic literature. The Mishnah discusses them in a fairly limited way, recognizing primarily their authority to manage the community's common property. The Tosefta discusses them more extensively, devoting a detailed collection of laws to the people of the city, incorporating widespread prerogatives, including privileges of legislation, enforcement, and ongoing administration of the life of the city.³⁰ Its legislative authority expresses the autonomy of the people of the city. We shall examine the definition of this authority:

1. The people of the city are allowed to regulate (literally: make conditions concerning) prices, measures, and the wages of workers. They are allowed to enforce their decisions.
2. The people of the city are allowed to say that whoever appears before such-and-such a person must pay so-and-so money, and whoever appears before the king must pay thus-and-such.
3. Whoever's cow grazes between the vineyards, must pay such-and-such money, and whoever sees such-and-such an animal must pay such-and-such. And they may enforce their rules.³¹

The legislation of the people of the city is described by the term תנאי (condition), which is used with regard to legislation in other contexts as well.³² In Section 1, mention is made of legislation relating to commercial life: the people of the city are allowed to determine the prices of various commodities, the size of the measurements used, and the wages of laborers. In addition to legislative authority, the people of the city also have the authority to enforce these rules upon those who refuse to obey them. In Section 2, the authority of the peo-

²⁹ Z. Safrai, "The Jewish Community," 165–68.

³⁰ *t. B. Metzi'a*, ch. 11. It is difficult to know whether the difference between these two works on this point is the random result of preservation of the material or an expression of differing attitudes towards the authority of the people of the city. For a detailed analysis of the editing of this chapter in the Tosefta, see N. Zohar, *Secrets of the Rabbinic Workshop: Redaction as a Key to Meaning* (Jerusalem: Magnes Press, 2007) 33–65 [Heb.].

³¹ *t. B. Metzi'a* 11:23 (ed. Lieberman), 126–27.

³² Such as "the conditions made by Joshua" or "conditions of the Court" (see Elon, *Jewish Law*, 404). Hence, the phrase does not indicate an understanding of this matter in terms of contract or agreement.

ple of the city to prevent individuals from meeting with various people who endanger the welfare or independence of the people of the city is discussed.³³ In Section 3, it is stated that the people of the city are allowed to make laws to prevent damage to the property of others.³⁴ There is no reason to assume that the list of laws enumerated here is a complete one; it is more reasonable to assume that one is speaking here only of examples. On the other hand, it does not seem that they enjoyed unlimited authority; rather, their authority was limited to matters relating to the administration of the life of the city. It is reasonable to assume that the legislative authority of the people of the city was formulated in such a way as to be consistent with the legislative authority of the Sages or the court. In light of the view that the Sages enjoyed broad legislative authority, it is clear that a certain tension between the authority of the Sages and that of the people of the city was not unlikely. The formulation of this ruling reflects the balance established by the Sages between these two authorities: the Sages were granted broad, general legislative authority while the people of the city were granted legislative authority relating to the life of the city alone.³⁵ Yet, within the framework of urban or communal life, the people of the city enjoyed true autonomy.

We find a certain erosion of this autonomy in the *Bavli*. The Talmud states that any agreement among the people of the city requires the confirmation of אדם חשוב (a distinguished person) – that is to say, the leading Sage of the city.³⁶

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- 33 The prohibition against appearing before “such-and-such a person” evidently relates to a person who endangers the people of the city, such as an informer. The prohibition against going to the rulers is also intended to prevent acts of informers and may also be intended to curtail the “foreign relations” of the city to those who are authorized to do on its behalf alone (Lieberman, *תוספתא כפשוטה*, 321–22).
- 34 The prohibition against causing harm and the obligation to make restitution for damage done are rooted in law. Here one is speaking about laws that prevent the very possibility of damage *ab initio*. The prohibition against “one who sees the animal of so-and-so” refers to sending a given animal to graze when it is known to be harmful or the animal of such-and-such a person who is known to harm the public (Lieberman, *תוספתא כפשוטה*, 322).
- 35 It should be emphasized that the discussion here is from the viewpoint of talmudic law or legal discussion. There is no assurance that this *halakhah* was in fact practiced in every place and that everybody obeyed it. One must take into consideration the possibility that the leadership of the city did not accept these limitations upon themselves and expanded the realm of their activity beyond the limits established by the Sages. On the tension between the Sages and the leadership of the community and the town, see: Y. Baer, “The Foundations,” n. 2 above, esp. 8; I. Levine, *Rabbinic Class of Roman Palestine in Late Antiquity* (Jerusalem: Yad Ben Zvi, 1988) 167–76.
- 36 *b. B. Bat.* 8b–9a. This passage discusses two butchers who made an agreement between themselves to divide the market, according to which each one would work on a given day and the other would rest from his work on that day. When one of them violated the agreement, Rava refused to enforce the agreement, contrary to the principle established in the *Tosefta* according

The precedent that served as a source for this limitation concerns an agreement between two private individuals (i.e., a contract), but one may assume that the same restriction would apply to an agreement among the people of the city as a whole (i.e., legislation).³⁷ The Talmud thus subjugates the authority of the populace of the town to the supervision of the Sages – a rule that evidently reflects the status of the Sages in the Jewish community of Babylonia.³⁸ In terms of the history of Jewish law, this would become an important precedent for the supervision of community decisions by rabbis and legal authorities.

What is the method by which decisions should be accepted in the community according to talmudic law? Should they be accepted by a simple majority? It is well-known that the principle of majority decision was a central principle in talmudic law, based by the Sages upon the biblical verse, “You shall not tend after the many to do evil, nor shall you speak in a cause to tend after the many to wrest judgment” (Exod 23:2). According to its plain meaning, this verse expresses reservations regarding the decisions likely to be made by the majority and warns the judge not to follow the many if they are doing or judging wrongly. The Sages, however, based their interpretation upon a typical atomistic reading of the end of the verse, which says literally, “tend after the many.” Subsequently, these words became a slogan for majority rule or, more precisely, for making decisions by vote. This principle served the Sages in reaching legal decisions. When R. Akiva decided against R. Gamaliel, the head of the Sages of the time, he explained his decision in the words, “Rabbi, you have taught us, ‘to tend after the many.’ So even though you say thus, the ruling follows the words of the majority.”³⁹ This principle underlies the famous decision of the Sages in the incident of the Oven of Akhnai. In that case, R. Eliezer ben Hyrcanus disagreed with the other Sages regarding the purity or impurity of a certain

to which workmen are allowed to make agreements between themselves. The explanation for his ruling is given by his disciple, Rav Papa: “These things apply where there is no important person in the city, but when there is a distinguished person they do not have the power to make such conditions.” In the Middle Ages, there was some discussion as to precisely whom is considered “a distinguished person.” Is one speaking of a Sage or of a person holding public office, or perhaps a combination of the two qualities together? See Elon, *Jewish Law*, 607–14.

37 The Talmud does not restrict the requirement for “a distinguished person” to private agreements; it would therefore seem that this rule applies to decisions made by all the inhabitants of the city as well (as makes sense). In any event, most halakhic authorities thought that this approval was required for community edicts as well (Elon, *ibid.*).

38 The status of the halakhic Sages in the Jewish community of Babylonia seems to have been more strongly based and centralized than that in the land of Israel. See I. Gafni, *The Jews of Babylonia in the Talmudic Era* (Jerusalem: Shazar Center, 1991) 104–9 [Heb.]. For a discussion on the differences in the social status of the Sages in both centers, see R. Kalmin, *The Sage in Jewish Society of Late Antiquity* (London: Routledge, 1999).

39 *t. Ber.* 4:15; *t. Yoma.* 2:12 (both in the name of R. Akiva).

type of oven. R. Eliezer refused to accept the majority decision and invoked supernatural proofs against them. R. Joshua, the representative of the majority, opposed him, saying “It is not in Heaven” – that is, supernatural proofs are not admissible in a legal deliberation. Later Sages explained that the significance of this statement was that the only rule applicable in resolving a controversy is that of majority decision. The Jerusalem Talmud cites the words of R. Hanina: “Once the Torah was given, it was only given to be determined by the majority.” The *Bavli* cites the words of R. Zeira: “It is not in Heaven . . . for it was already written in the Torah given at Mt. Sinai, ‘after the many – even if they err.’”⁴⁰ In a later *midrash*, a more general formulation of this principle appears: “‘To tend after the majority’ – in a Sanhedrin that was divided regarding any of the laws, be it in matters of purity or impurity, in matters of civil law, or in matters of prohibited things – one follows the majority.”⁴¹ However, all these sources deal with the resolution of legal disputes by the court or within the academy of the Sages; not a single one of these sources deals with a decision made by the community in a public dispute.

We therefore return to our original questions of how decisions have been made in the community of the people of the city, as well as how they should be made according to tannaitic and talmudic law. In practice, we have no means of determining precisely how decisions were made within the community. The talmudic sources cannot provide a clear answer for that, and we don’t have any other external sources that can provide one. On the legal level, it is also difficult to arrive at any clear-cut answer on the basis of the sources quoted above. There are those who wished to infer the principle of majority rule from the ruling cited above, “The people of the city are allowed to enforce their decisions.” On the face of it, the permission granted to the people of the city to impose their decision upon those opposed to it indicates the authority held by the majority over the minority. But this is not a real proof. One may infer from this that the public had the authority to impose its decision upon an individual who refused to accept its authority, but this does not mean that the decision of the public was accepted by virtue of the majority. It could be that the decision of the people of the city was adopted by a small, limited leadership group alone.⁴² The *Yerushalmi* states that the leadership of the city represents all the people of

40 *y. Mo'ed Qat.* 3:1 (81d); *b.B. Metz'ia.* 59b.

41 *Midrash ha-Gadol*, ed. Mordechai Margalio (Jerusalem: Mosad Harav Kook, 1967) [Heb.]; *Mishpatim* 23:2; E.E. Urbach, *The Halakhah: Its Sources and Development* (Givatayim: Masada, 1984) 93–99 [Heb.].

42 For further interpretation, see the words of Rabbenu Tam mentioned below (in section 3). According to his approach, the original decision of the inhabitants of the city must be accepted unanimously, and coercion may only be applied towards one who was a participant in the agreement.

the city: “Three from the synagogue are like the synagogue, and seven of the people of the city are like the city” (*y. Meg.* 3:2 [74a]). According to this, there is no need for the approval of the majority; the decision of the leadership is sufficient. The context of the above relates to the authority to sell joint property, but the statement may have a broader application. According to the conjecture of historians, the leadership of the city had greater weight in the conduct of matters of the city than did the assembly of the people.⁴³ It is thus difficult to determine how decisions were arrived at in the city. More important for our purpose, nowhere in talmudic literature do we find a rule stating how decisions are to be made in a community. One may state at least that talmudic law did not apply the principle of majority to public matters in general or to the life of the city in particular.

To summarize: talmudic law saw the Rabbis and their court as the central body authorized to legislate and to determine norms on behalf of the public. It recognized also the authority of the people of the city but limited its extent to administering the internal life and commerce of the city alone. The community’s authority in matters of legislation was thus of a secondary and limited nature. The principle of the majority was only applied within the area of the rabbinic court and Academy and not within the realm of the community as such.⁴⁴

2. The Legislative Authority of the Public in the Middle Ages (Tenth to Eleventh Centuries)

During the Middle Ages, the legislative authority of the Jewish community was expanded far beyond that which had been recognized in talmudic law. Menachem Elon describes matters as follows: “From this point on, the legislative activity of the public (ציבור) extended to a very large portion of Jewish law, including: all branches of civil law, a significant part of public law . . . and various matters relating to criminal law.”⁴⁵ The question to be examined here is: what does the term “public” mean in this context? It seems clear that the term refers to the community as opposed to the Rabbis or the rabbinic court, but does it refer to the entire community or only to its leadership? One must remember that during the Middle Ages – in Franco-Germany (Ashkenaz) until about

⁴³ Z. Safrai, “The Community,” 243–46, 262–67.

⁴⁴ I would like to stress again that this summary reflects the normative viewpoint of the Sages and not necessarily the reality of the various communities in late antiquity. Most historians assume that in general communities were not led by the Rabbis (though there might be some exceptions. See Fraade’s conclusion, n. 20, above). If that is true, one may suppose that, in practice, local leaderships held more power than the Sages “allocated” them.

⁴⁵ Elon, *Jewish Law*, 682.

the twelfth century and in Spain even later – the Jewish community was ruled by a relatively small group of individuals and of families, who concentrated in their hands the social capital of wealth, pedigree, and learning. These families represented the community and acted in its name.⁴⁶ In this light, one must examine whether the authority granted to the “public” or the “community” applied to all members of the community or only to its oligarchic leadership. In order to do so, I shall reexamine the rulings of the earliest medieval Sages who established the authority of the community. These rulings have already been discussed in the scholarly literature, but most of the studies do not focus on this question. Indeed, from many studies, one may get the impression that decisions were taken by the members of the community in a kind of democratic way. I shall analyze these sources again, paying attention to the social structure and relationship reflected therein as well as to their legal reasoning. I shall demonstrate that the authority of the public spoken of therein is the authority of the communal leadership and not that of the public as a whole. These rulings relied upon the authority of the court and did not recognize any distinct authority on the part of the community or the public.

We shall begin with a ruling that originated in Babylonia in the early Middle Ages (seventh to tenth centuries). During that period, the organization of Jewish communities was characterized by a large degree of centralization. The communities scattered throughout the Middle East were subject to the influence and even domination of the two great centers in the land of Israel and Babylonia, within which there were well-developed and organized institutions of leadership.⁴⁷ Nevertheless, independent local communities with their own leadership existed under the aegis of these centralized institutions. The *geonim*, the heads of rabbinic academies of their time, who were one of the central organs of leadership, acknowledged the authority of the local rulers. A prominent example of this recognition of community authority appears in a responsum by R. Hanania Gaon (head of the academy in Pumbedita, tenth century). The Gaon was asked a question that arose in wake of an event involving a local in-

46 H.H. Ben-Sasson, *On Jewish History in Middle Ages* (Tel Aviv: Dvir, 1977) 84–89, 120; A. Grossman, “The Attitude of the Early Ashkenazic Sages Towards Communal Rule,” *Shenaton ha-Mishpat ha-Ivri*, 2 (1975) 175–99 [Heb.]; Y. Baer, *A History of the Jews in Christian Spain* (Tel Aviv: Am Oved, 1965) 53–56, 126–27 [Heb.].

47 In the land of Israel this was the *yeshivah*, which was originally located in Tiberias and thereafter in Jerusalem. In Babylonia, there was a more complex leadership, which included the Exilarch and the two venerable *yeshivot*, Sura and Pumbedita (which towards the end of the ninth century moved to Baghdad). R. Brody, *The Geonim of Babylonia*, 3–134; M. Ben Sasson, “The Self-Government of Jews in Muslim Countries During the 7th to 12th Centuries,” *Kehal Yisrael: Jewish Self-Rule Through the Ages*, II, ed. A. Grossman and Y. Kaplan (Jerusalem: Shazar Center, 2004) 11–55 [Heb.].

vasion: “A city had been conquered by gentiles and its inhabitants slaughtered by the sword and it was burnt by fire and plundered and destroyed, and they lost their *ketubot* [marriage contracts].... What is to be done regarding the *ketubot* of the members of this community?”⁴⁸ The practical question here is how to deal with lawsuits brought by wives against their husbands, based upon sums promised in marriage contracts, when the latter had been lost and it was impossible to ascertain the sums of money promised therein. The Gaon answered as follows:

The matter is to be corrected thus: the elders of the city should gather together and come to unanimous agreement, and make a law regarding the *ketubot* based upon what they knew to be the custom of the place: the wealthy according to his wealth, the poor one according to his poverty, and those in-between according to what they are, and each one will renew his *ketubah* according to the law they shall render.... And this is the rule: in every case involving the people of the city in which all of them agree and make a regulation and have resource thereto, they may force one another to that same thing, and the agreement of the elders is accepted among them and all the people of the state are included therein. As is said: “and whoever did not come within three days by order of the officials and the elders, all his property shall be forfeited, and he himself shall be banned from the congregation of the exiles” [Ezra 10:8]. And our Rabbis said: “The people of the city are allowed to regulate regarding prices and measurements and the wages of workers, they may enforce them” [*b. B. Bat.* 8b]. And all this is determined by vote of the elders. From these biblical verses and rabbinic traditions we infer that the elders of the city are allowed to enact edicts for the people of the city and to force the people of the city to perform that which has been enacted.

The Gaon thus suggests that the elders of the city gather together and make an edict fixing the value of the *ketubot* in accordance with the economic status of the parties involved and the accepted norms. He adds that this suggestion is based upon the general authority of the city elders to enact edicts for the welfare of the community and to force the people of the city to follow them.⁴⁹ The Gaon thus acknowledges the legislative authority of the city elders – that

48 *Teshuvot ha-Geonim Sha'arei Tzedek* (Salonica, n.p., 1792) 4.4.16 (brought also in B.M. Levine, *Otzar ha-Geonim: Ketubot* [Jerusalem, n.p., 1939], §162).

49 For a discussion of this responsum, see H.H. Ben-Sasson, “The Place of the Community-City in Jewish History,” in *Town and Community* (Historical Society of Israel: Jerusalem, 1968) 166–67 [Heb.]; A. Nahalon, *The Kahal and its Enactments in the Geonic Period* (Jerusalem, 2001) 13–17, 59–65 [Heb.].

is, of the community leadership.⁵⁰ He bases his ruling on two sources: 1) the verse from Ezra elucidating the authority of the elders and the princes, including the authority to confiscate the property of one who does not obey their instructions; and 2) the talmudic law establishing the authority of the people of the city to enact ordinances. The biblical verse with which the Gaon begins matches his tendency to grant legislative authority to the local leadership: the verse states the authority of the “princes and elders” to command the community and to confiscate the property of the one who refuses. From this, the Gaon concludes that every community leadership enjoys similar authority. It should also be mentioned that this verse serves in the Talmud as the source for the principle that defines the court’s authority with regard to civil law: “the court has the power to expropriate.” The Gaon, however, does not mention the talmudic interpretation but infers the principle of the authority of local leadership directly from Scripture, without the intermediacy of the courts’ authority.⁵¹ In any event, it seems clear that the verse conveys authority upon the leadership of the community alone. The second source used by the Gaon is the talmudic law that speaks of the people of the city. This law originally bore a popular, quasi-democratic nature and does not grant any special status to the leaders of the city. Hence the Gaon must state explicitly: “and all this is determined by vote of the elders.” This ruling exemplifies well the nature of the community in his day and the significance of recognizing its power. The community is headed by the elders, and everything is done by their word.⁵² Legislative authority is given to the elders of the city alone, and there is no indication that the other members of the community need to agree with their decisions. Even rhetorically, the Gaon does not require the agreement of the public, nor indeed does he even mention it.

From the tenth century on, independent Jewish communities began to develop which were no longer subject to the rule of the large centers in *Eretz*

50 On the “elders” (זקנים), see H.H. Ben-Sasson, s.v. “Elder,” *EncJud* 6 (Jerusalem, 1971) 580–81.

51 This is implied by his language at the end of the responsum, in which he summarizes his words by saying that they are based upon “biblical verses and Rabbinic traditions” (מקראות ושמורות). It would therefore seem that the “biblical verses” refer to those quoted from Ezra (with no reference to the talmudic principle about the court), while “Rabbinic traditions” refers to the law of the people of the city (compare Elon, *Jewish Law*, 686).

52 A similar approach is implied by other sources of the period. In all of these, the elders of the city are seen as those who represent the public and make decisions on its behalf. See throughout Nahalon’s study (n. 49 above), especially pages 81–92. Additional sources for the status of the elders appear in R. Judah Bargeloni’s *Sefer ha-Shetarot* (Berlin, 1908). While this book is post-geonic, it preserves formulae of documents from the geonic period. Among these are a group of documents dealing with various public matters, referred to as documents of the elders (שטרות זקנים), which document the unique status of the leadership. See Y. Kaplan, “Authority and Status of Public Leaders in the Medieval Jewish Community,” *Dinei Israel* 18 (1995–96) 263–65 [Heb.].

Yisrael or in Babylonia. The leaderships of these communities were called upon to decide on various matters that came before them, and the halakhic Sages were asked about the validity of these decisions. The main discussions regarding this matter appear in the realm of Franco-German culture.⁵³ During the second half of the tenth century, R. Meshullam ben Kalonymus (from Lucca in Italy) was asked about the validity of the decision of the “heads of the community” to impose a fine greater than usual upon a certain person who had caused damage to his neighbor. He responded that the heads of the community have the authority to do so by virtue of the talmudic principle that “The court has the power to expropriate”: that is to say, the authority of the community’s leadership derives from that of the court.⁵⁴ In this context, relying upon the authority of the court seems quite natural, as one is speaking of a judicial decision made by the leaders of the community. However, the use of this principle was not limited to judicial decisions but also served as an element in other decisions of the community. Rabbenu Gershom Me’or Ha-Golah (Germany, tenth–eleventh century) was asked to examine the validity of a certain community decision in the civil realm: a ship owned by Jewish merchants containing a great deal of merchandise had sunk in the river.⁵⁵ The inhabitants of the area, Jews and non-Jews, made efforts to find the lost property and to take possession of it. At a gathering of Jews who had assembled at the place, it was decided that “whoever takes hold of anything that was lost on this ship must return it to the owners.” It became clear, however, that this innocent decision by the community was opposed to talmudic law. One of the Jews, referred to in the responsum as Shimon, bought gold that had been dredged from the river by some gentiles and refused to return it to the merchant who had lost it, referred to as Reuven, justifying his refusal on the talmudic law that “a lost item that was swept away by a river is permitted” – that is, as the owners had relinquished hope of recovering it, the one finding it may take possession. Rabbenu Gershom responded as follows: “As the community there made an edict that whoever takes hold of anything that was lost in that occasion must return it to its owners, Shimon must return it to Reuven, even though under

53 A. Grossman, “The Attitude of the Early Ashkenazic Sages towards Communal Rule,” [Heb.]; for a methodological and textual discussion of these responsa, see H. Soloveitchik, *The Use of Responsa as Historical Source* (Jerusalem: Shazar Center, 1991) [Heb.].

54 *Teshuvot Geonim Kadmonim*, §125. On R. Meshullam, see A. Grossman, *The Early Sages of Ashkenaz* (Jerusalem: Magnes Press, The Hebrew University, 1981) 49–78 [Heb.]; Soloveitchik, *The Use of Responsa*, 28–45.

55 This responsum appears in *Teshuvot Hakhmei Tzarfat ve-Lutir*, §97; *Mordechai, Bava Metzi’a*, §257; S. Eidelberg, *Teshuvot Rabbenu Gershom Me’or ha-Golah* (New York: n.p., 1956) 158. The quotation below is taken from *Teshuvot Hakhmei Tzarfat ve-Lutir*, which is the best source. For a textual discussion, see Soloveitchik, *The Use of Responsa*, 46–53.

Torah law it is rightfully his, as the court has the power to expropriate.” That is, the decision by the community even overrules Torah law, being considered a valid court decision, and “the court has the power to expropriate.”⁵⁶ Rabbenu Gershom does not elaborate the exact identity of the “public” that made this edict, but the reference to the principle of judicial authority suggests that one is speaking here of the leadership of the community, as was common at that time. Further on in the responsum, Rabbenu Gershom emphasizes that the court’s authority to allocate a person’s property is not restricted to a prominent court “such as that of Shammai and Hillel” but applies to every court. To this end, he quotes a talmudic passage (*baraita*): “Why were not the names of the elders not stated explicitly in the Torah?⁵⁷ So that a person will not say: So-and-so is like Eldad and Medad, so-and-so is like Nadav and Avihu . . . [to teach you that even the lightest of the light (i.e., the least distinguished person)], once he has been appointed as a leader [*parnas*] over the community, is like the noblest of people.”⁵⁸ This source implies that an individual’s authority is determined *ex officio*, “by virtue of his office,” and does not depend upon his personal merits or greatness. There are those scholars who think that these remarks of Rabbenu Gershom are intended to bolster the authority of those individuals who are not learned. But even if this is true, it refers to people who fulfill the function of *parnasim* (public office-holders) and not to the public as a whole. The main point to be emphasized is that Rabbenu Gershom does not mention any need for general agreement of the public; hence, it does not seem that this ruling implies recognition of the authority of the public in general but only that of the communal leadership.

An extensive discussion regarding the legislative authority of the community appears in a responsum of R. Joseph Tov-Elem (early eleventh century).⁵⁹ A certain community, referred to in his responsum as “Tiberias,” had decided

56 Rabbenu Gershom offers an additional reason, based upon the decision of the local ruler and the halakhic principle that “the law of the king is the law.” As the ruler had decided that one must return the lost object, then according to their laws the gentile who had taken the gold and sold it to Shimon is considered a thief, while Shimon, who bought it from the thief, cannot retain the lost item but is required to return it to its owner.

57 This question alludes to Exod 24:1: “And to Moses He said: ‘Go up to the Lord, you and Aaron, Nadab and Abihu, and seventy of the elders of Israel, and worship from afar . . .’”

58 *b. Rosh. Hash. 25a–b* (and cf. *t. Rosh. Hash. 1:18* [Lieberman Edition, p. 311]). The quotation is truncated, and I have added only that which is necessary to understand it. H. Soloveitchik, in *Responsa as Historical Source* raises the possibility that the quotation was truncated by R. Gershom himself, so as not to compare the leaders of his community to “Jephthah in his generation” or to “the lightest of the light.”

59 This responsum appears in *Teshuvot Maharam ben Barukh* (ed. Lvov, §423). For a discussion of this responsum of R. Joseph Tov-Elem and other matters, see Soloveitchik, *The Use of Responsa*, 66–86.

upon a particular means of collecting the communal taxes intended for “the portion of the king.” Trustees were appointed to determine the amount to be paid by each individual, as well as beadles (*gabbaim*) to collect the sum that had been determined. The decision of the community was enforced by the use of the ban and of fines, as was customary. Most members of the community accepted the decision upon themselves, but there were two individuals who refused to obey the decision and appealed to a neighboring community, referred to in the responsum as “Sepphoris,” for support. The latter agreed to repeal the ban that had been imposed upon those who violated the edict. The question addressed to R. Joseph Tov-Elem contained two parts: 1) Does the community have the authority to impose regulations upon members of the community? 2) Can another community override the decision of the first one? He responds: “If matters are as you have described them, it seems to me that, as the community has appointed trustees and made edicts upon the advice of experts and with their agreement, no [other] community has the authority to violate or to nullify [their decision], neither on the basis of numbers [i.e., their being more numerous] nor because of [the power of] leniency.”⁶⁰ R. Joseph Tov-Elem thus validates the original decision of the local community and its autonomy. He states that a second community cannot involve itself and negate the decisions made by another one, even if the latter is larger. R. Joseph Tov-Elem also bases his decision on the authority of the court. In this connection, he mentions two principles: 1) “The court has the power to expropriate,” related to the area of monetary law, and 2) “The court may punish and give stripes, even not based upon Torah law,” from the area of criminal law. But in addition to these he also mentions the *halakhah* relating to the people of the city: “The people of the city are allowed to make conditions related to measurements and prices and the wages of workers, and to enforce them.” This addition was intended to respond to the unique circumstances of this question. From the wording of the question asked of R. Joseph Tov-Elem, it is implied that the people of the community of Sepphoris recognized the legitimacy of the decision of the people of Tiberias, which they saw as an edict that had been issued by a court. However, they thought that they had the power to nullify this decision by means of an opposing decision by another court.⁶¹ The unique challenge facing R. Joseph

60 לא משום ריבוי ולא משום מחירין. These points allude to the talmudic principle that, “A court cannot nullify the words of its fellow court unless it is greater than it in wisdom and in number” (*m. Ed.* 1:5). By this, he alludes to the idea that the neighboring community (“Sepphoris”) saw itself as greater than the other in both wisdom and number. This is a further expression of the analogy between communal leadership and the rabbinic court.

61 The people of Sepphoris based their position upon the biblical verse, “When the trumpet sounds a long blast they shall come up the mountain” (Exod 19:13). This verse is used in the Talmud as a source for the principle that “Everything which is determined by voting [i.e. legislation] requires

Tov-Elem lay, therefore, not in establishing the authority to decide as such, but rather in protecting the autonomy of the first city and protecting it from nullification. The use of the law of the people of the city was intended to protect the independence of the people of the city, implying that they have autonomous authority and that they alone are entitled to make various regulations in their own realm; no other entity has the right to be involved in their decision.⁶²

The picture that emerges from these responsa is clear: the halakhic Sages of the tenth and eleventh centuries acknowledged the legislative authority of the leaders of the community and based their authority upon that of the court. Scholars have raised questions as to why they followed this approach. If one is speaking of the authority of the “public,” why didn’t they rely upon the law of the people of the city, which is seemingly more appropriate to this matter? Haym Soloveitchik noted this issue and stated that, “We are standing here before a unified and widespread tradition in which the rule of the community is based upon the authority of the court. . . . It is impossible for us to determine the sources of this tradition.”⁶³ Menachem Elon justified it by arguing the legal advantage, which the court has over the people of the city: the court’s authority is wider, and it is able, among other things, to introduce edicts that are opposed to Torah law.⁶⁴ Elon’s words seem to imply that this was a calculated move on the part of the Sages intended to expand the legislative authority of the community. He seems to have thought that one was speaking here about communal decisions that were accepted by a majority and that, by means of certain formal legal procedures, the Sages conveyed upon these decisions the preferred status of a court decision. However, there is no sign in any of these responsa that the decisions were in fact accepted by the community as a whole or by a majority thereof. In several cases, it states explicitly that the decision was accepted by ראשי הקהל (heads of the community) or by the נאמנים (trustees). These responsa are therefore concerned with the status of the decisions

another vote to nullify it” (*b. Betzah* 5a–b). That is, a legislative act of a court is not automatically nullified, but requires other, separate legislation in order to nullify it. It follows from this that the people of Sepphoris recognized the validity of the decision of Tiberias; however, they thought it possible to nullify it using the same principles as used to nullify decisions of a court.

62 In this connection, R. Joseph Tov-Elem draws a distinction between legislation of the court pertaining to “forbidden and permitted [things]” – that is, the strictly religious realm – and that pertaining to public matters: “But those things regarding which the public makes a regulation [תקנה] among themselves, another court is unable to nullify.”

63 *Responsa as Historical Source*, 104.

64 M. Elon, “Authority and Power in the Jewish Community,” *Shenaton ha-Mishpat ha-Ivri*, 3–4 (1976–77) 16–17. Yaakov Blidstein added to this the symbolic burden carried by the court as a deeply rooted Jewish institution, as opposed to the concept of the “people of the city,” representing the Hellenistic ideal. See G. Blidstein, “Individual and Community in the Middle-Ages,” in *Kinship and Consent*, 252–53 [Hebrew; also available in English].

made by the leaders of the community and not by the public as a whole. The comparison that these Sages draw to the court refers to decisions of the community leaders and not to those of the community as a whole. Hence, these sources ought not to be seen as drawing a comparison of the community as a whole to the court but rather of its leadership alone.⁶⁵ The comparison to the court may be better understood if we take into account the fact, which emerges from several different sources, that Sages were generally among the leaders of the community during that time.⁶⁶ This reality follows clearly from the *Responsa of Rashi* (Rabbi Shlomo Yitzchaki), the greatest commentator of the Torah and the Talmud (France, eleventh century). Rashi was asked about the validity of an oath taken by someone not to carry out a communal edict. It seems that one of the means used by individuals to avoid obedience to the decisions of the community was an oath not to fulfill a particular public edict. As the fulfillment of an oath was a strict religious obligation, people thought that they could use such an oath to refrain from the obligation of obeying the edict. Rashi decisively answered that whoever takes an oath not to fulfill a public edict is comparable to one who takes an oath to nullify any commandment of the Torah, and his oath is null and void.⁶⁷ He explains this ruling on the basis of the principle, “incline your ear and hear the words of the wise” (Prov 22:17), from which it follows clearly that the Sages made edicts for the “public.” If the Sages are the leaders of the public and issue an edict, it is natural to base their authority as leaders upon that of the court.⁶⁸

To summarize, the use of principles related to the authority of the court does not necessarily indicate recognition of the authority of the public as a category

65 This, as opposed to the position of such scholars as Irving Agus (“Democracy in the Communities of the Early Middle Ages,” 163–65) and Menachem Elon (“Authority and Power”). A certain comparison between the public and the court appears in the thirteenth century in the language used by Rashba (R. Solomon ben Adret), but he compares the public to any authoritative public factor – to the king, to the *Nasi*, and to the Great Court (see the sources brought by Elon, *ibid.*). To the best of my knowledge, an explicit comparison of the community to the court only appears in the sixteenth century, in the ruling of R. Eliyahu Mizrahi (*Teshuvot R. Eliyahu Mizrahi*, §53).

66 H.H. Ben-Sasson, *On Jewish History in the Middle Ages*, 84–91 [Heb.]; Grossman, *The Early Sages of Ashkenaz*, 18–23; Grossman, “The Attitude of the Ashkenazic Sages,” 192–93; Blidstein, “Individual and Public”; Y. Handelsman, “Ravyah’s Views on the Ways of Communal Leadership and their Place in the Development of Public Thought of Ashkenazic Sages in the Middle Ages,” *Zion* 48 (1983) 21–54, especially pages 30–36. While Grossman takes exception to this generalization and thinks that the Sages did not fulfill leadership functions in all the communities, even according to his approach this was certainly the dominant reality.

67 *Teshuvot Rashi*, §247 (ed. Alfenbein, 288–89). This is a hybrid text, which combines several responsa. See the analysis by Soloveitchik, *Responsa as Historical Source*, 107–24. For a discussion of this responsum, cf. Grossman, “The Attitude of the Ashkenazic Sages.”

68 Handelsman took note of this: “Ravyah’s Views,” 30–36.

in its own right. To the contrary, it suggests that the essential understanding remained as it had been and that the principle legislative authority remained in the hands of the Sages. The main development that occurred during this period relates to the decentralization of authority. Whereas during the talmudic period authority over the public was concentrated within one central body (at least theoretically, from jurisprudential point of view), in the Middle Ages it was transferred to the local community. Grounding the authority of the local community upon that of the court suited the hierarchical social structure that was accepted in the communities during that time, particularly the involvement of the Sages in the leadership of the community. As we shall see below, the leadership structure of the community changed during the waning of the Middle Ages, particularly during the course of the thirteenth century. In wake of this, the halakhic sources also presented a different understanding of community authority.

3. The Development of the Principle of Majority Rule

As we have seen, the principle of majority decision is a central one in the world of the talmudic Sages. Talmudic law, however, did not apply the principle of majority rule to public disputes but used it only in the rabbinic court and Academy. In light of this, scholars disagree regarding the question as to when the principle of majority was accepted in public life and what its source was. The historian Yitzhak Baer argued that this principle did not become widely accepted in Jewish communities until the thirteenth century, under the influence of European law. The Germanic system, which had until that time been dominant, did not recognize the principle of majority decision. According to that system, public decisions needed to be accepted by general and unanimous agreement, attained only after lengthy negotiation and, on occasion, under pressure. Against that, already in antiquity the Roman system of law recognized the principle of majority decision in public bodies. With the revival of Roman law in Europe during the twelfth century and its acceptance in the cities of Europe during the course of the thirteenth century, the Franco-German Sages were exposed to the principle of majority rule, which they adopted. Baer summarizes matters as follows: "In principle, the Jewish Sages learned this doctrine from their Christian juristic and canonic colleagues and not from the Talmudic tradition."⁶⁹ Many historians questioned this approach. Their main argument is that the majority principle is deeply rooted in the talmudic tradition, such that the Jewish Sages did not need to learn it from Christian schoolmen. In

69 Y. Baer, "The Foundations," 38, and, in his wake, H.H. Ben-Sasson, *On Jewish History in the Middle Ages*, 116–17.

their view, the application of the principle of majority rule to public matters was the result of an internal Jewish development that already occurred prior to the thirteenth century. This position has been held by, among others, Irving Agus, Menachem Elon, Avraham Grossman and Haym Soloveitchik, who cited evidence in support of this position from various sources in which the principle of majority rule was already applied to communal matters prior to the thirteenth century and even outside of the European cultural orb.⁷⁰ Following the proofs brought in support of this position by Grossman and Soloveitchik, it seemed that the scales were tipped in their favor. However, more recently, Yehiel Kaplan reopened this issue and argued anew on behalf of Baer's position. He showed that, notwithstanding references to the majority principle in ancient sources, it was not used in the concrete sense prior to the thirteenth century. He likewise tends to explain the change that took place during this period in terms of the influence of Roman and canon law, with a certain refining in his description of the manner of its influence (rather than direct influence, indirect or perhaps unconscious influence).⁷¹

While this controversy is of course pertinent to our subject, it does not by itself resolve the question of majority rule and the democratic nature of community government. As noted in the introduction to this paper, the principle of majority rule in and of itself does not necessarily imply true democracy. More important is the question of to whom this principle is applied. Even if we accept the position that the principle of majority rule was already operative from the early Middle Ages, this does not mean that it was applied within a representative body of all members of the community. If it was implemented, for example, only among the community oligarchy, it simply reflects an oligarchic system of rule. The decisive question, thus, is this: what was the extent of the circle from within which the majority was counted? In this section, I shall trace the development of the principle of majority, noting its adoption as a principle of decision in public matters, test the manner of its application, and discuss the extent to which the principle of the majority reflected participation of members of the community in the decision-making process.

The *geonim*, continuing the talmudic tradition, did not apply the principle of majority in public matters.⁷² They recognized the unique status of the leadership

70 I. Agus, *Rabbi Meir of Rothenburg* 85; Elon, *Jewish Law*, 715; Grossman, "The Attitude of the Ashkenazic Sages"; Soloveitchik, *Responsa*, 102–5.

71 Y. Kaplan, "Majority and Minority in Decisions of Jewish Communities in the Middle Ages," *Shenaton ha-Mishpat ha-Ivri* 20 (1995–1997) 213–80. (In a later article, Grossman accepted in part Kaplan's argument. See A. Grossman, "The Jewish Community in Ashkenaz During the Tenth and Eleventh Centuries," *Kahal Yisrael* 2 [Jerusalem: Shazar Center, 2004] 69–71).

72 See A. Nahalon, *The Kahal and its Enactments*. In all the edicts cited in this book, no mention is made of the principle of majority rule.

of the city and did not grant any special standing to the public as a whole. As we noted earlier, Rav Hanania Gaon gave the authority to issue edicts to “the elders of the city” and did not even mention the need for agreement of the rest of the members of the community. A similar position is implied by the writings of the early Spanish Sages who, generally speaking, continued the geonic tradition. In R. Judah Bargeloni’s *Book of Documents* (*Sefer Ha-Shetarot*; Spain, eleventh–twelfth century), there are a number of documents pertaining to the running of the community, from which it follows that the leadership of the community is given over to the “elders,” without any mention of decisions of the public per se.⁷³ Similarly, Rav Yitzhak Alfasi (“the Rif” – North Africa, eleventh century) continues the geonic tradition, granting a special status to the elders of the community. In a responsum dealing with the community’s punitive authority, R. Alfasi stated that the authority to introduce preventive measures around the Torah is granted to “the judge of the city and the elders of his community,” based upon the talmudic principle that “the court may administer corporal punishment and other sanctions not found in the Torah.”⁷⁴ Interestingly, in one of his responsa R. Alfasi does mention the principle of majority rule. I refer to a brief responsum that delineates the method to be followed in introducing a new edict: “The gist of the practice followed is that the majority of the community take counsel with the elders of the community and make whatever edict they make, and sustain this custom.”⁷⁵ The “elders of the community” generally refers to the leadership of the community, while “the majority of the community” indicates a wider stratum of householders who constitute or represent the majority of the community. It follows from R. Alfasi’s words that the authority to introduce a new edict is given to the majority of the community and that, in any event, it depends upon their agreement.⁷⁶ Offhand, Alfasi’s responsum seems to express the principle of majority decision – and indeed, it is interpreted as such by several scholars.⁷⁷ However, this brief responsum does not provide many details, making it difficult to determine the nature of the majority referred to. Who was included within “the majority of

73 R. Judah Bargeloni, *Sefer Ha-Shetarot* (Berlin, n.p. 1904) 131–38.

74 *Teshuvot ha-Rif* §36, ed. Leiter (Pittsburgh, 1954). See Kaplan’s discussion in “Majority and Minority,” 232.

75 *Teshuvot ha-Rif* §13.

76 Y. Kaplan, “Majority and Minority,” thinks that the body making the regulations is the elders, as accepted in geonic literature. However, it would appear from Alfasi’s language that the authority is given to the majority of the community, who are the subject of the sentence and to whom the verb יתקנו (they will institute) refers. In any event, it is clear that the edict depends upon agreement of the majority.

77 See, e.g., Elon, *Jewish Law*, 715. This responsum supports the view that the principle of the majority was already recognized prior to the thirteenth century, even outside of Europe.

the community?” Does this denote a numerical majority of all members of the community, or perhaps of only one group from within them? And how did the majority express their agreement to the matter? Was a vote taken? If not, who acted in the name of the majority? These questions are sharpened in light of the geonic tradition, which was continued by R. Alfasi and which finds expression, against the background of his approach, in other sources. It is difficult to conclude from the above-mentioned responsum that he intended to take the power away from the elders and give it to a numerical majority of all members of the community. As we shall see below, on occasion the expression “majority of the community” is used in a rhetorical sense, referring in practice to only a small group within the community. It seems reasonable to assume that the term “majority of the community” as used in this responsum does not refer to a numerical majority of the entire community but only to a group within it that supported the community leadership. But the background of the talmudic approach and the geonic tradition notwithstanding, R. Alfasi’s responsum constitutes an initial testimony to the use of the concept of the majority (if only in a rhetorical sense) regarding communal matters.

During this period, more detailed discussions of the manner in which decisions were made in the community appear specifically within the Franco-German cultural sphere. As observed in the previous section, European legal authorities discussed the issue of the authority of the community leadership during the tenth and eleventh centuries. However, the majority principle was not mentioned in these responsa, so it seems that the decisions discussed there were made by a limited leadership. The majority principle is explicitly mentioned for the first time in a responsum written by two of the Sages of Mainz (Mayence) during the eleventh century: R. Judah ha-Cohen and R. Eleazar b. R. Yitzhak.⁷⁸ These two authors state explicitly that in decisions of the community one must follow the majority, and the majority is permitted to impose its position upon the minority. This responsum lay at the center of the scholarly dispute mentioned earlier: Agus fixed its date as the eleventh century, whereas Baer argued that it was from the thirteenth century, until Avraham Grossman brought convincing proof that this responsum was from the two above-mentioned eleventh-century Sages.⁷⁹ On the face of it, this resolved the dispute, as we have an extant source applying the principle of majority rule in communal decisions already in the eleventh century. However, one needs to carefully examine the contents of this responsum and the extent to which

78 *Kolbo* (Medieval halakhic collection, unknown author), article 142. For a textual discussion of this responsum, see Soloveitchik, *Responsa as Historical Source*, 87–106.

79 Agus, “Democracy in the Communities of the Early Middle Ages,” 153–76; Baer, “The Foundations”; Grossman, “The Attitude”; Soloveitchik, *Responsa as Historical Source*.

it in fact supports the principle of majority rule and the kind of communal government reflected therein.

In wake of an incident that took place in the city of Troyes, the people presented a series of questions to the Sages of Mainz, including the following: 1) “Are the people of the city permitted to make an edict upon some members of the community and to impose regulations upon them?” and 2) “Are we required to ask each and every individual if he agrees with our will and opinion?” The inquirers explained the background to the second question by noting that, generally speaking, most of the members of the community accepted the decisions of the leadership. The question is thus whether the leadership of the city is allowed to rely upon this presumption or whether they need the explicit consent of all the inhabitants of the city. The respondents began by answering the first question, concerning which they drew a distinction between decisions relating to the enforcement of Torah laws and those relating to “optional matters” – that is, the running of communal life *per se*. Regarding the former, they stated that every Jewish community has the authority to impose the laws of the Torah upon all individuals therein and that this includes the authority of the majority to impose upon the minority.⁸⁰ They then turn to the second subject, which was essentially the point of the query. They state there that the community’s authority also extends to public matters, which are not in the realm of Torah law: “And not only regarding a matter in which one needs to make a protective edict or fence to the Torah, but even regarding optional matters, such as taxes and other regulations that the community makes for itself, the individual cannot exclude himself from their regulations.” The authors of the responsum base the community’s authority regarding “optional matters” upon the law of the people of the city, which deals with public matters. From this law the respondents infer that “the people of the city are allowed to impose edicts upon some of the members of their community and to force regulations upon them.” That is, there is no need for total consensus within the community; rather, the majority is allowed

80 The authors of this responsum base this essential authority on a series of biblical sources concerning the public’s responsibility to uphold the words of the Torah and their authority to take sanctions against individuals who do not do so. Among these sources one should particularly mention the two following verses: “Whoever does not come for the three days at the advice of the princes and the elders, all of his property shall be banned” (Ezra 10:8), and “These are the inheritances which were inherited by Eleazar the priest and Yehoshua ben Nun and the heads of the fathers” (Josh 19:51). These two verses serve in the Talmud as a source for the authority of the court and for the principle of הפקר בית דין הפקר (expropriation of the court is valid), *b. Yevam. 89b* and parallels. However, our authors do not mention this matter, and it would seem that they wish to infer the authority of the leadership directly. Further on in this responsum they argue that the authority of the communal leadership is even greater than that of the court, as it cannot be disqualified even in case of hostility or competition (as opposed to the court, which may be declared invalid in the case of an argument of this type).

to impose its view upon the minority. But regarding the second question, how precisely to count this majority, our respondents state that there is no need to ask the opinion of each and every individual. The community's leadership is entitled to rely upon experience, which shows that the ordinary people accept the view of the distinguished members of the community. This obedience, as testified to by the interlocutors, is not only a fact but an obligation: "It is the law that the small ones listen to the great ones regarding whatever edicts they make upon them." It is fitting that the ordinary folk accept the edicts of the important members of the community; hence there is no need to even examine this; it may be assumed by the communal leadership (alternatively: it may be taken as a working assumption by the communal leadership).

While this responsum states the principle of majority rule as a legitimate basis for activity within the community, alongside that it presents another principle, namely, that "the small ones listen to the great ones." To the contemporary reader, these two principles seem to contradict one another; however, from a medieval viewpoint, the two principles were perfectly consistent. The reality described by both inquirers and respondents is one in which the community was ruled by an unchallenged oligarchy. In such a situation, most members of the community accepted the leadership's decisions and gave them a legitimate basis. Nevertheless, our respondents go on to examine a hypothetical case in which the "little ones" (i.e., the ordinary householders) refuse to accept the opinion of the "great ones" (i.e., the designated leadership) and even succeed in creating a majority against them. In such a situation there would be a frontal confrontation between the two operative principles. According to the authors of this responsum, in such a case the ordinary members of the community would be obligated to accept the position of the leaders: "Even though the small ones were more numerous than the great ones, the law requires them to listen to the elders and the great ones, for we find it stated in a number of places that the Omnipresent One [i.e., God] gave honor to the elders and the great ones." In other words, our respondents give priority to the principle of oligarchy over that of majority rule. If we needed proof that the principle of majority rule does not necessarily imply a democratic regime as we know it, we have it here.

Nevertheless, one oughtn't ignore the innovation implicit in this responsum in comparison to those we saw earlier from the tenth and early eleventh centuries. In the earlier response, leadership authority derived from the authority of the court. The public's duty to obey was based upon the obligation to follow all and any decisions of the court. By contrast, in the present responsum, their authority is based upon the authority of the people of the city and the agreement of the majority. Even if one is dealing with rhetoric, or with a legal fiction, the approach expressed here is that the legitimacy of the actions and decisions of the leadership is based upon the public and the consent of the majority. In

this respect, one may see in these things a quasi-democratic theory, even if in practice the reality was oligarchic.

The combination of oligarchic rule and majority rule is expressed in numerous other sources from the tenth to the twelfth centuries. These sources state that community decisions must be accepted by the majority within a given important group within the community. This group is referred to by various terms, such as מהווגים (the decent ones), טובים (the good ones), חשובים (the important ones), and גדולים (the great ones).⁸¹ A communal edict attributed to Rabbenu Gershom Me'or ha-Golah (Ragma"n) states the following:

If the people of the city make an edict on behalf of the poor, or other edicts, and the majority from the מהווגים [decent ones] accept this matter, the others are not allowed to cancel the edict and to say "We shall go to court over this," because the court is not allowed to side on this, for everything depends upon the perceptions of the "good men of the city," for such was the custom of our predecessors of old.⁸²

The attribution of this edict to R. Gershom (tenth century) is doubtful, and it is difficult to determine its exact date. There are some scholars who place it as late as the twelfth century.⁸³ In any event, the edict states that communal regulations need to be accepted by the agreement of the majority of "the decent ones."⁸⁴ This term refers to the leadership level of the community – composed of people of good family, wealth, and scholarship, similar to "the great ones" mentioned in the earlier responsum of R. Yitzhak ha-Cohen and R. Eleazar Ben-Yitzhak – and is similar to the "important people" and the "good ones" mentioned elsewhere. All these terms allude to an oligarchy that dominated the community by virtue of their status, without having been elected to their position in any official way. The principle of majority mentioned in all these

81 Handelsman, "Ravyah's Views."

82 Meir ben Baruch שעייר תשובות מהר"ם בן ברוך (Berlin: Bloch 1891), §140; *Teshuvot Maharam* (Prague: n.p., 2008), §153. The various formulae are brought by L. Finkelstein, *Jewish Self-Government*, 121.

83 On the attribution of this edict to Rabbenu Gershom Me'or ha-Golah, see Finkelstein, *ibid.*, 111–17. S. Eidelberg, *Teshuvot Ragma"n* 23, questioned its attribution to Rabbenu Gershom, as he is not mentioned in the Ashkenazic sources until the thirteenth century. Baer, "The Foundations," 37, thinks that this regulation belongs to a series of regulations from the twelfth century; Grossman, "The Attitude," 185, supports Baer's view, citing in proof the fact that the edict is not mentioned by Rabbenu Gershom's disciples, R. Judah ha-Cohen or R. Eleazar b. R. Yitzhak. But in his book *Early Sages of Ashkenaz*, 141–42, he returned to his earlier view that the edict is ancient even if it is not necessarily from Rabbenu Gershom. Cf. Kaplan, "Authority and Status," 268, n. 70.

84 Y. Baer, "The Foundations," 61–63, drew a parallel between this formula and that of the 1215 regulation pertaining to the election of the Pope: *maior vel sanior pars*.

sources was therefore applied within the community's oligarchy and not among the members of the community at large.

During the course of the twelfth and thirteenth centuries, there was a lively debate conducted among the halakhic Sages regarding the principle of majority decision. The best-known challenge to majority rule came from R. Yaakov Tam, the greatest French scholar of the twelfth century. Rabbenu Tam said that the majority of the public are not allowed to impose their opinion upon individuals who are opposed to it if it affects the rights of the latter. In his opinion, any decision that affects others must be acceptable to those whose rights will be affected in the future. Rabbenu Tam was familiar with the talmudic sources upon which the other halakhic authorities based the authority of the community and offered his own interpretation thereof: 1) The law of the people of the city, authorizing the people of the city to enforce their decisions, applies in his opinion only to those cases in which everyone agreed to the matter from the onset: "For when we say that 'the people of the city are allowed to enforce their decision,' this means that they are permitted to seize the money of a person who violates the assessment which had been imposed and agreed upon by all, where he had agreed when the regulation was initially adopted, but which he now violates."⁸⁵ One is not speaking here of imposition by the majority upon a minority or upon individuals who are opposed to the decision, but rather of the enforcement of a decision in whose adoption all had participated, and in which someone now attempts to shake off the obligation that he had taken upon himself. Elsewhere, he says as follows: "The phrase 'they are permitted' refers to 'moving about,' meaning that they had already made a condition among themselves; but if they did not make a condition from the onset, the people of the city do not have the power to force one of the people of the city to do what they will."⁸⁶ Thus, the law of the people of the city does not authorize the majority to impose its decisions upon individuals who had not originally agreed to them. 2) As to relying upon the power of the court to seize money based on the rule that "the court has the power to expropriate," Rabbenu Tam thought that this authority was only granted to the Great Court in each generation, one comparable to the Court of Rav Ami and Rav Asi (the leading Sages in the land of Israel during the third century), but that other courts and the community leadership cannot appropriate such authority: "For when we say 'the court has

85 *Mordechai, Bava Qamma*, §179.

86 *Mordechai, Bava Batra*, §480. For a survey and discussion of all of those sources in which Rabbenu Tam expressed his view, see Y. Kaplan, "Decision-Making in the Jewish Communities According to Rabbenu Tam – Theory and Practice," *Zion* 60 (1995) 277–99, and E. Kanarfogel, "Unanimity, Majority, and Communal Government in Ashkenaz During the High Middle Ages: A Reassessment," *American Academy for Jewish Research* 38 (1992) 79–106.

the power to expropriate' – this refers to the likes of the Court of Rav Ami and Rav Asi, who were authorized to confiscate money" (ibid.).⁸⁷ Thus, Rabbenu Tam questioned the public's power to nullify the rights of individuals, whether by virtue of majority decision or by a court decision. The implication of Rabbenu Tam's position, in practice, is that decisions of the community must be accepted unanimously, with full agreement.⁸⁸

Whether Rabbenu Tam's position was formulated under the influence of the Germanic legal system or whether it was based upon his own original thinking, it requires some explanation. It seems that, underlying his rejection of the principle of majority rule and the coercive authority of the public, there is a different concept of the nature of community. Most medieval Jewish Sages conceived the community as a corporation and hence recognized the authority of the majority to impose its will upon the minority. As mentioned earlier, a similar position was held by Roman law, which stated that in public bodies and corporations decisions were to be made on the basis of the majority. Rabbenu Tam rejected this view of the community, which he saw as an assembly of individuals among whom there were relations of partnership. Partnerships are treated according to the principles of private law and cannot make decisions that affect the rights of one of the partners except with the agreement of all. Hence, the public is only allowed to make decisions unanimously.⁸⁹ This approach clearly imposes numerous practical difficulties, as it grants each member of the community the right to veto the majority decision. And indeed, the impressive stature and influence of Rabbenu Tam notwithstanding, there is no indication that the communities behaved in accordance with his approach. A number of his disciples continued to adhere to his theoretical approach, but there do not seem to have been any communities that adopted it in practice. It may be that, as Yehiel Kaplan has conjectured, Rabbenu Tam's approach was largely theoretical and that, in practice, even according to this approach, the opinion of the majority carried decisive weight. According to this, the moment the majority expressed its opinion, pressure was exerted upon the minority to accept it and, in the final analysis, the decision was made on the basis of the majority.⁹⁰

87 *Mordechai, Bava Batra*, §480

88 Rabbenu Tam expressed contradictory views regarding the authority of the court to appropriate monies. See Kaplan's above-mentioned discussion as well as I. Ta-Shma, "What is the Significance of *bet-Din Hashuv*?" in *Studies in Jewish Law – Judge and Judging*, ed. Y. Havah & A. Radzyner (Ramat Gan: Bar-Ilan University, 2007) 335–45 [Heb.].

89 S. Albeck, "Rabbenu Tam's Attitude to the Problems of His Time," *Zion* 19 (1954) 27 [Heb.]. Baer took note of its correspondence to German law in "The Foundations," as did Kaplan in "Majority and Minority."

90 See Kaplan's discussion, *ibid.*, 292. Against it, E. Kanarfogel asserted that R. Tam's ruling was practical. See "The Development and Diffusion of Unanimous Agreement in Medieval Ashkenaz,"

Legal authorities of subsequent generations disagreed with Rabbenu Tam and expressed a position explicitly in favor of the principle of majority decision. Ravyah (R. Eliezer b. Yoel Ha-Levi of Bonn), who was active in Germany at the end of the twelfth century, formulated the following position:

It seems that one can say that if one of the people of the city objects to that thing which the leaders of the community wish to do or to impose the ban [חרם], if the majority of the community agree, then the ban applies, as I shall explain.⁹¹ But if most of the community did not agree and objected, then even the heads cannot object⁹². . . . But if the majority agreed and the minority objected, the edict applies even against their will, as we read in the second chapter of Tractate *Avodah Zarah*: “One does not impose an edict upon the public unless the majority of the public are able to stand to it, as is said, ‘You are cursed with a curse [yet you are defrauding me, the entire nation]’ [Mal 3:9]. If the entire nation [consents] – it is effective; and if not, it is not.”⁹³

According to his approach, the community is an independent entity and not simply a collection of individuals. A majority of the community represents its entirety and may act in its name. Ravyah infers this central principle from the Talmud, which identifies the majority of the community with “the entire nation.” It follows from this approach that the validity of the community’s decision depends upon the agreement of the majority. If the majority of the community agrees, then the edict applies even to those who are opposed to it; if the majority do not agree, then the edict is invalid. Ravyah emphasizes that even the leaders of the community are subject to the opinion of the majority

in *Studies in Medieval Jewish History and Literature*, vol. 3, ed. I. Twersky and J. Harris (Cambridge, Mass.: Harvard University Press, 2000). For the question of R. Tam’s motivation, see A. Reiner, “Rabbinical Courts in France in the Twelfth Century: Centralization and Dispersion,” *JJS* 55:2 (2009).

91 The reference here is to any edict or regulation that is generally accompanied by the sanction of the *herem*/חרם (ban), which was intended to back up the edict and to serve as a sanction upon those who violated it.

92 This responsum is quoted by R. Eliyahu Mizrahi in a slightly different formulation, but the substance is the same: “If the majority of the public agreed with the leaders, then the edict and regulation is valid; and if the majority of the community did not agree with it and objected, but the leaders instituted it, they are able to object to this” (*Teshuvot R. Eliyahu Mizrahi*, §53, quoted below).

93 *Teshuvot Maharah Or Zaru’a* (Leipzig, 1860), §222; and the parallel in *Mordechai*, *Bava Batra* §282. At the end of his words, Ravyah states: “And I have explicated this matter at length because there are those among our rabbis who say that, when it states in the *baraita* that the people of the city are allowed to stipulate conditions and impose sanctions, this [only] applies if all agreed unanimously and he with them, and he thereafter violated their conditions”). Among his rabbis whom he mentions was his teacher, R. Eliezer of Mainz who was a disciple of Rabbenu Tam.

and cannot oppose it. This approach is entirely different from that expressed by R. Yehudah ha-Cohen and R. Eleazar b. Yitzhak in the responsum discussed earlier. Nor does Ravyah mention the principle that “the small ones must listen to the great ones.” Instead, he mentions the obligations of the heads of the community to accept the view of the majority. It would appear that Ravyah does not conceive a narrow oligarchy but rather a leadership that is meant to enjoy the trust of the entire community. And, indeed, Ravyah is quoted as one who supports a leadership elected by the community as a whole.⁹⁴

R. Meir ben Baruch of Rothenburg, who was active in Germany during the thirteenth century, also embraced the principle of majority rule, describing as follows the manner of making decisions within the community:

Regarding your question, if there is a dispute within your community and they are unable to arrive upon an agreed position. . . . It seems to me that one needs to sit down those householders who pay tax, that they accept upon themselves with a blessing that each one will say what he thinks for the sake of Heaven and for the welfare of the city, and that they follow the majority, whether it be to clarify who will be the leaders, or to choose the cantors [*hazanim*], or to take care of matters of alms, or to appoint tax collectors [*gabbaim*], or to build or to knock down a synagogue, or to add or to subtract, to buy a house for bridegrooms, a house of artisans, or to establish or to destroy all the needs of the community.⁹⁵

According to R. Meir (Maharam) every decision relating to the needs of the community is to be decided on the basis of the view of the majority, as determined at a gathering of “those householders who pay tax.” The Maharam of Rothenburg further requires that, at the beginning the meeting, all those present take upon themselves by means of an oath that whatever they do shall be “for the sake of Heaven and for the welfare of the city” and not for the sake of their own private interests. Thereafter they will discuss the matter at hand and decide on the basis of the majority opinion. The Maharam thus agrees with the approach of Ravyah in terms of considering the majority as determinative of community decisions. However, for him the majority is constituted from among all “those householders who pay tax.” This is a more inclusive definition than that of the “great ones” or “the decent ones” that we saw above, but it still does not include all members of the community. The justification for

94 “Our ancient ones were accustomed to appoint פּרנסיים/*parnasim* to lead and manage the community; and once they were appointed, one may not add or detract from whatever they may do.” Thus wrote Rabbenu Avi Ha-Ezri in *Teshuvot Maharah Or Zaru'a*, §65.

95 *Teshuvot Maharam* (Berlin, 1891), §885; *Hagahot Maimaniot*, on *Tefillah* 11:2; this responsum is also brought in *She'elot u-Teshuvot Mahari Mintz* (Judah ben Eliezer ha-Levi Mintz) §7.

this definition is clear: the tax payers are those who need bear the cost of the decision, whether it is one concerning matters of taxation or charity or one related to building or acquiring property; therefore, it is fitting that they enjoy decision-making authority.

Rabbenu Asher Ben-Yehiel, the disciple of R. Meir of Rothenburg, formulated matters as follows:

You should know that, regarding every public matter, the Torah said “to follow the many.” Thus, regarding every matter about which the community agrees, one follows the majority, and the individuals must carry out whatever has been agreed by the majority. For were this not so, if individuals had the power to nullify their consent, the community would never agree about anything.⁹⁶

R. Asher was the first rabbinic authority to apply the biblical principle “to follow the many” with regard to public matters. As I mentioned, according to talmudic law, this principle only applies to a rabbinic court. His words here are a kind of answer to the approach of Rabbenu Tam by saying that, if one were not to accept the decision of the majority, “individuals would have the power to nullify their consent.” From these remarks of R. Asher, it is not fully clear from among whom the majority is counted. It seems logical to assume that he did not deviate from the view of his teacher and referred here to the majority of the taxpayers. In one case he was asked how to rule regarding an economic dispute in which the wealthy found themselves in the minority: “[regarding] a community which imposes the ban: is this also dependent upon the majority? Are the minority allowed to disagree? And do we follow the majority even if it is a matter involving money and the wealthy are in the minority?” R. Asher answered: “If it is a matter concerning money, one follows the majority of the money... for it is inconceivable that the majority of people who pay the minority of the tax can impose a ban upon the wealthy according to their own view.”⁹⁷ According to R. Asher’s view, in matters of money “one follows the majority of the money” and not a numerical majority. His definition, however, is not entirely clear and invites differing interpretations. What is meant by “the majority of the money?” Does this refer to the majority of all those who pay taxes, or does it only refer to those who pay the majority of the tax? If the latter, it may well refer to an isolated number of individuals.⁹⁸ In any event, it is clear that, according to this approach, in a

⁹⁶ *Teshuvot ha-Rosh*, 6.5.

⁹⁷ *Teshuvot ha-Rosh*, 7.3.

⁹⁸ R. Yosef b. Moshe Terani (Maharit, Zefat 1568–1639) advocated the latter option: “And it is obvious that the sense here is not that we follow the majority of money, literally – that is, that if

decision relating to money matters one does not follow a numerical majority but rather a monetary majority.

During the course of the thirteenth century, the principle of majority decision was accepted by the Spanish authorities as well. This was well-expressed by R. Shlomo Ben-Adret (Rashba), who was active in Barcelona:

The bottom line of the law regarding the agreement of the people of the city is that, concerning whatever is agreed to and enacted and accepted by the majority, one does not heed the words of the individual, for the majority in each city bear the same relation to its individuals as does the High Court to all Israel. Hence, if they made edicts, their edicts are valid, and one who violates them shall surely be punished, as is written, “You are cursed with a curse,” etc. – that is, that the majority may place them in a ban against their will, as in the verse: “You are cursed with a curse, yet you are defrauding me, the entire nation” [Mal 3:9]. If the entire nation [consents] – it is effective; and if not, not: that is to say, the individuals are considered to be cursed if there is a majority.⁹⁹

The Rashba thus accepts the corporative understanding of the community and sees a majority of the community as representing the community as a whole, relying upon the same talmudic sources as were used by Ravyah, whose words echo in this responsum. From this approach, there follows the illuminating comparison drawn between the majority’s authority over individuals and that of the Great Court over the Jewish people as a whole. Just as the High Court is the authoritative political factor whose decisions and edicts obligate all Israel, so too is the majority of the community – that is, the leadership of the community supported by the majority.¹⁰⁰

As we have seen, beginning from the end of the twelfth century and throughout the course of the thirteenth century, the principle of majority decision became more firmly based, and the circle of those participating in community decisions expanded. This circle was no longer limited as it had been in the past to a narrow group of “great” and “good” men – that is to say, the aristocracy –

there were two people in the community who pay more than all the rest of the community that one follows their view, Heaven forbid! For we always follow the majority with regard to paying back money... after the majority of those who pay money. But those who do not pay or who pay a head tax but do not pay the regular tax are not included in the majority, for this matter does not apply to them” (*Teshuvot Maharit*, 1. [Yoseph ben Terani] §69).

⁹⁹ *Teshuvot ha-Rashba*, v. §126

¹⁰⁰ In practice, Rashba did not require the presence of the majority of the community at the gathering; it was sufficient for him to have the presence of part of the community (even if they were a minority of the total population of the community) in order to decide on the basis of the majority and to obligate the entire community. See *Teshuvot ha-Rashba* III. §443.

but included all those who paid communal taxes. Parallel to these changes, a change also took place in the nature of community leadership. During the tenth to twelfth centuries, the community leadership had been composed of an oligarchy that had neither been elected to their position nor appointed by the community but simply held its position by virtue of its privileged familial or economic standing. During the course of the thirteenth century, the elected leadership of the community supplanted the oligarchy.

This change may be illustrated by the different definitions given to the concept of the “seven good people of the city.” When Maimonides was asked as to the nature of this institution, he answered, “the good people of the city are the Talmudic Sages, the men of Torah and those who engage in good deeds.”¹⁰¹ By contrast, Rashba expressed an entirely different view: “The seven good people of the city mentioned in every place are not seven people outstanding in wisdom or wealth and honor, but seven people whom the public placed as leaders [*parnasim*] over the matters of the city.”¹⁰² The difference between Maimonides and Rashba may be understood as an ideological difference on the question of who is fit to stand at the leadership of the city, but it seems to me that this difference also reflects a different historical reality. Maimonides’ responsum, written in the twelfth century, was made in a situation in which the leadership of the community was given over to an elite group of scholars, wealthy people, and pedigreed families. From among these, Rambam of course emphasizes the place of the learned. As against that, in the thirteenth century, the leadership of the community was an elected leadership; therefore Rashba emphasizes that one is not speaking here of “people outstanding in wisdom or wealth and honor,” but rather of those whom “the public placed [over themselves] as leaders.” Thus, the leadership now enjoys its position by virtue of its election and appointment by the community.

But we cannot assume that the election or appointment of the leadership was done specifically through means of democratic election as we know it. In one of his responsa, Rashba documents various manners of choosing community leadership:

And I say that the customs of various places regarding these matters are not at all the same, for there are those places all of whose matters are conducted [by] the elders and their advisors, and there are other places where even

¹⁰¹ *Teshuvot ha-Rambam*, ed. Blau (Jerusalem: Meqitse Nirdamim, 1960) §271.

¹⁰² *Teshuvot ha-Rashba*, 1. §617. On the parallel between the “good people of the city” in Jewish communities and the leaders of the gentile cities, see A. Grabois, “The Leadership of the *Parnasim* in the Jewish Communities of Northern France in the 11th and 12th Centuries: The ‘Good People of the Community’ and the Elders of the Cities,” in *Culture and Society*, n. 10 above, 303–14 [Heb.]; and Y. Baer, *History of the Jews*, 126–38.

the majority are not allowed to do anything without taking counsel with the entire community and with the agreement of all. And there are those places which appoint certain known people for a fixed period of time, that they might follow them in all their common affairs, and these are their guardians. And I see that you behave thus, because you appoint [people] upon yourselves in advance.¹⁰³

Rashba's remarks imply that he sees each of these practices as legitimate. The first approach is that of the traditional unelected leadership of the elders and members of the council. The third approach is that of a leadership elected or appointed for a fixed period of time and supported by the agreement of the majority. This is a quasi-democratic system (we do not know the exact nature of the elections within the community). The second approach advocates general agreement, somewhat like the approach of Rabbenu Tam. According to this, the "many" (i.e., numerical majority of the members of the community) do not have the power to decide matters without general agreement of all members of the community. This approach is opposed to the principle of the majority advocated by Rashba elsewhere (as we have seen above), but there is no contradiction in this, as Rashba enumerates the different customs. He himself thinks that the majority has the power to impose their will upon the minority, but he allows those communities that prefer to do so to continue in their previous custom and to deviate from the principle of majority rule in favor of requiring unanimous agreement.¹⁰⁴ It would appear that Rashba allows different communities to choose their own system of leadership, even if this is not based upon the majority (according to all, he accepts the legitimacy of the traditional leadership of the elders). He therefore recognizes the legitimacy of the democratic principle of majority rule but does not rule out a non-democratic system if the members of the community see such leaders as their representatives.¹⁰⁵

103 *Teshuvot ha-Rashba*, III, §428 (the Arabic word *mukdamim* means both head of the community and the judge).

104 There are those who have attempted to harmonize these rulings and have suggested that the "many" referred to are not a numerical majority of all the members of the community but rather a large group from within it, and the "agreement of all" refers to the majority, but this reading seems to me rather forced (see D. Guttenmacher, "Public Halakhic Rulings and the Concept of Democracy," *Higayon* 3 [1996] 59–74 [Heb.]). For a general discussion of Rashba's approach, see M. Lorberbaum, *Politics and the Limits of Law* (Berkeley: Stanford University Press, 2001) 112–23; D.M. Feuchtwanger, "By the Permission of God' – The Congregation as a Theological and Political Entity: On the Question of Political Theory in the Teaching of R. Solomon ben Abraham Adrat," *Jewish Political Tradition throughout the Ages*, ed. M. Helinger (Ramat Gan: Bar-Ilan University Press 2010) 145–72.

105 Guttenmacher has shown that a central principle in Rashba's approach is the principle of

The impression received upon reading the responsa literature is that, from the beginning of the thirteenth century on, most communities adopted the principle of majority rule. Many even adopted the system of elected leadership, although we do not know whether the election procedure was fully egalitarian. The use of the principle of majority rule for ratifying decisions was also not implemented in an equal way and was generally only applied within that group defined as the “taxpayers.” Against this background, one may understand the ongoing discussion among the Sages regarding the nature of the majority and whether one ought to follow a numerical majority or a qualitative majority. A penetrating discussion of this question took place among the legal authorities during the period following the expulsion from Spain, when R. Samuel de Modena (Maharshadam), one of the great Sages of Salonica during the sixteenth century, ruled:

Offhand, it would appear that when the Torah said, “[you shall follow] after the majority,” it would seem that one ought not to distinguish between wealthy and poor, that all of them are equal in the count, and that the minority is nullified vis-à-vis the majority. And this would seem to be the simple meaning of the things said in the responsum of the Rosh, who wrote as follows: “Therefore, in a matter concerning which the community agrees, one follows the majority, and the individuals need to fulfill whatever will be agreed upon by the majority. . . . Therefore the Torah said, regarding every matter involving agreement of the multitude, ‘to go after the majority.’” This is a common saying in the whole world. But it seems to me that that which is said by the Torah, “to go after the majority,” does not mean what is generally understood by people. . . . For the Torah did not say “to go after the majority” except when those in disagreement are equal, in which case the quality of being in the majority is decisive. But when there is a difference between two groups, it may be that one person is worth a thousand. And where is this written in the Torah? Rather, we must say that when the Torah says, “after the majority,” this may refer to a numerical majority [רוב מנין] or to a qualitative majority [רוב בנין]? When they are equal, it follows the numerical majority; when they are unequal, it follows the qualitative majority.¹⁰⁶

Initially, R. Samuel de Modena admits that the principle of “to go after the majority” refers to a numerical majority, “without distinction between wealthy

representation, as finds expression in his understanding of leadership in terms of “guardianship.” This principle allows Rashba to recognize non-democratic leadership that was understood as representing this principle but to nullify that of individuals who seized leadership by force and are not understood as representatives of the community.

106 *Teshuvot Maharshadam, Orach Hayyim*, §37.

and poor,” as is accepted throughout most of the world. However, after some examination, he arrives at the conclusion that the principle of majority decision only applies when those disagreeing are equal in stature, in which case matters are decided by numerical majority. If, however, one side is preferable to the other in either wisdom or wealth, there is no reason to follow the majority in a mechanical way. In light of this, he proposes that the principle of the majority be interpreted in a manner that includes both the quantitative majority (רוב מנין) on the one hand and a qualitative majority (רוב בנין) on the other. The preferable, decisive majority is the qualitative majority; only if it is impossible to arrive at a decision with the qualitative majority, or if both sides are equal to one another, does one then decide on the basis of a numerical majority.

As against that, R. Eliyahu Mizrahi, one of the great Turkish Sages of the sixteenth century, writes:

The community as a whole is called the court [*Bet Din*] for purposes of such matters [i.e. matters relating to the public], like judges who gather together in the court, who are not allowed to leave there because of differences of opinions that have arisen between them, such as these declare something to be pure and those declare it to be impure, these say he is exempt and these say that he is culpable; rather, they take a vote and follow the majority, in accordance with the rule of our Holy Torah, “to follow the majority.” And one who disagrees with [i.e., does not accept the ruling of] the majority is called a sinner. And it makes no difference regarding this matter whether that majority was wealthy or poor, learned or laypeople, as the entire community is called a court regarding matters that are among them.¹⁰⁷

R. Eliyahu Mizrahi bases the community’s authority upon the concept of the court. However, unlike earlier authorities who made use of this comparison in order to bolster the authority of the community leadership, R. Eliyahu Mizrahi states that “The entire community as a whole are called the court for those matters that are among them.” This analogy leads him to apply the same manner of decision-making within the community as is used in the court – namely, “follow the majority.” If the earlier Sages attempted to adjust the fundamentally democratic concept of the “laws of the people of the city” to the oligarchic structure of their communities, R. Eliyahu Mizrahi attempts to apply the “laws of the court,” which are by nature oligarchic, to the democratic structure he attempted to implement in the community in his own day. The important point in his responsum is that, “It makes no difference for this

¹⁰⁷ *Teshuvot R. Eliyahu Mizrahi*, §53, 145. These two responsa are brought in the paper of M. Elon, “Democracy, Basic Rights and Proper Administration in the Judgments of the Sages from the East after the Expulsion from Spain,” *Shenaton ha-Mishpat ha-Ivri*, 18–19 (1992–94) 9–63.

matter whether that majority was wealthy or poor, learned or laypeople” since regarding public matters, all members of the community are considered like judges and one must decide among them on the basis of majority opinion. That is to say, in all matters pertaining to the public, all members of the community enjoy equal status, and one should not distinguish among them on the basis of alien parameters such as wealth or erudition.

Summary

The foundations of the Jewish community government are rooted in the encounter between the Jewish tradition and the Greco-Roman tradition. Jewish communities and cities were organized following a framework quite similar to that of Greek and Roman *poleis*. The talmudic Sages acknowledged the authority of the people of the city and its democratic nature. However, their authority was limited; talmudic law gave priority to the Court of the Sages. By the early Middle Ages, the democratic nature of the community had become almost completely eradicated. The *geonim* identified the focus of community authority in their own traditional leadership and did not at all relate to the public who composed it. Similarly, the halakhic Sages in Europe (tenth–twelfth centuries) saw the focus of authority in the leadership of the community and not in the members of the community as a whole. This approach is expressed in the grounding of communal authority upon the authority of the court rather than upon that of the people of the city. While halakhic sources already mention the status of the “majority of the community” or “majority of the public” in the eleventh century, these concepts do not indicate formal processes of counting or voting. The agreement of the majority finds expression in the silence of the majority of the members of the community and in their acceptance of its leaders’ decisions. During the course of the twelfth century, there was a lively halakhic discussion on the nature of community organization: ought it to be considered as a partnership of individuals, hence requiring that decisions be made on the basis of unanimous agreement? Or is it a corporative body, allowing decisions on the basis of majority? The view that it is a corporative body was to become the more widely held one and, during the course of the thirteenth century, the view that the majority principle is to be determinative in communal and public disputes became accepted. This process occurred parallel to a general European process during that same period in which the leadership of the cities took shape and corporations were founded. Within this framework, European law adopted the principle of majority rule as the main method of arriving at decisions. Halakhic sources do not mention the external European background, but it seems reasonable to conjecture that there was a direct or indirect relationship

between these two processes. At the same time, the structure of the communal Jewish leadership in Europe changed. The unelected oligarchy was replaced by a leadership chosen by the public through procedures which, while not fully clear to us, indicate a broad participation in the selection of leadership. In Spain, the sources indicate a wider variety of organizational structures: there were those communities that preserved the oligarchic structure and others that had an elected leadership. But the Spanish Sages also joined in the broad support of the principle of majority rule. From this point on, the halakhic discussion focuses on the question of who is counted as part of the majority. At first only members of the highest level of society were counted, but over the course of time the circle expanded, and the commonly accepted formula was that "all taxpaying householders" participate in decisions of the community. This formula does not include women, nor does it include all of the men, but it does reflect a process of democratization. The process of democratization was not completed, and in most communities the principle of all-inclusive equality was not accepted, until modern times. Nevertheless, on the normative level, that approach was accepted according to which the source of ruling authority over the public and the operative principle for expressing the position of the public was through majority-based decision.