UNANIMITY, MAJORITY, AND COMMUNAL GOVERNMENT IN ASHKENAZ DURING THE HIGH MIDDLE AGES: A REASSESSMENT

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I

Much has been written about the principles and practices of communal government in medieval Ashkenaz. The discussion has focused mainly upon the rights of individual members who opposed the will of the majority as well as the sources of power which enabled the community and its leaders to enact and enforce ordinances, levy taxes, and regulate economic life.[1] Not enough attention has been paid, however, to the usage of several talmudic and rabbinic texts that define the roles and prerogatives of those involved in communal leadership. A thorough analysis of these sources will reveal several substantive distinctions and nuances that have gone unnoticed. Moreover, it will require us to downplay, reformulate, or discard some of the conclusions drawn and highlighted by earlier scholarship.

A talmudic legal formulation, "the residents of a city may fix weights and measures, prices and wages, and inflict penalties for the infringement of their rules," (*Bava Batra* 8b, *Tosefta Bava Meẓi'a* 11:23) granted to members of a community the right to decide a wide range of communal policies. Medieval

[1] See the literature cited in Avraham Grossman, "Yaḥasam shel Ḥakhmei Ashkenaz ha-Rishonim el Shilton ha-Qahal," *Shenaton ha-Mishpat ha-'Ivri* 2 (1975): 176, n. 1, and in Yiẓḥaq Handelsman, "Hashqafotav shel Rabiah 'al Darkhei Hanhagat ha-Qehillot u-Meqoman be-Hitpatḥut ha-Maḥshavah ha-Ẓibburit shell Ḥakhmei Ashkenaz Bimei ha-Beinayim," *Zion* 48 (1983): 23–24, nn. 4, 14.

halakhists argued, based to a large extent on this passage, about whether all must agree or only the majority of the members in order to enact a policy.[2] In an ensuing discussion (*Bava Batra* 9a), the Talmud ruled that members of a profession or guild could not enact restrictions dealing with their specialty without the agreement of an *adam ḥashuv,* ostensibly a noteworthy scholar, except in situations where such a person was unavailable.

This ruling derived from a case in which ritual slaughterers had agreed that anyone who worked during a day assigned to another butcher would be subject to a fine. When such a fine was actually imposed, an appeal was made to Rava. He ruled that the butcher should be compensated for the loss that he suffered through the fine, thereby nullifying the agreement that members of the guild had reached. Rav Yemar bar Shalmeya, referring cryptically to the earlier talmudic formulation, noted that members of a city could legally impose restrictions or fines upon themselves. Rava himself did not respond to this query. R. Pappa justified Rava's action by maintaining that such agreements or fines could be imposed by the artisans themselves only if there was no *adam ḥashuv* present to approve them. If such a person was available, however, his approval was required.

Menahem Elon has identified the medieval halakhists who discussed explicitly the question of whether the conclusion of the second *Bava Batra* passage, that an *adam ḥashuv* had to approve group decisions or restrictions, applied also to the earlier passage that dealt with communal enactments made by members of a city or town. Ribash and Meiri held that *Bava Batra* 8b should be taken separately and that an *adam ḥashuv* was not required to ratify communal enactments. Rashba and Rosh ruled that an *adam ḥashuv* who

[2] See Irving A. Agus, *Rabbi Meir of Rothenburg* (New York, 1947), v. 1, pp. 92–95, and Menaḥem Elon, *Ha-Mishpat Ha-'Ivri,* v. 1, (Jerusalem, 1988 [third edition]), pp. 580–84.

oversaw the community must be consulted, as mandated by the *sugya* of *Bava Batra* 9a.[3]

The argument between these authorities was predicated upon a number of factors. On the one hand, the conclusion of the latter passage appears to take into account the fact that members of a city can impose restrictions upon themselves. If so, the second passage modifies the first. On the other hand, the reference to the earlier passage is only a fleeting one. Moreover, the need for an *adam ḥashuv* in the case of the artisans was understood by medieval talmudists in two ways. Only one of these interpretations would necessarily apply to decisions made by community members or communal boards.

The first view was that the types of arrangements or restrictions needed by artisans or tradesmen, e.g., the designation of different days for different butchers, could very easily result in a loss to individuals within the guild, or more significantly, to other members of the city outside the guild.[4] Therefore, the agreement of a scholar was required to ensure that the arrangement itself was fair and appropriate. The second interpretation held that this requirement was introduced in order to bring honor to the singular scholar, whose approval was respectfully sought for any type of public policy.[5] In regard to the first explanation, which was the more prevalent, an argument could be made that only the unstructured, unregulated

[3] Elon, pp. 609–11. Cf. Meir ha-Levi Abulafia, *Yad Ramah le-Bava Batra* (Warsaw, 1887), 9a, s.v. *hanhu tabbaḥei* (#103). On the connotations of the term *adam ḥashuv* within talmudic literature, see *Encyclopedia Talmudit,* 1:82–83; and see now, S.J. Berman, "Adam Ḥashuv — New Light on the History of the Babylonian Academies," *Dinei Yisrael* 13–14 (1986–88): 123–54; Z.A. Steinfeld, "Adam Ḥashuv Shani," *Dinei Yisrael* 13–14 (1986–88): 193–238.

[4] *Ḥiddushei ha-Ramban le-Bava Batra* (Jerusalem, 1929), 9a, s.v. *ha de-'amrinan, Ḥiddushei ha-Ran,* ad loc., ed. Avraham Sofer (Jerusalem, 1963), p. 49.

[5] *Ḥiddushei Ha-Ritva,* ad loc., ed. Barukh Menat (repr. Jerusalem, 1976), p. 17, and R. Yiẓḥaq bar Sheshet, *Responsa* (Lemberg, 1905), #399.

process of artisans setting policy for themselves required the presence of an *adam ḥashuv.* The members of a city acting together, however, could be expected to enact fair law.

Nonetheless, all major eleventh- and twelfth-century Spanish halakhists stipulated that the agreement of an *adam ḥashuv* was a necessary prerequisite for the enactment of communal ordinances and policies. Ri Migash and Ramah appear to have endorsed this practice in their talmudic novellae. In their view, the *adam ḥashuv* had to be a scholar who was also active as a communal leader. Formulations in the *Sefer ha-Shetarot* of R. Yehudah al-Barceloni indicate that the communities did actually consult rabbinic scholars prior to the implementation of enactments and policies.[6]

The picture that emerges from pre-Crusade Ashkenazic rabbinic literature is much less clear. While *Bava Batra* 8b was cited in passages that dealt with issues of communal government,[7] there are no references in this literature to *adam ḥashuv.* The absence of *adam ḥashuv* suggests that the interpretational tradition of the pre-Crusade period considered the passage in *Bava Batra* 8b as independent from the passage in 9a. The

[6] Shalom Albeck, "Yesodot Mishtar ha-Qehillot bi-Sefarad 'ad Ramah," *Zion* 25 (1960): 114–17. Cf. R. Yiẓḥaq (mi-Marseille) *Ba'al ah-'Ittur, Me'ah She'arim,* cited by R. Yoel ha-Levi (below, n. 14); Maharam Alashkar, *Responsa* (Sadilkow, 1834), #49; Ribash (cited in the above note); *Shakh, Ḥoshen Mishpat* 231:4; and Elon, *Ha-Mishpat ha-'Ivri,* p. 610, n. 34.

[7] See the responsum of R. Yosef Tob Elem in *She'elot u-Teshuvot Maharam b. Barukh* (Lemberg, 1860), #423 [cf. Agus, Rabbi Meir of Rothenburg, pp. 97–99, and Grossman, "Yaḥasam shel Ḥakhmei Ashkenaz," pp. 181, 186, n. 40], and the oft-cited responsum, *Kol Bo* (Lemberg, 1860), sec. 142. [Grossman has demonstrated conclusively that this responsum was authored by Rabbenu Gershom's student, R. Yehudah ha-Kohen, and by R. Eliezer *ha-Gadol.* See Grossman, *Ḥakhmei Ashkenaz ha-Rishonim* (Jerusalem, 1981) pp. 192–93 = "Yaḥasam shel Ḥakhmei Ashkenaz," pp. 185–86.] See also the so-called commentary of Rabbenu Gershom [= *perush Mayence*; see Israel Ta-Shema in *Qiryat Sefer* 53 (1978): 356–67] and the commentary of Rashi to *B.B.* 8b/9a.

laconic style and somehwat limited scope of pre-Crusade rabbinic literature, however, make it difficult to be absolutely certain that 9a played no role.

There are additional factors that must be considered. Two pre-Crusade texts, one discussing an enactment by a communal board and the other referring to a vote of the entire community membership, required the agreement of most *(rov)* of the *mehuganim (= tuvei ha-'ir)* or support of most of the *gedolim* (= important members of the community) for the measure to pass.[8] In context, these terms need not refer to scholars per se. Indeed, several pre-Crusade sources demonstrate that talmudic scholarship was not a *de jure* prerequisite for those who sat on the communal boards, despite the fact that the power of these boards to govern was often characterized as a kind of *koaḥ beit din.*[9] Nonetheless, the high concentration of scholars in the

[8] *Kol Bo,* sec. 142, and the ordinance attributed to Rabbenu Gershom in Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (New York, 1924), pp. 49, 121. Finkelstein suggested that the original version of the ordinance did not contain the words *min ha-mehuganim* as a description for the *tuvei ha-'ir.* These words were found in almost all subsequent versions, beginning with the second oldest text. He concluded, however, that even the original version is best understood as referring to a measure initiated and approved first by the *tuvei ha-'ir* and then ratified by the community. See pp. 114–15, p. 132, n. 3, and pp. 132–33, n. 5. Grossman, following Baer, allows that the entire ordinance may have been promulgated in a later period; see "Yaḥasam shel Ḥakhmei Ashkenaz," p. 185. R. Meir of Rothenburg quotes this ordinance, however, in the name of Rabbenu Gershom; see below, n. 54.

[9] See Grossman, "Yaḥasam shel Ḥakhmei Ashkenaz," pp. 177–79, 185–86 [= *Ḥakhmei Ashkenaz ha-Rishonim,* pp. 130–31, 191–93]; Elon, *Ha-Mishpat ha-'Ivri,* pp. 564–76; and Agus, "Ha-Shilton ha-'Aẓma'i shel ha-Qehillah ha-Yehudit Bimei ha-Beinayim," *Talpiyyot* 5 (1950–52), pp. 194–95, 644–45. Indeed, Grossman has noted that even some members of the rabbinical courts were not bonafide scholars. See his "Avaryanim va-Allammim ba-Ḥevrah ha-Yehudit be-Ashkenaz ha-Qedumah ve-Hashpa'atam 'al Sidrei ha-Din," *Shenaton ha-Mishpat ha-'Ivri* 8 (1981): 147. Grossman's studies have also demonstrated that while rabbinic scholars and courts were often the arbiters of the powers of communal boards and the principles of communal government, the boards, not the rabbinic bodies, were in control of the communities themselves.

small communities of Ashkenaz and the roles taken by several scholarly families in founding and maintaining some of the more important communities meant that scholars were often involved in communal decisions.[10] To be sure, their involvement was nowhere attributed to the talmudic requirement for *adam ḥashuv*. Given the presence of these scholars, however, it is conceivable that the talmudic requirement concerning *adam ḥashuv* was being satisfied *de facto*.[11]

II

It has been suggested that the differences between Ashkenaz and Sefarad described thus far were a reflection of the diverse patterns of leadership that developed in these societies. During the heyday of the Geonic period, Sefardic communities had an affinity to the Babylonian center, which often exerted considerable influence on the religious and communal affairs of its satellite *qehillot*. The *roshei yeshivah* and *roshei golah,* whose approval was sought in many matters, acted in the role of an *adam ḥashuv*. With the decline of the Babylonian center, the outlying communities retained this concept on a local level. Ashkenazic communities, on the other hand, had no formal connection to Baghdad or any other faraway center. They were administered, for the most part, by aristocratic families whose members were scholars and communal leaders at the same time. Because of the involvement of these figures, there was no need to require the presence of an *adam ḥashuv*. Indeed, proponents of this view maintained that the formal requirement for the approval of an *adam ḥashuv* did not actually

Cf. Moshe Frank, *Qehillot Ashkenaz u-Vattei Dineihen* (Tel Aviv, 1937), pp. 1–5, and Handelsman, "Hashqafotav shel Rabiah," pp. 31–36.

[10] See Grossman, *Ḥakhmei Ashkenaz ha-Rishonim,* pp. 21–23, and 409–11, and David Berger's review, "Ḥeqer Rabbanut Ashkenaz ha-Qedumah," *Tarbiz* 53 (1984): 481–82.

[11] See below, n. 42.

surface in Ashkenaz until the thirteenth century, when the complexion of communal leadership in Ashkenaz changed.[12]

In fact, however, the need for an *adam ḥashuv* was discussed in Ashkenaz from the mid-twelfth century onward. R. Eliezer b. Nathan (Raban; c. 1090–1160) required the approval of an *adam ḥashuv* to verify communal enactments or any other arrangements between the community and its members. Raban added that this requirement applied only to communal enactments such as those specified in *B.B.* 9a and 8b. Arrangements between two individuals, however, did not require the approbation of an *adam ḥashuv*.[13]

Raban's son-in-law, R. Yoel ha-Levi, also required an *adam ḥashuv* to ratify communal agreements. He too added a caveat. The approbation of an *adam ḥashuv* was required only when the condition or restriction being proposed was one that arbitrarily fined the violator of the agreement and did not actually compensate the one who had lost. This was the type of arrangement that the butchers' case (*B.B.* 9a) represented. The violator's property was to be destroyed rather than having him pay a fine to the butcher whom he had wronged. Other conditions, however, that would evenly com-

[12] See Menaḥem Ben-Sasson and Avraham Grossman, *Ha-Qehillah ha-Yehudit Bimei ha-Beinayim* (Jerusalem, 1988), pp. 62–63. See also Ben-Sasson, "Shivrei Iggeret meha-Genizah: Le-Toledot Ḥiddush ha-Qesharim shel Yeshivot Bavel 'im ha-Ma'arav," *Tarbiz* 56 (1987): 173, 180–83, 197, and "Qesharei Maghreb-Misraq ba-Me'ot ha-Tet-ha-Yod Alef: Ne'emanut, Meḥuyyavut, Shutafut," *Pe'amim* 38 (1989): 35–46; David Rosenthal, "Le-Toledot R. Paltoi Gaon u-Meqomo be-Massoret ha-Halakhah," *Shenaton ha-Mishpat ha-'Ivri* 11–12 (1984–86): 603–09; Albeck, below, n. 16; and Handelsman, "Hashqafotav shel Rabiah," pp. 23–27.

[13] *Haggahot Maimuniyyot, Hilkhot Mekhirah* 14:11:[3]. Raban's name appears in the standard editions as well as the Constantinople edition of *Mishneh Torah/Haggahot Maimuniyyot.* It is also found in ms. Budapest [Kaufman] A77 (book eleven), fol. 38v; Bodl. 610, fol. 73v; Bodl. 591, fol. 71v; and in a private manuscript labeled New York 6 [film #19512], fol. 213r, in the collection of the Institute for Microfilmed Hebrew Manuscripts at the Jewish National and University Library in Jerusalem.

pensate one who lost money, did not require the agreement of an *adam ḥashuv*.[14] Clearly, both Raban and R. Yoel understood the need for an *adam ḥashuv* as a means of guaranteeing that communal conditions and restrictions were fair and would not cause undue loss.

Rabbenu Tam required the acquiescence of an *adam ḥashuv* for conditions and fines imposed by a community, but for a different reason than his German contemporaries did. In a responsum regarding the payment of taxes, Rabbenu Tam wrote:

> Members of the community can exact payment from anyone who ignored the (tax) levy that had been unanimously agreed upon between them at the beginning [of the period] and was now being ignored, if the assessment had been arrived at with the acquiescence of a communal figure *(ḥaver 'ir)* as in the case of the [two] butchers where they agreed and one subsequently reneged. Since there was no means of acquisition *(qinyan),* and it is similar to [acquiring] something which does not yet exist, a communal figure is required.[15]

For Rabbenu Tam, the presence of an *adam ḥashuv* (which he described using the phrase *ḥaver 'ir*) was required when a community or group wished to impose new restrictions or

[14] *Sefer Mordekhai, Bava Batra,* sec. 483.

[15] *Sefer Mordekhai, Bava Qamma,* sec. 179 (in regard to *Bava Qamma* 116b, *rasha'in ha-ḥamarin*; see the *Sefer Or Zarua'* text, below, n. 34):

רשאין בני העיר להסיע ולהפסיד ממון את העובר על הקצבה שקצבו והתנו ביניהם לדעת כולם שנתרצה בתחלת התקנה ועתה עובר עליה והוא שעשאוהו (ב)חבר עיר כי הנהו (תרי) טבחי שנתרצו וחזר בו האחד והואיל וליכא קנין וכמו דבר שלא בא לעולם הוא צריך חבר עיר.

[This responsum was apparently found at one time in some versions of *Sefer Mordekhai* to *Bava Batra* 8b. See R. Yosef Colon (Mahariq), *Responsa,* (Warsaw, 1884), #179, fol. 209b.] Variant readings of the Mordekhai passage, in manuscript and first edition, are conveniently collected in Avraham Halperin, *Sefer Mordekhai ha-Shalem le-Massekhet Bava Qamma* (Ph.D., Hebrew University, 1978), v. 2, p. 226.

requirements upon its members, in order to effect a proper means of transference *(qinyan)*.[16]

This passage requires us to carefully consider the relationship between *adam ḥashuv* and the need for unanimous or majority agreement in communal government. Rabbenu Tam linked *B.B.* 9a to 8b just as Raban and R. Yoel (and Ri Migash and Ramah) did. An *adam ḥashuv* was needed to approve communal enactments, and not only the agreements of groups of artisans. But in Rabbenu Tam's view, 9a had an additional bearing on 8b. Indeed, the linkage of 9a to 8b generated a vital component in Rabbenu Tam's structure of communal government.

As modern scholarship has noted, Rabbenu Tam challenged the status quo in medieval Ashkenaz (extending from the pre-Crusade period) that a majority of the members of the community could impose their will upon the minority in regard to communal enactments.[17] He interpreted *B.B.* 8b as if it implicitly recognized the need for unanimous agreement. Members of a community could compel those individuals who deviated from their policies if those policies had been approved previously by unanimous agreement.[18] The passage under analysis indicates, however, that Rabbenu Tam considered *B.B.* 9a to be an explicit source that mandated unanimous agreement since the talmudic text considered it necessary to point out that all

[16] See Shalom Albeck, "Yaḥaso shel Rabbenu Tam li-Ve'ayot Zemanno," *Zion* 19 (1954): 128–30; Handelsman, "Hashqafotav shel Rabiah," p. 43. Albeck equated Rabbenu Tam's position with that of the Spanish Talmudists (above, n. 6). Neither Albeck nor Handelsman refer to Raban or R. Yoel ha-Levi.

[17] See Yiẓḥaq Baer, "Ha-Yesodot veha-Hatḥalot shel Irgun ha-Qehillah ha-Yehudit Bimei ha-Beinayim," *Zion* 15 (1950): 36–41; Albeck, "Yaḥaso shel Rabbenu Tam," pp. 130–32; and I.A. Agus (above, n. 9), pp. 637–39, 648, and in *Talpiyyot* 6 (1956), p. 320, n. 158a. Agus' contention that Rabbenu Tam allowed the majority to impose its will in cases of *migdar milta* remains unsubstantiated. Cf. below, n. 58.

[18] *Sefer Mordekhai, B.B.*, sec. 480.

the butchers in that situation agreed in advance to the restrictions.[19]

In determining the standard of *tosefet ketubah* prevalent in a particular area, Rabbenu Tam maintained that local custom could not be relied upon unless:

> the members of the community have ratified it amongst themselves ... and with a communal figure as seen in our source that members of a city may make enactments. It is necessary to have unanimity; without it, no [enactment may be passed.][20]

In this responsum, the need for *ḥaver 'ir* was based by Rabbenu Tam directly upon *B.B.* 8b, which required the confirmation of communal enactments *mi-da'at kullam.* Treated here as a unit, *B.B.* 8b/9a were again adduced by Rabbenu Tam as a talmudic source that explicitly required unanimity in communal government.

Two explanations for the motivation behind Rabbenu Tam's requirement of unanimity in matters of communal government have been offered. Rabbenu Tam greatly valued the rights of

[19] The predominant reading of the talmudic text, *hanhu tabbaḥei,* leaves unspecified the number of butchers involved. A variant reading (see *Diqduqei Soferim* ad loc.) specified that the initial agreement was between two butchers *(hanhu trei tabbaḥei).* The manuscripts of *Sefer Mordekhai* are split regarding this reading; see Halperin, above, n. 15. At first blush, the latter reading does not convey as strongly the sense of unanimous agreement. Nonetheless, Rabiah, who vigorously contested Rabbenu Tam's insistence on unanimity, noted that Rabbenu Tam based his claim in large measure upon this *sugya,* which indicated that one of the two butchers who had earlier agreed (unanimously) to the condition now wished to back out. Rabiah's qualms are with the ideology behind the position which he believed was contradicted by other Talmudic texts. At no point does he question the soundness of its derivation from *B.B.* 9a. See below, n. 41.

[20] R. Meir b. Barukh, *Responsa,* Prague ed., #268 (= *Teshuvot Maimuniyyot le-Sefer Nashim* #17):

אם לא קיימו בני העיר ביניהם ... ובחבר עיר כדמוכח בשמעתין דרשאין בני העיר להסיע על קיצתן וצריך מדעת כולם אבל ממילא לא.

the individual and sought to protect these rights on the basis of talmudic law.[21] Alternatively, Rabbenu Tam was operating under the influence of contemporary Germanic law which required the acquiescence of every member of a community.[22]

These explanations were predicated upon two related observations about Rabbenu Tam's position. First, his position was markedly different from those of contemporary Ashkenazic halakhists. Second, his position was supported by an unusual or imaginative (re-)interpretation of the underlying talmudic texts. These traits are clearly evident in cases where scholars have maintained that temporal concerns or needs led Rabbenu Tam to formulate or confirm a position and then justify it on the basis of rabbinic texts. In this case as well, the assumption was that Rabbenu Tam saw the need for unanimity as an independent or external value and then sought talmudic support for his position.

There are, however, several factors which suggest that halakhic reasoning rather than the influence of realia was the primary force behind this particular position. Subsequent medieval halakhists such as Rabiah, Rambam, Ramban, and Ritba, did not link *B.B.* 8b to 9a. But as we have seen, an equally impressive array of Rabbenu Tam's contemporaries did. Thus, the interpretational strategy upon which Rabbenu Tam's position rests was not, at its core, particularly unusual or creative. In addition, Rabbenu Tam was not, in this case, attempting to justify the status quo. Rule by majority was the preferred mode in both the pre-Crusade period and in the period after Rabbenu Tam. Moreover, we shall see below that Rabbenu Tam suggested an alternate means of achieving unanimity precisely because he recognized that the need for unanimity, taken to mean

[21] See Agus, above, n. 2.

[22] See above, n. 17. Cf. M.P. Golding, "The Juridical Basis of Communal Associations in Medieval Rabbinic Thought," *Jewish Social Studies* 28 (1966): 72–78.

the agreement of all members of a community, would make communal government unwieldy.[23]

III

Scrutinizing prevalent ritual, economic, and societal practices and conventions against the background of the talmudic corpus was a major aim of Rabbenu Tam, and of the Tosafist enterprise generally. Regarding issues of communal government, Rabbenu Tam's intention was to consider all relevant talmudic sources on the question of majority versus unanimity. It was apparent that pre-Crusade scholarship, where written remnants were extant, had not integrated fully the available talmudic material in formulating its positions.[24] Thorough study of several formulations of Rabbenu Tam will demonstrate that a requirement of talmudic monetary law, rather than an overarching theory of individual rights or a school of contemporary non-Jewish legal thought, was the linchpin of Rabbenu Tam's position.

In his tax responsum discussed earlier, Rabbenu Tam explained that an *adam ḥashuv* was required in *B.B.* 9a/8b in order to ratify the *qinyan* since this was a case of *davar shelo ba le-'olam.* He offered no explanation on the need for unanimity in 9a/8b. But in support of his interpretation of the two requirements derived from 9a/8b, Rabbenu Tam continued by

[23] The issue of original intent in Rabbenu Tam's halakhic thought has been the subject of much discussion. See now Ḥaym Soloveitchik, "Religious Law and Change: The Medieval Ashkenazic Example," *AJS Review* 12 (1987): 205–21.

[24] On the paucity in Tosafist literature of pre-Crusade material that dealt with the power of the majority, see Grossman, "Yaḥasam shel Ḥakhmei Ashkenaz," pp. 193–94. On the thinness of the pre-Crusade material itself, see Agus, *Rabbi Meir of Rothenburg,* pp. 94–95; Baer, "Ha-Yesodot veha-Hatḥalot," p. 39; Handelsman, "Hashqafotav shel Rabiah," p. 53; Ḥaym Soloveitchik, *She'elot u-Teshuvot ke-Maqor Histori* (Jerusalem, 1990), pp. 100–06; and cf. Israel Ta-Shema, "Halakhah, Minhag u-Massoret be-Yahadut Ashkenaz ba-Me'ot ha-Yod Alef/Yod Bet," *Sidra* 3 (1987): 159–60.

stating that money could not be taken away from an individual community member except through confiscation by the community *(hefqer ẓibbur)* or by a rabbinic court *(hefqer beit din). Hefqer ẓibbur* required the agreement of all the members of the community while *hefqer beit din* could be performed, in Rabbenu Tam's view, only by the leading rabbinic court of the day, akin to that of R. Ammi and R. Assi in their era.[25] Moreover, at the end of the responsum, Rabbenu Tam refers to an actual communal tax collection practice through which one individual's money could be given by another person (his investment partner) because "they accepted this upon themselves originally by unanimous agreement."[26]

It appears that both features of 9a, *adam ḥashuv* and unanimity, were necessary in order to effect the requisite modes of transference *(da'at maqneh/qinyan).* According to Rabbenu Tam, the presence of an *adam ḥashuv* solved the problem of transferring an item (in this case, a possible future payment or debt) that did not yet exist *(davar shelo ba le-'olam).* An *adam ḥashuv,* overseeing the transaction as it were, creates an acceptable degree of consent or approval *(semikhut da'at)* on the part of the involved parties.[27] By introducing the concept of *hefqer ẓibbur,* and further reiterating the need for unanimous agreement, Rabbenu Tam wished to stress that this requirement was also necessary in order to combat another *qinyan* problem

[25] On *hefqer ẓibbur,* see Elon, *Ha-Mishpat ha-'Ivri,* p. 581, and Albeck, "Yaḥaso shel Rabbenu Tam," p. 128, n. 44. On *hefqer beit din* in Rabbenu Tam's thought, see Albeck, pp. 129–30; Handelsman, "Hashqafotav shel Rabiah," pp. 43–44; and cf. E.E. Urbach, *Ba'alei ha-Tosafot* (Jerusalem, 1980), v. 1, pp. 43–45.

[26] See the *Mordekhai* text, above, n. 15.

[27] See Shalom Albeck, *Dinei ha-Mamonot ba-Talmud* (Tel Aviv, 1976), pp. 297–304; Shillem Warhaftig, *Dinei Ḥozim ba-Mishpat ha-'Ivri* (Jerusalem, 1974), pp. 1–15; Sinai Deutsch, "Gemirat Da'at veha-Kavvanah li-Ẓor Yeḥasim Mishpatiyyim be-Dinei Ḥozim ba-Mishpat ha-'Ivri, ha-Angli, veha-Yisraeli," *Shenaton ha-Mishpat ha-'Ivri* 6–7 (1979–80), pp. 82–90.

brought about by communal enactments that mandated the eventual payment of funds by individual members.

A binding *qinyan* could normally be effective only in regard to an object or commodity which possessed real value. There was, in theory, no meaning to a *qinyan* which imposed the performance of a duty or action. This type of deficient *qinyan* was referred to, in rabbinic parlance, as a *qinyan devarim.*[28] According to Rabbenu Tam, unanimous agreement was necessary in order to provide a sufficient level of intent *(da'at maqneh)* so that a *qinyan* could, in effect, be activated in this type of situation as well. In Rabbenu Tam's precise phrasing, the case of the butchers presented two *qinyan* problems: "...there is no *qinyan [= qinyan devarim]* and [the proposed agreement] is akin to a *davar shelo ba le-'olam.*"

Ramban and Ritba maintained similarly that the absence of any of the artisans prevented them from making a full and proper *qinyan* even if an *adam ḥashuv* was present.[29] Indeed, R. Meir of Rothenburg, who clarified and adopted many aspects of Rabbenu Tam's larger position, as we shall see, explicitly identified the *qinyan* problem in *B.B.* 9a (and in *B.B.* 8b as well) as one of *qinyan devarim.* He too argued that the agreement of all affected artisans (or residents) was the only means of providing an appropriate *da'at maqneh* that fully bound each participant.[30] In a responsum issued circa 1200 (to be discussed more fully below), the leading rabbinic tribunal of Worms wrote that the acquiescence of an *adam ḥashuv* was required in *B.B.* 9a in place of a regular *qinyan*

[28] See Berakhyahu Lifshitz, *Ashmakhta* (Jerusalem, 1988), pp. 64–72; 95–96, and M. Elon, "Contracts," in *Encyclopedia Judaica* 5:924–25. For an example in Tosafist legal thought of the integration of the problem inherent in *qinyan davar shelo ba le-'olam* with that of *qinyan devarim,* see *Tosafot Ketubot* 54b, s.v. *'af 'al pi.*

[29] See above, nn. 4–5.

[30] See below, nn. 49–50.

which could not be effected properly in such a case. The situation there was characterized by the tribunal as one of *qinyan devarim* which thus required additional approbation.[31]

Two other aspects of Rabbenu Tam's position may be readily understood in light of our suggestion that an *adam ḥashuv* was needed to effect proper *qinyanim* and was not simply viewed as a means of ensuring fairness. Unlike Raban and R. Yoel ha-Levi, Rabbenu Tam held that the presence of an *adam ḥashuv* was necessary for the ratification of restrictive agreements between communal members even where these restrictions were not connected to communal issues and affected only a portion of the community.[32] For the same reason, Rabbenu Tam apparently required an *adam ḥashuv*'s approval in all cases even though the talmudic *sugya* itself required the agreement of an *adam ḥashuv* only if he was available locally.[33] In addition, it should be noted that Rabbenu Tam required an actual instrument of *qinyan* or positive intent *(gemirat da'at)*

[31] See below, n. 40. Rabbenu Tam's well-known position regarding the inability of a community to force an individual to give charity can also be viewed as a *da'at maqneh* issue. Only if a charity assessment had already been agreed to by all members, or if they had assented to allow the charity collectors to coerce them could individual members be compelled to contribute. See *Sefer Or Zarua', Hilkhot Ẓedaqah,* sec. 4; *Tosafot B.B.* 8b, s.v. *'akhfeh le-R. Natan*; *Tosafot Ketubot* 49b, s.v. *'akhfeh Rava.*

[32] *"Rasha'in benei ha-'ir le-hasi'a 'al qiẓẓatan, 'afilu bi-devarim delo shaykha lekhol ha-qahal ela li-yeḥidim,"* (cited in a responsum of Maharam mi-Rothenburg, published by I.Z. Kahana; see below, n. 37). This view was directly opposed to the caveat of Raban (above, n. 13). Problems in regard to *qinyan,* which were Rabbenu Tam's major concern, could arise even in cases involving individuals. Raban held that concern for outsiders who might be unfairly affected was not warranted in arrangements made between individuals. Cf. Mahariq, *Responsa,* #14.

[33] Cf. Mahariq, *Responsa,* #179, fols. 209–10; *Perush Rabbenu Gershom* to *B.B.* (above, n. 7), 9a, s.v. *'aval 'ikkah 'adam ḥashuv*; and Handelsman, "Hashqafotav shel Rabiah," p. 43, n. 115.

rather than relying on a presumption of obligation in other cases as well.[34]

[34] See the sources discussed in Sinai Deutsch, "Gemirat Da'at be-Hitḥayvuyot ba-Mishpat ha-'Ivri," *Dinei Yisrael* 3 (1972): 216–224, and below, n. 45. Cf. Mahariq in the above note. The Talmud (*Nedarim* 27b) indicated that *'asmakhta,* a conditional monetary obligation on which a *qinyan* was not normally effective, could be made binding if the arrangement was ratified by an "important court" *(beit din ḥashuv).* In connection with this *sugya,* Tosafists discussed the procedure for binding a prospective groom to future monetary commitments made by him to his bride at the time of betrothal. Ri and R. Samson of Sens maintained that no special *qinyan* was needed. Since the custom to promise a sum of money at the time of betrothal was universal, it was therefore understood by all that this payment was binding and that every groom automatically committed himself to this payment. Rabbenu Tam wrote, however, that the popular custom of gathering together all the members of the town to witness the betrothal was an acceptable form of *beit din ḥashuv* since it provided an effective degree of *da'at maqneh.* See *Tosafot Nedarim* 27b, s.v. *ve-hilkhata 'asmakhta qanya*; *Tosafot Yeshanim le-Massekhet Nedarim,* ed. Alter Halpern (London, 1966), pp. 119–20; *Sefer ha-Yashar le-Rabbenu Tam (Ḥeleq ha-Ḥiddushim),* ed. Shim'on Schlesinger (Jerusalem, 1959), pp. 138–39; *Sefer Or Zarua', Pisqei Bava Qamma* (66a), sec. 188; *Ḥiddushei ha-Ritva 'al Massekhet Nedarim,* ad loc. Cf. *Sefer Or Zarua', Pisqei Bava Qamma* (116b), sec. 458. To be sure, the relationship between *'asmakhta* and *qinyan devarim* is quite complex; for some discussion of this relationship within Tosafist legal thought, see B. Lifshitz, *Asmakhta,* pp. 19–25, 94–95. In addition, both Ri and Rabbenu Tam offered their suggestions in the context of the talmudic requirement that a *beit din ḥashuv* needs to be present. Cf. the so-called Rashi commentary to *Nedarim,* [a product of eleventh-century Mayence; see Y.N. Epstein in *Tarbiz* 4 (1937): 174–77, and I. Ta-Shema (above, n. 7), p. 356, n. 2] ad loc., s.v. *ube-veit din ḥashuv*; *Teshuvot Rashi,* ed. Israel Elfenbein (New York, 1942), v. 1, #238 (pp. 264–67); *Sefer Rabiah,* ms. Bodl. 637, sec. 997 (fol. 255); *Sefer Mordekhai, Bava Mezi'a,* secs. 323–24; R. Menahem ha-Meiri, *Beit ha-Beḥirah le-Massekhet Nedarim,* ad loc.; M. Frank, *Qehillot Ashkenaz u-Vattei Dineihen,* pp. 134–35; Agus, "Ha-Shilton ha-'Azma'i shel ha-Qehillah ha-Yehudit," (above, n. 9), p. 189, n. 69, and Grossman, "Yaḥasam shel Ḥakhmei Ashkenaz le-Shilton ha-Qahal," p. 189. Nonetheless, the possible significance of Rabbenu Tam's formulation as (a) further evidence that, in his view, a proper level of *da'at maqneh* cannot simply be assumed, and as (b) a situation in which the presence of an entire group provided that *da'at maqneh* according to Rabbenu Tam must be considered. Cf. *Siftei Kohen (Shakh), Ḥoshen Mishpat* 207:24.

Recognizing that unanimity for all communal enactments would be difficult to achieve, Rabbenu Tam developed an alternate procedure that was true to his theory but more feasible in practice. *Sefer Mordekhai* records the following explanation of the talmudic phrase, *rasha'in benei ha-'ir le-hasia' 'al qiẓẓatan* in the name of Rabbenu Tam:

> The assessment was made with the consent of all the good men of the city (with their consent or at their initiative). The good men are akin to the singular scholar of the city and are in his place.[35]

Some have understood this passage to mean that Rabbenu Tam required the agreement of all local *anashim ḥashuvim (= tuvei ha-'ir),* as per *B.B.* 9a, in addition to unanimous agreement of the members of the community in order to enact policies or restrictions.[36] Such a requirement would obviously serve to protect the individual at the expense of the community.

A more complete version of this passage, cited in a responsum of R. Meir of Rothenburg, leads to a different interpretation. In its fuller form, that begins with the phrase, *"Ve-khen katav Rabbenu Tam biteshuvato de-rasha'in benei ha-'ir le-hasia' 'al qiẓẓatan,"* the formulation of Rabbenu Tam presented above is preceded by the following:

> If in the beginning, they have accepted them [the *tuvei ha-'ir*], they cannot back out on them, and this is his statement: "Regarding land of B that A claims is his ... if [this apportionment] was enacted by the *tuvei ha-'ir* and A

[35] *Mord. B.B.*, sec. 480:
שנעשית הקיצות מרעת כל טובי העיר (מרעתן או מחמתן), וטובי העיר הוו כחבר העיר וכל כמיניה.

[36] See Baer and Albeck, above, n. 17. See also Gerald Blidstein, "Le-Hilkhot Ẓibbur shel Yemei ha-Beinayim: Meqorot u-Mussagim," *Dinei Yisrael* 9 (1978–80): 157–58, n. 103.

did not question it then when he became aware of it, he has no claim.[37]

As Rabbenu Tam then goes on to explain (in the previously cited passage), the reason that Reuven had no claim was that the *tuvei ha-'ir* were empowered *"keḥaver 'ir ve-khol kemineh."*[38] The complete ruling of Rabbenu Tam's should be understood as follows: *tuvei ha-'ir* who were elected/selected by unanimous agreement of the community could themselves initiate and enact, by unanimous agreement, communal policy on behalf of the entire community provided that no members of the community objected at that time. A properly selected communal board could function in place of the entire community and in place of the *ḥaver 'ir.* Through the selection process, the members of the community granted the *tuvei ha-'ir* the ability to function on their behalf.

It is striking that Rabbenu Tam never actually used the talmudic term *adam ḥashuv.* He invariably referred to this figure as *haver 'ir.* In doing so, Rabbenu Tam was perhaps connecting the need for an individual scholar *(ḥaver 'ir)* to the need for the entire group or community *(ḥever 'ir)* to be present. This linkage may have also underscored the role of the *tuvei ha-'ir,* also known as *ḥever 'ir,* who were at the same time

[37] See the text published and annotated by Izaak Ze'ev Kahana, "Teshuvot R. Yiẓḥaq Or Zarua' u-Maharam ben Barukh," *Sinai* 8 (1941): 273:

אם מתחלה קבלו עליהם אין יכולין לחזור בהן וזה לשונו: על קרקע שמערער ראובן על שמעון שהוא שלו ... אם על ידי טובי העיר נגזרה ולא ערער עליה אז כששמע אין ברברי ראובן ממש.

This responsum, found in ms. Bodl. 844, is a more complete version of Cremona #230, and *Teshuvot Maimuniyyot le-Sefer Shofetim,* #10.

[38] These phrases, which define the power of the *tuvei ha-'ir,* are taken directly from *B.B.* 9a. Only if the *tuvei ha-'ir* acted by means of *pesharah* are their decisions not fully effective. See below, n. 41.

representatives of all the members of the community as well as substitutes for an *adam ḥashuv.*[39]

IV

The members of the rabbinical court of Mayence, circa 1200, held that an *adam ḥashuv* was formally required to ratify communal enactments. Indeed, in the absence of such a scholar or the approval of a *beit din,* communal enactments were not binding. Their opinion was issued as part of a ruling written to the *beit din* of Worms in favor of an individual who wished to exempt himself for cause from a communal tax assessment. In the course of their responsum, the Mayence court explained the role of the *adam ḥashuv* as both a means of protecting other members of the community and as a means of dealing with what would otherwise be a *qinyan devarim.*[40]

[39] In R. Ḥayyim Or Zarua', *Responsa* (Leipzig, 1860), #65 (fol. 19d), *ḥaver 'ir* is utilized in the context of *B.B.* 9a, but is explicitly defined as *gadol ha-'ir.* See also *Ḥiddushei ha-Ritva 'al Massekhet Avodah Zarah* 36b, s.v. *ba-me'erah attem ne'arim,* ed. Moshe Goldstein (Jerusalem, second printing, 1982), p. 165 [cited in *Teshuvot Maharashdam, Oraḥ Ḥayyim* (#37)]; R. Meir b. Barukh, *Responsa,* ed. Moshe Aryeh Bloch (Berlin, 1891), p. 240, #240; and Elon, p. 581, n. 10. On the interpretations of *ḥaver/ḥever 'ir* in medieval rabbinic literature, see Levi Ginzburg, *Perushim ve-Ḥiddushim Bi-Yerushalmi,* v. 3, pp. 410–32, and Saul Lieberman, *Tosefta ki-Feshutah,* v. 1 (Pe'ah, chapter 4), p. 190; Handelsman, "Hashqafotav shel Rabiah," pp. 27–29. [The inconsistency in Rashi's interpretations of these terms (Handelsman, p. 28, n. 32) is typical of Rashi's tendency to explain a term based primarily on the context in which it appears even if contradictory interpretations emerge. See Yonah Frankel, *Darko shel Rashi be-Ferusho le-Talmud ha-Bavli* (Jerusalem, 1980), pp. 284–89.]

[40] R. Ḥayyim Eliezer Or Zarua', *Responsa,* #222 (fol. 74a–b). Thus, the Mayence court enunciated the lines of reasoning offered by both Raban/R. Yoel and Rabbenu Tam, although it must be noted that they read *B.B.* 9a as a case where only two butchers out of the larger group agreed. If all had agreed, however, the *beit din* would not have shared Raban's concern about fairness. On the other hand, the court held, against Rabbenu Tam's view, that an *adam ḥashuv* had no role in approving conditions that were made between individuals.

Rabiah, who was also asked to respond to the question from Worms, ruled in favor of the community.[41] If *shiv'ah tuvei ha-'ir* were properly appointed, their enactments and fines were binding as long as the majority of the community did not object. Rabiah did not require the acquiescence of *adam ḥashuv* in this case or in any other. In his view, the powers of *tuvei ha-'ir,* including their ability to practice *hefqer beit din hefqer,* flowed from the concept of *"Yiftaḥ be-doro ki-Shmuel be-doro,"* and more substantively from *sugyot* in *massekhet Megillah* that invested *tuvei ha-'ir* with certain powers and prerogatives. Properly selected *tuvei ha-'ir* possessed these powers irrespective of their level (or lack) of scholarship. The only limitation was that any enactment with which the majority of the community disagreed was not binding.[42]

For Raban and R. Yoel ha-Levi, an *adam ḥashuv* was necessary only as an added deterrent to unfair legislation. They were not concerned, as Rabbenu Tam was, with problems related to *qinyan.* The rabbinical court of Mayence, on the other hand was concerned with both issues. Rabiah does not mention either his father or his grandfather. It follows easily from his responsum, however, that properly appointed *tuvei ha-'ir,* whose decision

[41] ibid. (fol. 74b–75a). Cf. Maharam, *Responsa* (Cremona, 1557), #165; Mahariq, *Responsa,* #14; Agus, *Rabbi Meir of Rothenburg,* p. 92; Baer (above, n. 17), pp. 38–40; and Handelsman, "Hashqafotav shel Rabiah," pp. 26–27, 34–35.

[42] Despite their strong disagreement concerning the strength of the majority in communal government, Rabiah cited a responsum of Rabbenu Tam to support his contention that properly selected *tuvei ha-'ir* were fully empowered to carry out their policies. See ms. Bodl. 637, sec. 1025 (fol. 271v). This citation, in addition to the research of Grossman (above, n. 9), significantly weakens Handelsman's theory that Rabiah was the first medieval rabbinic scholar to advocate a separation between the functions and members of the rabbinical courts and the communal boards thus allowing laymen a much greater role in communal government. The presence or absence of scholars among the *tuvei ha-'ir* was a matter of circumstance throughout the history of medieval Ashkenaz. See above, at n. 11, and below, n. 60.

was acceptable to the majority of the community, could be relied upon to ensure the fairness of an agreement.

Rabiah referred to *B.B.* 8b/9a in response to the linkage of these *sugyot* by Rabbenu Tam (and by his student R. Eliezer of Metz) that had led to Rabbenu Tam's position on the need for unanimity. Indeed, the reaction of Rabiah further corroborates the interpretation and role of *B.B.* 9a in Rabbenu Tam's halakhic reasoning that I have suggested. According to Rabiah, R. Eliezer of Metz derived from 8b/9a:

> That which the Baraita recorded, 'members of the community can confirm their conditions and impose fines for [non-compliance with] their restrictions,' applies in a situation where all agreed together including the plaintiff, and subsequently he ignored the condition, similar to the case of the two butchers. But if he [the plaintiff] did not agree, they are not able to enforce it.[43]

Rabiah indicates that he presented his own view at great length, that the majority rules, in order to indicate his strong disagreement with the approach taken by R. Eliezer mi-Metz. Indeed, Rabiah's is the most elaborate halakhic justification of what was the dominant principle of self-government in medieval Ashkenaz.

Implicit in Rabiah's discussion of the powers and prerogatives of the *tuvei ha-'ir* is an assumption that their actions either suffice as or do not require a *qinyan.* R. Eliezer of Metz had stated that the absence of even one individual's *da'at (maqneh)* meant that money could not be confiscated via the conditions being imposed by the members of the community. Rabiah remained unconcerned about this problem since, in his view,

[43] R. Ḥayyim Or Zarua', *Responsa,* #222 (end) = *Sefer Mordekhai, Bava Batra,* sec. 482:

> דהא דתניא רשאין בני העיר לקיים תנאם ולהסיע על קיצתם הני מילי אם כולם נאותו יחד והוא עמהם ושוב עבר על תנאם דומיא דהנהו תרי טבחי אבל בלא דעתו לא אלימי לעשות.

Rabiah refers to *B.B.* 8b alone in *Sefer Mordekhai, Bava Batra,* sec. 517. Cf. Handelsman, "Hashqafotav shel Rabiah", p. 36.

tuvei ha-'ir were empowered even to impose *hefqer beit din,* regardless of their level of personal scholarship. R. Asher b. Yeḥiel wrote that "it is common practice that whatever the *tuvei ha-qahal* agree to do is effective without a *qinyan.*"[44] It appears that Rabiah was already working with this assumption.[45]

Amongst thirteenth-century Ashkenazic authorities, the need for the acquiescence of an *adam ḥashuv* was expressed by R. Moses of Coucy and R. Ḥayyim Or Zarua'. Neither of them, however, referred to *da'at maqneh* issues. R. Moses of Coucy linked the need for *adam ḥashuv* in *B.B.* 9a to the ability of city-dwellers to enact ordinances (*B.B.* 8b). His rationale was that *"ein rasha'in la'anosh adam ela 'al pi ḥakham."* R. Mosheh noted that the requirement of *adam ḥashuv* applied only if one was available. His discussion of *adam ḥashuv* appeared in his analysis of the prohibition of *ona'ah.*[46] All of these factors point to the conclusion that *adam ḥashuv* was, for R. Moses of Coucy, a means of preventing the community from issuing unfair or mistaken ordinances, similar to the position taken by Raban.

[44] R. Asher b. Yeḥiel, *Responsa,* 6:19–21.

[45] See the commentary of Rabbenu Ḥanan'el to *B.B.* 8b published by Eleazar Hurvitz in *Hadarom* 44 (1977): 51 (cited by Gra on *Ḥoshen Mishpat* 163:6 [103]); *Sefer Mordekhai, Megillah* sec. 825; Ramo's gloss to *Ḥoshen Mishpat,* ad loc.; R. Eliyahu Mizraḥi, *Responsa* (Jerusalem, 1938), #57, 180–81, 184; R. Eliyahu b. Ḥayyim, *Responsa Mayim Amuqqim* (Berlin, 1778), #63, fol. 63b; R. Shelomoh Kook, "Ha-Teḥiqqah veha-Shipput shel Malkhut, Ẓibbur u-Medinat Yisrael," *Torah She-Be'al Peh* 11 (1969): 99–100. See also Elon, *Ha-Mishpat ha-'Ivri,* p. 573. Rabbenu Tam, on the other hand, clearly held that monetary actions taken by the community or its officials did require some form of *qinyan.* Cf. Elon, pp. 581–82, and above, n. 34.

[46] *Sefer Miẓvot Gadol, lo ta'aseh* 170 (Venice, 1547), fol. 60b. Given R. Moses' possible connection to the German Pietists [see my *Jewish Education and Society in the High Middle Ages* (Detroit, 1992), p. 179, n. 87], the relationship between their views must be considered. On the views of the German Pietists concerning communal government, see Ivan Marcus, *Piety and Society* (Leiden, 1981), pp. 59–60, 80, and Handelsman, "Temurot be-Hanhagat Qehillot Yisrael be-Ashkenaz Bimei ha-Beinayim" (Ph.D. diss., Tel Aviv University, 1980), pp. 281–87.

After outlining a system of communal government, based on Rabiah's theories, that gave great power to the *shiv'ah tuvei ha-'ir,* R. Ḥayyim Or Zarua' discussed the interface between the charity fund trustees *(gabba'ei ẓedaqah)* and the community. He wrote that the *gabba'im* must present a tally of the charity funds to (at least) one leading scholar of the town. R. Ḥayyim based this requirement upon a *sugya* in *Gittin,* and upon the requirement for *adam ḥashuv* in *B.B.* 9a. This application of *adam ḥashuv* was obviously quite limited.[47]

V

R. Meir of Rothenburg maintained the conventional view, held by Rabiah, that the majority of the members of a community could set communal policy in most cases.[48] Nonetheless, he agreed with Rabbenu Tam that unanimity was required in the apportioning of tax encumbrances. R. Meir argued that the need for unanimity in these situations was due to the fact that the tax obligations, which were assigned verbally, were considered a *qinyan devarim* whose efficacy was normally even less than that of *asmakhta* and would otherwise not be binding.[49] Utilizing Rabbenu Tam's interpretation of *B.B.* 8b without attribution, R. Meir concluded that unanimous consent allowed the apportionment of taxes based on this verbal agreement, without any formal *qinyan*:

> Members of the city are permitted ... this is with unanimous consent and we are told that words alone without a [formal] *qinyan* do bind the parties ... and they are able to fine whomever accepted [their agreement] initially and then violated it.[50]

[47] *Responsa,* #65 (fol. 19b). Cf. Handelsman, "Temurot," pp. 82–85.

[48] Agus, *Rabbi Meir of Rothenburg,* v. 1, pp. 108–24.

[49] R. Meir of Rothenburg, *Responsa* (Prague, 1895), #941.

[50] Prague #968:
רשאין בני העיר ... היינו מדעת כולם וקא משמע לן דבדיבור בעלמא בלא קנין הן דברים הנקנין ... ורשאין לקנוס את מי שקיבל עליו תחילה ועבר על תקנתן.

R. Meir apparently relied on Rabbenu Tam's interpretations whenever *da'at maqneh* problems were most severe. Indeed, R. Meir describes the case of the butchers in *B.B.* 9a as a situation based solely on a verbal commitment where the agreement was nonetheless binding. This was so because the agreement was made by all those involved. R. Meir does not, however, make specific reference to an *adam ḥashuv.* The *da'at maqneh* amongst the butchers was the knowledge that showing sensitivity to others was a valued characteristic that would earn good will for future endeavors:

> Members of a community who wish to pass ordinances through unanimous agreement (as in the case of the butchers who came before Rava having made conditions with each other through the agreement of all of them), their agreements are binding even though they accepted the conditions through mere verbal acquiescence which is worse than (acquisition through) *asmakhta* (a mode of commitment that is typically not binding) ... (Mere verbal assent) is effective here because of the mutual benefit that both sides derive from listening to (complying with) each other in a case where both sides stand to benefit. This is similar to an unpaid watchman who accepted upon himself the (additional) liabilities of a borrower. Even though (he accepts his added responsibilities) through mere verbal acquiescence, he has agreed to obligate himself in light of the benefit that accrues to him from the word going out that he is a trustworthy (responsible) person.[51]

R. Meir used his understanding of *B.B.* 9a, as Rabbenu Tam did, to explain how communal enactments were binding in 8b,

[51] Prague #941:
רשאין בני העיר ... שהן עצמן באים לתקן תקנות מרעת כולם [כהנהו טבחי דמתא דאתו לקמיה דרבא דאתנו בהדי הדדי מרעת כולם] וקא משמע לן דנתקיימו הדברים ואף על גב דבריבור בעלמא קא מתנו דגרע טפי מאסמכתא ... הכא ודאי מהני בההוא הנאה דקא צייתי להדדי במידי דאיכא רווחא להאי כמו להאי ... כי ההוא מתנה שומר חנם להיות כשואל ואפילו בדברים בההוא הנאה דנפיק עליה קלא דאיניש מהימנא הוא גמר ומשעבד נפשיה.
Cf. Mahariq, *Responsa,* #179, and B. Lifshitz (above, n. 34).

even though these were also enacted only through *qinyan devarim.*

Maharam also held that *tuvei ha-'ir* could determine the apportioning of taxes only if they were selected by unanimous vote. He derived the power of unanimously selected *tuvei ha-'ir* (in addition to the need for unanimous agreement in taxation cases) from *B.B.* 8b, as Rabbenu Tam did. If they were selected, however, by only part of even most of the community, their ordinances *(le-hattil ha-mas ve-khol milei di-shemaya ude-mata)* could not be effective according to R. Meir without the approval of an *adam ḥashuv.*[52] In an incident brought before R. Meir, a scholar was being treated unfairly by an improperly elected single communal leader. R. Meir concluded that the scholar's status as an *adam ḥashuv* could, in such a situation, allow him not to participate in the tax assessment process. Where *tuvei ha-'ir* were properly selected *(= mi-da'at kullam),* however, an *adam ḥashuv* had no role.[53]

In non-taxation matters, a majority of the *tuvei ha-'ir* could impose monetary fines and restrictions.[54] But even for non-taxation issues, R. Meir preferred that the *tuvei ha-'ir* be selected by unanimous agreement. Only if unanimity was impossible to achieve does R. Meir recommend that the members of the community conduct communal affairs on the basis of majority rules.[55]

Like R. Tam, R. Meir's insistence upon unanimity in the passages cited reflected his concern for ensuring the presence of sufficient *da'at maqneh* to bind all the parties involved. For

[52] *Responsa* (Berlin, 1891), ms. Amsterdam #128, p. 206.

[53] See *Responsa* (Cremona), #165. Cf. Agus, *R. Meir of Rothenburg,* p. 113, n. 205, and Handelsman, "Temurot," pp. 77–78.

[54] Berlin (Amsterdam #140), p. 209. R. Meir's acknowledgement of the agreement of his relative Kohen Ẓedeq, ostensibly an *adam ḥashuv,* was a matter of courtesy. R. Meir clearly states that the majority of the *tuvei ha-'ir* have full power to enact ordinances in the realm of *migdar milta.* He bases this claim upon an ordinance of Rabbenu Gershom.

[55] Berlin (ms. Prague #865), p. 320.

R. Meir, however, *tuvei ha-'ir* did not have to be scholars *per se* as long as they could provide the appropriate presence in a given situation.[56] Moreover, while Rabbenu Tam required unanimity in all votes dealing with communal government, R. Meir allowed duly constituted communal boards or the communities themselves to decide most matters according to the will of the majority.[57] Despite his concern with *da'at maqneh,*

[56] See the text of R. Meir's responsum published by I.Z. Kahana (above, n. 37), pp. 272–74, and Handelsman, "Hashqafotav shel Rabiah," pp. 32–33. R. Israel Isserlein noted that *tuvei ha-'ir* who had committed personal indiscretions that would normally disqualify a person from serving as a judge were also unacceptable. See *Terumat ha-Deshen (Pesaqim u-Ketavim)* #214, and Ramo's gloss to *Ḥoshen Mishpat* 37:22. Consistent with his overall view, Maharam wrote that the ability of a community to levy fines necessarily flowed from the notion of *rasha'in benei ha-'ir.* It could not be seen as an extension of the normative powers of the Jewish court because according to talmudic law, fines could not be set in *Bavel.* See Ephraim Kupfer, ed., *Teshuvot u-Pesaqim me-'et Ḥakhmei Ashkenaz ve-Ẓarefat* (Jerusalem, 1973), p. 152, #94, and p. 150, n. 1. The formulation of R. Isaac of Evreux in *Mordekhai Gittin* 384, that *dinei kenasot* can now be ajudicated only by *shiv'ah tuvei ha-'ir,* may be understood in similar fashion. Cf. Grossman, "Avaryanim va-Allammim," (above, n. 9), p. 145.

[57] It is possible that the enhanced status that R. Meir conferred upon the *tuvei ha-'ir* reflected the influence of Rabiah's theories upon his own thinking. Cf. Handelsman, "Temurot," pp. 73–81. In explaining the powers extended by Rabbenu Tam to the *tuvei ha-'ir* in matters of taxation (see above, n. 37), R. Meir compared the *tuvei ha-'ir* to *gedolei ha-dor* who have the ability to make things *hefqer.* Rabbenu Tam himself stopped far short of this designation. Cf. Mahari Bruna, *Responsa,* #123; Albeck, "Yaḥaso shel Rabbenu Tam," p. 130, n. 46; and Handelsman, "Hashqafotav shel Rabiah," p. 47, n. 130. Moreover, R. Meir based his interpretation on *Megillah* 26b–27a, the key text used by Rabiah in granting broad and substantial powers to the *tuvei ha-'ir.* For another instance in which R. Meir characterized the status of the *tuvei ha-'ir* in terms more lofty than those used by Rabbenu Tam, see *Haggahot Mordekhai, Bava Meẓi'a,* secs. 457–58. [M. Elon, *Ha-Mishpat ha-'Ivri,* p. 572, n. 59, has correctly identified this seemingly anonymous responsum as that of R. Meir of Rothenburg. A preceding passage in *Haggahot Mordekhai* begins with the phrase, *"she'elot leha-Ram."*] As this passage confirms (see above, n. 51), R. Meir held that the presence of all or even "many" of the *tuvei ha-'ir* obviated the need for a formal *qinyan.* See also his *Responsa*: Cremona, #10, 222; Lemberg, #108;

R. Meir apparently felt that *rov* was sufficient to bind the community in regard to those communal decisions which he classified as matters of *"migdar milta."* This category consisted of issues that were governed by talmudic law or were related to religious life and practice. As I.A. Agus has noted, enactments in this category were intended to improve the religious, social, and economic status of the community.[58] Given the generally beneficial nature of this legislation, the agreement of a majority was sufficient.

The other sphere of communal activity consisted of issues that were essentially secular. In addition, it often included situations where an individual stood to lose to another member of the community. Taxation matters were the major component of this category. To insure that a proper level of prior authorization was achieved, it was necessary to bind all participants by means of unanimous agreement.[59]

VI

What emerges from our study of communal government in medieval Ashkenaz is that during the twelfth and thirteenth centuries, discussions concerning *adam ḥashuv,* the power of the majority, and the prerogatives and functions of the *tuvei*

and Berlin (ms. Amsterdam), #128, p. 206. In this issue as well, R. Meir adopted the approach of Rabiah rather than that of Rabbenu Tam. See above, n. 45, and ms. Bodl. 637, sec. 1025 (above, n. 42).

[58] See Agus, *Rabbi Meir of Rothenburg,* pp. 119–22. Cf. Finkelstein, *Jewish Self-Government in the Middle Ages,* pp. 51–54; and Handelsman, "Temurot," pp. 75–77; and S. Morell, "The Constitutional Limits of Communal Government in Rabbinic Law," *Jewish Social Studies* 33 (1971): 87–107.

[59] It is significant that Maharam almost always cited *B.B.* 8b as a source that supported the need for unanimity (Rabbenu Tam's position) in tax cases rather than as a source that allowed the majority of the community to rule (Rabiah's position) in cases of *migdar milta.* See the responsa cited in Agus, R. Meir of Rothenburg, p. 113, n. 205, and p. 121, n. 235, and in "Ha-Shilton ha-'Aẓma'i shel ha-Qehillah ha-Yehudit," (above, n. 17) pp. 310, n. 126, and p. 312. Cf. Prague #980.

ha-'ir remained in a state of flux. Throughout the Tosafist period, members of the community and their duly appointed boards retained much power. While temporal conditions and conceptions undoubtedly had an impact,[60] leading Ashkenazic halakhists formulated their positions on issues of communal government based primarily on their analyses of relevant talmudic sources. The role of scholars in communal government was defined by the parameters of talmudic law, which were open to varied and diverse interpretations.

[60] See now Aryeh Grabois, "Hanhagat ha-Parnasim bi-Qehillot Ẓarefat ha-Ẓefonit ba-Me'ot ha-11 veha-12: "tuvei ha-qahal" ve-"ziqnei ha-'ir," *Tarbut ve-Ḥevrah be-Toledot Yisrael Bimei ha-Beinayim* [Qoveẓ Ma'amarim le-Zikhro shel Ḥayyim Hillel Ben-Sasson], ed. Reuven Bonfil et al. (Jerusalem 1989), pp. 303–14. The worsening economic and political climate in northern France and Germany during the second half of the thirteenth century, and the noticeable effect of these developments on rabbinic scholarship in Ashkenaz, may have impacted with some force on the thinking of Maharam mi-Rothenburg and his student R. Ḥayyim Or Zarua'. See my *Jewish Education and Society*, p. 74, and Handelsman, above, n. 56.