

WOMEN RECEIVING *ALIYOT*?:
A SHORT HALAKHIC ANALYSIS

by

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Introduction

Over the last few years an innovation has been suggested to Orthodox synagogue ritual: Women should receive *aliyot* and read the Torah as part of the public reading of the Torah every Shabbat (in the presence of a *minyan* of men). Much has been written about this proposal, focusing on many different aspects of it, from the breach of *minhag yisrael* to the public policy issues, to such concepts as the dignity of the congregation and the dignity of the people, to the rules of modesty of women and the proposed need for public sanction by eminent halakhic authorities for such a dramatic change.¹

This article will not address any of those issues, but will focus instead on the crucial underlying issue which, in this writer's opinion, has not received sufficient attention – whether this proposed change is consistent with the minimal halakhah of Torah reading, independent of any other issues,² and if so, how. The article

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¹ See M. Shapiro, "*Qeri'at haTorah* by Women: A Halakhic Analysis", *Edah Journal* 1:2 (2001); Y. Herzl Henkin, "*Qeri'at HaTorah* by Women: Where We Stand Today", *Edah Journal* 1:2 (2001); D. Sperber, "Congregational Dignity and Human Dignity: Women and Public Torah Reading", *Edah Journal* 3:2 (2002); T. Weiss, "*Shirah H'dashah – minyan hilkhati at'er*", *De'ot* 15 (*Adar I* 5753), 15; A. Stern, "*Al shiluv hanashim bif'ilut hadatit bakehillah*", *Tsohar* 14 (Spring 5763), 37; E. Shochetman, "*Aliyat nashim laTorah*", *Sinai* vol. 135-136 (5765), 271-348; G. Rothstein, "Women's *Aliyyot* in Contemporary Synagogues", *Tradition* 39:2 (Summer, 2005), 36-58; and A. Isaacs, "*Kevod Hatsibbur: Towards a Contextualist History of Women's Role in Torah Reading*", *Nashim* 12 (Fall 2006), 261-288. To see how timeless these articles really are, it is worth comparing them to A. Blumenthal's classic Conservative article, "An *Aliyah* for Women", *Proceedings of the Rabbinical Assembly* 19 (1955), 168-181.

² Such as *minhag*, laws of modesty, *hukot hagoyim* and other external concerns.

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begins with a discussion of the dispute between R. Meir b. Barukh of Rothenberg (Maharam, Germany, c. 1215-1293) and R. Solomon b. Abraham Adret (Rashba, Spain, c. 1235-c. 1310) about a city where all of the men are *kohanim*. The crux of this dispute rests on two issues: whether or not *pegam* (stigma) *kohen* is subjectively or objectively generated, and whether or not women can be *oleh* as a matter of base-line halakhah. The second section of the article discusses the view of R. Jacob b. Asher (*Tur*, Spain, 1269-1343), R. Joseph Karo (*Shulḥan ’Arukh*, Israel, 1488-1575), and post-medieval *poskim*. This article concludes that, though the possibility of women receiving *aliyot* (as a matter of *Hilkhot kerit’at haTorah*) was disputed among the *Rishonim*, *poskim* from the *Tur* onward are nearly unanimous in insisting that Jewish law prohibits such *aliyot*.

The Talmud in *Megillah* 23a, quoting a *beraita*, states:

Anyone may count towards the obligation³ as a member of the seven mandatory *aliyot* [on Shabbat], even a minor, even a woman; but the Sages stated that a woman may not read from the Torah due to the dignity of the community (*tsibbur*).

Relevant as this issue might seem, there is almost no further discussion of this point in the Talmudic sources. Is this assertion that women may not receive *aliyot* a rabbinic decree, good advice, or something else? There is no further analysis of this Talmudic source at all, and a serious discussion of it waited for the era of the *Rishonim* to elaborate and codify the halakhah on this matter.

The Dispute Between Maharam and Rashba about a City Where All the Men are Kohanim

Exactly such a discussion starts with the famous question of how to allocate *aliyot* in a city where all the men are *kohanim*.⁴ The Talmudic rule (*Gittin* 59b) requires that the first *aliyah* goes to a *kohen*, the second to a *levi*, and the remaining five to *yisraelim*. What does one do when one cannot distribute the *aliyot* in that manner due to lack of *yisraelim*? The Talmud (*Gittin* 59b) indicates that there is a prohibition to give one *kohen* an *aliyah* after another one (and one *levi* after another) as this generates doubt as to whether the first *kohen* is really a valid *kohen*

³ The word *oleh* is used in this context to mean “count to the requisite number”; see similar uses in *Megillah* 21b, 23a, 28b, 31a (noted in a comment from Rabbi J. Wieder).

⁴ Another question related to this is whether women who are descendents of *kohanim* are themselves priestesses or merely the daughters of priests. This is a dispute between Maimonides (Rambam, Egypt, 1135-1204) and R. Abraham ben David (Ravad, France, 1125-1198) (compare Rambam and Ravad on *Hilkhot Terumah* 1:19). According to those who consider such women to be priestesses, they too would receive the first *aliyah* according to the view of R. Mordechai b. Hillel (the Mordechai, Germany, c. 1250-1298).

– called *pegam* (stigma) *kohen*.⁵ It is obvious, however, that in a city where all are *kohanim*, one cannot follow this rule and have a successful Torah reading, as there are only *kohanim* to receive *aliyot*. The proper protocol in this case was a dispute among the *Rishonim*.

Maharam proposes a solution relevant to this problem and also to women receiving *aliyot*. He states that:

It appears to me that the [selfsame] *kohen* receives the first two *aliyot*,⁶ and after that women should read the Torah, since the Talmud tells us that all can receive *aliyot* to make up the seven, and the Talmud later recounts that the Sages decreed that a women may not read from the Torah due to the dignity of the congregation – when no other possibility is available, the dignity of the congregation is discarded lest we impute ancestral sin to the *kohanim*, since if additional *kohanim* read Torah, people might say that the initial *kohanim* are children of divorce [and not really *kohanim*].⁷

The understanding of halakhah upon which his view is predicated seems simple. Since the Talmud does not categorically preclude women from receiving *aliyot*, in a time of need one may conduct oneself consistently with the initial Talmudic rule that permits *aliyot* for women and assume that the congregation has waived its dignity. This congregation does not have enough people to give *aliyot* to, absent the women, thus, it has no choice but to waive its dignity in order to read the Torah. This is better than either not reading the Torah or calling up only *kohanim*, which Maharam posits is simply prohibited, based on the Talmudic rule found in *Gittin* 59b, which prohibits two *kohanim* from getting *aliyot* one after another due to *pegam kohen*. A number of *Rishonim* agree with this view, including R. Meir haKohen of Rothenburg (*Hagahot Maimoniot*, France and Germany, 13th-14th centuries) and the Mordechai.⁸ According to Maharam, there is no objective rabbinic decree flatly prohibiting women from receiving *aliyot* in all circumstances.

Of course, even if the Maharam is correct as a matter of halakhah, it is still a

⁵ Since the second *kohen* might be receiving the *aliyah* because the first *kohen* is actually not a *kohen* or has done something to invalidate his status. (Similar reasoning applies for *leviim*, with the additional factor that one might confuse the first *levi* with a *kohen*.)

⁶ Though halakhah generally demands that separate individuals receive each *aliyah*, the absence of a *levi* creates a well-known exception whereby the *kohen* called for the first *aliyah* is re-called for the second *aliyah* normally reserved for a *levi* (as *kohanim* are a sub-set of *leviim*, but calling another *kohen* would give rise to the *pegam* problem); see *Orah Hayyim* 135:8.

⁷ *Shut Maharam ben Baruch meRutenberg* 108.

⁸ *Mordechai*, *Gittin*, *siman* 404; *Hagahot Maimoniot*, *Hilkhot Tefillah* 12:17; Rabbeinu Yeruham ben Meshullam (France, 1290-1350), R. Elijah Ba'al Shem (*Toledot Adam*, Poland, d. 1583), *Nativ* 2, *Helek* 3 p. 20b in the name of R. Meir ben Todros HaLevi Abulafia (*Yad Ramah*, Spain, c. 1170-1244); and R. David ben Josef ben David Abudraham (Abudraham, Spain, fl. 1340), *Daily Services*, p. 144.

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leap to allow women to receive *aliyot* generally, but – it must be conceded – it is a leap that is within the range of possibility. One could confine the Maharam to a case where men could not receive the *aliyot*, and refuse to analogize cases where men cannot receive *aliyot* to cases where enough men could.⁹ However, it would not be beyond the pale to assert that, given the perceived reality of our society and the *sha'at hadehak* that some see, contemporary conditions give rise to enough of a *bedi'avad* situation to permit this conduct in a time of need. Such a line of reasoning has been spelled out by many others, and seems possible within the confines of the Maharam.¹⁰

In contrast to the view of the Maharam stands the view of the Rashba. Rashba states:

In Chapter *haNizakin* (*Gittin* 59b) it appears that one *kohen* should never receive an *aliyah* after another *kohen*, lest it imply that the first or second *kohen* is invalid, as it states there. In a city where all are *kohanim*, what should they do?...In a place where all are *kohanim* or there are not enough *yisraelim* as needed, one *kohen* receives an *aliyah* after another, and there is no stigma (*pegam*) since they all know that there are only *kohanim* present, and the second *kohen* knows that he is reading not because of the stigma of the first *kohen*, but because there are no *yisraelim* present. This is true for the third and the fourth and for all of them.¹¹

Rashba posits that only male *kohanim* should get *aliyot* in a town where all the men are *kohanim*, and everyone will understand that there is no invalidation of the *kohanim* in such a case, as there is no choice but to give *kohanim* all the *aliyot*.¹² The intellectual basis for the Rashba is apparent. Rashba maintains that the doctrine of *pegam kohen* has a socially subjective component to it. There is no concern for stigma, and indeed none arises, when all the people in the congregation understand that one *kohen* is being *oleh* after another due to the fact that there is no choice as to whom else to give the *aliyah*. All the people listening to the Torah reading understand why this is happening, and do not think that any of the *kohanim* are actually invalid, since they know that no other choice is possible. Many *Rishonim* adopt the view of Rashba,¹³ yet the matter remained a dispute among the *Rishonim*.

⁹ As R. Avraham Bornsztain (*Avnei Nezer*, Poland, 1838-1910) in *Yoreh De'ah* 345(9) puts it, “One does not analogize cases of the possible to cases of the impossible”.

¹⁰ See the article by Sperber *supra* n.1 at 4 and the article by Shapiro *supra* n.1 at 38.

¹¹ *Shut haRashba haMeyuhasot laRamban*, 186; see also *Shut haRashba* 1:13 and 1:733 for a similar statement.

¹² *Shut haRashba* 1:732 and 1:13.

¹³ R. Jacob ben Judah Landau (*Sefer haAgur*, Germany and Italy, d. 1493), *Hilkhot Keri'at haTorah* 187; R. Isaac Aboab (Mahari Abuhav, Spain, 1300s) on *Tur*, *Orah Hayyim* 135; R. Yom Tov (al-) Asevilli (Ritva, Spain, 1250-1330), *Ketubot* 25b.

Although the primary dispute between Rashba and Maharam is about whether *pegam* to a *kohen* is objectively determined by the abstract halakhah, or subjectively determined by the knowledge of the people at this particular Torah reading, there is an important ancillary question that also needs to be resolved: why does the Rashba not consider the possibility of women receiving *aliyot* (as the Maharam proposes)? After all, given the presence of women who can receive *aliyot* (as Maharam claims), maybe the *kohanim* are in fact stigmatized – as the essence of the stigma, in Rashba’s view, occurs when a *kohen* receives an *aliyah* after another *kohen* when someone else could have.¹⁴

This question is extremely important to the question of women receiving *aliyot*. According to both Maharam and Rashba, there is an improper stigma imposed on *kohanim* when a *kohen* receives an *aliyah* immediately after another *kohen* in the presence of a non-*kohen* who may receive an *aliyah*. Thus, both Rashba and Maharam agree that it is a violation of halakhah to give two *kohanim* consecutive *aliyot*: Maharam rules this as a specific decree with no exceptions and Rashba accepts that this decree does not apply when no one else in the congregation is eligible to receive an *aliyah*. Maharam thinks that the presence of women who could be *olot* obviates the issue of stigma, and thus one must give women *aliyot* when no other *yisraelim* are present, as the alternative stigmatizes *kohanim* in violation of halakhah. The intellectual predicate of Maharam’s view is that women may receive *aliyot* in certain cases.

The Rashba maintains that women are generally ineligible to receive *aliyot*, and the nature of the decree of the Sages prohibiting women from receiving *aliyot* – even as it is built around the dignity of the congregation – appears in his view to be un-alterable by the reality on the ground. Since women cannot receive *aliyot* as a matter of halakhah according to Rashba, women’s presence in the congregation does not generate *pegam* to the *kohanim*, and some other solution must be adopted if Torah reading is to proceed – and that is for one *kohen* get an *aliyah* after another.¹⁵

Rashba is not merely positing an alternative solution to the one put forward by

¹⁴ Maharam, by contrast, sees the potential for invalidity even when no other eligible *olim* are present, and thus ten *kohanim* alone might pose a significant problem; cited in n.19. It is exactly for this reason that Maharam insists that women must receive *aliyot* when that is an alternative.

¹⁵ Of course, one could adopt Rashba’s view prohibiting women from getting *aliyot* without accepting his view that stigma to *kohanim* is subjective. The two views are unrelated conceptually. However – and this is extremely important to grasp – one cannot reach the result Rashba actually reaches without accepting both views. If one were to adopt only the view that stigma is subjective, but believe that women could receive *aliyot*, one would still conclude that since there are people present who can receive *aliyot*, halakhah requires that these women receive the *aliyot*, as even subjective stigma is generated by the presence of others who can receive *aliyot*. The reverse, however, is not correct. Maharam’s two insights – stigma is absolute and women may receive the *aliyot* – are interrelated, in that if he held that stigma was absolute, but women simply could not receive *aliyot*, then he would propose that no Torah reading occur.

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Maharam, or even a better solution than Maharam’s while conceding that the Maharam’s also can work. Instead, Rashba’s approach is predicated on the view that the solution put forward by Maharam is untenable, as women cannot receive *aliyot* as a matter of Jewish law by rabbinic decree.¹⁶ The simple and direct language of the Rashba in this *teshuvah* directly supports the *sub silentio* argument that women simply cannot receive *aliyot*. His phrasing of the issue “in a place where *all* are *kohanim* or there are not enough *yisraelim* to receive the *aliyot*” seems to simply exclude women from the counting; the same type of language is present in his discussion of the answer, where he states “everyone knows that there are only *kohanim* present, and a second *kohen* cannot read because of stigma (*pegam*), except in a case where there is no *yisrael* present”. This categorical linguistic exclusion only makes sense if – in fact – women are excluded.

According to Rashba, *pegam kohen* can, however, be generated by presence of minors. Thus, if there were ten *kohanim* and five minor *yisraelim* in a city, the minors would certainly have to get the *yisrael aliyot*, since the Gemara in *Megillah* 23 allows minors to receive *aliyot*. Their presence generates stigma (*pegam*) if two *kohanim* receive successive *aliyot* in the presence of these eligible minors – since the *kohanim* do not have to receive such *aliyot*, if they do, it is because the first *kohen* is defective. (Maharam agrees to this as well.¹⁷) For Rashba, the presence of women in the congregation cannot create any stigma (*pegam*) for the *kohanim* by their presence, such that the *kohanim* would not be able to receive multiple *aliyot*. Rashba’s position simply makes no sense if women are ever practically eligible to receive *aliyot* – *pegam* is attached to the *kohanim* exactly by such a person being present.

Nor is it possible to answer this question by positing that women simply were not present, as Rashba derives this halakhah from the Jerusalem Talmud (*Yerushalmi*) (*Gittin*, 5:9) which states:

Rabbi Ḥaninah states: A city which is all *kohanim* (except for one), the single *yisrael* reads Torah first as such is the way of peace. Rabbi Acha and Rabbi Tanḥum the son of Rav Ḥiya state in the name of Rabbi Simlay: A city which is all *kohanim*, all the *kohanim* bless the people; who do they bless? Their brothers in the north and the south. Who answers after the *kohanim*? The women and children.

Thus it is clear that women were present in the synagogue, and were capable of

¹⁶ Rashba would adopt the view that women may not receive *aliyot* even when they are the only ones at all seemingly eligible. (Consider, for example, the case of ten mute-but-not-deaf men and their accompanying wives stranded on an island with a *sefer Torah*. On Shabbat, this *minyan* is obligated in *kri'at haTorah*, but is physiologically prevented from reading. Maharam would certainly permit the women (not mute) to receive *aliyot*. It seems clear from Rashba himself that he thinks *kavod hatsibbur* in this case simply cannot be waived. See *Teshuvot haRashba* 1:144.)

¹⁷ See sources *supra* n.7 and 8.

ritual participation in synagogue activity – but yet, Rashba posits (correctly, from the view of the *Yerushalmi*) that one sees that women cannot receive *aliyot*, even though they can ritually participate in the priestly blessing.¹⁸

Section Summary

One sees two views in the *Rishonim* as to what to do when all the congregants in the village are *kohanim*.

- A. Maharam maintains that two or more *kohanim* may never receive consecutive *aliyot* due to the objectively determined stigma imposed on the first *kohen* in that case, and others must be *oleh*. Since women can receive *aliyot* as a matter of halakhah when the *tsibbur* so directs, when there are no male *leviim* or *yisraelim* in the room, women receive *aliyot*.¹⁹
- B. Rashba maintains that multiple *kohanim* may receive *aliyot* when not enough eligible *yisraelim* are present, as stigma is determined subjectively. Women, however, may never get *aliyot*, as a rabbinic prohibition. Their presence does not generate stigma (*pegam*) on the *kohanim* so as to prevent two or more *kohanim* from receiving sequential *aliyot* in the presence of women.

There is no middle ground between these two views – either women can or cannot receive *aliyot*. Each answer views the other as wrong – and this is independent of any general dispute about *kavod hatsibbur* in other contexts. One can say with some halakhic confidence that seven hundred years ago, a person living in Northern France or Southern Germany (those areas where the intellectual school of thought of the Maharam dominated) would not be considered a sinner if he or she lived in a village where all the adult men were *kohanim* and women received *aliyot* after them, as this school of thought was certainly a reasonable one for a *moreh hora'ah* to choose at that time.

The View of the Tur, Shulḥan 'Arukh, and Post-Medieval Poskim

Jewish law is not intellectually static, and disputes can close. The question of the city with only male *kohanim* is widely discussed in the halakhic literature from the *Tur* onward, with many different aspects of the matter addressed. However,

¹⁸ This author has thought many times about how the Maharam would respond to this *Yerushalmi*, and has no clear answer. See also n.53.

¹⁹ So strongly does this group hold this view that Rema in *Darkhei Moshe* quotes Rabbeinu Simḥah as saying that if only *kohanim* are present, the congregation may not publicly read the Torah. *Darkei Moshe, Oraḥ Ḥayyim* 143:2.

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from the *Tur* onward, one does not see a single halakhic authority who accepts the view of the Maharam as a matter of Jewish law. The *Tur* rejects it²⁰ as do R. Yoel Sirkis (*Bach*, Poland, 1561-1640)²¹ and *Shulḥan ’Arukh*,²² as does R. Moses b. Israel Isserles (Rema, Poland, 1525/30-1572) by his silence, and R. Mordecai ben Avraham Yoffe (*Levush*, Poland, c. 1530-1612)²³ explicitly. So do the classical commentators on the *Shulḥan ’Arukh*, including R. David HaLevi Segal (*Taz*, Poland, c. 1586-1667),²⁴ R. Abraham Abele Gombiner (*Magen Avraham*, Poland, c.1633-c.1683),²⁵ R. Elijah ben Shlomo Zalman (Gra, Lithuania, 1720-1797),²⁶ R. Ḥayyim Joseph David ben Isaac Zerahiah Azulai (*Birkei Yosef*, Jerusalem, 1724-1807),²⁷ R. Yisrael Meir Kagan Poupko (*Mishnah Berurah*, Poland, 1838-1933),²⁸ and R. Yehiel Michel Epstein (*Arukh haShulḥan*, Lithuania, 1829-1908).²⁹ R. Solomon Luria (Maharshah, Lithuania, 1510-1574) also agrees with the Rashba, as do other super-commentaries writing about normative Jewish law.³⁰ Indeed, I have seen no authorities after the time of the *Shulḥan ’Arukh* who adopt the view of the Maharam as correct or even plausible (*bar samcha*) – not a single one of the classical commentaries printed in the standard *Shulḥan ’Arukh* even makes mention of the Maharam’s view.³¹

The reason why these authorities seem to have rejected the view of Maharam and adopted the view of the Rashba is that the latter view is supported by an explicit statement in the Jerusalem Talmud (*Yerushalmi*). The *Yerushalmi* states in the name of Rabbi Ḥaninah that in a city in which there is but one *yisrael* and the rest are *kohanim*, the *yisrael* receives the first *aliyah*.³² This ruling can be

²⁰ *Tur*, *Orah Ḥayyim* 143.

²¹ *Orah Ḥayyim* 143, s.v. *ir shekulo kohanim*.

²² *Shulḥan ’Arukh*, *Orah Ḥayyim* 135:12.

²³ *Levush*, *Orah Ḥayyim* 135:12-14.

²⁴ *Orah Ḥayyim* 135:11 (who proposes a problem which could have been easily solved if he were to have accepted the Maharam).

²⁵ *Orah Ḥayyim* 135:17, by implication.

²⁶ *Orah Ḥayyim* 135:15.

²⁷ *Orah Ḥayyim* 143:8.

²⁸ *Orah Ḥayyim* 135:45.

²⁹ *Orah Ḥayyim* 135:28. For an even more modern authority who rejects this view, see R. Ovadia Yosef (Israel, contemporary), *Yalkut Yosef* 2:135:42 p. 65.

³⁰ *Yam Shel Shlomo*, *Gittin* 5:24.

³¹ See for example, *Responsa Binyamin Ze’ev* 160, *Shut Beit Yehudah Orah Ḥayyim* 37, and *Minḥat Yitsḥak* 2:40. R. Yehuda Henkin (Israel, contemporary) in *Benai Banim* 1:4 notes that R. Ya’akov Emden (*Hagahot Yavets*, Germany, 1697-1776) on *Megillah* 23 and R. Ḥayyim Pardo (*Ḥasdei David*, Italy, 1710-1792) on *Tosefta Megillah* 3:5 seem to reach a contrary conclusion and maintain that (at least after the fact) women can receive *aliyot* when no men can.

³² Jerusalem Talmud, *Gittin* 5:9 (47b).

understood as indicating that the presence of women in the congregation does not count toward creating stigma (*pegam*), as women can never receive *aliyot* by rabbinic decree. If the proper solution was that women should receive *aliyot*, the Jerusalem Talmud would have told us so. So strong is this question from the *Yerushalmi* on the Maharam, that even the Maharshah, who is generally a staunch defender of the school of thought of Maharam, writes that “if Maharam had seen the Jerusalem Talmud, he would have retracted his view”.³³ There seems to be no way in which to harmonize the Maharam’s view with that of the Jerusalem Talmud, and it is for that reason that his view is forsaken by halakhic authorities.

When considering the situation of a city where all the men are *kohanim*, Tosafot (*Gittin* 59a s.v. *ki*) suggests a different solution than those offered by the Maharam and Rashba:

In the name of Rabbenu Yehuda it is written that in a synagogue in which there are only *kohanim*, one *kohen* reads in the place of all seven, and for every *aliyah* he blesses before and after.³⁴

Although his solution is rejected *lahalakhah*,³⁵ its predicate would seem to be that women are not *olot*, as he makes no mention of the possibility of women receiving *aliyot* to solve this problem.

Nor should one think that the formulation for the prohibition of women receiving *aliyot* found in *Shulḥan ’Arukh* OC 282:2 is at tension with this analysis.³⁶ That the *Shulḥan ’Arukh* quotes both the pre and post decree status of halakhah is not his typical style, but it is well within the normal linguistic framework of the *Shulḥan ’Arukh*. *Shulḥan ’Arukh* frequently introduces contemporary halakhah with a framing of issues that requires that he discuss in the code both normative halakhah and the halakhah that preceded the Talmudic halakhah – it certainly implies no acceptance of the view of Maharam.³⁷ Rema’s formulation is more troubling. Given the fact that Rema quotes the Maharam in the

³³ *Yam Shel Shlomo*, *Gittin* 5:24.

³⁴ This solution is adapted from *Tosefta Megillah* 3:12 (Lieberman edition).

³⁵ As it seems to forsake the obligation of seven different people arising to read.

³⁶ Which states:

Everyone counts to the seven needed [for Torah-reading], even women and minors who know to Whom they are blessing, but the Sages said that a woman may not read in public due to communal dignity.

³⁷ More generally, the language of *amru ḥakhamim* used here fits exactly into the framework of the five other times where it is used in the *Shulḥan ’Arukh* (outside of *Hoshen Mishpat*), where the *Shulḥan ’Arukh* seems to use this phrase as an introduction to additional Talmudic developments which are not fully consistent with the statement which follows the phrase *amru ḥakhamim*. See YD 203:7 (*nedarim*), YD 246:6 (Torah study for women), 280:2 (mourning), EH 25:2 (marital sexuality), 143:15 (marital ethics). In each of these cases, the statements which follow the phrase *amru ḥakhamim* substantially modify the saying of the Sages. Its use in *Hoshen Mishpat* is much more limited.

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Darkhei Moshe, but chooses not to quote him in the *Rema*, is a fairly clear indication that he too agrees that the halakhah does not follow the view of the Maharam.³⁸

It is worth noting that Maharam’s view, that a village with only *kohanim* should give women *aliyot*, is forsaken even by those *Rishonim* and *Aharonim* who agree with him generally that dignity of the congregation can be waived in many situations. For example, a similar dispute takes place between Maharam and Rashba about a related topic, which sharpens one sense of this dispute about *aliyot*, and is worth noting. The issue at hand is whether one may publicly read from a *pasul sefer Torah* when no other scroll is present. Maharam states (as quoted in the *Mordekhai*):

... What is the rule with regard to reading from a *ḥumash* [as opposed to a Torah scroll] to fulfill the communal obligation? And we conclude that it is not to be done due to the dignity of the congregation, and it appears that if the community forgives its dignity, it is permitted ...³⁹

Rashba argues and insists that *kavod hatsibbur* may never be waived and such a Torah may never be used; instead, Torah reading should be cancelled.⁴⁰

Many halakhic authorities agree with the ruling of the Maharam in this case, including a *teshuvah* of Maimonides which permits one to read from such a Torah and recite blessings.⁴¹ It is not without precedent in Jewish law that a community can forgive its dignity generally, and there is quite a literature which shows that many halakhic authorities in many different contexts permitted this. Indeed, the view of the Rambam and Maharam are relied on *bedia’vad* by no lesser authorities than *’Arukh haShulḥan* and *Mishnah Berurah*.⁴²

Why do these same halakhic authorities accept the Maharam that dignity of the community can be waived in some cases, but understand that the specific decree prohibiting women from reading from the Torah is different in nature than the more general concept of *kavod hatsibbur*? Indeed, these same authorities accept the ruling of Rashba that categorically prohibits women’s *aliyot* – and this includes schools of thought that are generally very deferential to Maharam. The answer, I

³⁸ My inclination is to understand both R. Nissim ben Reuven (Ran, Spain, 1320-1380) and R. Isaac ben Sheshet Perfet (Rivash, Spain, 1326-1408) (which the Rema quotes) as articulating a halakhic position that is prior to the decree of *kavod hatsibbur*, and that the Rema is fundamentally quoting them for their view of *aliyot* by minors (as the *Mishnah Berurah* notes in passing). I am otherwise at a loss to explain the Rema, although I acknowledge that this explanation is not fully consistent with the general methodology of how Rema generally operates.

³⁹ *Mordekhai*, *Halakhot Ketanot* 968. See also *Teshuvot Maharam meRutenberg* 4:174.

⁴⁰ *Rashba*, commentary to *Gittin* 60a as well as *Shut haRashba* 1:144 and many other places.

⁴¹ *Shut haRambam* 294.

⁴² *’Arukh haShulḥan*, *Orah Ḥayyim* 143:3-4 and *Mishnah Berurah* 143 (*Be’ur Halakhah*, s.v. *im nimtsa’u*).

suspect, is that the Jerusalem Talmud makes it clear that in a city with only men who are *kohanim* in residence, women cannot receive *aliyot* by rabbinic decree, contrary to the ruling of Maharam. Based on this, I suspect that *poskim* intuited something different about this issue in contrast to other cases of *kavod hatsibbur*.

One might be tempted to argue that maybe Rashba's followers merely have a different balance for women's *aliyot*, and that even Rashba's followers might agree that there could arise a case where women could be *oleh*, as social stigma of *kavod hatsibbur* could be waived. In this theory, all that Rashba is doing is weighting one type of societally dependent stigma more heavily than the other – sort of “it is better to insult some *kohanim* than insult all men by calling women”, and still argue that women's *aliyot* are not categorically precluded.

There are three serious flaws with this approach. First, it denies that there is a connection between who can be *oleh* and generating stigma to *kohanim*. Maharam is conceptually forced to give women *aliyot*, as (since he thinks women can sometimes be *oleh*) their presence must generate *pegam* to the *kohen*. Rashba's followers do not contemplate that possibility since they deny that women can ever be *oleh*. Since they cannot be *oleh* ever, no *pegam* is possible, whereas people who can sometimes be *oleh* generate *pegam* (such as a minor in Talmudic times).

Second, this socially subjective explanation (the men are choosing not to waive *kavod hatsibbur*, even though they could, even according to Rashba) is centrally missing from Rashba. Many *Rishonim* believed that *kavod hatsibbur* could be waived in some cases (and they clearly had Maharam in front of them noting that it could be done for women). Yet they do not note that in a city of all *kohanim*, unless the *tsibbur* waives its *kavod*, only *kohanim* should be *oleh*, but if the *tsibbur* waives its *kavod*, then any can be *oleh*. The *Levush* (OC135:13) makes it clear that this view is rejected by later *poskim*.

Finally, if Rashba conceives of *pegam kohen* to be societally subjective (as he notes), there is no reason to put forward that he or his followers assume that women's *aliyot* are also subjective, but still are outweighed by *pegam kohen*. Rather, it makes sense that he considers women's *aliyot* to be objectively *assur* and that is the way he puts it on a higher level. If they are equal, we have no reason to pick one over the other.

It is important to understand that the ruling of the Rashba, that in a village of all *kohanim*, women are not *oleh*, but all the *kohanim* are *oleh*, is accepted as normative halakhah. This is not only held by those *poskim* who accept the Rashba's general theory of *kavod hatsibbur* as un-waivable, but also by those who generally argue with his theory, and accept that *kavod hatsibbur* can be waived in many cases – but not with regard to women's *aliyot*.

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Section Summary

Although there was a dispute among the *Rishonim* about what to do in a city with only male *kohanim*, with the Maharam permitting women to receive *aliyot* in such a case and Rashba prohibiting women’s *aliyot* even in such a case, over the last five hundred years a deep and wide consensus has developed in halakhah that Rashba is correct and Maharam is not to be followed – and women’s *aliyot* would then seem to be a violation of the halakhah. To the best of this writer’s knowledge, no halakhic authority of the last five hundred years has disagreed with that consensus and thus halakhic practice is to generally prohibit women from receiving *aliyot* in all situations.

Some readers will be troubled by this conclusion, as a close read of the three *teshuvot* of the Rashba does not even make mention of women receiving *aliyot*. How can he be so clearly against it, one might ask, if he does not discuss it? The answer is important to understand conceptually. Precisely because Rashba and those who follow his view make no mention of the possibility of women receiving *aliyot*, and instead formulate an answer to the question of what to do in a city of *kohanim* that presupposes that women cannot receive *aliyot*, one has no choice but to accept that – if the Rashba is correct as a matter of halakhah – it is because women cannot receive *aliyot*. Women’s presence does not create stigma for *kohanim* because they are not *olot*. Maharam thinks women can be *oleh*, and therefore do create stigma.

This understanding is also clear from many early and late explanations of the Rashba. Consider the comments of the *Levush*:

But, if there are *kohanim* and *leviim* and no *yisraelim*, or *kohanim* and *yisraelim* but no *leviim*, or *leviim* and *yisraelim* but no *kohen*, and no one group has the minimum number needed to get all the *aliyot*, I have not found for them any solution [and no Torah reading should occur]...But if there are seven from one group, then all of that group receives the *aliyot*.⁴³

According to the *Levush* (who clearly accepts the view of the Rashba on this matter), when there are five *kohanim* and five *leviim*, no Torah reading takes place, as the problem of stigma (*pegam*) cannot be fixed. Why not give women *aliyot* rather than cease reading Torah according to the *Levush*? The answer is – albeit unstated – that the *Levush* recognizes that according to the approach of the Rashba, women cannot receive *aliyot*. Others propose other solutions to this problem predicated on the view of the Rashba, but – no matter how complex the problem – no one suggests that women be *olot*.⁴⁴

⁴³ *Levush Oraḥ Hayyim* 135:14.

⁴⁴ See *'Arukh HaShulḥan* 135:27-28 for other solutions.

A further proof of the fact that women were generally thought to be simply ineligible for *aliyot* can be found in the treatment of *aliyot* by minors, which the Talmud (*Megillah* 23b) would seem to permit. Yet the broad and deep consensus of Rishonim and Aḥaronim is that since nowadays each *oleh* recites his own blessing over Torah reading, we do not allow a minor to be called up to the Torah anymore. As the *'Arukh haShulḥan* states:

Even though by Talmudic rule a minor can receive an *aliyah* to the seven *aliyot*, nonetheless, to us since all of those who receive *aliyot* recite blessings, we do not call up a minor for the seven *aliyot*.⁴⁵

This rationale provides yet further proof of the proposition that women simply are not *oleh* according to the analysis of Rashba, in that if minors (who were permitted by Talmudic law to receive *aliyot*) no longer may, this is even more so true for women (who were not permitted *aliyot* by Talmudic convention). Of course, Maharam disagrees with that analysis and directs that minors too may be *oleh* – but in this instance as well his view is not accepted.

As a side note, this halakhic analysis also explains why significant Aḥaronim and Rishonim repeatedly discuss each of the cases where dignity of the congregation is advanced as a reason to prohibit an activity (such as publicly reading from a *pasul* or partial Torah,⁴⁶ or rolling a Torah during services⁴⁷). Many conclude that such conduct is permitted in some situations and that a congregation can waive its dignity in a time of need – but in the recorded history of halakhah (other than those few who accept the view of Maharam with regard to a city of all *kohanim*) one finds essentially no one who permits, or who even ponders the possibility of permitting, women to receive *aliyot*. Rashba's analysis prohibited it, and his view was accepted as normative.⁴⁸ This point also clarifies why it would be halakhically incorrect to analogize from the other cases of communal dignity to this one, as many have (incorrectly) done. Those who permit women's *aliyot* can

⁴⁵ *'Arukh haShulḥan Oraḥ Ḥayyim* 135:29.

⁴⁶ *Shut haRambam* 294 (*pasul Torah*) and many others, as noted in *'Arukh haShulḥan Oraḥ Ḥayyim* 143:3-4 and *Mishnah Berurah* 143 (*Biur Halakhah*, s.v. *im nimtsa'u*. See also *Yabia Omer, Oraḥ Ḥayyim* 6:23 (waivable *kavod hatsibbur*). See generally, *Havalim baNe'imim* 1, topic 29.

⁴⁷ *Darkhei Moshe, Oraḥ Ḥayyim* 144:1 (rolling Torah); *Mishnah Berurah* 144:16 (same); *Peri Hadash, Oraḥ Ḥayyim* 53:6 (6) and *Peri Hadash, Oraḥ Ḥayyim* 143 (1) (reading from *humash*). Many other examples could be cited of significant *poskim* acknowledging that *kavod hatsibbur* can, in fact, be waived in time of urgent need.

⁴⁸ Nor is the argument that somehow the social status of women is now uniquely different than some of the eras of the Rishonim and the Aḥaronim. After all, R. Jacob b. Moses Moelin (Maharil, Germany, c. 1365-1427) justifies women leaning at the seder by noting “nowadays, all of our women are important” (*Maharil, Minhagim, Seder haHaggadah* no. 19), and the society in the time of Tosafot encouraged women to perform *mitsvot* that they were exempt from, and in the time of the *Levush* men and women generally sat together at *seudot mitsvah*. But yet, that no Aḥaronim even ponder women receiving *aliyot* is a statement of some import.

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only do so by arguing that the dispute between Rashba and Maharam was wrongly decided in favor of Rashba⁴⁹ and that *kavod hatsibbur* can be waived in this case.

Conclusion

In Jewish law there are some matters that are in dispute for many generations with halakhic decisors taking diverse stands on the matters, and in such cases each and every Jewish law authority is entitled to resolve the matter in accordance with his own judgment and inclination – the Jewish law authority need not be able to “prove” his view to be absolutely correct, but can voice an opinion on an open dispute with less than certain proofs, and be relied on in practice. One is hard-pressed to be categorically wrong (or right) in such a case. Indeed, one could claim that such is exactly the job of a competent Jewish law authority.⁵⁰

On the other hand, there are many disputes in halakhah that were open for a period of time and then functionally closed, as a strong intellectual consensus developed as to which view was correct (and which was not). Of course, just because disputes among the *Rishonim* are apparently resolved by the consensus of the modern *poskim* does not make them permanently closed – a contemporary halakhic authority can reopen a debate among *Rishonim* that appears to be closed, and can even argue with *Rishonim* in such cases.⁵¹ However, such can only be done when the halakhic authority who is reopening the debate claims to have clear proof as to why the view that was heretofore thought to be wrong is actually

⁴⁹ More on this below.

⁵⁰ Consider for example the issue of wearing *tefillin* on *ḥol hamo'ed*, which has been the subject of a multi-generational dispute.

⁵¹ See for example, R. Moses Feinstein (New York, 1895-1986), *Iggrot Moshe, Yoreh De'ah* 1:101 who states:

And that which my dear correspondent wrote asking how we are permitted to rely in practice on such innovative insights as those I have presented, particularly when such a view contradicts the position of some latter-day authorities, I say: Has there already been an end or boundary set for Torah study, God forbid, that we should only rule according to what is found in existing works, but when questions arise that have not been posed in our traditional works we will not decisively resolve them even when we are able?!... And even for a *halacha* which has been discussed in our Jewish law works, the one issuing a ruling must certainly understand the issue, too, and reach a conclusion in his own mind before issuing a ruling, and not rule solely based on a ruling that can be found on the topic in other halachic works... And even if one's decisions sometimes go against those of eminent latter-day rabbinic authorities, so what? We are certainly permitted to disagree with latter-day authorities (Achronim), and sometimes even with medieval authorities (Rishonim) when one has valid proofs, correct reasoning in particular on matters like this, our sages stated, “A judge has but only what his eyes see [before him]” (as explained in *Bava Batra* 131a; see Rashbam there) so long as one does not contradict the undisputed opinion of the *Shulchan Aruch* and commentaries which have been widely accepted in our community....

correct.⁵² It may not be done merely based on a practical desire to prefer one view over another in a time of need (which a *posek* certainly may do when a dispute is still open). It is well established that one may not rely on a discarded view of a *Rishon* not cited in the *Shulḥan 'Arukh* without demonstrable analytic proof that this heretofore discarded view is indeed correct. So too, it is much more complex and difficult to rely on a view that is not even cited in the *Tur* or *Shulḥan 'Arukh* than it is to rely on a cited view in the primary codes.

Women receiving *aliyot* is an example of such an intellectual movement in halakhah. A group of *Rishonim* advanced a rationale that could plausibly permit women to receive *aliyot* in certain cases, and for a period of time this matter could fairly have been described as an open dispute within the sea of Torah, with authorities taking both sides of this issue. Gradually, over time, this dispute closed, as the unanimous intellectual weight of the *poskim* of the last six hundred years sided with Rashba, as the *Yerushalmi* is on his side. Consequently, one has not encountered a *posek* in the last five hundred years who actually accepts the view that women can receive *aliyot* as correct or even tenable, even in a case where all the congregation are *kohanim*. In the absence of an intellectually persuasive explanation for why the view of the Maharam is indeed correct,⁵³ and the view of the Rashba wrong, it would be outside of the framework of normative halakhah today to rely on the view of the Maharam absent a persuasive explanation of why the view of the Rashba, which is adopted by nearly all subsequent halakhic authorities, is not persuasive and the view of Maharam is plausible.⁵⁴

⁵² As an example of this, consider R. Yehezkel ben Yehuda Landau's (*Noda BiYehudah*, Poland, 1713-1793) attempt to revive the view of R. Jacob ben Meir (Rabbeinu Tam, France, c. 1100 – c. 1171) that shaving on *ḥol hamo'ed* was permitted as a matter of halakhah if one shaved before *yom tov*. See *Noda biYehudah* 1:13 and M. Broyde, "Shaving on the Intermediate Days of the Festivals", *Journal of Halacha & Contemporary Society* 33 (1996), 71-94. Such is concisely stated by R. Feinstein in the preceding note when he comments, "We are certainly permitted to disagree with latter-day authorities (*Aḥaronim*), and sometimes even with medieval authorities (*Rishonim*) when one has valid proofs, correct reasoning in particular on matters like this, our sages stated, 'A judge has only what his eyes see [before him]'".

⁵³ I can think of two avenues of exploration, both very tentative, to justify the view of Maharam. This first might be part of a general dispute among the *Rishonim* as to the weight of the Jerusalem Talmud in the face of the silence of the Babylonian Talmud – perhaps Maharam did not feel bound by the Jerusalem Talmud ever. The second approach might argue that Maharam is dealing with a community where women did go to the synagogue and Rashba is in a community where they did not, and thus there is no dispute, although R. Joseph Karo (*Beit Yosef*, Israel, 1488-1575) and others who present the two views as being in conflict clearly argue with this understanding.

⁵⁴ Allow me to give a recent example of an analytic reopening of what was thought to be a closed dispute among the *Rishonim*, which I think was recently reopened by an impressive defense of a generally disregarded view in the *Rishonim*. The Talmud in *Ketubot* 93a discusses the problem of division of debt among multiple debtors, and two main schools of thought in the *Rishonim* are present and cited in the *Tur*, CM 104. The first is the view of R. Isaac ben Jacob Alfasi haCohen (Rif, Morocco, 1013-1103) and assumes *pro-rata* distribution (which is the view of most *poskim*); the second is R. Ḥananel ben Ḥushiel (Rabbeinu Ḥananel, Tunisia, 990-1053) and assumes *pro-rata* proportionality

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One who reads the literature written by those who favor women receiving *aliyot* (and even the literature by many of those opposed to this practice) finds that it seems to completely miss this issue. Instead, the arguments seem to focus on such secondary questions as whether dignity to the congregation can change over time, or how *minhag* can change, or what is the relationship between human dignity and congregational dignity, and many other secondary issues. In fact, no matter how one resolves those secondary issues, it seems to me that the intellectual predicate of the view of the Rashba – that women cannot receive *aliyot* due to an explicit rabbinic decree – has been adopted as the normative halakhah in this matter, and all the other arguments are moot.

(one has to look at the *Tur* to fully grasp the dispute). R. Hai ben Sherira (Hai Gaon, Iraq, 939-1038) is quoted as maintaining a third view (see Rif on *Ketubot* 93a), which nearly all *Rishonim* disagree with. However, R. Aumann and M. Maschler in a paper entitled “Game Theoretic Analysis of a Bankruptcy Problem from the Talmud”, *Journal of Economic Theory* 36 (1985), 195-213, and R. Aumann, “On the Man with Three Wives” (Heb.), *Moriah* 22 (Tevet, 5759), 3-4, explain the mathematical theory of R. Hai Gaon so well that one is now hard pressed to completely reject his view. Robert/Yisrael Aumann, a religious Jew, won the Nobel Prize in Economics in 2005 for his work, including the cited article, on game theory. As Rabbi Feinstein observed (*supra* n.51), novel insights into halakhah continue to this very day.