

May women get their hair cut on chol hamoed?

שולחן ערוך אורח חיים סימן תקמו סעיף ה

עושה אשה כל תכשיטיה במועד; כוחלת ופוקסת (פי' מחלקת שערה לכאן ולכאן רש"י), ומעברת סרק על פניה, וטופלת עצמה בסיד וכיוצא בו; והוא שתוכל לסלקו במועד; ומעברת שער מבית השחי ומבית הערוה, בין ביד בין בכלי, ומעברת סכין על פדחתה

תלמוד בבלי מסכת מועד קטן דף ט עמוד ב

ועושה אשה תכשיטיה

תנו רבנן: אלו הן תכשיטי נשים: כוחלת ופוקסת ומעבירה [שרק] על פניה ואיכא דאמרי מעברת סרק על פניה של מטה

רמב"ם הלכות יום טוב פרק ז הלכה כ

מותר ליטול שפה בחולו של מועד, וליטול צפרנים ואפילו בכלי, ומעברת האשה השיער מבית השחי ומבית הערוה בין ביד בין בכלי, ועושה כל תכשיטיה במועד, כוחלת ופוקסת ומעברת סרק על פניה וטופלת עצמה בסיד וכיוצא בו והוא שתוכל לקפלו במועד.

Men are forbidden to shave on chol hamoed, so as to ensure that they shave before the first Yom Tov. According to Shulchan Arukh 546:5, however, women may do all cosmetic necessities on chol hamoed. This general statement is followed by a list of specifics relating to makeup, hair arrangement, and hair removal, with the last being “she may draw a knife across her forehead”; this may refer to shaving eyebrows, but the use of “knife” rather than “razor” is anomalous, so there is a possibility that it refers to trimming bangs.

Shulchan Arukh is rooted in Mishnah Moed Kattan 8b and a beraita on Talmud Bavli Moed Kattan 9b, with one key difference being that the beraita’s language may imply that it is offering a comprehensive list of permitted cosmetics, whereas the Shulchan Arukh seems clearly to be providing only examples. This may be a function of the other key differences, which are the inclusion of removal of underarm hair and the permission of drawing a knife across the forehead; the first comes from Rambam rather than directly from the Talmud that was in front of Beit Yosef, although it seems clear that the latter at least was in Rosh’s Talmud, and the former may have been in Rambam’s. Regardless, no one’s Talmud text listed everything that Shulchan Arukh permitted.

Shulchan Arukh, therefore, is compelled to read the list in the Talmud as noncomprehensive, and has no basis for assuming that his list is comprehensive. Furthermore, it seems reasonable to assume that the cosmetic techniques of his time differed somewhat from those of the Talmud, and that he had no interest in banning the new techniques.

Nonetheless, it seems reasonable to argue that had he believed haircutting and headshaving to be permissible, that would have made the list. This *diyuk* (deduction on the basis of close reading) is the basis for forbidding women’s haircutting on chol hamoed. Mishnah Berurah, for example, writes:

(טז) ומעברת שער מבית השחי וכו' - אבל מראשה אסור גילוח ותספורת בחוה"מ באשה כמו באיש [הגר"א ופמ"ג]:

Our purpose here is to decide whether this reading, and the authorities behind it, are dispositive. Let’s look first at Pri Megadim.

פרי מגדים תקמו:ט

"ומעברת" –

עמ"א (כלומר שמעברת השער בסכין).

ומשמע לגלח ראשה אף באשה אסור בזה"מ כמו באיש,
אף על גב דל"ש בה נוול, דאדרבה שער באשה בראשה נוי,
ושער פדחתה מותר בסכין דקישוט הוא.

Pri Megadim suggests that the list of permitted activities specifically excludes headshaving, but concedes that he doesn't understand why the prohibition should apply to women; after all, we should discourage women from shaving their heads before Yom Tov, rather than encouraging them.

At first glance, Pri Megadim does indeed seem to support the prohibition. However, more careful examination shows that he forbids headshaving but never mentions haircutting. Why not? There are three possibilities:

- He sees haircutting as identical with headshaving, and therefore feels no need to mention it
- He does not consider haircutting relevant to women
- He specifically intends to permit haircutting.

Of these, c) seems implausible, as if haircutting is permitted, the *diyuk* that headshaving is forbidden is undermined; and a) seems implausible, as if haircutting actually improves women's appearance, and is forbidden, there is no mystery as to why the decree applies to them, with headshaving included within the decree as the equivalent of a bad haircut. That leaves b) – but is it really plausible that Pri Megadim could not imagine women simply cutting their hair? The answer to that is yes, as per the following Rosh.

רא"ש מסכת מועד קטן פרק ג סימן נג

תניא באבל רבתי (פ"ז): אכל ל' יום אסור בתספורת אחד ראשו ואחד זקנו ואחד כל שער שיש בו ואשה מותרת בנטילת שער לאחר שבעה, וגרסינן בפרק החולץ (דף מג א) בענין:

רבי יוסי אומר: כל הנשים יתארסו חוץ מן האלמנה מפני האיבול, וכמה איבול שלהן? שלשים יום. אמר רב חסדא: ק"ו - ומה במקום שאסור לכבס ולספר מותר לארס, שלשים יום של איבול שמותר לספר ולכבס, אינו דין שמותר לארס?

וש"מ שהאשה מותרת בנטילת שער כדקתני באבל רבתי, וכן כתב בה"ג דאשה מותרת בנטילת שער. וקשה לדברי האלפסי: דאי אשה מותרת בנטילת שער לאחר שבעה, דלמא שריא נמי בשבת של ט' באב?! ועוד, דנטילת שער שמתיר באבל רבתי באשה היינו ע"י טיפול סיד כדי שלא תתגנה על בעלה, ותספורת לא שייך להזכיר באשה דמגדלת שער כלילית?!

ועוד הקשה הרמב"ן ז"ל: דהל"ל שאסורה לספר ולכבס ומותרת ליארס, וגבי ל' יום של איבול היה צריך להזכיר שמותרת לספר ולכבס, דתניא: "האשה מותרת בנטילת שער לאחר ז'", שאין הדבר ידוע ופשוט כל כך להקשות סתם בלא הזכרת הברייתא?!

ורש"י לא גרס התם "לספר" אלא "לכבס", והכי פירוש: שאסור לכבס שבת של ט' באב, דאסורין ללבוש כלים מכובסים אפילו ישנים ואפילו אינם מגוהצים, ל' של איבול, דאינם אסורים אלא בכלים חדשים מגוהצים, וכן עיקר:

While the comparison to demoneses seems out of place, and in its original context does not seem intended to flatter, Rosh clearly states that women simply do not cut their hair, and therefore failure to mention that case proves nothing one way or the other.

One might nonetheless argue that since Pri Megadim applies the decree against headshaving to women, it naturally extends to covering haircutting as well. But this would be a misconception, I believe. The Halakhah according to Pri Megadim, rather, is that

the decree banning cosmetic procedures on chol hamoed never applies to women. It is precisely because headshaving detracts from their appearance that it can be applied to them, even though, as he concedes, it does so purely mechanically. Thus I suggest, contrary to Mishnah Berurah, that there is at the least no evidence that Pri Megadim bans haircutting for women on chol hamoed.

We move on, then, to the Gra

גר"א תקמו"ח

"ומעברת האשה שיער מבית השחי ומבית הערוה בין ביד בין בכלי" – גירסת הרי"ף: "ומעברת סרק על פניה, וא"ד ומעברת סכין על פניה שלמטה", ובירושלמי שם: "נוטלת שיערה וצפרניה ומעברת כלי על פניה. א"ר יודן אבוי דר' מתניה: בלשון נקי היא מתניתא", ר"ל פניה שלמטה. והאי "נוטלת שיער" אינה תגלחת, מדל"ק "ומספרת" או "מגלחת", אלא בגוף קאמר, וכמ"ש תוספות במו"ק יח. וכן פירשו המפרשים מ"ש באבל "והאשה מותרת בנטילת שיער וכו'". אע"ג שהרמב"ם שם מתיר, היינו משום סוגיא דהחולץ שאמרו: "מה במקום שמותר וכו'", ועיין בטור יו"ד סי' שצ, אבל כאן, משום שלא יכנסו לרגל כשהן מנוולין, והך גזירה ג"כ באשה, וא"א דקאי על בית הערוה – הא קאמר אח"כ "ומעברת וכו'!" אלא על בית השחי, ומדקאמר "ומעברת סכין" וקאמר "ונוטלת שיערה וצפרניה", מותר בין ביד בין בכלי כמ"ל סי' תקלב וז"ש "בין וכו'".

Unlike Pri Megadim, Gra explicitly forbids haircutting. His evidence is the same *diyuk*. However, Gra apparently sees the decree against haircutting as directly applicable to women; in other words, he knows of and forbids cosmetic haircutting for women on chol hamoed. The questions remaining are the strength of his evidence and whether there are explicitly contrary authorities.

A primary point here is that Gra is not primarily engaged in psak – rather, he is engaged to justify Shulchan Arukh's permission to shave underarm hair. He suggests that Shulchan Arukh reached this conclusion by process of elimination: the Talmud Yerushalmi permits שיער נטילת, and this cannot refer to head hair owing to the decree, and pubic hair is mentioned separately, so only underarm hair is left.

Gra knows that Shulchan Arukh is only citing Rambam in this regard, however. This makes his claim that שיער נטילת refers only to body hair weak, as while he cites Ashkenazic authorities who interpreted the phrase in that way regarding Sheloshim, Rambam himself permits women to cut their hair during shloshim.

Tosafot Moed Kattan 18a does explicitly ban haircutting during Sheloshim, although it is hard to understand why the issue is discussed there in Tosafot, which is focused on nailcutting. But Tosfot Yevamot 43a seems to permit, and in general the discussion there demonstrates that שיער נטילת is used to include haircutting.

But while Gra's evidence is weak, his authority stands. But here we turn to Arukh haShulchan:

ערוך השולחן תקמו"ז

ועושה אשה כל תכשיטיה לקישוט הפנים במועד, בין ילדה בין זקנה, והיינו שכוחלת בצבע, וכן נותנת כחול בין עיניה כדי שתהן נאות, ופוקסת – והיינו מחלקת שיערה לכאן ולכאן ומתקנת שיערה חוץ לצעיף, ונותנת חוטין של בצק דק על פניה להאדים הבשר, ומעברת סרק על פניה, וטופלת עצמה בסיד וכיוצא בו להשיר השיער,

ודווקא שתוכל לסלקו להסיד במועד, דאז מקבלת תענוג מזה, דבשעה שהסיד על פניה מצטערת קצת, אך אח"כ שמחה היא לה, ולכן אם השמחה תהיה במועד מותר, ואם לאחר המועד אסור, ומעברת שיער מבית השחי ומבית הערוה בין ביד בין בכלי, ומעברת השיער שעל פדחתה בסכין. וכל אלו קשה לעשותן קודם המועד, שתקלקל, ואפילו בלא זה א"א להחמיר על אשה בתכשיטיה, שכל שמחתה היא בתכשיטיה וזהו עונג יו"ט שלה, אבל האיש אסור לו מיני תכשיטין במה שיש בהן מלאכה, דגם בלא"ה אין לאיש להרבות בקישוטין ותכשיטין משום "לא ילבש גבר שמלת אשה", כמ"ש ביו"ד סי' קפב.

Arukh HaShulchan seems to state that by definition the decree cannot apply to women, even with regard to cosmetic activities they could have completed before yom tov. While he never mentions haircutting, it seems clear that he would permit it, and that he argues fundamentally with Gra.

Finally we turn to Ritva.

ריטב"א מועד קטן דף ח עמוד ב

עושה אשה תכשיטיה במועד פ"י שזה צורך הגוף הוא וכעין אוכל נפש ולפיכך עושה כדרכה ובלא שינוי ובטירחא רבה ולא גזרו בה שמא תכנס לרגל מנוולת דקשוט מילתא דצריכא כל יומא ויומא הוא ועוד שאין דרכן להשהות

Ritva supports Arukh HaShulchan against Gra, let alone Magen Avrohom, by saying that the decree intentionally excluded women from its ambit. It follows that Gra is a shitat yachid (minority position). Furthermore, a rule of psak is that the authority of precedent is greatly diminished when new evidence is presented that was not available to the original decisors, and to my knowledge the Ritva was not available to the Gaon. Accordingly, b'mechilat kvod the Gra and with trepidation, it seems to me that at least bish'at hadchak women may have haircuts on chol hamoed.

May women have their hair cut on chol hamoed? On a technical halakhic level, I argue in the companion shiur to this dvar Torah that the answer is yes. What I want to do here is discuss four metahalakhic questions relative to this specific issue.

The first – and this is perhaps the safest topic we can choose to discuss this generally explosive question – is what sort of attitude we should have toward gender distinctions in Halakhah. Here I must acknowledge that this framing – which assumes that gender distinctions constitute a discrete category, toward which a consistent attitude is appropriate – is borrowed from American constitutional law’s notion that various distinctions can be subjected to loose, intermediate, or strict scrutiny. But I think it offers a valuable tool to poskim, and I specifically favor subjecting potential Jew-Gentile distinctions in interpersonal halakhot to strict scrutiny.

This cannot, however, be the case with regard to gender in Halakhah – there are simply too many areas in which the distinction is deeply ingrained, and others in which such distinctions flow inexorably from physical differences. But there is nonetheless room for some form of scrutiny, especially when potential rulings seem to assume psychological or intellectual differences between men and women.

The second question is whether we ought to evaluate potential gender distinctions primarily in terms of their outcomes or rather in terms of their reasoning. What are we to do if the best way to reach the solution we see as most compatible with justice and with properly recognizing the tzelem Elokim in every human being is to utilize a legal rationale that seems sexist or even misogynist?

For example: Some understandings of the exegetical basis for the exclusion of women from the obligation to procreate can easily be criticized as sexist: “It is the way of men to conquer, but not the way of women”. To counter this critique, a posek might seek to play up the positions that see women as rabbinically obligated. But a primary effect of the exemption is to prevent women from being halakhically coerced into procreative sex, and generally to give them halakhic control of their sexuality, and this effect can be undone by the position that they are rabbinically obligated.

The third question is the extent to which we are willing to concede that past halakhot simply cannot be extended to current circumstances – the differences are just too great. This issue presents differently with regard to d’oraita law, where we are committed to the position that the Torah’s Author foresaw all future circumstances and legislated accordingly, and d’rabbanan law, where we have no such theological commitment. Thus, for example, Rav Moshe Feinstein takes the position that doing otherwise prohibited labor via preset electric timers often falls into a category of “appropriate to forbid but not actually forbidden”, on the ground that the Talmudic Rabbis were unaware of electricity and therefore could not have legislated regarding it.

The fourth question is the extent to which we are willing to undo past authoritative rulings, especially those of Rav Yosef Karo in Shulchan Arukh, on the basis of our considerably larger-than-his library of the works of the rishonim and of variant manuscripts of all rabbinic texts. The potentially destructive effects of allowing such overturning can be seen in halakhic civil law, where plaintiffs can succeed only if the defendant has no plausible defense. A primary task of halakhic civil jurisprudence, therefore, is to eliminate positions from the discussion, and this the Shulchan Arukh accomplished admirably; the standard rule is that positions not mentioned in the Shulchan Arukh are halakhically irrelevant in civil matters. And yet, it is hard to allow rulings that

no longer accord with the weight of textual evidence to stand, especially when they seem to us to have deleterious consequences.

Let me give very brief answers to these questions, in reverse order, in the expectation that there will be many occasions to discuss them in more detail and depth in the future.

4) We should resist the temptation to establish a bright line in this area and argue that the Halakhah must be determined either by pure historical/interpretational truth, as we understand it, or else by pure halakhic process establishing irreversible precedent. Rather, we should take the nuanced position that precedent generates significant but not infinite inertia, varying with its antiquity and the weight of the authorities who establish it, which can be overcome by some compelling combinations of contrary evidence, practical need, and moral intuition.

In the case of women's haircuts on chol hamoed, the weight of precedent seemed to me extremely weak and the contrary evidence quite strong. I did not see a real issue of morality involved, and practical need would be a function of specific cases only.

3) I think there are actually three positions possible here:

- a) Laws should be seen as inevitably extending to whatever new circumstances seem to present the same issues.
- b) Laws can only extend to circumstances that could plausibly be seen as having been conceived of when the law was made
- c) Laws may or may not be extended to cover new circumstances at the discretion of contemporary decisors, subject to the willingness of the community to follow them when they exercise that discretion. In such cases, it should be evident, what are formally judicial decisions are in practice legislative acts.

I favor the last approach. In the case of women's haircutting, the question then became whether we should extend the decree made regarding men to women. It seemed to me that this was probably extending the wrong rabbinic ray, that we should instead extend the exceptions for cosmetic bodyshaving and tweezing etc. to this case

2) Here again we should avoid bright-line answers. There are times, circumstances, and issues in which it is appropriate to focus on symbols; I cannot think of any non-extreme case, for example, in which I would pasken based on the sometime principle that "women's wisdom is only with the shuttle" – maybe to be matir an agunah. But as a general rule it is wiser to focus on results, although one must always recognize that the results of a halakhic ruling are not just the immediate case, but also all cases for which that case will become precedent.

In our case, it is not clear to me that the presumption that women's happiness often depends on their sense of their own appearance is sexist, although taking the extreme formulation of Arukh haShulchan that "their entire happiness is in their adornments" literally rather than hyperbolically might be sexist. But I take it hyperbolically, and therefore am comfortable using Arukh haShulchan's consequent ruling as precedent.

1) I suggest that the standard should be that the proposed distinction has a purpose plausibly defensible in non-sexist terms and the proposed distinction should

plausibly relate to genuine differences in the religious, political, social or other experience of men and women. In this case, the desire to make women's yom tov experience happier is certainly defensible in non-sexist terms, and I suggest that it plausible relates plausibly to the different norms and expectations governing male and female hair grooming and growth in our society.

Accordingly, I see no barrier to ruling permissively on this question

Shabbat shalom and chag kasher v'sameiach

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