

YESHIVAT HAR ETZION  
ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)  
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**TALMUDIC METHODOLOGY**  
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**OWNERSHIP REQUIREMENTS OF A SUKKA**

In several instances, Halakha demands that the item via which a mitzva is performed be owned legally by the person performing the mitzva. Arguably, the most familiar application of this principle is that associated with the mitzva of lulav. Since the Torah (Vayikra 23:40) employs the word "lakhem" (yours) when describing the taking of the four species, legal ownership of the lulav or etrog becomes a critical factor in performance of the mitzva, at least on the first day of Sukkot. During the last 2000 years of exile, when many Jews lived in climates not conducive to the cultivation of the four species, it was sometimes difficult to procure some or all of them for Sukkot. In many cases, only one set was obtained for a congregation - sometimes even for an entire city. Given the condition of ownership necessary to fulfill the mitzva, the set had to be legally transferred from one party to the next to allow each and every person to fulfill the mitzva.

Though this ownership requirement is most familiar in terms of the mitzva of lulav, it applies in other areas as well. What about the sukka? Does the hut in which a person sits on Sukkot have to be owned by him legally in order to allow performance of the mitzva?

The gemara (Sukka 27b) cites a dispute between the Sages and Rabbi Eliezer regarding this issue. According to Rabbi Eliezer, since the Torah writes (Devarim 16:13), "Chag ha-sukkot ta'aseh lekha" (You shall make for YOURSELF a festival of sukkot), employing a possessive term, ownership is deemed critical. We will begin our analysis by exploring the dissenting opinion of the Sages, who allow individuals to fulfill the mitzva in a "sukka she'ula," a borrowed sukka, which is not legally theirs.

Instinctively, we might view the position of the Sages as absolute. In contrast to Rabbi Eliezer, they reject all notions of ownership as irrelevant to the mitzva of sukka;

one can sit in a sukka which he does not own and still fulfill the mitzva in its entirety. Though this might seem to be the simplest explanation of the Sages's view, it may be further questioned in light of the gemara's formulation of their opinion.

How do the Sages derive their understanding of this law? Indeed, Rabbi Eliezer has a point: the Torah does employ a possessive construction in describing the mitzva of sukka. The gemara provides a counter-source for the Sages (Vayikra 23:42): "Kol ha-ezrach be-Yisrael yeshvu ba-sukkot" (Every citizen of Yisrael should reside in sukkot). They understand this verse to mandate that, in theory, there must be a situation whereby every single Jew can fulfill the mitzva in one sukka (not necessarily simultaneously, but at least successively). Such a situation can only arise if each participant in the mitzva, in turn, legally "borrows" the sukka from its owner. Hence, we must conclude from this verse that a borrowed sukka is sufficient for the fulfillment of the mitzva, even if it is not owned technically by the person performing the mitzva.

This formulation does not preclude the idea that some degree of ownership or association is necessary for the mitzva of sukka. Rather, it might indicate that some level of ownership is indeed required, but not absolute legal possession. The degree of license which a "borrower" enjoys would thus be sufficient. In fact, according to many positions among the halakhic authorities, a "sho'el" (borrower) enjoys a wide array of rights, many of them bordering upon total ownership. Two prime examples which come to mind are his right to use the item and his near-absolute liability if the item is damaged. (See in particular the Rambam in Hilkhot She'eila U-pikadon, chapter 1, for an expression of a borrower's quasi-ownership.)

Thus, we may ask: What in fact do the Sages intend - a complete rejection of the concept of ownership which Rabbi Eliezer demands with regard to sukka, or merely a redefinition of the level of ownership necessary? If the latter is true, Rabbi Eliezer demands full legal ownership, whereas the Sages downgrade the level of ownership necessary so that even a borrower fulfills the requirement.

We might restate the question as follows: Did the Sages reject any notion of ownership (ba'alut), or did they simply diminish the requisite level? The consequences of this question are numerous. For example, how would the Sages rule concerning a stolen sukka? If they reject any degree of necessary ownership, in theory they might validate the performance of the mitzva with a stolen sukka. Alternatively, if they concur

with Rabbi Eliezer that some form of ownership is required (but claim that a sukka on loan meets that requirement), they might invalidate a stolen sukka because it fails to meet the minimum ownership requirement.

The gemara (Sukka 9a) disqualifies a stolen sukka because the Torah uses the term "lekha." Though it utilizes the verse we have been ascribing to Rabbi Eliezer, this gemara is stated unanimously. Are we therefore to assume that even the Sages would adopt this law? Are we forced to concede that even the Sages set some requirement of ownership and thereby disqualify a stolen sukka?

If we persist in viewing the Sages in the absolute manner - that no level of ownership is necessary - we might have to redefine the nature of the gemara's rule that a stolen sukka is invalid for the mitzva. Quite possibly this gemara refers to a different principle, that of "mitzva ha-ba'a be-aveira:" even when mitzvot do not carry an ownership clause, they still cannot be performed with items which were involved in the performance of prohibitions. For example, according to many positions, even after the thief fully acquires an item (by altering the stolen item — a process known as "kinyan shinui"), the item still cannot be used for performing a mitzva, since it was involved in the violation of an prohibition. According to some Rishonim (see Tosafot and the Ritva to Sukka 9a), the disqualification of a stolen sukka is based upon the principle of mitzva ha-ba'a be-aveira, and not on any specific need for ownership of a sukka. Thus, even if the Sages absolutely maintain that there is no ownership requirement, they would still disqualify a stolen sukka.

Another test case to probe the position of the Sages would be the scenario of a jointly-owned Sukka. If the Sages do not require any ownership, but still disqualify a stolen sukka, they should clearly accept a jointly-owned one; when one partner uses the sukka, he is not stealing, and even if his ownership is compromised by the other partner's, this should not impinge on either one's ability to fulfill the mitzva. If, alternatively, the Sages do require some partial ownership (and view the borrower as a partial owner), they might not make the same claim regarding a partner. In contrast to the borrower, who has uninterrupted rights to use the item, a partner has to rotate; thus, a partner's relationship to the item is less like a true owner's. To be sure, the Sages might validate a partner in the very same manner as a borrower, as both enjoy partial ownership, but at least the possibility remains that they would distinguish between them. If the Sages reject all notions of ownership, this alternative is inconceivable. Rashi and

Tosafot (27b) disagree as to what the Sages would rule about a partner, and quite possibly they dispute, along these lines, the logic which underwrites the Sages' position.

A final case to consider appears in the gemara (Sukka 31a) regarding someone who builds a sukka in "reshut ha-rabim" (public domain). The gemara states that this individual fulfills the mitzva of sukka. Evidently, this gemara was stated according to the position of the Sages; Rabbi Eliezer, who requires full ownership, would clearly reject this type of sukka. This gemara seems to indicate that according to the Sages, no ownership at all is required to fulfill the mitzva of sukka; had there been some minimal ownership requirement (even if we grant that a borrower or a partner enjoys such a level), we would certainly have disqualified a sukka built on public property — which, presumably, no one owns, at any level. Evidently, this gemara had a very specific view of the Sages's position, that no ownership whatsoever is required as long as the sukka is not stolen. Of course, if every member of the public is considered a partner in the public domain, we would not need to take such an absolute view of the Sages' concept of sukka.

#### **METHODOLOGICAL POINTS:**

A dispute sometimes surrounds a fundamental issue; alternatively, the two sides may assume the very same principle but merely argue about the degree. Do the Sages and Rabbi Eliezer argue about the ownership requirement per se, or do they merely differ as to the degree of ownership necessary?

Halakhic ownership exists at many levels. One can achieve partial ownership quantitatively (as in the case of partners) or qualitatively (e.g., a borrower might own the right of use, while the legal owner retains the right to the item proper). Individuals who might achieve partial levels of ownership include a guardian, a thief, and a partner.