

HALOCHOSCOPE

This week's (and next week's) question:

Some one attends a college run by a religious denomination. Some poskim consider this group *avoda zara*, *halachically* pagan. The college offered to build a *sukah* for their Jewish students. Is this acceptable?

The issues:

- A) Ownership of a *sukah*
- B) *Sukah* of non-Jews; *sechach*, walls, ground

Next issue:

- C) Using *avoda zara* items for the *mitzvah*
- D) *Neheneh* and *mehaneh*, benefit from, or giving benefit to *avoda zara* and its order
- E) Concern for *bizayon*, desecrating the sanctity of the *sukah*

A) Ownership of a *sukah*

For some *mitzvos*, there is a requirement that the performer owns the article. This is usually based on the language used by the Torah for the *mitzvah*. For example, one must own the *lulav* and *esrog* he uses to perform the *mitzvah*. The words '*ulekachtem lachem*', take for yourselves, when introducing the *mitzvah* of the four species, are taken to mean *mishelachem*, of your own. This precludes using an article that belongs to another person. One may not perform the *mitzvah* with a stolen *lulav*. In addition, one may not do so with a borrowed *lulav*, since the person performing the *mitzvah* is not free to do with it as he wishes. [One can accept the *lulav* as a gift from the 'lender', with the provision that the gift will not take effect unless it is returned in full after the *mitzvah*.]

Another reason that a stolen item may not be used is that a *mitzvah* may not be performed by way of violating an *avairah*, known as *mitzvah habaah baavairah*. If the only way to fulfill *lulav* would be through stealing it, one could not be credited with the *mitzvah*. The poskim discuss the need for two ways to preclude using a stolen article.

The *mitzvah* of *sukah* is written with a similar word: *Chag Hasukos taase lecha*, make **for you** a holiday of *Sukos*. This is the source for the obligation to make a *sukah*. The word *lecha* is indeed used to preclude a stolen *sukah*. The Talmud does not seem to be concerned with the aspect of *mitzvah habaah baavairah*. One suggestion is that *mitzvah habaah baavairah* is a Rabbinically instituted condition. Scripturally, while one violated an *avairah*, he is still credited with a *mitzvah*. Rabbinically, he may not use the article for his *mitzvah* performance. Thus, both reasons apply to a stolen *sukah*.

The Talmud debates whether one may fulfill the *mitzvah* with a borrowed *sukah*. In one view, *sukah* is exactly the same as *lulav*. Neither may be fulfilled with a borrowed item. We follow the opinion that validates a borrowed *sukah*. This is based on a separate Scriptural reference to all of Israel dwelling in one *sukah*. Some say this means that if

any individual Jew would be required to own the *sukah*, this could be accomplished by owning a *perutah*-worth share, the minimum amount of value. This is unlikely in a *sukah* built for the entire nation. Therefore, it must be owned by an individual or small group and loaned to the rest, perhaps in groups. Another approach is that the same word *lecha* often precludes using an item owned in partnership. Even if individual Jews had a valid *perutah* partnership in the *sukah*, they could not fulfill their *mitzvah* based on *lecha*. Since the Torah refers to all the Jews in the same *sukah*, presumably as partners, the word *lecha* must have a limited application. It only precludes a stolen *sukah*, and nothing more. Another approach is that once the Torah permits a borrowed *sukah*, *lecha* no longer applies universally to forbid using a *sukah* belonging to someone else. Rather, it refers to the action of not taking a *sukah* from another – stealing. Thus, it becomes a way of saying that *mitzvah habaah baavairah* is applied to the *mitzvah* of *sukah*. One might not normally apply it to *sukah*. The concept is derived from Prophetic teachings condemning the use of stolen animals for offerings. The objection of *avairah* seems to apply to activity done to appease Hashem. It is inappropriate to commit an *avairah* in an attempt to appease. *Sukah* is not an act of appeasement, but an obligation. A special lesson is needed to forbid using a stolen *sukah*, and thereby, *mitzvah habaah baavairah*.

There are three parts to a *sukah* that could belong to the owner or could be stolen or borrowed: the ground on which it stands; the material for the walls; and the *sechach*. In general, ground cannot be stolen. This is derived from the language used for certain *mitzvos*. The logical reason for this is that one can steal a portable item and take it away. Land cannot be carried off. One can force the owner off the land, but it remains in place. Nothing was done to change the *halachic* possession. However, illegal possession of land does exist in *halacha*. While the original owner is in the process of litigating to regain possession, the land may be considered stolen. For this period, one may not use the land in the performance of a *mitzvah*. This can apply when one gentile seizes land from another, unless it is taken in war. Endangering life in war is considered 'payment', agreed by both sides. Land can be 'stolen' by illegally encroaching on the property of a neighbor. Even using someone's property without permission is thievery. One may not use another's *sukah* without his permission. If one used it, he still fulfilled his obligation. There is a presumption that he would consent to a *mitzvah* being done with his property. Therefore, while the other person is present, one should ask permission. He might be uncomfortable with someone looking in on him. In his absence, one may use his *sukah*. By the same token, one should not build his *sukah* on a fellow's property without permission, nor on public property. If one did so, it is kosher. Some say that in a town with non-Jewish residents one may not assume that the gentiles waive their rights, and it is invalid.

If one purchases an item on credit, and the seller comes to collect payment, one must pay immediately. By deferring payment against the wishes of the seller, one is withholding the item illegitimately. This also amounts to robbery. Some say that one might be able to steal a *sukah* built on something portable, such as a boat, an animal or a wagon.

The walls and *sechach* can be physically stolen. If they are taken directly from the possession of the owner, the robber may not use them for his *mitzvah*. If they are transferred to others in the process, there are situations when they are considered valid. If a

thief or suspect sold these to an innocent purchaser, the purchaser can be considered in fulfillment of the *mitzvah*. The main condition for this is that the original owner has given up any hope of retrieving his article. A Rabbinical institution allows a thief to keep stolen materials built into a building, and to compensate for them with cash. Therefore, even if the thief did not modify the items, he is considered the owner, as long as he is willing to pay. As with the land, *sechach* and walls that were purchased on credit must be paid for when payment is claimed. Further situations occur when a borrower loans to others, or when a squatter builds a *sukah* and is evicted by the owner, who then uses the squatter's *sukah* without permission. These are beyond the scope of our discussion.

The commentaries raise another issue with regard to a stolen *sukah*. The Talmud says a *sukah* must be made *Lashem*, for Hashem's sake. That is, consecrated similar to the *korban chagigah*, offering made on the holiday. This is learned from the use of the word *chag* in relation to both of these *mitzvos*. Thus, one must be able to fulfill his *mitzvah* in a sanctified, or consecrated *sukah*. If one steals the *sukah*, or its parts, he is unable to effect *kedusha*, sanctity. *Ain adam osair davar sheaino shelo*, one cannot consecrate or effect a ban or sanctity on the item of another. Accordingly, one would be unable to sanctify a stolen *sukah*. Why, then, is there a need for *lecha* to preclude a stolen *sukah*?

Some poskim raise this problem in similar contexts [see below], while others do not. This indicates various ways to explain *lashem*. Some say *lecha* is needed when one steals a portable *sukah* that the owner had sanctified. Others maintain that the Torah's comparison to *chagigah* is ideal but not essential. Thus, one may still consider any *sukah*, made for shade, kosher. [See Sukah 9a (Ritva, RAE) 27b 30a-b Beitza 30a Chulin 135a-136a, Poskim. Tur Sh Ar OC 637:2-3, commentaries. Shu'T Nezer Hakodesh 87.]

B) Sukah shel goyim

The Talmud discusses whether *sukah* must be made for the sake of the *mitzvah*. We follow the opinion that it need not be. A generic booth is acceptable. The only provision is that it be made for shade. The Talmud permits using a *sukah* of gentiles that otherwise meets *halachic* specifications. We assume it is a booth made for shade by a gentile.

The question is whether this refers to a *sukah* belonging to a gentile, or one constructed by a gentile for a Jew. Both have *halachic* advantages and disadvantages. If it was made by a gentile for a Jew, he might not have intention for shade. He might think of it as a ritual dwelling or storage shed. If he made it for himself for shade, on the Jew's property (such as an employee), it is valid. If a gentile makes his own booth for shade, it is valid. The Jew needs permission from the gentile to use it. He would then be borrowing the gentile's *sukah*. The poskim debate the permissibility of a borrowed *sukah* of a gentile. Some say that the lesson learned from the reference to 'all of the native Israelites dwelling in a *sukah*' can only be used to permit borrowing a Jew's *sukah*. It seems that the prevailing custom is validate borrowing a gentile's *sukah*.

From this discussion, it would appear that if a gentile builds a *sukah* on his own property for the use of a Jew, it has some disadvantages. Firstly, it raises the issue of intent. Since he did not make it for his own use, we suspect that he made it for the Jew to dwell in or for storage. If it is self-evident that the Jew does not need it for this, this issue is irrelevant. However, the gentile probably does not know the point of a *sukah*. He prob-

ably does not realize that it is for 'shade', and thinks it has something to do with ritual. He might think that the ritual is a dwelling type. Secondly, the opinion that invalidates a *sukah* borrowed from the gentile would invalidate this *sukah*. Thirdly, even the accepted opinion validating a borrowed gentile's *sukah* would require formal borrowing. This is a transaction. While a Jew can be invited as a guest of a fellow Jew, the guest becomes part of the Jew's household. In our case, the Jew does not join the household of his gentile 'host'. A Jew who uses his fellow's *sukah* with permission, he effectively borrows it. The gentile does not automatically understand this. Therefore, he must nominally either 'sell, gift or loan' it to the Jew.

By contrast, there is a view that one may 'borrow' the *sukah* of a gentile without his permission. While doing this with a Jew's *sukah* raises the issue of theft, it does not do this with regard to that of a gentile. Part of the reason for this is that it is only considered theft Rabbinically. Therefore, the Rabbis did not necessarily apply it to the property of a gentile. Others maintain that it applies to the *sukah* of a gentile as well. These opinions seem to believe that a gentile can automatically loan the *sukah* for use. However, it is still possible that when asked for permission, the gentile will think he is hosting the Jew rather than loaning. Only when it is taken without permission is it like automatic borrowing.

A second issue is raised in regard to the consecration. A gentile cannot effect a consecration of a *sukah*, since he does not have the *mitzvah*. [He can consecrate an offering, since he may perform this *mitzvah*. He may make binding vows. However, this kind of consecration does not work for him.] In one view, this simply means that his *sukah* will not be consecrated, which is valid but not ideal. However, some say that in another view, consecration is essential. Thus a gentile-owned *sukah* (as opposed to a gentile-built *sukah*) should be invalid. Since it is a matter of dispute, some suggest that if one must use this *sukah*, he should not recite a *brocha*. For example, travelers are exempt from *sukah*. If one is on the road and has no *sukah* but a gentile's, he may use it. If it is not kosher, he has no choice, and is anyhow exempt. If it is kosher, according to one view, it is better than nothing.

A third opinion maintains that a fellow Jew can be included in the word *lecha*. Therefore, once the Talmud permits the *sukah* of a fellow Jew, it means to include him in *lecha*. However a gentile cannot be so included. This invalidates a gentile's *sukah*. This is a minority view that is rejected by others.

The poskim discuss a *sukah* constructed on public property. If all the residents of the city are Jews, this poses no problem. If there are gentile residents, they might not automatically loan the use of their shares in the property. Thus, even if one may use a gentile's *sukah*, there is no automatic validation of this *sukah*. This issue further complicates using a gentile's *sukah*. [See Sukah 8b, Poskim. Tur Sh Ar OC 635, commentaries. Mich-tav Sofer 38. Chavalim Baneimim 33. Shu'T Nezer Hakodesh 87. Sukah Kehilchasah 1:note 6 3:note 1. Nitei Gavriel 4: 7 11 etc.] *To be continued ...*

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