

# SUPPLEMENTAL TEXTS

## Bava Batra 9a

### CONTENTS

**PARALLEL RABBINIC TEXTS** | *other texts in rabbinic literature where versions of or ideas from our text appear*

Talmud Bavli Berakhot 4b	1
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**CODES** | *codification of our text in halakhic literature (for more info on this check out the Codes Cheat Sheet in the Bet Midrash Reference Guide!)*

Mishneh Torah, Sefer Zeraim, Hilkhot Matanot Aniyim 7 & 9	2-7
-----------------------------------------------------------	-----

**RISHONIM** | *medieval commentators on our sugya*

Hiddushei Halachot v'Agadot Maharsha on Masechet Bava Batra	8
-------------------------------------------------------------	---

**REFERENCE**

Menachem Elon, "Sevara" (aka Svara) from <i>Principles of Jewish Law</i>	9-10
--------------------------------------------------------------------------	------

















designed to ensure freedom of decision for later scholars – albeit with due reference to and regard for the decisions of earlier scholars. The basic rule applicable is that the judgment of a person who has erred because he was unaware of the decisions of earlier scholars shall be of no force as soon as that person gains such knowledge and realises his error; however, “if he does not find their statements correct and sustains his own view with evidence that is acceptable to his contemporaries – the authority of Jephthah in his generation was as that of Samuel in his, and there is only the judge that ‘shall be in those days’ – he may contradict their statements, since all matters which are not clarified in the Talmud of R. Ashi and Ravina may be questioned and restated by any person, and even the statements of the *geonim* may be differed from . . . just as the later *amoraim* differed from the earlier ones; on the contrary, we regard the statements of the later scholars to be more authoritative since the latter knew not only the legal thinking of their contemporaries but also that of the earlier scholars, and in deciding between the different views they reached the heart of a matter” (*Piskei ha-Rosh*, loc. cit.).

This conception of a flexible and dynamic legal order naturally left no room for the doctrine that especially a conclusion springing from a practical decision should impose itself on the judicial process. The court which is apprised of a matter has the task of referring to, and taking into proper consideration, all the available relevant laws and certainly the rules emerging from earlier practical decisions, particularly when the halakhic principle emerging from the practical decision has been accepted without exception in a series of legal decisions (“daily practical acts of decision,” Ket. 68b; BB 173b; etc). However, if after such study the judge should, in reasonable manner and in reliance on the halakhic system itself, come to a different legal conclusion from that reached by earlier scholars, he will have not only the right but also the duty to decide as he sees fit; such decision will take precedence over an earlier decision in a like matter, since the judge will also have known the legal thinking of earlier scholars and have decided as he did by going to the root of the matter.

Thus *ma'aseh* constitutes one of the significant lawmaking sources of the Jewish legal system, and every principle emerging from it becomes part of the accumulated body of laws comprising this system, in accordance with which the judge must decide. In standing and validity such principles are like any others deriving from the statements of *posekim* and halakhic scholars, and embraced by the common rule that the judge must consider every law on its substantive merits and decide, in the concrete case before him, according to his own knowledge and understanding deriving from due examination of all the relevant rules of Jewish law.

**Bibliography:** Epstein, *Mishnah*, 598–608; J. M. Guttmann, in: *Devir*, 1 (1922/23), 40–44; Ch. Tchernowitz, *Toledot ha-Halakhah*, 1 pt. 1 (1934), 189–96; A. Kaminka, *Mehkarim ba Mikra u-va-Talmud* . . . (1951), 1–41; A. Weiss, *Le-Heker ha-Talmud* (1954), 111–67; H. Cohn, in: *Mishpat Ve-Khalkalah*, 3 (1956/57), 129–41; H. Albeck, *Mavo la-Mishnah* (1959), 92f.; E.Z. Melamed, in: *Sinai*, 46 (1959/60), 152–65; B. de Vries, *Toledot ha-Halakhah ha-Talmudit* (1962), 169–78; M. Elon, in: *ILR*, 2 (1967), 548–50; idem, *Ha-Mishpat Ha-Ivri*, II, (1973), 768–804.

Menachem Elon

**SEVARAH** (Legal Logic), the legal logic employed by halakhic scholars in their reasoning. This logic is founded on observation of the characteristics of human beings as they are disclosed in their social relations with one another and on a

study of the practical realities of daily life. *Sevarah* may serve both as a historical source of law – a source which factually and indirectly leads to the creation of a particular legal rule – and as legal source of law – a source recognized by the particular legal system as a direct means for the acceptance of a legal rule into that system. (On the different sources of law, see Introduction.<sup>1</sup>) Logic may also serve as a historical source in the functioning of the other legal sources of Jewish law. Thus, for instance, when a particular legal rule is created by means of the legal source of Midrash (see Interpretation), the interpretative activity constitutes the direct creative source of that rule; however, the interpreter is guided along his interpretative path by logic and reasoning, which therefore form the historical-factual source of the rule. The same is true of rules created by means of legal sources of legislature, that is *takkanah*, *ma'aseh*, and *minhag*, where the rules are naturally created and fashioned in outcome of certain needs as dictated by logic and practical exigencies. It is as a historical source in the aforementioned sense that *sevarah* is quoted as a basis for the study and understanding of the *halakhah* (see, e.g., Git. 6b; Shab. 63a; Suk. 29a, et al.). On the other hand, *sevarah* functions as a legal source whenever it serves as the direct source of a particular rule, that is whenever such rule is created by virtue of logic and reasoning alone, outside the framework of and without assistance from any other legal source such as *Midrash*, *minhag*, or *ma'aseh*.

An important place is assigned to *sevarah* as the creative source of halakhic norms in all fields of the *halakhah* – whether in relation to the precepts between man and his Maker or the laws pertaining to relations between man and his fellow men either in matters of ritual law or civil law. The high regard in which *sevarah* was held also finds expression in the manner of classification of the laws originating from this legal source. Thus a law having its creative source in *takkanah* or *minhag* is numbered among the category of laws known as *de-rabbanan* (see Introduction<sup>2</sup>), whereas a law having its direct source in *sevarah* is generally numbered among the category known as *de-oraita* (Chajes, in bibl., and see below). The honorable status thus lent a rule originating from *sevarah* is attributable to the fundamental principle which underlies the whole of the halakhic system, namely, that the Torah was given on the authority (*al da'at*) of the halakhic scholars (see Authority, Rabbinical); hence every rule founded on the logical reasoning of the halakhic scholars originates, as it were, from the Torah itself, because the logic of the halakhic scholars corresponds with the logic embodied in the Torah.

**Sevarah as the Creative Source of General Legal Principles.** It is an important principle of Judaism that a person who is told to transgress or else suffer death should transgress rather than be killed (Sanh. 74a), since the laws of the Torah were given so that man could live by them and not die because of them (Yoma 85b; Yad, Yesodei ha-Torah 5:1). However, in three cases a person given the choice between transgression or death should choose the latter; idolatry, incest (including adultery), or murder (Sanh. 74a; Pes. 25a–b; et al.). As regards idolatry and incest the rule was established by way of biblical exegesis (Sanh. 74a), but with regard to murder the rule was derived logically, and not by way of exegesis, as follows: “The *sevarah* is . . . who shall say that your blood is redder? Perhaps the blood of the other is redder!” (Sanh. 74a); for “as far as the murderer is concerned, since in the end man is anyhow destined to die, why should it be permissible for him to transgress? Who knows that the Creator holds his life to be of greater worth than that of his fellow?” (Rashi, ad loc.). Thus the rule that as regards the shedding of blood a person shall choose death rather than transgression has its legal source in *sevarah*.

1. page 10; 2. page 9.

There is a long series of general legal principles operating in the field of both ritual and civil law which similarly originate from the legal source of *sevarah*. The rule that the burden of proof is on the claimant is derived from logic on the reasoning that just as the person who has a pain seeks out a doctor and recites his symptoms (and it is not the doctor who runs around to find out who is ill), so too the person who has a claim against another must first bring proof to substantiate his claim and the defendant need not first prove that he is not liable on such claim (BK 46b). So too a woman's statement that she was married and became divorced – there being no witnesses to the fact that she was married – is believed as regards her becoming divorced, in terms of the rule pertaining to the laws of evidence that "the mouth which has rendered prohibited is the mouth which has rendered permissible"; this rule is derived from the logical reasoning that since she prohibited her own self (to others) she may also permit her own self (Ket. 2:5; Ket. 22a; from this rule there was derived in amoraic times the rule of *miggo*; see Pleas; Evidence).

The two aforementioned rules are expressly stated as having their legal source in *sevarah* and this also appears to be the case with reference to a number of further rules and principles, for instance as regards the principle of *hazakah* as a legal presumption – such as the presumption that a person is alive (Git. 3:3), the presumption of legal competence (*hezkat kashrut*; BB 31b), the presumption of bodily fitness (Ket. 7:8), and numerous other kinds of presumptions. Logic is also the source of the rule regarding reliance on the majority, even when the majority is not a factual one (such as a majority of the judges hearing a particular case), but is based on surmise alone [Hul. 11a; the biblical passages cited there with regard to several kinds of majority and *hazakah* are in the nature of *asmakhta* ("mere allusion") alone; see also Interpretation<sup>1</sup>]. These presumptions have validity in all fields of the *halakhah*, in matters of the civil law as well as matters of ritual prohibitions and permissions, and even in matters which are *de-oraita*: "For matters learned by way of *sevarah* are of the same value as the actual statements of the Torah itself . . . since the power of observation deriving from experience is of precisely the same value to them [the halakhic scholars] as a matter learned through application of the exegetical *midot*" (see Interpretation; Chajes, in bibl., 118–30).

**Sevarah in the Amoraic Period.** A substantial proportion of the laws and principles deriving from *sevarah* are attributable to an early period of the *halakhah*. From talmudic sources it is also possible to conclude that the use of *sevarah* as a legal source of the *halakhah* was particularly resorted to during amoraic times – just as the *amoraim* laid down rational rules with regard to the use of other legal sources and the modes of studying the *halakhah* (see *Takkanot*,<sup>2</sup> *Asmakhta*). Thus in regard to forbidden food and drink R. Johanan laid down that the taking of even half of the determined measure was also forbidden by the pentateuchal law – since one half-measure may combine with another half-measure to constitute a full measure, it follows that he will be eating that which is forbidden (Yoma 74a). The *amoraim* stated that in respect of various laws it may be said that they have their source either in a biblical passage or in *sevarah*, for instance as regards certain matters relating to the laws of evidence (Sanh. 30a), the laws of *halizah* (Yev. 35b) and in other fields (see, e.g., Shevu. 22b and Tos. loc. cit.).

In other cases the *amoraim* searched for the legal source of a particular rule and came to the conclusion that such a rule had its origin in the legal source of *sevarah*. An interesting illustration of this is to be found in the discussions of the *amoraim* concerning the legal source of the rule that three years' possession of real

property confers presumptive rights of ownership (i.e., upon a claim of lawful acquisition with subsequent loss of the title deed, but with possession for the said period without protest from the former owner; see *Hazakah*). The *amoraim* confronted difficulties in attributing the source of the rule to Midrash (see Interpretation) and to Kabbalah (see Introduction<sup>3</sup>) in turn, and then Rabba determined the legal source of the rule thus: "The first year a person guards his title deed and so he does the second and third years; thereafter he guards it no longer" (BB 28a–29a). That is to say, logic – which is founded on the observation of daily practical life – teaches that a person who purchases property takes care to guard his title deed for a period of three years as proof against any challenge to his right in such property; however, after three years have elapsed without any such challenge, he no longer sees need to guard the material evidence of his ownership since he is already sure that he is fully in possession of the property and does not contemplate the possibility that his right to it will any more be challenged. This *sevarah* was accepted as the legal source of the rule that three years' possession of property suffices to prove the possessor's acquisition thereof according to law, even when the latter cannot produce his title deed or any other proof (for additional substantiation of the rule, see *Hazakah*).

*Sevarah* continued to be a creative legal source in the post-talmudic period. For examples, see Elon, *Ha-Mishpat Ha-Ivri*, II (1973), 820f. However, the halakhic literary sources of this period, unlike those of the talmudic period, do not generally specially emphasize the fact that certain rules have their source in *sevarah*, as is generally done in the case of *minhag*, *takkanah*, and other legal sources. Hence painstaking research is required in order to distinguish the post-talmudic halakhic literary principles which originate from *sevarah*.

**Bibliography:** Weiss, Dor, 2 (1904<sup>4</sup>), 48f.; J. M. Guttmann, in: *Devir*, 2 (1924), 128–30; Ch. Tchernowitz, *Toledot ha-Halakhah*, 1 (1934), 151–63; Z. H. Chajes, *The Student's Guide Through the Talmud* (1960<sup>2</sup>), 29–31, 118–30; M. Elon, in: *ILR*, 2 (1967), 550; idem, *Ha-Mishpat Ha-Ivri*, II (1973), 805–828.

Menachem Elon

**CODIFICATION OF LAW.** This article is arranged according to the following outline:

The Concept and Its Prevalence in Other Legal Systems

In Jewish Law

In the Mishnah

Format and Style of the Mishnah

The Talmud and Post-Talmudic Halakhic Literary Forms

Variety of Literary Forms in the Codes

In the Geonic Period

The Rif (Alfasi)

Maimonides' Method

Reactions to Maimonides' Approach

“Arms-Bearers”

Codification until the Compilation of the Arba'ah Turim

The System of the “Ba'al ha-Turim”

Structure of the Turim

“Arms-Bearers” to the Turim

the Method of Joseph Caro

Structure and Arrangement of the Shulḥan Arukh

The Rule of Moses Isserles (Rema) in Halakhic Codification

Reactions to the Shulḥan Arukh

Acceptance of the Shulḥan Arukh as the Authoritative Halakhic Code

After the Shulḥan Arukh