Research Proposal: Testimony and Oath in Antiquity

My research deals with the subject of witnesses and testimony during antiquity and engages in comparative analysis of the classical sources of Jewish law together with other contemporaneous legal systems. In my doctoral dissertation, I examined the rules of evidence in Tannaitic law, which developed at the same time as the rise of Roman law and reflects jurisprudential engagement with many of the latter’s conceptions and innovations. I found that the Tannaitic rules of testimony are best understood against the backdrop of widespread shifts in the conception of testimony and its place in the legal process that took place in several ancient legal cultures. . These shifts, and particularly the different meanings attributed to testimony in the ancient world, will be the subject of the proposed study.

According to the jurisprudential approach prevalent today, the role of witnesses in the legal process is instrumental, limited to providing information to the judges deciding a case. In my dissertation, I found that this probative approach emerged as the result of an ancient paradigm shift in the conception of legal testimony. It was preceded by a different approach in which witnesses were regarded as representatives of the political community and had substantive authority – equal to that of judges – in the settling of legal disputes. According to this earlier approach, the role of the witnesses was not to report facts but rather to sentence defendants. the transformation of this approach is reflected in Tannaitic Halakha but is not unique to it. Roman law reflects a similar tension between two approaches to the role of witnesses:one observes a gradual preference for a thin, probative conception of testimony over the model of constitutive, authoritative testimony that preceded it.

This widespread shift in the legal theory underpinning testimony, which unfolded in late antiquity, has not yet been given proper scholarly attention. With few exceptions, most scholars studying laws of testimony from antiquity– in the Ancient Near East, in biblical law, or in Greek and Latin legal literature – have attempted to explain these laws within a probative paradigm, despite the many difficulties this approach creates. In the proposed project, I will attempt to outline an alternative to this approach based on an examination of the jurisprudential foundations of the concept of testimony in ancient law. In particular, I intend to deal extensively with the connection between testimony and oath.

In my doctoral dissertation, I found initial indications of a connection between testimony and oath. I found that, in certain Tannaitic sources, witnesses are regarded as establishing an oath which binds the defendant to bear sanctions for violating the law, and this oath is perceived as part of the justification for punishment. Notably, the concept of testimony as an imposition of an oath greatly advances our understanding of the character of ancient legal testimony. It clarifies why testimony is more accurately described as an action and not merely a verbal report, and it sheds light on the reasons that witnesses were deemed authorized to punish offenders. In the framework of the proposed study, I will examine the origins of this surprising notion of testimony.

My research will be informed by the extensive scholarly literature dealing with oaths and sworn treaties in the ancient world. This scholarship has long shown that the basic structure of an oath as a declaration made in the presence of divine witnesses was a common feature of documents and texts written in Akkadian, Hittite, Aramaic, Hebrew, Greek and Latin. The reason for this broad similarity is yet to be uncovered; however, be the reason as it may, the fact is that the ancient legal space shared basic patterns of connection between testimony and oath. It is possible that this connection was responsible for the conception of witnesses as imposing oaths on litigants, not only in rabbinic law but also in other ancient legal cultures. This hypothesis will be a focal point of my research.

The proposed project will combine philological study of ancient texts with an analysis of the legal theory underpinning ancient rules of procedure. It will therefore be divided into two parts:

The first part will be devoted to describing the foundations of the linguistic connection between testimony and oath. As an expert in Jewish law, my research will focus on Jewish and early Christian texts in Hebrew and Greek, but I will proceed from a comparative perspective taking into consideration important parallels from other cultures. I will analyze the various uses of the verbs describing the action of witnesses: ע-ו-ד in Hebrew, ש-ה-ד in Aramaic, and μαρτυρέω in Greek. The polysemic interpretation proposed for these verbs in existing scholarship reflects the difficulty of squaring their ancient uses with a modern paradigm of testimony. I will offer a different solution to this difficulty by revisiting prior assumptions regarding the role of witnesses and the meaning of testimony in legal proceedings. In preliminary research, I was able to show that, due to the involvement of witnesses in the mechanism of establishing oaths and covenants, the word *hē‘îd* in Biblical Hebrew indeed came to bear the meaning of imposing an oath. Further research is now required in order to examine the uses of the Greek μαρτυρέω and its variants (διαμαρτύρομαι /επιμαρτύρομαι) in similar contexts, both in Jewish texts written in Greek and in the New Testament.

The second part of the proposed study will be devoted to a conceptual analysis, based on the preceding philological inquiry, in which I hope to contribute to a better understanding of the legal process in antiquity. Since the dawn of history, the parties to legal processes might seem to have been playing archetypical roles akin to those of today’s litigants, witnesses and judges. Fascinatingly, however, in ancient texts these categories are not stable. Both in the Bible and in the laws of Hammurabi, those referred to as ‘witnesses’ are often the litigants – and, more specifically, the accusers who initiate the legal proceedings against the defendant. At the same time, scholars have struggled with the fact that, in Hebrew, Greek and Latin alike, the word for ‘witness’ (עד, ἴστορ, *testis*) seems occasionally to describe the function appropriate to a judge. This phenomenon is usually explained as reflecting a fluid perception of legal categories in the ancient world. Presumably, as it were, the ancients did not find it necessary to make sharp distinctions between the various legal functions as we understand them today. However, this explanation seems to assume a ‘primitive’ ancient legal thinking, in contrast to a ‘progressive’ modern thinking, without offering any basis for this hierarchical supposition. Instead, I suggest that the ancient legal paradigm was based on a different understanding of the legal process and the logic guiding it. This understanding still needs to be examined and its underlying legal theory deciphered.

Remarkably, the links between testimony, treaty and oath may potentially help explain how the various legal categories – those of litigants, witnesses and judges - overlap with one another. Upon the establishment of an oath or a treaty, the gods summoned as witnesses are also entrusted with supervising and enforcing it, thus functioning in the capacity of judges. At the same time, in certain instances – both in the Hebrew Bible and in the New Testament – the person who commits to the covenant is called ‘a witness.’ Therefore, there seems to be an inherent connection between covenant and oath, on ??one hand, and the fundamental questions of the legal procedure in the ancient world, on the other. It is still necessary to ask how and in what manner the conceptualization of a binding legal connection created by an oath maps onto the conceptualization of the legal process; who influenced whom; and what the similarities and differences are between the two models.

In sum, my research seeks to shed light on the meaning of testimony in the ancient world. Beyond its expected contribution to the study of central biblical and post-biblical Jewish and Christian texts in which the concept of testimony plays a key role, this research also presents a promising direction for deciphering the jurisprudential underpinnings of legal procedure in antiquity, by unveiling the connection between testimony and oath. This is important not only for better understanding certain ancient legal arrangements, but also for tracing the origins of the probative conception of testimony, which modern jurists mistakenly take for granted, and reconstructing its conceptual history.

Abstract

The proposed project will explore the conception of witnesses and their role in the legal process in ancient legal thought. Initial study of classical Jewish legal sources suggests that the probative conception of testimony prevailing today was preceded by a different view of the role of witnesses as holding substantive authority in the settling of disputes – akin to that often attributed to judges. There are strong indications that this is not an internal issue within Jewish legal thought alone, but rather reflects a widespread shift in the conception of testimony that unfolded in several legal cultures in antiquity. The proposed study will investigate this shift, seeking to unveil the ancient legal theory of testimony that preceded it. To do this, I will focus on the connections between testimony and oaths.

In ancient cultures, an oath was a declaration made in the presence of divine witnesses. However, the role of these witnesses is puzzling, as they are not merely called upon as passive observers, but rather entrusted with supervising and enforcing the oath, thus functioning in a capacity associated with judges. This puzzle, I believe, may hold the key for deciphering archaic assumptions regarding the authoritative role of witnesses. The commonality of the basic legal structure of oaths makes it an especially suitable site for examining the conception of witnesses embedded in it, thus providing a promising path for disentangling the riddles of the ancient conception of testimony.