**Orit Malka**

Polonsky Postdoctoral Fellow

Van Leer Jerusalem Institute

**Research Agenda**

I am a historian of law, working on the early history of legal ideas in the western tradition, through the prism of rabbinic sources. At the same time, I am a researcher of rabbinic literature from the perspective of the history of law. I believe these are two sides of a coin which necessarily depend on one another, if one aims for deep understanding of the relevant materials; as Rabbinic texts consist of vast juristic work from professional jurists of late antiquity, however given their special characteristics these texts are only accessible through high proficiency in Talmudic scholarship.

Rabbinic literature is often studied as the ground layer of Jewish law or as the basis of Jewish religion. This approach is completely justified; however, I content that the study of Rabbinic Halakha has a broader potential to contribute to the study of the intellectual history of legal thought in the western tradition. Rare among ancient legal traditions, it demonstrates what could be described as a process of “modernization” of legal perception from an ancient near eastern framework (typical of the bible) to a Roman-like framework (which is the basis of modern legal thought in many respects). In my research I found that not only do legal ideas of the time can help us better understand rabbinic legal ordering, but the contrary is also true: rabbinic Halakha is in itself a window through which one can look at important developments in legal thought of the period. By applying the methods of critical Talmud scholarship to untangling the literary strata of rabbinic sources and through comparative analysis of doctrines and institutions, I study the evolution of basic legal concepts in late antiquity through the prism of rabbinic law.

The historical account of evolutions that legal institutions have undergone in critical moments of history uncovers the contingency of basic legal concepts which are sometimes taken for granted in modern legal scholarship. By showing how basic legal institutions were once conceptualized differently it contributes to a critical perspective on modern law. A Thus, central arena of legal intellectual history which occupies me is the conceptual role of witnesses vis-à-vis Judges in legal procedure. What is a judge, what is the role of a witness – those legal ideas are deemed so basic that they are seldom revisited from a critical point of view. A historical perspective- especially one carried from the point of view of the dramatic transformations in legal thought that took place in late antiquity -may illuminate the political and cultural preconceptions underpinning those ground concepts.

Modern legal paradigm implies a sharp distinction between the witness and the judge as two actors of the legal drama: the judge holds the authority to rule the case, and the witness provides the judge with information regarding the facts of the case. In this model, the judge may accept or reject the witness’ testimony at will. However, this scheme hardly fits rabbinic laws of testimony, where judicial discretion is limited by strict rules and the statement of witnesses, once deemed admissible, binds the judges. Certain rabbinic sources portray testimony in and of itself an authoritative action that designates the results of the judicial procedure (what I call “the authoritative model of testimony”). This phenomenon was explained in previous scholarship as a local, cultural or moral aspect of rabbinic religion. In my PhD dissertation I have argued that this sort of explanations overlook what must have been a development in the conceptual role of witnesses characterizing several legal regimes of late antiquity. I have attempted to portray this development from the point of view of rabbinic literature, while comparing it to other ancient and late antique legal regimes. Strikingly, I found significant parallels between the authoritative model of testimony as displayed in rabbinic sources, and certain characteristics of testimony, not known in previous scholarship, in sources from other cultures of late antiquity. Based on these findings I have so far published three articles that begin to unveil the common legacy of rabbinic and other legal regimes of late antiquity. In my article titled: “Disqualified Witnesses between Tannaitic Halakha and Roman Law: The Archeology of a Legal Institution” (37.4 *Law and History Review* 903-936 [2019]), I demonstrate the links between rabbinic laws of disqualification for testimony and early Roman laws of *infamia*. In two others articles I place rabbinic laws of testimony within their Ancient Near Eastern context, by highlighting the role of witnesses in erecting oath-bound obligations (“Testimony, Forewarning and Oath: from the Bible to the Rabbis”, 31 *Teuda* [2020], forthcoming; “On the Meaning of hē‘îd in Biblical Hebrew: Between Summoning Witnesses and Imposing Oaths”, *Vetus Testamentum*, forthcoming). There is more work to be done, but these parallels suggest that the notion of authoritative testimony is by no means unique to rabbinic tradition and is in fact a common denominator of ancient legal cultures by and large.

Truly, the picture is more complex, as the authoritative model of testimony is not monolithic in rabbinic literature. Several rabbinic sources do adhere to what I call “the instrumental model of testimony”, in which witnesses merely provide the judges with knowledge of the facts under dispute, as one would expect based on modern legal assumptions. In my articles titled “On the Testimony of a Single Witness and that of Women in Tannaitic Literature” (33 *Dine Israel* 227-270 [2019]) I offered a preliminary articulation of the dual perception of the role of witnesses in early rabbinic literature, and suggested that this duality is due to the fact that rabbinic sources are composed on the verge of a conceptual change from the ancient, authoritative model of testimony towards a new, instrumental model of testimony, and exhibit an effort to advance this change while maintaining a conservative framework. This transformation in rabbinic literature appears to be an aspect of a large-scale transformation from an ancient perception to a new paradigm. The rabbinic materials seem to be part of (or, effected by, if you will) a much more extensive intercultural shift that took place in late antiquity, with regards to the conceptualization of the role of witnesses in legal proceedings. Thus, I have shown in my dissertation that classical Roman law too preserves elements that reflects the same duality, although the hold of the authoritative, traditional model of testimony in Roman sources is smaller, probably because the materials that survived reflect a more advanced phase in this process of conceptual alteration.

As the role of witnesses in the legal proceedings is defined vis-à-vis other actors of the legal drama – the judges and the parties – any conclusions regarding the transformation in the perception of witnesses will have far reaching implications on the way we imagine the history of the legal procedure as a whole. If witnesses used to hold the authority, what was the role of Judges? What was the jurisprudential logic behind granting this authority to witnesses and not to judges? And what were the reasons for the shift in the division of labor that took place in the legal cultures of late antiquity? Describing the full conceptual history of legal procedure in different legal cultures of late antiquity exceeds the limits of a single researcher’s work; However, my aim is to contribute to this effort by broadening the scale of my previous research and offering a philologically sensitive analytical study of these transformations in rabbinic texts, with a comparative intercultural perspective.

The next step in my research would be to focus on oath formulations. In oath formulations divine entities are named “witnesses” even though they function as judges; a phenomenon that caused much confusion among researchers. Given that oath formulations have a fixed legal structure throughout many ancient traditions, involving gods and goddesses as “Judging witnesses”, this seems to me to be a promising vain to progress in the unfolding of the common ancient conception of the authoritative model of testimony. I argue that the supposedly religious nature of these texts should not deter us from treating them as a source of information on legal ideas. Attributing the aforementioned complexity to the religious nature of the materials, in an anthropological-like attitude, may end up being anachronistic when the possibility of historical change and evolution of legal ideas in the western tradition is not taken seriously.

Alongside the structure of the legal procedure, another focus of my interest in the history of law is the criteria for applicability of law and its relation to political organization and the concept of citizenship (in its varied ancient contexts). In modern legal thought a territorial principle for the applicability of law is associated with political regimes, whereas personal law is thought to characterize religious normativity. However, in antiquity the territorial criterion is characteristic of Ancient Near Eastern religions, where different divinities are associated with different peoples and their land. The concept of personal law, in turn, is developed extensively in imperial Rome with the grant of roman citizenship to non-Romans throughout the empire. This inversion in modern and ancient suppositions is a result of the fluctuations in the architecture of the analytic separation of law and religion (the conceptual possibility of separation, and not the actual world separation – which is of course a whole different story), which in itself is an important chapter in the history of law. In my research I devote several projects to the study of the criteria of law applicability in rabbinic texts, with an aim to better understand the relation between law and religion in rabbinic tradition against the background of its period, and here is a brief description of some of these projects.

A. In a current project I study the change from a territorial law to personal law which in the Jewish tradition occurs, as I wish to claim, in rabbinic stratum. I argue that the rabbis work hard to reject the territorial principle governing the applicability of the *Mitzvot*, the commandments, according to the bible (as read by the rabbis), in favor of the personal law model. Moreover, it is my contention that this transformation is not due to religious ideas about the relationship of each Jew with God and/ or other Jews, but rather comes from the said change in the grounds for granting Roman citizenship (manifested by the subjugation to Roman law), which is of purely political in nature.

B. In another project, which I conduct in collaboration with my colleague, Dr. Yakir Paz from the Hebrew University, we examine the meaning of captivity in rabbinic texts in comparison with Roman law. Here again what is at stake is the applicability of law, since according to Roman law captives lose their status as Roman citizens, and as a result upon captivity they cease to be subject of Roman law. Traditionally it was believed that this model of citizenship is alien to rabbinic Halakha, as the rabbis must have been bound to the idea that the subjugation to Jewish law–which results from the religious identity of Jewishness - cannot be lost like a legal status. Contrary to this assumption, we were able to show that many Halakhic sources in fact adapt Roman prior assumptions regarding the implications of captivity, and seem to accept that Halakha – Jewish law – ceases to apply to Jews taken captive under certain political circumstances. We have so far published two articles based on these findings, one dealing with the impact of captivity on marriage (“Ab Hostibus Captus et a Latronibus Captus: The Impact of the Roman Model of Citizenship on Rabbinic Law”, 109.2 Jewish Quarterly Review 141-172 [2019]) and the other focusing on property rights of captives (“A Rabbinic Postliminium: The Property of Captives in Tannaitic Halakha in Light of Roman Law”, in Legal Engagement: The Reception of Roman Law and Tribunals by Jews and Other Inhabitants of the Empire, Katell Berthelot, Natalie Dohrmann and Capucine Nemo-Pekelman eds, forthcoming [2020]). We are currently working on a third chapter that will focus on captivity and inheritance, towards a book project.

C. In yet another project I am exploring the connection between the political idea of freedom and the applicability of legal norms in Jewish law. Contra Robert Cover and others which highlight the nature of the commandments as obligations, commitments, which are supposedly the ultimate opposite of freedom and rights, I show that the meaning of obligations in legal traditions of antiquity is associated with moral and political liberty (the difference between freedom and liberty notwithstanding, the two terms are deeply connected, both historically and conceptually). Liberty is a precondition for the applicability of law in rabbinic litrature, which accordingly does not apply to slaves, women, and minors. In this respect I examine *inter alia* the effect that the moral ethics of self-control (a virtue associated with liberty of the soul) had on legal status in both Jewish and roman legal thought.

In these projects and still others not described here due to the limited space, I seek to unveil the political underpinnings of rabbinic thought. These are often overlooked in research given that rabbinic tradition evolved in an era of no Jewish political autonomy and devotes little attention to the construction of standard political institutions (such as the authorities of a king, governmental mechanisms etc.). My contention is that rabbinic texts form a political scaffold nevertheless, and that its deep political roots are to be found in the legal framework of Halakha and the conceptual structure of law as a political mechanism embedded within it.

In sum, I believe that the study of rabbinic sources can contribute significantly to the study of critical moments in the evolution of western legal thought, given its special locus between ancient near eastern legal traditions and the world rising power of Roman law. On the other hand, the unique phenomenon of rabbinic Halakha, the evolution of which is challenging researchers of Halakha for generations, could, in my mind, be best explained only as a chapter in the history of law, within the contours of the aforementioned tension between the ancient and the new (Roman) legal regimes. In my research I seek to synchronize the two realms of study to maximize their mutual benefit.

Teaching: As a lawyer in my education, who has practices commercial litigation for over ten years in leading Israeli law firms, I am qualified and happy to teach courses in all fields of law, with special preference to Evidence and Procedure, alongside my research proficiency in Jewish Law (*Mishpat Ivri*). In addition, I could teach an introductory course to Roman law and to ancient legal thought more generally. I can also offer courses and seminars on the history of evidence law, the history of legal ideas, law and religion in the Jewish tradition, citizenship in Jewish law, and more.