Dissertation #1

Title: **Das Gesetz über falsche Zeugen nach Bibel und Talmud** (The Legal Treatment of the False Witness According to Bible and Talmud)

Author: **Oscar Bähr**

Year: 1882; Place of Publication: Berlin; Publisher: H. Izkowski

German Rabbis – Project
Carlebach Institute / Bar-Ilan University

Summary by: Michael Hasin
Date: May 20, 2020

Summary

Executive Summary: The dissertation belongs to the area of Halakhic scholarship or legal history (the author uses the term "literary-history", though); the author, a graduate of the (Orthodox) Berlin Rabbinical seminary, gives an account of the legal framework for determining and sanctioning false testimony in Jewish law based both on the written law contained in the Hebrew Bible (part I) and on the oral law in rabbinic literature (part II). Philological methods are used to assert the accuracy of the traditional Jewish interpretation of the Hebrew Bible, in addition, the dissertation attempts to defend the ethical character of Talmudic law against accusations of immorality.

Preface (pp. v - vi)

The dissertation was created in response to a prize question of the (Orthodox) Berlin Rabbinical Seminary. Despite the inapplicability of Halakhic (capital) criminal law since around 30 CE, the subject is said by the author to have possible practical relevance for Jewish religious courts dealing with civil law cases in modern times.

Introduction (pp. 1 - 7)

In the introduction, the mandatory oath for a witness in Talmudic criminal law is taken as the point of departure in order to present a short overview of the different rules applying to testimony in all criminal cases which are conducted according to Halakha (for example: the legal regime regarding the examination or disqualification of witnesses). Of these various rules that are meant to prevent wrongful convictions, the law on false testimony, i.e., intentional lying in court, is then announced by the author as the subject of his dissertation. This law is codified in *Deuteronomy* (*Devarim)* 19, 16 – 21, and its uniqueness – compared to other testimony rules - lies in the fact that false testimony is not just disqualified but that the false witness is actively punished. Biblical written law, however, makes no provisions with regard to the methods of how to determine that a witness was indeed consciously providing false testimony, an issue that is only regulated by the oral law contained in rabbinic literature. Therefore, the dissertation is split into two parts: one dealing with the basic legal framework contained in the Hebrew Bible and the second dedicated to the supplementary law of false testimony according to the Mishna and the Talmud.

Part I (pp. 7 - 28)

This part is structured as a verse-by-verse commentary on *Deut.* 19, 16 – 21 offering a reconstruction of both the text's original intended meaning and of the law as it was applied in practice by courts up to the Second Temple period. For this purpose, the author makes use of philological-historical reasoning based upon a plethora of sources ranging from Hellenistic Judaism, the rabbinic tradition, the religious Christian tradition and the academic scholarship of his day, including the *Wissenschaft des Judentums.*[1]

1 e.g. the Septuagint, Philo, Josephus, the Targumim, the Vulgate, the Peshitta, Karaite texts; rabbinic literature, Post-Talmudic commentators; works by Carl Friedrich Keil, Joseph Levin Saalschütz, Abraham Geiger; dictionaries etc.

At the beginning of this part, the whole section *Deut.* 19, 16 – 21 is given in the author's literal German translation. The remainder consists of passages dedicated to explicating all verses in the order they appear in this section.

Deut. 19, 16 is interpreted – contra the Protestant theologian Carl Friedrich Keil but in accordance with the traditional Jewish view – as mandating that the laws regarding false testimony apply only in cases where there are (at least) two concurrent witnesses even though the verse features the term (one) "false witness" in the singular only. In addition, the rules apply, despite some rabbinic commentators like Ibn Esra claiming otherwise, not just to those witnesses accusing someone falsely of committing idolatry but to all lying witnesses.

As to *Deut*. 19, 17 – 18, the verses are read – against unnamed "newer commentators" - as meaning that, in case someone is to be prosecuted for false testimony, two men have to accuse this person of such a crime in front of a criminal tribunal (not necessarily the Sanhedrin).

Then, in commenting on *Deut.* 19, 19 the author discusses different interpretations of the verse by the Sadducees and the Pharisees, the former favoring to read it as signifying that false testimony is only punished if it leads not just to a wrongful conviction but if the verdict is also carried out in practice, too. According to the Pharisees, however, the sentence need not to be executed. Based on a lexical and grammatical analysis, the author sides with the Pharisees. In addition, the word "evil" in the command to "purge the evil" can either be seen as referring to the evil-doer (as translated in the Aramaic Targumim) or to wickedness in the abstract (as preferred by the Septuagint and the Vulgate). The author argues that only the second (!) option is correct due to how the word is employed otherwise in the Hebrew Bible.

Deut. 19, 20 means, so the author, to mandate to publicly proclaim any condemnation due to false testimony to all those who are capable to be a witness in Jewish law as a means of deterrence. Thereby, the author defends an interpretation given by the Babylonian Talmud (as against the Targumim that suggest to only warn "sinners").

Finally*, Deut*. 19, 21 contains the expression "an eye for an eye" and seems, in a literal reading, to stipulate a mirroring punishment for false witnesses identical to the verdict caused by their false testimony to someone who is, in fact, innocent. Against the historical-critical view advanced by Joseph Levin Saalschütz who assumed that talionic punishment was indeed practiced in pre-rabbinic times and only later superseded by Talmudic law, the author argues in a lengthy argumentation that such a literal reading would contradict other legal norms contained in the Hebrew Bible and, that, therefore the penalty for false testimony in Jewish law must be assumed to always have been monetary compensation if it caused damage to the body of the innocent defendant (however, if it led to the death of the defendant it could entailed the death penalty for the false witness).

Part II (pp. 29 - 102)

The second part of the dissertation is subdivided into four sections, all serving to elaborate on one or more of the particular principles of Halakhic false testimony law that are exclusively to be found in rabbinic literature without any explicit textual support in written biblical law.

I. (pp. 29 - 59)

Witnesses are deemed to have provided intentionally false testimony, only if two other persons testify to having seen these witnesses elsewhere at the time the alleged crime happened.

This rule - which is contained in Mishna *Makkot* 5a – did, so the author, not supersede an earlier Halakha. The existence of a such a supposed older legal rule, according to which a contradiction between two witnesses was alone sufficient to presume false testimony, was posited by Abraham Geiger whom the author sets out to refute using arguments based on various rabbinic sources (Sifre, Tosefta, the Jerusalem Targum) and even on the Christian Gospels of Matthew and Mark. The author then discusses the rationale behind this rule, disagreeing with various theories brought forward by several traditional rabbinic commentators like Nissim of Gerona or Jonathan Eibeschütz; instead, the author expresses sympathy for (different) views expressed by the more recent Orthodox writers Hirsch Bär Fassel and David Hoffmann without ultimately, however, taking a definite stance. The last part of the

section deals with issues arising from situations when not (just) the witnesses but also the parties involved in the trial (such as the accuser or the defendant) were seen elsewhere at the time the alleged crime happened.

II. (p. 59 - 66)

All witnesses and not just one of them must be proven to have been elsewhere at the time of the alleged crime in order to convict them of false testimony. Even if there are one hundred witnesses, and of them ninety nine are proven to have given false testimony they are not punished unless the last witness has not been found guilty of the same.

This follows from a Mishnaic rule in the tractate *Makkot,* so the author arguing against Rashi who saw the source in the tractate *Sota,* which reflects the general principle in Jewish law to treat identical testimonies by several witnesses as one single testimony. The author cites, however, approvingly a restrictive interpretation proposed by Maimonides who applied this rule only when there was no substantial temporal gap between the testimonies of various witness pairs (otherwise they are treated as pairs that can be convicted separately of false testimony). Then, a discussion ensues on the Mishnaic dictum that two accusers alone can lead to the conviction of a numerically larger group of witnesses for false testimony. Finally, the author expands on the Talmudic rule from the tractate *Ketubot* which demands of those accusing others of a crime to make the accusation in the physical presence of the defendant.

III. (p. 66 - 80)

False testimony is sanctioned if it leads to the conviction of a defendant, but the sentence needs not to be executed. If witnesses are proven to have lied during the trial itself before the court hands out the sentence, their testimony is disqualified but they are not punished.

This section seeks to provide an ethical justification for said rule that is included in the Mishna. In the section's first half, the author gives ethical reasons for the Pharisaic standpoint of letting a mere conviction of an innocent suffice for punishing the false witness against the more stringent interpretation of the Sadducees who required the sentence to be executed (see above Part I, *Deut.* 19, 19 for the defense of the accuracy of the Pharisaic interpretation with regard to the text of the Hebrew Bible). However, an additional Mishnaic rule says that if a death sentence is handed out and the defendant has already been executed, the false witness is not punished. The author defends this norm against moral criticism by Abraham Geiger, citing mainly arguments devised by Post-Talmudic writers such as Hasdai Crescas or Jonathan Eibeschütz.

IV. (pp. 81 - 102)

The last section elucidates the rules applying to the interrogation and the punishment of false witnesses.

The interrogation of both the alleged false witnesses and those accusing them of false testimony must confirm to the general principles of witness interrogation laid out in the Talmud tractate *Sanhedrin*. The author provides details on how these general rules are to be interpreted in false testimony cases (asserting to be in agreement with all Halakhic decisors). As to the type of punishment, the author provides a detailed case-based overview (death penalty, corporal penalty / lashing, monetary compensation, combined penalties) relying directly upon Talmudic sources and upon the Code of Maimonides. This is followed by detailed remarks on the public proclamation of convictions for false testimony (see above Part I, *Deut.* 19, 20). The section and the dissertation ends with noting that due to the Halakhic principle that nobody is punished for instigating others to commit a crime, those causing the false witness to lie do not face sanctions but have to return unlawfully acquired monetary benefits.