"This is the Law of the Persians" – An Allusion to the Sasanian Law of Surety in the Babylonian Talmud

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The monumental Babylonian Talmud (or Bavli), the foremost source for Jewish law and theology, was produced in the long period of Iranian rule over Mesopotamia during the Parthian and Sasanian ages and completed in the fifth or sixth century. As a complex religious and legal compilation the Bavli presents enormous interpretative problems to historians, theologians, literary and legal experts alike due to its often shortened, elliptical style (which is also typical for Zoroastrian exegetic literature) and its lack of explanations. Passages referring to Iranian mores and norms often remain completely enigmatic and can be only understood when the painstaking task of reconstructing their historical, social, legal and cultural background is under-

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taken. Despite all these difficulties, allusions to juridical matters can be especially intriguing, since they offer the possibility of examining the extent of interaction between two of the most influential legal systems of late antiquity, Sasanian and Rabbinic law. As the product of a heterogeneous cultural environment, the Talmud employs not only several Iranian technical terms, taken as loanwords directly from Sasanian jurisprudence,[1] but also alludes in other cases to Iranian law[2] and reveals that the rabbis did not refrain from discussing difficult juridical problems – either openly or tacitly – in the light of the solutions found in the Sasanian system.[3] In this short contribution dedicated to the memory of our esteemed colleague Amnon Netzer, I will try to illuminate the legal background of an explicit reference to the "law of the Persians" in the context of the law of obligations.

In his recent book on the Iranian elements in the Babylonian Talmud, Shai Secunda examines an elaborate passage at the end of tractate Bava Bathra[4] referring to "Persian law" in the context of a rabbinic discussion dealing with a problem of surety.[5] The larger context, in which he places this discussion, is the question, whether it is true – as several authors interpreting this passage have concluded – that the rabbis had *in toto* a negative view of the Iranian legal system. Secunda denies this, in my opinion convincingly, since the sources present a far more complex image of the relationship between the two legal systems and there is no reason to assume that the

[1]I have commented on the legal background of Iranian legal loanwords in the Babylonian Talmud in several articles; see Maria Macuch, "Iranian Legal Terminology in the Babylonian Talmud in the Light of Sasanian Jurisprudence," in *Irano-Judaica IV: Studies Relating to Jewish Contacts with Persian Culture Throughout the Ages,* ed. Shaul Shaked and Amnon Netzer (Jerusalem: Ben Zvi Institute 1999), 91–101; "An Iranian Legal Term in the Babylonian Talmud and in Sasanian Jurisprudence: *dastwar*," in *Irano-Judaica VI: Studies Relating to Jewish Contacts with Persian Culture Throughout the Ages*, ed. Shaul Shaked and Amnon Netzer (Jerusalem: Ben Zvi Institute 2008), 126–138; and "Allusions to Sasanian Law in the Babylonian Talmud," in *The Talmud in its Iranian Context,* ed. Carol Bakhos, and M. Rahim Shayegan (Tübingen: Mohr Siebeck 2010), 100-111.

[2]See the cases discussed in Maria Macuch, "The Talmudic Expression 'Servant of the Fire' in the Light of Pahlavi Legal Sources," in *Jerusalem Studies in Arabic and Islam* 26 (2002) [*Volume in Honour of Shaul Shaked*], 109–129, and "Jewish Jurisdiction within the Framework of the Sasanian Legal System," in *Encounters by the Rivers of Babylon: Scholarly Conversations between Jews, Iranians and Babylonians in Antiquity,* ed. Uri Gabbay and Shai Secunda (Tübingen: Mohr Siebeck 2014), 147-160.

3 Maria Macuch, "Substance and Fruit in the Sasanian Law of Property and the Babylonian Talmud," in *The Archaeology and Material Culture of the Babylonian Talmud,* ed. Markham J. Geller (Leiden, Boston: Brill 2015), 245-259.

[4]Bava Bathra 173b.

[5]See Shai Secunda, *The Iranian Talmud. Reading the Bavli in its Sasanian Context* (Philadelphia, Pennsylvania: University of Pennsylvania Press 2014), 93-100, 107-109.

allusion to Persian law was derogatory.[6] There is no need to repeat his arguments here, nor his examination of the Talmudic passages, but a few words on this branch of law and the rabbinic discussion will be necessary before trying to assess the reference to "Persian law" in the context of Sasanian suretyship.

All advanced legal systems know different forms of securing debts. To put it simply: if a man (the borrower or debtor) borrows money from another (the loaner or creditor), the latter would often wish to obtain some kind of additional security for the loan instead of just having to rely on the willingness and the ability of the debtor to pay the money back on time. The creditor would wish to be protected against loss, against the possibility that the debtor may be insolvent or unattainable when called upon to repay the loan. Hence the debtor usually has to provide some kind of real or personal security for the borrowed money. Real security is the granting of either ownership, possession or another specific right to particular funds or property of the debtor, entitling the creditor to retain or recover this property in satisfaction of the debt (such as mortgage, pledge, pawn, lien, deposit, etc.). Personal security, on the other hand, permits a creditor to look to a third party for satisfaction (guarantee or suretyship). The surety (or guarantor) commits himself to guarantee in some form for the debtor, thereby extending the group of persons against whom the creditor has recourse. In Rabbinic and Sasanian law suretyship could take a variety of forms, depending on the formal words creating the loan contract. Specific formulations could extend or limit both the commitment of the surety as well as the rights of the creditor. Since there were different types of personal security in the credit law of both systems, one of the major difficulties discussed in Rabbinic and Sasanian law is the question, when exactly and under which circumstances does the creditor have the right to exact payment from the surety or guarantor? This is the context in which the allusion to Persian law appears in the Talmud.

The rabbinic discussion (*sugya)* in the Talmud examined by Secunda refers to the following *Mishna*[7]:

> If a man lent his fellow money through a guarantor (/surety), he may not exact payment from the guarantor. If he said: "On the condition that I may exact payment from whom I wish," he may exact payment from the guarantor. R.

[6]Secunda, *Iranian Talmud* (see n. 5), 93, 109.

[7]The code edited by R. Judah the Patriarch c. 200 CE, a collection of statements, discussions and Biblical interpretations of the Tannaim, Rabbinic sages from c. 10-220 CE.

> Shimʿon b. Gamliel says: If the borrower (/debtor) has property, in either case [the creditor] may not exact payment from the guarantor.[8]

The *Mishna* refers to two different types of suretyship: (1) The first one, strangely, forbids the creditor to make a claim against the guarantor. This ruling creates a major problem in the ensuing rabbinic discussion, since it does *not* correspond with the obvious reason for agreeing on suretyship in the first place (i.e. providing additional security for the creditor) and hence has to be explained. (2) The second type of suretyship is defined exactly by a precise formulation in the credit contract or stipulation: the loan is given "on the condition that I may exact payment from whom I wish". In this case the creditor has agreed to the legal transaction on the condition that he may approach either the debtor or the guarantor, with the implication that he is allowed to exact payment from both and even from the guarantor directly. This ruling is in turn restricted by R. Shimʿon b. Gamliel: the creditor may make a claim against the guarantor in both cases *only* if the debtor is insolvent.

The opinions of the rabbis diverge as to how these rulings in the *mishna* should be interpreted:

> What is the reason [that the *mishna* does not require the guarantor to pay the loan]? Both Rabba and Rav Yosef say: [Because the guarantor can say,] "You have handed over to me a man; and a man I have handed over to you."
>
> Rav Naḥman raised an objection: *This is the law of the Persians! "The law of the Persians"?! On the contrary; they pursue the guarantor!* Rather [the following is Rav Naḥman's objection]: "[Is not this ruling] like Persian law [where we find that the judges] do not give reasoning for their matters (i.e. rulings)!" Rather said R. Naḥman: What is [the meaning of] "he may not exact payment from the guarantor?" [That] he may not demand [payment from] the guarantor first. […] And if he said, "On the condition that I may exact payment from whom I wish," he may demand [payment from] the guarantor first.[9]

Two commentaries on the first type of suretyship mentioned in the *mishna* (which does not allow the creditor to put a claim against the guarantor) are presented in the ensuing rabbinic discussion in the Talmud:

[8]The translation follows Secunda, *Iranian Talmud* (see n. 5), 93, where the original text of this passage may also be found. See also Lazarus Goldschmidt, *Der babylonische Talmud* (Haag: Martinus Nijoff 1933), vol. 6, 1401.

[9]B. Bava Bathra 173b; Goldschmidt, *Talmud* (see n. 8), vol. 6, 1401; the translation follows Secunda, *Iranian Talmud* (see n. 5), 94; the italics, emphasizing the section on Persian suretyship, are mine.

(1) The first explanation ("You have handed over to me a man; and a man I have handed over to you"), attributed to Rabba and Rav Yosef, interprets this ruling by referring to a specific type of suretyship, which is also known in Sasanian law: the guarantor does *not* agree to make payment in lieu of the debtor, but commits himself to delivering either the debtor or another person *(tan)* agreed upon as security to the creditor when payment is due. The obligation of the surety ends with "handing over the man" and he cannot be called upon to repay the debt. According to these two rabbis this is the reason why the creditor in the *Mishna* cannot reclaim the debt from the guarantor.

(2) Rav Naḥman, one of the Babylonian Amoraim (c. 200-500 CE), depicted as acculturated to Persian elite society,[10] comments this interpretation with the exclamation "This is the law of the Persians!" He seems to have had better knowledge of Iranian law than his contemporaries, since he obviously understood that the interpretation of the mishnaic ruling given by Rabba and Rav Yosef was *very near to or even based on Iranian law*. This correct assessment, however, caused complete confusion in later interpretative layers of this passage, leading to a different (and false) explanation of his exclamation.[11] The main objection to Rav Naḥman's (correct) assessment is that – contrary to the ruling in the *Mishna* – the guarantor was indeed pursued in Persian law. The objection is also correct: there were forms of personal security allowing the creditor to sue the guarantor either in the event of the debtor's insolvency (this is the interpretation Rav Naḥman offers) or even immediately under certain conditions. In our passage three completely different forms of personal security were confused, as I will try to show in the following.

As the law of a vast empire with a long history, Iranian jurisprudence knew various forms of suretyship *(pāyēndānīh)*, some of which were relics of a distant past, surviving beside other more recent legal developments in the Sasanian period. Since we have no systematic description of this branch of law, but only an extremely complicated casuistic, it is rather difficult to sort out the various types of suretyship prevalent in legal practice. They were obviously distinguished precisely by the formal words spoken by one or several of the contractors (the guarantor or debtor or creditor) and it will be best to begin by assessing the diverse prescribed formulae and their legal implications:

[10]Secunda, *Iranian Talmud* (see n. 5), 95.

[11]See the extensive discussion of the different layers in Secunda, *Iranian Talmud* (see n. 5), 95-97.

1. The surety *(pāyēndān)* could commit himself by using the formula "I am guarantor of such-and-such a man with respect to this money (=loan)" *(pad ēn xwāstag wāhmān mard pāyēndān hom)*. With these words he committed himself to accept liability for a debt only secondarily on condition that the principal debtor *(mādagwar)* was insolvent and could not pay back the loan. The implication of this declaration is stated clearly: "there is no claim against the surety if the principal debtor is solvent *(*ādān*)*" *(ka mādagwar ādān rāh ō pāyēndān nēst)*. The guarantee was conditional on the principal contractor's, i.e. the debtor's, default. The surety could only be held responsible for payment if the debtor failed to perform because of insolvency.[12]

2. The debtor himself could declare "I have made such-and-such a man guarantor with respect to this money (=loan)" *(kū-m pad ēn xwāstag wāhmān mard pāyēndān kard)*. The implications of this wording are similar to those of the first formula above: "a claim against the guarantor is in force at the time when the man (=debtor) is insolvent or has not come" *(rāh ō pāyēndān ān zamān bawēd ka mērag an-ādān ayāb nē mad ēstēd)*. The guarantor was only obliged to accept liability if the principal debtor was insolvent *(an-ādān)* or did not show up to pay back his loan on time.[13]

3. Another formula was prescribed if the contracting partners wished to create a primary commitment on the part of the surety, giving the creditor direct access to payment. In this case the formal words in the contract would be: "Because of suretyship for such-and-such a man I will pay you so-and-so much money" *(man pāyēndānīh ī wāhmān rāy xwāstag and ō tō dahom)*. With this phrasing an agreement comparable to the indemnity was concluded, i.e. an obligation by one person to pay to another person a sum that is owed to the latter by a third party: "a claim against the guarantor (is in force) and does not return to the origin (= principal debtor)" *(rāh ō pāyēndān u-š abāz ō bun nē bawēd)*. We

[12]According to the Sasanian Lawbook *(Mādayān ī) Hazār Dādestān* (MHD in the following) 57.1-2; see Maria Macuch, *Rechtskasuistik und Gerichtspraxis zu Beginn des siebenten Jahrhunderts in Iran: Die Rechtssammlung des Farroḫmard i Wahrāman* (Wiesbaden: Harrassowitz Verlag, 1993). Transliteration and translation of this formula pp. 388, 393. On the heterogramm NKSY' for *xwāstag* with the exclusive meaning of "money" in legal texts see Maria Macuch, "Zur juristischen Terminologie der Berliner Pahlavi Dokumente," in Dieter Weber, *Berliner Pahlavi Dokumente. Zeugnisse spätsassanidischer Brief- und Rechtskultur aus frühislamischer Zeit* (Wiesbaden: Harrassowitz Verlag, 2008), 264-265.[12]MHD 56.5-6; Macuch, *Rechtskasuistik* (see n. 12), 387, 392.

[13]MHD 56.5-6; Macuch, *Rechtskasuistik* (see n. 12), 387, 392.

are informed that if there was no time limit in the contract, the agreement was not conditional on the third party's default, hence it allowed the creditor to demand payment from the surety directly *without* first suing the original debtor.[14]

4. Two or several debtors in a partnership *(hambāyīh)* could agree to act at the same time as co-sureties *(ham-pāyandān),* i.e. they could guarantee the debt together, with the following formulae: (a) "We are co-sureties" *(ham-pāyandān hēm)*[15] or (b) "We have taken money as a loan and are co-sureties" *(kū-mān xwāstag abām stad ham-pāyēndān hēm)*[16] or (c) "For this money (=loan) we are co-sureties, one for the other" *(pad ān xwāstag ēk ōy ī did ham-pāyēndān hēm)*[17]. In all these cases the co-sureties had joint liability with regard to the debt and the creditor could demand full payment of the whole amount from any one of the persons under contract: "he (=the creditor) is authorized to claim it (=the debt) from anyone he wishes to" *(az har kē kāmēd pādixšāy xwāst)*. The person who paid the whole sum had the right to demand regress from the other joint debtors.[18] The implications were completely different if the co-debtors were *not* at the same time co-sureties. In the case of co-debtors the creditor could only sue each debtor for the amount he had himself taken as a loan. If the formulation in the contract allowed the creditor to claim the whole sum from one of the co-debtors, the debtor who paid the whole amount had no right to demand regress from the others.[19] This distinction between co-debtors and co-sureties seems to have been very similar to Jewish law.[20]

5. Another form of personal security was agreed upon if the creditor used the formal words: "I have accepted so-and-so (=name of the person) as a body/person *(pad tan)* from you" *(kū-m ... pad tan az tō padīrift)*.[21] A debtor who had no other property could offer a member of his family, e.g. one (or several) of his children, as security to the creditor and a third party, the guarantor, could commit himself to delivering this person in due time. If the creditor accepted

[14]MHD 56.15-17; Macuch, *Rechtskasuistik* (see n. 12), 387, 393.
[15]MHD 56.1; Macuch, *Rechtskasuistik* (see n. 12), 386, 391f.
[16]MHD 56.8-9; Macuch, *Rechtskasuistik* (see n. 12), 387, 392.
[17]MHD 56.9-10; Macuch, *Rechtskasuistik* (see n. 12), 387, 392.
[18]MHD 55.17-56.5; Macuch, *Rechtskasuistik* (see n. 12), 386, 391-392.
[19]MHD 56.3-5; Macuch, *Rechtskasuistik* (see n. 12), 392.
[20]See Isaac Herzog, *The Main Institutions of Jewish Law. Volume 2: The Law of Obligations* (London and New York: The Soncino Press Limited,, 1939; reprint Colchester and London: Spottiswoode Ballantyne Ltd.,., 1980), 216.
[21]MHD 57.12-13 and 57.15; Macuch, *Rechtskasuistik* (see n. 12), 388, 393.

this specific form of suretyship, using the formula cited above, and the principal debtor failed to pay, then this family member was given into debt bondage with the obligation to serve the creditor personally with his work capacity either for a certain limited time or become part of the latter's property as a slave. The guarantor was only obliged to deliver the person and could not be held liable for paying back the debt if he fulfilled this commitment.

6. The guarantor could commit himself to delivering the debtor to the creditor and to paying a certain sum of money (which could be - but was not necessarily - the same amount given as a loan) if he failed to do so with the formal words "When you request M. I will deliver M., otherwise I will pay 200 (dr.)" *(ka tō Mihrēn xwāhē Mihrēn ō tō abespārom* ēnyā *200 be dahom)*.[22] The case discussed here is too complex to be repeated here[23], but the main information to be gained from this passage is that Sasanian law still knew a type of suretyship, already attested in cuneiform legal texts, designated by Koschaker in his refined and admirable work on cuneiform law as "Stillesitzbürgschaft" (suretyship of place) and "Gestellungsbürgschaft" (suretyship of delivery).[24] The guarantor ensures that the debtor will either stay at the place of performance or he commits himself to hand out the debtor to the creditor when the debt is due.

Although the information is sparse, the available material reveals clearly that Sasanian law knew a great variety of different types of suretyship, permitting a creditor to look to a third party for satisfaction in several ways. A guarantor could be committed to deliver the debtor or another person agreed upon by the contractors to the creditor personally, with no obligation to pay the debt. He could also be either primarily liable for the debt, according to an agreement comparable to the indemnity, or be appointed as security with a secondary obligation to make payment only if the principal debtor was in default. Co-sureties and co-debtors were also known with different implications. To sum up, we may distinguish between at least five different forms of suretyship, which are listed in the following according to their presumed historical age (beginning with the oldest):

I. Suretyship of performance: the guarantor ensures that the debtor will either stay at the place of performance (suretyship of place) or he commits himself to deliver the debtor to the creditor (suretyship of delivery).

[22]MHD 58.4-5; Macuch, *Rechtskasuistik* (see n. 12), 389, 394.

[23]See commentary in Macuch, *Rechtskasuistik* (see n. 12), 404-405.

[24]See Paul Koschaker, *Babylonisch-assyrisches Bürgschaftsrecht* (Leipzig: Teubner, 1911; reprint Aalan, 1966), 75.

II. Suretyship "of the body/person" *(pad tan)*: the guarantor commits himself to deliver a specific person *(tan)*, agreed upon as security for the loan, to the creditor if the debtor is in default.

III. Accessory suretyship: the guarantor commits himself to accept liability by repaying the debt if the debtor is in default. The surety is only liable if the debtor is insolvent.

IV. Indemnity: suretyship of the guarantor without commission of the debtor. The liability of the surety is not conditional on the debtor's defaulting on the payment. The creditor can sue the guarantor without first demanding payment from the debtor.

V. Joint suretyship of co-debtors, who are at the same time co-sureties with the commitment to guarantee for each other a debt they have contracted together.

It would not be too far-fetched to assume that these different forms of suretyship, although they are all attested as variants beside each other, also represent various historical periods in the development of Sasanian credit law. The first type (suretyship of performance), by which the guarantor ensures that the debtor will be available to the creditor when the loan is due, was certainly a very old form of personal security, since it is also known in cuneiform law, as already mentioned above. Originally the surety only guaranteed that the debtor would remain at a certain place (suretyship of place) or that he would deliver him to the creditor (suretyship of delivery), but was not held responsible for repaying the debt. The second type (suretyship of the body/person) could have well been a further development of the first type by extending the possible circle of persons against whom the creditor had recourse. The guarantor would agree to deliver a specific person (a child or another family member of the debtor) to the creditor if the debtor himself was unattainable. The child would be kept in debt bondage until the loan was paid. Both forms are probably precursors of accessory suretyship (type III), allowing the creditor to exact payment from the guarantor if the debtor is insolvent. The guarantor in type I (surety of performance) and type II (surety of person) is originally liable not only with his property, but with his *whole person*. If he is not able to deliver the debtor (type I) or another person agreed upon as security (type II) to the creditor, the guarantor himself is forced to go into debt bondage and to put his work capacity at the disposal of the creditor. He has the possibility of freeing himself from bondage by satisfying the creditor and paying back the debt. In the course of the historical development of credit law this "detour", leading the guarantor first into debt bondage, is avoided: the surety immediately

gives a promise to satisfy the creditor in the event of the debtor defaulting. This would lead to the form of guarantee most common today, accessory suretyship (type III): the guarantor is liable *in lieu* of the debtor if the latter is insolvent.[25] Types IV (indemnity) and V (joint suretyship) are further developments of credit law, which are to be expected in a complex and advanced economy such as the Sasanian one.

To conclude: the rabbinic discussion in the Talmud passages cited above refers to at least three (maybe four) different types of suretyship, all well attested in Sasanian law. Whereas Rabba and Rav Yosef in their commentary seem to have had either "suretyship of performance" (type I) or "suretyship of person" (type II) in mind, a form, which Rav Naḥman correctly identified as one of the specifically Iranian variants of personal security, later layers of the text probably refer to those types of guarantee we have been able to identify above as "accessory suretyship" (type III) and "indemnity" (type IV). No matter whether Rav Naḥman's comment was derogatory or not, there is no reason to doubt his precise knowledge of a rather complex and sophisticated branch of Sasanian jurisprudence: this was indeed the law of the Persians!

[25]On the development of Sasanian suretyship see also Maria Macuch, *Das sasanidische Rechtsbuch "Mātakdān i Hazār Dātistān" (Teil II)* (Wiesbaden: Harrassowitz 1981), 225-227.