

# D'oraita, D'rabanan and Divrei Soferim: Interpretations to Shoresh Sheini of Sefer Hamitzvot

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## Preface

Rambam<sup>215</sup>, in the introduction to his *Sefer HaMitzvot*, presents the rules and principles that form the guidelines for determining which *Mitzvot* are to be included in the count of the *Mitzvot*<sup>216</sup>. Rambam maintained that the “*Monei HaMitzvot*”<sup>217</sup> who preceded him were often mistaken, basing their count on faulty methodology. To rectify the situation, Rambam prefaced his count with a detailed explanation

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215 pain, Egypt, 1135/8-1204

216 The concept of the “count of Mitzvot” originates in the statement of R' Samlai (Makkos 23b) that 613 Mitzvot were given to Moshe on Sinai.

217 The authors of works listing the Mitzvot. For the most part Baal Halakhot Gedolot (בה"ג). Others are R' Saadya Gaon, R' Shlomo Ibn Gabirol

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of his own methodology, in which context he points out the mistakes of his predecessors. However, many of his statements proved to be quite controversial, both in substance as well as his rejection of the earlier, accepted methods. In this study we will focus on the principle stated by Rambam in *Shoresh Sheini* and the various approaches to understanding it that developed over the generations following Rambam.<sup>218</sup>

### Rambam's statement in Shoresh Sheini

We have already explained in our Introduction to the *Mishna* that most laws of the Torah are learned by way of the 13 exegetical principles .... Thus not every law that we find the Sages learning by way of the 13 exegetical principles will we assume that it was said to Moshe on Sinai, but we will also not say that such a derivation is necessarily of Rabbinic authority, as it may have been a tradition (from Sinai). Therefore, anything that is not found to be written in the Torah, but is found in the Talmud as having been learned through one of the 13 exegetical principles<sup>219</sup> – if they themselves (the Sages of the Talmud) clarify and say that it is *d'oraita* or *guf torah* it can be counted as a *Mitzvah* because the bearers of the tradition said it is *d'oraita*. If no such statement is made, it is *d'rabanan* as there is nothing written (in the Torah) to indicate it.

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218 The most comprehensive discussion of this topic to date is Yehuda Neubauer's *HaRambam Al Divrei soferim* [Jerusalem: Mossad Harav Kook, 1957], which covers nearly all the available material on the topic. Our goal is to present the major opinions and trends in the analysis of Shoresh Sheini.

219 Rambam is not limiting this to the 13 principles – the same will be true for any of the hermeneutic tools known as drashot.

*Rambam: Sefer HaMitzvot Shoresh Sheini*

Following the above, Rambam goes on to show how others made the mistake of including in the *Mitzvot* those which he just excluded, and attacks them for being inconsistent. At face value, he seems to be saying something very clear: The only *Mitzvot* that can be considered *d'oraita* are either those that can be found explicitly written in the Torah, or those that are presented in the Talmud as having been learned through one of the 13 principles, but the Talmud says is actually *d'oraita*. Otherwise, anything learned by way of the 13 principles is to be called *d'rabanan*. This statement, simple as it may be, should be quite shocking to anyone familiar with the Talmud. The general understanding is that the 13 exegetical principles were tools given to Moshe together with the Torah as a means of getting to the true meaning and intent of the *passuk*<sup>220</sup>. Consequently, anything derived from the *passuk* by using those methods carries the same authority as that which is written explicitly, and is to be considered *d'oraita*.

An illustration of the apparent difference between the approach of Rambam and the generally understood principles of the Talmud is the oft-used statement in the Talmud “*It is really Rabbinical, and the passuk is just support,*” a solution often applied when the Talmud finds a *passuk* seeming to dictate a *Halakha* that is understood to be of Rabbinic authority. The implication is that unless the Talmud specifically says otherwise, wherever we find a *Halakha* derived from a *passuk*, namely something learned from the 13 principles, we assume that it is *d'oraita*. According to the rule set out by Rambam, the opposite should be true; by default, all *Halakhot* derived through the 13 principles will be *d'rabanan*, unless there is special indication to the contrary.

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220 Referring here to any verse in Scripture.

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Although some of the categories put forth by Rambam elsewhere may only hold value to classify various types of Halakhot or Mizvot<sup>221</sup>, here the terminology is crucial because it has major legal repercussions. Probably the most significant one is the case of a “*safeik*” - a situation in which the proper ruling cannot be determined. Throughout *Halakha*, in any situation of doubt we follow the following rule: If the uncertainty involves a *Halakha* of *d'oraita* status, we must be as stringent as necessary to avoid violating a Biblical directive. If however we are facing a Rabbinic issue, we take a more lenient position<sup>222</sup>. As Rambam points out<sup>223</sup>, were those who counted the *Mitzvot* derived from the 13 principles correct, there would be many thousands of *Mitzvot*. Accordingly, there would be many, many scenarios where in a situation of doubt Rambam would rule to be lenient, while the earlier authorities would maintain that given the *d'oraita* authority of the *Halakha*, one must be stringent. Clearly we are not dealing with a minor semantic disagreement, but rather an argument with colossal legal implications.

However, it seems that the legal implications, although serious enough to elicit an outcry, are not the only issue that Rambam's new principle raises. With the principle given here, Rambam has effectively moved the majority of *Halakha* from being of Siniatic (and thereby Divine) origin to the realm of the Rabbinic, in origin as well as authority. Such a position leaves room for the claim that Judaism is

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221 For example, although Rambam in the introduction to *Peirush HaMishnayot* divides the Mitzvot into five categories, in that context he does not deal with the authority or stringency of any given category per se. However as we will see and as Rambam himself began, there is certainly a connection between the category created here and those given in *Peirush HaMishnayot*.

222 Although this is a general guideline in Halakha, it and Rambam's particular position in the matter are a topic of discussion on their own which will not be dealt with here beyond it's immediate relevance.

223 Later on in Shoresh Sheini, as an additional objection to Halakhot Gedolot

indeed a man-made religion, a claim which the medieval authorities expended much energy to disprove.

This combination of legal ramifications and theological difficulties prompted harsh attacks by Rambam's contemporaries and, in later generations, attempts to redefine or limit parameters of the principle given in *Shoresh Sheini*. Before moving on to discuss these arguments, we will list some of the places in Rambam's legal work, Mishna Torah, where he seems to have followed this principle by deeming certain *Halakhot d'rabanan*.

### Rambam's rulings in Mishna Torah

In Hilkhot *Isbut* 1:2, Rambam delineates the three methods of *kiddushin* - betrothal; physical relationship (*Biah*), deed (*Shtar*), and monetary acquisition (*Kesef*). The first two are "from the Torah" (*d'oraita*) and the third (which will be referred to as *Kiddushei Kesef*) is "*m' divrei soferim*," literally "from the words of the Sages," meaning of Rabbinic origin and authority (*d'rabanan*). This differentiation is repeated later on in *Isbut* 3:20, where Rambam uses identical terminology, and in *Sefer HaMitzvot*<sup>224</sup> as well.<sup>225</sup> The Talmud uses a *Gezeira Shava*, one of the 13 principles, to derive *kiddushei kesef* from a *passuk*<sup>226</sup>, so this could be a clear example of Rambam following the principle of *Shoresh Sheini*. In fact, when challenged on this ruling,

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224 Positive Commandment 213

225 This opinion is found in the works of some of the Geonim as well, based on a passage in Kesubos 3a. It has been suggested that these Geonim shared the opinion of Rambam in *Shoresh Sheini* that drashot have a Rabbinic status. However, this is by no means conclusive as Y. Neubauer proves at length in *HaRambam Al Divrei Soferim*, from p. 5.

226 Kiddushin 2a

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Rambam wrote in response<sup>227</sup> that this ruling is a result of the principle he established in *Shoresh Sheini*.

Although there are several rulings of Rambam that can be traced to the principle of *Shoresh Sheini*, this is the most notable. Many authorities, who would not otherwise have taken an interest in *Sefer Hamitzvot*, indirectly addressed the question of *Shoresh Sheini* while discussing Rambam's ruling in *Ishut* 1:2 and the practical implications thereof.

For example, according to *Halakha*, once a woman is “mekudeshet” (betrothed), she is considered to be married, and a sexual relationship with another man is punishable by death. Because the death penalty is only implemented in a case of a Biblical transgression, a woman whose betrothal is of Rabbinic status would not have committed a Biblical transgression and should only have to face the punishment given for Rabbinic violations. Not only is this contrary to the Talmud and to the opinions of all other authorities, it is contrary to the opinion of Rambam himself. Immediately after designating *kiddushei kesef* as *divrei soferim*, he says that once a woman has become betrothed by *one of these* methods, she is married and can be put to death for committing adultery.

Because of the potentially grave consequences that result from a forbidden relationship, disqualifying *kiddushin* - and potentially releasing a married woman - is generally treated with the greatest seriousness. According to Rambam's opinion however, such caution should be unnecessary in many cases. As early as the time of the Talmud, *kiddushei kesef* had already become the only commonly used (and acceptable) method of betrothal. Consequently, until the criteria

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227 *Teshuvot HaRambam* Freiman ed.[Jerusalem: Mekitze Nirdamim, 1934] # 166, quoted by Ramban in *Shoresh Sheini*, and in *Maggid Mishne*, *Ishut* 1:2.

of “*Nesuin*”<sup>228</sup> is met, the couple are not considered married, and there is no special severity in the case of betrothal. As in any other *Halakha* that is *d'rabanan*, where in a situation of doubt we rule leniently, if the method employed for betrothal was *kiddushei kesef*, according to Rambam we should follow the general rule and disqualify the *kiddushin*<sup>229</sup>. Therefore, any case of a doubt regarding the validity of *kiddushin*<sup>230</sup> will always be a Rabbinic issue, where we should rule leniently and assume the *kiddushin* to be non-existent.

Additionally, a woman who is betrothed to a Kohen<sup>231</sup> is entitled to eat the *Terumah* – tithes. Benefiting from *Terumah* is the exclusive privilege of a Kohen and his immediate family, and intentional consumption by a non-Kohen is punishable by death. The wife of a Kohen is permitted to eat *Terumah* from the time of betrothal<sup>232</sup>. According to Rambam, this should only be true if a woman betrothed with deed or physical relationship, as this gives her a Biblically betrothed status. The Rabbinic method of *kiddushei kesef*, however, should not be sufficient to waive the Biblical prohibition against a non-Kohen eating *Terumah*. Nonetheless, Rambam makes no such distinction in the *Halakha* of the wife of a Kohen<sup>233</sup>.

It must be noted here that there are manuscripts of Mishna Torah containing variations in the text of the two *Halakhot* mentioned

228 The actual finalization of the marriage. Although nowadays all parts of the marriage are completed in one ceremony, it was common practice for many centuries to separate these two stages.

229 Disqualifying the *kiddushin* is a leniency as it removes all the laws and restrictions that apply to a married couple.

230 Such as an occurrence of “*kiddushei s’khok*” – “play *kiddushin*” that were performed without all the conditions necessary for a proper *kiddushin*.

231 Priest

232 Although this is the law on the Biblical level, the Sages forbade the wife from eating *Terumah* until the final stage of *Nesuin* has been completed.

(Mishna Torah, *Terumot* 6:3)

233 *Terumot* 6:3

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above. In these texts, Rambam says the exact opposite, namely that all three of the methods of *kidushin* are “*din torah*” - Biblical<sup>234</sup>. According to R' Avraham ben HaRambam<sup>235</sup> and R' Moshe HaKohen of Lunil<sup>236</sup>, although initially Rambam held that *kiddushei kesef* is Rabbinic, he subsequently changed his position and amended the text of Mishna Torah to say that they are all Biblical. The earlier manuscripts of Mishna Torah which had already been in circulation at that point were never changed, and these were later used as the source for the printed editions<sup>237</sup>. Obviously, such a correction would leave the *Halakha* of *kiddushei kesef* outside our discussion of *Shoresh Sheini*. However, in all printed editions of Mishna Torah, the *Halakha* appears as we have it. Considerable literature has been created to explain Rambam's position surrounding this *Halakha*. Thus, the words of the commentators to *Ishut* 1:2 and 3:20 are important to the discussion of *Shoresh Sheini*, even if it is true that Rambam changed his position with regard to *kiddushei kesef*.<sup>238</sup>

In *Hilkhot Eidim* 13:1, Rambam enumerates the relatives considered invalid for testimony<sup>239</sup>. According to Rambam, only relatives of one's father are invalidated by the Torah, but the Sages added relatives of one's mother as well as relatives through a marriage to the

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234 It is interesting to note there are editions of Mishna Torah that do not have the gloss of Raavad in both of these places where he completely rejects the opinion of Rambam that *kiddushei kesef* is Rabbinic.

235 *Birkat Avraham* 44, quoted in *Kesef Mishne* to *Ishut* 1:2.

236 *Hasagot HaRamakh* *Ishut* 1:2

237 Apparently many such corrections were made by Rambam himself after *Mishna Torah* was already in circulation, which could be a partial explanation for the numerous instances of discrepancies between manuscripts.

238 For a detailed list of the manuscripts with variations see *Yalkut Shinuei Nusha* aot printed in the Frankel edition of *Sefer HaMitzvot*.

239 The ramifications of a relative not being fit to testify is not limited to the court. Any act that needs *Eidut*, such as a marriage, could not be completed in the presence of witnesses who are related to one of the parties or to each other.

list of “relatives.” Once again, this law is learned in the Talmud<sup>240</sup> from a *drasha*<sup>241</sup> indicating the source in the *passuk* that was used to derive the status of “*krovei baeim*”.

As in the case of *kiddushei kesef*, there are potentially serious consequences that could result from this *Halakha*. If a marriage takes place in the presence of witnesses who are related to either member of the couple or to each other, the marriage is null and void. According to Rambam, this can only be said in a case in which the relationship is paternal. In the case of witnesses who are maternal relatives or relatives by marriage, the couple is married according to the Torah. However, because the witnesses were invalid by Rabbinic standards, they are in need of a new “proper” marriage that will meet the Rabbinic criteria.

In Aveil 2:7, Rambam rules that a Kohen may not come in contact with a corpse for any reason, with the exception of his immediate blood relatives<sup>242</sup>, towards whom he has an obligation to assist in their burial. Rambam adds that although this is the law mandated by the *passuk*, the Sages required that a Kohen bury his wife as well. The law requiring the Kohen to assist in burying his wife is learned in the Talmud from a *drasha*. Rambam is calling this requirement Rabbinic, presumably following the rule that anything learned from a *drasha* is Rabbinic, yet he is giving it authority to override the Biblical restriction against a Kohen becoming impure.<sup>243</sup>

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240 Sanhedrin 28a

241 A hermeneutic device expanding the simple meaning of a verse allowing for a new law to be learned.

242 These are a father, mother, son, daughter, brother, unmarried sister and wife; which is the subject at hand.

243 This *Halakha* is the source (according to Rambam) of the laws governing which relatives one mourns for. Much of the discussion on the topic is on Aveil 2:1 where those laws are found.

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### Literal understanding of Shoresh Sheini – Early Rishonim

Ramban, who is the primary critic of *Sefer HaMitzvot*, understands Rambam to be saying literally that all *Halakhot* or *Mitzvot* learned from *drashot* – the 13 exegetical principles as well as *ribut*<sup>244</sup> – all should be considered *d'rabanan*, of Rabbinic origin as well as authority. In addition, he quotes the responsa mentioned earlier when Rambam reiterates his position specifically in the context of *kiddushei kesef*. For Ramban, this is further indication that Rambam indeed meant *d'rabanan* in the full legal sense and not merely as a formal classification. Based on this understanding, Ramban attacks Rambam very strongly, claiming that Rambam is either ignoring or distorting many passages in the Talmud. As noted, there are countless instances in the Talmud where a *drasha* is used as a method for deriving *Halakha*. In each case unless the Talmud says otherwise, the resulting *Halakha* is considered to have Biblical status.

In addition to this apparent disparity between Rambam and our understanding of the Talmud, Ramban seems to be bothered by another one of Rambam's points. Rambam writes later in *Shoresh Sheini*: "Do not think that the reason to exclude that which is learned from the 13 principles is because those principles are not true. Rather, anything which a human derives from the text of the Torah is really a branch coming off the root, even if the agent was Moshe Rabbeinu himself." In the first half of this statement, Ramban sees a paradox. If the 13 principles are not tools given at Sinai as a means for interpreting the Torah, than the *Halakhot* derived through them are not true. If, on the other hand, they are from Sinai, why are we to differentiate between an instance where we are told explicitly that something is *d'oraita* and where we find a *drasha* unaccompanied by such a statement? If the *drasha* is there to tell us the intention of the

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244 The hermeneutic principle of inclusion, whereby an unneeded word is understood to broaden the parameters of a given Mitzvah.

*passuk*, then as far as we are concerned it is effectively written. Apparently, while Rambam was willing to have different layers in understanding a written *passuk*, whereby that which is explicit is different from that which is not, Ramban could not accept that any intended meaning will not be considered *d'oraita*.

The arguments of Ramban are quite lengthy and become somewhat technical. However, it seems that Ramban was bothered by both of the issues mentioned – both Rambam's apparent divergence from the Talmud as well as the logical and theological difficulties mentioned. Ramban says:

...It (*Shoresh Sheini*) uproots great mountains in the Talmud and destroys strong walls in the Gemara... should never be said.

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### Ramban on Sefer HaMitzvot, Shoresh Sheini

Following Ramban's understanding, as well as his position, are R' Shlomo ben Aderet<sup>245</sup>, R' Yitzchak bar Sheshet<sup>246</sup>, and R' Yehuda ben HaRosh<sup>247</sup>. These authorities do not bring any new arguments to the discussion. Instead, they reference the fact that Ramban already rejected the position of Rambam as stated in *Shoresh Sheini*. They are interested in possibly employing Ramban's opinion to resolve a legal question rather than dealing with the classification of *Mitzvot*. These authorities understood Ramban to have said that anything learned from the 13 principles is Rabbinic, a position with many legal ramifications as previously stated. Considering its rejection, Ramban's opinion could not be used to contribute to a legal ruling. None of these *Rishonim* questioned the literal reading or the arguments of Ramban.

There is an interesting exception to the apparently universally accepted reading of Shoresh Sheini in Ramban's lifetime and immediately thereafter. It does not seem that Raavad<sup>248</sup>, shared this understanding of *Shoresh Sheini*, or at the very least considered it far less relevant. Raavad was the earliest critic of Mishna Torah and we would have expected his attack in Mishna Torah to match Ramban's attack on Sefer Hamitzvos. However, in his glosses to the ruling of Rambam in *kiddushei kesef*, Raavad makes no mention of *Shoresh Sheini* or any such overarching principle. Rather, he attributes the Rambam's ruling to a mistaken understanding of a Gemara<sup>249</sup>. There

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245 Barcelona 1235-1310, *She'elot u'Teshuvot HaRashba* V. II:230, V. I:1185

246 Spain 1326-1408, *She'elot u'Teshuvot HaRivash* 14

247 Toledo 1270-1349, *She'elot u'Teshuvot Zichron Yehuda* 81

248 Posquières (Provence) 1120-1197, one of the earliest and primary critics of Mishna Torah.

249 The Gemara referred to is in Ketubot 3a, where the implication of the words קדיש בביאה מאי איכא למימר, קדיש בכסף, is that kiddushei kesef indeed have a Rabbinic status.

is one place where Raavad refers to Rambam systematically calling *Halakhot d'rabanam*, but even there he makes no mention of *Shoresh Sheini*<sup>250</sup>.

## Non-legal status of Shoresh Sheini - Rashbaz

R' Shimon ben Tzemach Duran (Rashbatz)<sup>251</sup>, a younger contemporary of R' Yitzchak bar Sheshet, introduced a new understanding to *Shoresh Sheini* in particular, and to *Sefer HaMitzvot* in general. In his work *Zohar HaRakia*<sup>252</sup>, R' Shimon states that the entire discussion of Rambam in *Shoresh Sheini*, and presumably in all of *Sefer HaMitzvot*, is only with regard to the count of the 613 *Mitzvot* and has no legal significance whatsoever. In his words:

After having researched and expounded upon the opinion of our teacher (Rambam), the matter is as follows: Our teacher never maintained that what is learned from *drashot* are to be considered Rabbinic [and therefore] to be lenient in a case of doubt, and his position will not be different than that of anybody else in any legal ruling. He only called them Rabbinic in one context; that they are not written explicitly in the Torah and due to that fact they should not be counted in the 613 *Mitzvot*.<sup>253</sup>

When Rambam says that *Mitzvot* or *Halakhot* learned from *drashot* are to be considered Rabbinic, he does not mean it the way we usually

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250 Tum'at Meit 5:5

251 Algier 1361-1444

252 A commentary on *Sefer Azharot* of R' Shlomo Ibn Gabirol. In the introduction there is a short commentary to the beginning of *Sefer HaMitzvot*.

253 *Zohar HaRakia, Introduction, Shoresh Sheini*

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understand the very specific terminology of Rambam. The terms *d'oraita* and *d'rabanan* as they are used in *Sefer HaMitzvot*, are labels used by Rambam in this particular work solely for the purpose of determining which *Mitzvot* are to be included in the count of 613 *Mitzvot*. Based on this understanding, he concludes that<sup>254</sup> all the questions of earlier commentators have been removed, and it was his unique privilege to understand Rambam properly. He reiterates this position twice in the legal context of responsa: once directly addressing the issue of *kiddushei kesef*<sup>254</sup> and elsewhere comparing his understanding to those preceding him<sup>255</sup>.

As R' Shimon himself realized, his approach was novel, and at least to him represented a breakthrough in understanding Rambam. We no longer need to reject Rambam's opinion as being in opposition to that of the Talmud. We simply can view it as unrelated to the question of the legal status of any given *Halakha*. From a historical perspective, it would seem that this illustrates a shift in attitude toward the works of Rambam. During the lifetime of Rambam and immediately following, the authorities were comfortable disagreeing with Rambam when they felt he had erred. However, after several generations, the role of the commentator changed. Instead of agreeing or disagreeing, he attempted to explain, resolve and elucidate. As the works of Rambam became accepted for large parts of the Jewish community<sup>256</sup>, it became necessary to address any perceived fundamental differences between the codes of law – the Talmud and Mishna Torah.

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254 *Tashbatz* V. 1:1. Interestingly, in *Ishut* 1:2 he had the text saying “all three are Biblical.”

255 *Tashbatz* V. 1:151, directly addressing *She'elot u'Teshuvot HaRivash*

256 For a list of communities that accepted Mishna Torah as authoritative see H. Davidson, *Moses Maimonides* [New York: Oxford University Press, 2005] p. 280-281.

The approach of Rashbatz was later embraced by R' Yitzchak Leon Ibn Tzur<sup>257</sup>. In his commentary to *Sefer HaMitzvot*<sup>258</sup>, he quotes the words of Rashbatz and sees in them a complete refutation of the attacks of Ramban:

It appears to me that R' Shimon has done us a wonderful service, for having interpreted the intention of Rambam in this principle in a manner which avoids all the replies of Ramban. He established that in this principle also all that is learned from the 13 exegetical principles is Biblical and its (legal) status is similar to what is written in the Torah, only it will not be counted in the count of *Mitzvot*. But he did not call them *d'rabanan* because he felt that one should be lenient with them like all other Rabbinic enactments and restrictions, rather because they are not written explicitly and the Rabbis clarified them to us. And in order that you should comprehend all of his proofs, I have copied his words here....<sup>259</sup>

R' Yitzchak Leon fully endorses the approach of Rashbatz, then goes on to address the questions of Ramban. There is no need for him to answer these question point by point because he believes Ramban completely misunderstood Rambam. In fact, he sees the severity of the questions as proof that Rambam could not have possibly meant what Ramban is attributing to him. R' Yitzchak Leon also attempts to address how, despite the rule in *Shoresh Sheini*, Rambam includes in the count certain *Mitzvot* learned entirely from the 13 principles. This

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257 Ancona, died 1546

258 *Megillat Esther*, The primary focus of this work was to defend *Sefer HaMitzvot* against the questions of Ramban.

259 *Megillat Esther*, *Sefer HaMitzvot Shoresh Sheini*

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is an internal problem in *Sefer Hamitzvot* and must be addressed according to any understanding of *Shoresh Sheini*. R' Yitzchak Leon does not provide a general explanation for this phenomenon, but rather finds a local reason for each case to explain why it is not subject to the principle *Shoresh Sheini*.

### Difficulties with Rashbaz's approach

There are numerous difficulties with understanding Rambam this way. First, as R' Yitzchak Leon addressed, Rambam included in the count *Mitzvot* that are learned through *drasha*, which Rashbatz says should not have made their way into the count.

Secondly, if the designation *d'rabanan* refers to nothing more than the formal count, why does Rambam repeatedly call *kiddushei kesef* Rabbinic? *Kiddushei kesef* is only a part of the *Mitzvah* of *kiddushin*, which everyone agrees is Biblical, and would not merit its own entry in *Sefer HaMitzvot* even if it is of Biblical origin. The same will go for the maternal relatives. All relatives are under one designation in *Sefer HaMitzvot*, so why is it significant that the maternal relatives are being called Rabbinic and being “excluded” from the count?

Understanding *Shoresh Sheini* this way poses other problems, as well. It is one thing to say that *Sefer HaMitzvot* is dealing with a formal, almost theoretical concept. It is far more difficult to say so with regard to Mishna Torah, which is a legal work employing very precise terminology. As explained earlier, it is clear that many of the rulings of Rambam in Mishna Torah are following the principles stated in *Sefer HaMitzvot*. Accepting the opinion of Rashbatz seems to mandate accepting that Rambam used the words *d'rabanan* and *d'oraita* to mean different things in *Sefer HaMitzvot* and Mishna Torah.

Another problem raised with this approach is the implication that all the arguments of Rambam in the fourteen principles preceding *Sefer HaMitzvot* are only dealing with a formality. Although this is possible, it is hard to accept that Rambam would argue so strenuously on a topic of relatively minor significance. Assuming this is the exact and

stated purpose of *Sefer HaMitzvot*, we still come back to the previous problem – that these labels are used by Rambam in Mishna Torah as well, where the legal ramifications cannot be dismissed.

Finally, if indeed Rambam held that *Mitzvot* learned through *drashot* have the same status as explicit Biblical commandments, why should the former not be included in the count of *Mitzvot*?

These problems notwithstanding, this approach was adopted by many later authorities, and in general became the context for any discussion of *Shoresb Sheini*. Even in the works whose authors chose alternative understandings of *Shoresb Sheini*, one can see the impact of Rashbatz, who allowed for a less literal understanding of *Sefer HaMitzvot*.

## D'oraita and d'rabanan as Written versus Oral – Maggid Mishne

Another possible way of understanding *Shoresb Sheini* follows the approach of R' (Don) Vidal de Tolosa<sup>260</sup>, author of the earliest commentary to Mishna Torah – *Maggid Mishne*<sup>261</sup>. Unlike Rashbatz, R' (Don) Vidal de Tolosa's remarks were written in the legal context of Mishna Torah and are not presented as a complete clarification of *Shoresb Sheini*. Over time, the words of *Maggid Mishne* themselves became a topic of discussion among later commentaries.<sup>262</sup>

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260 Catalonia, second half of 14th century.

261 There is some doubt as to the authorship of Maggid Mishne. See Y. Spiegel's *Maggid Mishne* in *Kiryat Sefer* 46 [Jerusalem: Hebrew University, 1970-71] p. 556.

262 Chronologically, *Maggid Mishne* was written before the works of Rashbatz. The latter was discussed first as his approach is a direct and far more straightforward commentary to *Shoresb Sheini*.

## D'oraita, D'rabanan and Divrei Soferim: Interpretations to Shoresh Sheini of Sefer Hamitzvot

In *Isbut* 1:2, the author of *Maggid Mishne* attempts to address the reason for Rambam labeling *kiddushei kesef* as Rabbinic, and in this context brings up the issue of *Shoresh Sheini*:

And that which our teacher wrote that monetary acquisition is *midivrei soferim*, this is a result of the second principle, which he stated in *Sefer HaMitzvot* that we do not call that which is learned from exegesis or any of 13 principles *dvar torah*, rather *divrei soferim*, unless they clarified that it is Biblical... Know that even according to the words of our teacher that money is *midivrei soferim*, it is nevertheless a complete acquisition... that once she has become betrothed by any one of these three means, she is betrothed, and a man who has relations with her (except her husband) is given the death penalty... And the reason for all this is that even though he considers *kiddushei kesef* to be *midivrei soferim*, it is not a Rabbinical enactment, rather [it is] part of the Oral Law that was given to Moshe and was not written explicitly in the Torah, and for this [reason] it is called *divrei soferim*.

This novel concept promotes the idea that Rambam used the terms *d'rabanan* and *divrei soferim* in a manner different than the common usage. As a rule, we understand the distinction between *d'oraita* and *d'rabanan/divrei soferim* as being Biblical versus Rabbinic. The designation of a *Halakha* as one or the other carries with it all of the practical implications as mentioned above. According to *Maggid Mishne*, both in *Sefer HaMitzvot* and in *Mishna Torah*, Rambam uses these terms as a way of indicating what is directly learned from the text of the Torah and what is part of the oral tradition. The legal status of both will remain Biblical, as evidenced by the fact that Rambam will apply the death penalty in the case of a woman who was betrothed with *kiddushei kesef*.

## Difficulties with Maggid Mishne in Ishut

This rule is highly problematic, however. In *Ishut* 4:6, commenting on the status of a marriage performed in the presence of witnesses who are related to one's mother or wife, *Maggid Mishne* again mentions *Shoresb Sheini*:

Know that [with regard to] these invalid witnesses, there is a dispute among the authorities whether they are Biblical or Rabbinic. Some of the Geonim maintain that all those [invalidations] learned from *drasha*, such as relatives of the mother, are Rabbinic, and this is also what our teacher (Rambam) writes in *Eidus* 13:1. And this is also from the second principle in *Sefer HaMitzvot* as I have written in the first chapter (*Ishut* 1:2). They have already argued on this opinion and said that all things learned from *drasha* are Biblical, and this is the opinion of Ramban and Rashba.

Here in *Maggid Mishne*, the author clearly says that the principle of *Shoresb Sheini* does in fact cause *Halakhot* to be considered Rabbinic. The dispute he refers to demonstrates that we are dealing with a practical matter not just a Written versus Oral classification. Not only does *Maggid Mishne* contradict what he said earlier, he even refers to his remarks in 1:2, apparently ignoring that his conclusion there is the exact opposite of his current assertion. This inconsistency within *Maggid Mishne* often became a primary focus of the later commentaries attempting to understand the opinion of Rambam.

The first question that must be asked is whether the sum total of the approach found in *Maggid Mishne* is really very different from that of Rashbatz. Conceivably, we could read the statements in *Ishut* 1:2 as saying that *Shoresb Sheini* is only talking about the explicit, written *Mitzvot*, in which category *drashot* do not belong. In this case, *divrei*

## D'oraita, D'rabanan and Divrei Soferim: Interpretations to Shoresh Sheini of Sefer Hamitzvot

*soferim* means “from the Oral Law,” both in *Sefer HaMitzvot* and in Mishna Torah, which would be a very similar approach to that of Rashbatz<sup>263</sup>. This in fact is the way the *Maggid Mishne* was understood by R' Yitzchak Leon, who following the section quoted above, adds: “and the same was written by the author of *Maggid Mishne*...”

However, this explanation was not given in *Isbut* 4:6, indicating that the author was somewhat reluctant to use this general approach. Apparently, with respect to *kiddushei kesef*, which the Talmud seems to have explicitly called Biblical, there is a need to reconcile Rambam with the popular position. On the other hand, in the case of the maternal relatives where there already was a dispute over their exact status, it was far easier for R' Vidal to accept the simple reading of Rambam and to point to *Sefer HaMitzvot* as the source.

In either case, it is problematic that in both places the ruling is attributed to *Sefer HaMitzvot*. If we are to resolve the issue by saying that the author of *Maggid Mishne* had a more nuanced view of the legal consequences and applicability of *Shoresh Sheini*, we will be left with an approach very different from that of Rashbatz, who maintains that everything is really Biblical.

## Rashbatz and Maggid Mishne as shared approach – Later authorities

As noted, the question of how to understand Rambam went through various stages, apparently as a result of the changing attitudes toward Rambam in general. The same seems to be true with regard to the treatment of the *Maggid Mishne*; as the approaches to Rambam became more nuanced and complex, the tendency to view Rashbatz

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263 Obviously not identical, but the difference is the detail of why Sefer HaMitzvot is not to be understood as saying that drashot are Rabbinic, not the essential point of whether this is stated in Sefer HaMitzvot.

and *Maggid Mishne* as differing also became more prevalent. Obviously, these shifts did not occur overnight, and the original ideas began developing even while the accepted approaches were still mainstream. The following list of commentaries and authorities, among the first to address the contradiction in the *Maggid Mishne*, all understood the approach of R' Vidal to be like that of Rashbatz -- a broad and general understanding of Rambam.

One of the major commentaries who follows the approach presented in *Maggid Mishne* is R' Yosef Karo<sup>264</sup>. In several places throughout Mishna Torah<sup>265</sup>, R' Yosef Karo says that by using the term *d'rabanam* or *divrei soferim*, Rambam is telling us that the origin of the *Halakha* is in the oral tradition and not written in the Torah. In practical terms, however, they are of Biblical authority in every way. In one case<sup>266</sup>, he says this even though Rambam did indeed give a different ruling because of the “Rabbinic” nature of the *Halakha*.

R' Yosef Karo also quotes the opinion of Rashbatz that according to Rambam maternal relatives are Biblically invalidated as witnesses<sup>267</sup>. Following this, he rules that all first and second degree relatives are invalid for testimony, and makes no distinction between the relatives of one's father, mother, or spouse<sup>268</sup>. Thus, although he did not say so outright, R' Yosef Karo did not see any difference between the approaches of Rashbatz and R' Vidal – Rambam in *Shoresh Sheini* is classifying the *Mitzvot*, and the terminology of Mishna Torah follows that classification.

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264 Tzfat, 1488-1575

265 Kessef Mishne - Ishut 1:2, 3:20, Aveil 2:1, 2:7, Tumat Meit 5:5

266 Tumat Meit 5:5

267 Beit Yosef, Even HaEzer 42

268 Shulchan Arukh, Choshen Mishpat 33:2

## D'oraita, D'rabanan and Divrei Soferim: Interpretations to Shoresh Sheini of Sefer Hamitzvot

R' David Ibn Zimra<sup>269</sup>, in his commentary on Mishna Torah, understands the terms *midivreibem* and *divrei soferim* in the usual sense<sup>270</sup> – as being of Rabbinic origin and authority<sup>271</sup>. Although this understanding is found in two places only, one would assume that we can extrapolate to all such places in Mishna Torah. However, Radbaz contradicts this reading elsewhere. He was asked<sup>272</sup> to explain how Rambam's ruling that a Kohen is Rabbinically instructed to bury his wife can run contrary to the Talmud, where a *passuk* is given as the source that a Kohen should be involved in his wife's burial. In his answer, Radbaz says that although Rambam uses the term *divrei soferim*, it is really of Biblical authority. The designation *divrei soferim* only means that it is learned from a *drasha*, and is not written explicitly in the Torah. He compares this to the case of *kiddushei kesef*, which Rambam also calls *divrei soferim*, even though, in his words "everybody agrees" *kiddushei kesef* is Biblical.<sup>273</sup>

For whatever reason, Radbaz changed his understanding of the terminology in Rambam. Because the latter position was said in the context of a specific question, it is hard to know whether Radbaz intended it as a general approach. However, he clearly was satisfied with the idea that a term usually understood as Rabbinic can be understood otherwise, at least in the legal context of Mishna Torah. In this respect, not to mention the practical application of *kiddushei kesef*, he is following the approach found in *Maggid Mishne*. We do

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269 Egypt, Eretz Israel, 1479-1573

270 R' David Ibn Zimra only wrote his commentary, Ykar Tiferet, on the sections of Mishna Torah to which there is no Maggid Mishne. As such we do not have his remarks on many of the places in Mishna Torah that these terms are used.

271 Aveil 2:1,2:7

272 *She'elot u'Teshuvot Radbaz* 1146(L'ishonot HaRambam 172)

273 This is only said with regard to the Halakha of a Kohen; the laws of mourning for one's wife are still Rabbinic.

not know whether he will also follow the approach of Rashbatz for *Sefer HaMitzvot*.

Radbaz's novel opinion hints at a difference between *divrei soferim*, the term used in the *Halakha* of a kohen, and *midivreibem*, which is used to describe the mourning one must observe for one's wife. As we will see, this idea became quite popular in the attempts to organize the terminology of Rambam.

R' Moshe Alashkar<sup>274</sup>, a contemporary of Radbaz, is among those who understood Rashbatz and *Maggid Mishne* as a common, general approach. A questioner suggested the possibility of applying to a Halakhic ruling Rambam's opinion that relatives through marriage can be valid witnesses Biblically and are only excluded Rabbinically, based on the rule of *Shoresb Sheint*<sup>275</sup>. In his response, R' Moshe Alashkar says that Rambam in *Sefer HaMitzvot* was only classifying the *Mitzvot* with regard to the count and never intended to make any distinctions in practice. This, he says, is the understanding of both Rashbatz and *Maggid Mishne*.

Another slightly later contemporary who shared a universal approach to understanding Rambam was R' Shmuel de Medina (Maharshdam)<sup>276</sup>. He also was asked a question<sup>277</sup> regarding a marriage witnessed by relatives. In this case, one witness was the maternal cousin of a father accepting kiddushin for his daughter<sup>278</sup>. In his ruling, Maharshdam addresses the contradiction between the *Maggid Mishne* in *Ishut* 1:2 and 4:6, the resolution thereof being the key to the true position of Rambam. It is clear to him that the difficulties

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274 Egypt, 1466-1542

275 *She'elot u'Teshvot Maharam Alashkar* 68

276 Salonika, 16th century

277 *She'elot u'Teshvot Maharshdam*, Even Haezer 33

278 A father has the right to betroth his daughter and receive the money given, until she is 11 years old, at which point she is "in her own property" and must acquiesce and receive the money herself.

## D'oraita, D'rabanan and Divrei Soferim: Interpretations to Shoresh Sheini of Sefer Hamitzvot

notwithstanding, one must understand Rambam as being consistent throughout Mishna Torah, either everything called Rabbinic is Rabbinic, or despite the label, they are in fact to be treated as Biblical. Since choosing the latter option would result in a greater consensus among the authorities, and neither possibility is devoid of problems, he prefers that approach. Additionally, he quotes Rashbatz,<sup>279</sup> whose opinions provide “strong support” for Maharshdam’s conclusion. Although Maharshdam does not discuss *Sefer HaMitzvot* directly, it is reasonable to conclude that he would use the same reasoning with regard to *Sefer HaMitzvot*. Again we see the ideas of *Maggid Mishne* and Rashbatz being treated as complimentary to one another but fundamentally the same.

A similar approach is found in the words of R' Betzalel Ashkenazi<sup>280</sup>. In his answer to the questioner regarding a marriage witnessed by a relative through marriage, he rules out the possibility that Rambam would deem such a witness valid Biblically. He quotes both Rashbatz and *Maggid Mishne* as explaining that the labels in Rambam are only formal descriptions, but in practice everything is Biblical.<sup>281</sup>

There are, however, several new ideas that are introduced by R' Betzalel Ashkenazi. One is the attempt made to resolve the contradiction in *Maggid Mishne* by saying that not all of the 13 exegetical principles and *drashot* have the same status in *Halakha*. According to this suggestion, anything learned through a *gzeira shava* will be considered to have Biblical status, but anything derived through the other twelve principles will indeed be Rabbinic. The

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279 In Tashbaz□ 1:151 quoted in Beit Yosef, Even Haezer 42, not what he says in Zohar Harakia with regard to Sefer HaMizvot.

280 Egypt, Eretz Yisrael, 1520-1592

281 It may be possible to clarify the position of Radbaz based on this, although certainly not conclusively. The fact that his student, R' Betzalel Ashkenazi, chose this universal approach to understanding Rambam could be an indication that Radbaz endorsed such an understanding, although he never really spelled it out.

basis for such a distinction is the rule found in the Talmud that “one is not permitted to learn a *gzeira shava* on his own,” meaning that the *gzeira shava* must be received as a tradition from one's teacher. This rule seems to demand a higher level of accuracy for the method of *gzeira shava*, and consequently it has a higher status than the other methods. R' Betzalel refers to this possibility, but he rejects it saying that “we are not to create a new principle [which was not given by Rambam].”

The other interesting idea mentioned by R' Betzalel Ashkenazi is his own answer to the problem of the *Maggid Mishne* in *Ishut* 4:6. His reading of the *Maggid Mishne* is as follows: There exists a dispute among the authorities as to the whether these witnesses are excluded Biblically or Rabbinically, but Rambam's ruling is unrelated to that dispute. Rather, Rambam refers to this as Rabbinic because of what he said in *Shoresb Sheini*, which is only relevant vis-a-vis the formalities of the count of *Mitzvot*. Really, this *Halakha* also is Biblical.

Thus, not only does R' Betzalel Ashkenazi understand Rashbatz and *Maggid Mishne* as saying the same thing, he also presents an original solution to the contradiction in the *Maggid Mishne*, removing the main obstacle to understanding *Maggid Mishne* as a general approach.

In summary, these authors, either explicitly or implicitly, combined the approaches of Rashbatz and *Maggid Mishne* and accepted that in *Sefer HaMitzvot*, Rambam is only dealing with the count of *Mitzvot*, but in Mishna Torah is identifying the *Halakhot* as being part of either the Written or the Oral law. In both books, we are not to understand the terminology as describing a legal status. This approach allows for both consistency in the words of Rambam as well as preserving the consensus among the early authorities, in the fundamental principle of *Shoresb Sheini* and in the resulting practical details of *Halakha*.

## D'oraita, D'rabanan and Divrei Soferim: Interpretations to Shoresh Sheini of Sefer Hamitzvot

There is one interesting exception to the accepted approach in this period<sup>282</sup> that Rambam is not to be understood literally. R' Moshe Isserles<sup>283</sup> rules that the relatives of one's mother<sup>284</sup> are in fact only invalid Rabbinically, based on the opinion of Rambam<sup>285</sup>. Not only does R' Moshe Isserles accept the idea that Rambam may be understood literally, he actually follows this ruling in practice. Although R' Moshe Isserles admittedly does not present us with a discussion of the topic and his ruling could be explained in a number of ways<sup>286</sup>, he clearly did not follow the majority of his contemporaries, who were unwilling to allow for this reading of Rambam anywhere.

### “Minimalist” understandings – subcategories in Rambam’s terminology

Toward the end of this period, the methodology used to explain Rambam shifted. We already saw the suggestions, made by Radbaz and the contemporary of R' Betzalel Ashkenazi, that there may be different categories within that which Rambam called Rabbinic. Although in the case of Radbaz this sort of solution was merely hinted at, and R' Betzalel Ashkenazi rejected it, similar ideas gained momentum from the beginning of the sixteenth century. Along with this creativity in understanding the words of Rambam came a tendency to view Rashbatz and *Maggid Mishne* as different approaches.

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282 From the later Rishonim in the 14th century through the completion of the Shulhan Arukh.

283 Cracow, 1520-1572, commonly known as “Rema”

284 Strangely, Rema does not include the relatives of one's spouse, although according to Rambam they would share the same status.

285 Shulchan Arukh, Choshen Mishpat 33:2

286 Meaning that theoretically one could claim that Rema adopted one of the minimalistic approaches that will be discussed shortly.

R' Tam Ibn Yahya<sup>287</sup> was the first to question the approach of Rashbatz directly. Bringing up some of the difficulties mentioned earlier, he rejects this approach as a viable reading of Rambam, certainly with regard to Mishna Torah<sup>288</sup>. On the other hand, he refuses to adopt a strictly literal reading of Rambam, which would result in many *Halakhot* being Rabbinic, contrary to the accepted position. His conclusion is that there is a difference between the usage of *midivreihem*, which is to be understood strictly as Rabbinic with all due implications, and *divrei soferim*, which can also be used to refer to *Halakhot* that are Biblical. This then leaves *kiddushei kesef* as being Biblical according to Rambam and minimizes the number of cases where there will be controversy. R' Tam Ibn Yahya claims that this is in fact the understanding of R' Vidal de Tolosa and accounts for the apparent inconsistency in *Maggid Mishne*.

This marks the beginning of the development of the minimalist approach to the interpretation of *Shoresb Sheini* and its ramifications. Although the details differ from author to author, the methodology seems to be the same; it seeks to resolve the difficulties in Rambam's classifications without resorting to the complete reinterpretation of Rashbatz. This is accomplished by creating different categories, some of which can fall under the clause of *Shoresb Sheini*, while others will not. For the most part, this new approach is presented as being the true opinion of *Maggid Mishne*. Such a claim necessitates the separation of Rashbatz and *Maggid Mishne*, but it allows the new approaches to maintain credibility as being based on the words of *Maggid Mishne*. The cryptic and apparently contradictory words of *Maggid Mishne* certainly left room for interpretations that may or may not have been the author's intent.

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287 Constantinople, early 16th century

288 *She'elot u'Teshuvot Ohalei Tam* 83

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The main objection to the suggestion put forth by R' Tam Ibn Yahya is that Rambam used both terms, *midivreibem* and *divrei sofrim*, for the same *Halakha*, apparently interchangeably. In Aveil 2:1, regarding the relatives for whom one is obligated to observe the laws of mourning, Rambam used the term *midivreibem*. Later, in Aveil 2:7, regarding the wife of a Kohen, the term *divrei sofrim* is used. As stated, the relationship between the two *Halakhot* is clear, and both should have the same status, — whatever that may be.

An interesting result of R' Tam ibn Yahya's rejection of Rashbatz is the opinion of R' Yakov Poppers<sup>289</sup>. He accepts R' Tam ibn Yahya's conclusion that the understanding of Rashbatz is not viable, but he also prefers not to go the route of subcategories. Consequently, R' Yakov Poppers understands that if we accept that Rambam indeed meant that a *Halakha* learned from a drasha is Rabbinic, this applies to all *Halakhot* answering to that description, including *kiddushei kesef*<sup>290</sup>. He says this in an almost offhand manner as an obvious fact, not as the result of an investigation into the position of Rambam. This opinion, as unique as it is in the historical context, was wholly rejected later by R' Akiva Eiger<sup>291</sup> and did not make any inroads in the ongoing discussion of *Shoresh Sheini*.

Another commentary who directly addressed the problem in *Maggid Mishne* was R' Avraham de Boton<sup>292</sup>, the author of *Lechem Mishne* on Mishna Torah. In *Ishut* 1:2, he, like *Maggid Mishne*, attributes Rambam calling *kiddushei kesef* Rabbinic to the principle of *Shoresh Sheini*. He then states some of the objections to this label, primarily because the Talmud sees to call *kiddushei kesef* Biblical.

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289 Frankfurt 1670-1740

290 *She'elot u'Teshuvot Shav Yakov* V. II:21

291 Prussia, Poland, 1761-1837, *Sh'elot u'Teshuvot R' Akiva Eiger* 94

292 Salonika, 1545/9-1588/1605. A student of and successor to Maharshdam.

Objections notwithstanding, R' Avraham de Boton's focus seems to be mostly on the label, not the fundamental question. This is further evidenced by his comments in *Ishut* 4:6, where he addresses the contradiction in *Maggid Mishne*. At first<sup>293</sup>, he suggests there is a difference between the 13 exegetical principles and the method of *ribui*; that which is learned from the former is considered Biblical, from the latter Rabbinic. *Kiddushei kesef* is learned from a *gzeira shava* - one of the 13 principles – and therefore is Biblical. The maternal relatives are learned in the Talmud from a *ribui*, resulting in the Rabbinic nature of the *Halakha*. In the second section, he addresses the problem more directly. If it is legitimate to say that Rambam considers *kiddushei kesef* Biblical despite the implication to the contrary, R' Avraham de Boton claims, the same should be said regarding the relatives being invalid. We saw what he is saying suggested earlier. The difference between the two cases lies in the fact that the former is learned by way of *gzeira shava*, which has a higher status than any of the hermeneutic devices available to us. As earlier noted, such a claim can be justified because one may not employ this method on his own, a criterion which does not exist for the other 12 (of the 13) principles.

While R' Avraham de Boton was willing to consider certain *Halakhot* Rabbinic based on *Shoresh Sheini*, he did not consider the possibility of *kiddushei kesef* belonging to that group. His objective is only to clarify the words of R' Vidal in *Maggid Mishne* and account for the fact that in *Ishut* 4:6 R' Vidal accepted the literal meaning of *Shoresh Sheini*.

R' Yehuda Rosanes took a very similar position<sup>294</sup> in his commentary *Mishne L'melekh*<sup>295</sup>. In his comments to *Ishut* 4:6, he asks what

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293 Lechem Mishne was compiled and published posthumously from the manuscripts of the author. As a result the work is somewhat lacking organization. In this case, we have two “editions” of the commentary to *Ishut* 4:6 printed one after the other.

294 Constantinople, d. 1727

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significance the label of *divrei soferim* will have if we accept the understanding of *Maggid Mishne* in *Isbut* 1:2 that indeed Rambam considers everything Biblical. He asks this as a local question on the words *Maggid Mishne* here, but he clearly takes the basic premise, that the terms *d'rabanan* and *divrei soferim* are not to be taken as legal terms, for granted.

Thus, the approach of *Maggid Mishne* developed into something distinctly different than that of Rashbatz. Two of the classical commentators to Mishna Torah, R' Avraham de Boton and R' Yehuda Rosanes, took this approach for granted and it became the norm for those approaching the issue. The task of the later authors on the topic was primarily to refine the parameters and to resolve all the issues within the minimalist understanding of *Maggid Mishne*, and, by extension, of Rambam.

As we have seen, the focus of discussion among the commentaries shifted eventually to addressing the *Maggid Mishne*. Any new ideas were presented as a new way of understanding the words of *Maggid Mishne*, and Rashbatz was, for the most part, ignored, if not rejected.

An exception to this is the opinion of R' Shabtai Cohen<sup>296</sup>. We previously noted the ruling of R' Moshe Isserles, who, following his understanding of Rambam, ruled that relatives through one's mother are only considered invalid witnesses rabbinically. R' Shabtai Cohen strongly rejected this ruling<sup>297</sup>, and at great length disputed this understanding of Rambam. In his opinion, the correct understanding of Rambam is that of Rashbatz, and he dismisses *Maggid Mishne* as inconsistent and difficult. Unlike the others who distinguished between *Maggid Mishne* and Rashbatz and adopted the approach of

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295 Published posthumously by his student R' Yaakov Culi.

296 Vilna, 1621-1662

297 Shakh, Choshen Mishpat 33:1

*Maggid Mishneh*, R' Shabtai Cohen indeed noted the difference but actually rejected the former.<sup>298</sup>

## Other authors

The last group of authors to be discussed are grouped together not because of a mutual conclusion, but because of a similar method in dealing with the topic. We do not see them taking any particular position for granted. Rather, their discussion took into account and incorporated all the relevant material, both in the works of Rambam, and all those who preceded them in addressing the subject. Their work attempted to resolve the open questions and account for all the details.

R' Avraham Aligari<sup>299</sup>, a primary commentary on *Sefer HaMitzvot* belongs to this group. In his discussion, he quotes and analyzes all of the possible explanations and approaches<sup>300</sup>. First, he answers some of the conceptual problems raised by Ramban and in doing so refines much of what Rambam says in the matter of tradition and hermeneutic tools. In discussing the approach of Rashbatz, R' Avraham Aligari raises all of the objections discussed, as well as an exhaustive list of places that the terminology will lead to practical results. It is clear that R' Avraham expects complete uniformity of language between the works of Rambam and will not accept an approach that compromises that uniformity. R' Tam Ibn Yahya's answer is rejected based on the difficulty already mentioned, and R'

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298 The arguments found in the Shach cannot be considered a proper treatment of the question of Shoreshei. At the end of his remarks regarding the opinion of Rambam, he says that "be that as it may" Rema is wrong anyway because "everybody" argued with Rambam. His focus seems to have been on disputing Rema, not interpretation of Rambam.

299 Constantinople, d. 1652

300 *Lev Sameach*, Sefer HaMitzvot, Shoreshei

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Avraham quotes several such examples where the terms are used interchangeably. He does, however, approve of R' Tam Ibn Yahya's treatment of Rashbatz.

In a further attempt to clarify the meaning of Rambam, R' Avraham discusses the connection between *Shoresh Sheini* and Rambam's introduction to *Peirush HaMishnayot*. In his introduction to *Peirush HaMishnayot*, we also find Rambam classifying the *Mitzvot* based on their respective origins. However, according to R' Avraham Aligari, the categories in that context do not correspond exactly to the categories in *Sefer HaMitzvot*. By defining precisely which category in *Peirush HaMishnayot* is affected by the statement of *Shoresh Sheini* and delineating different types of *drashot*, R' Avraham refines the exact point of contention and proceeds to his own view.

R' Avraham Aligari comes to the conclusion that *Shoresh Sheini* is indeed saying that *Halakhot* or *Mitzvot* learned from *drashot* are to be considered Rabbinic, *in all respects*. However, numerous criteria exist for the inclusion of a *Halakha* or *Mitzvah* in *Shoresh Sheini*, and therefore the practical implications of *Shoresh Sheini* are far more limited than was thought. Thus, anything that is a part of another *Mitzvah* that is Biblical is also considered Biblical and does not fall under the clause of *Shoresh Sheini*. The most prominent example is “*shiurim*” (quantities), which includes the measures used throughout *Halakha* to define quantities within the context of consumption-related *Halakhot*, the *Halakhot* of ritual impurity, and others<sup>301</sup>. Although *shiurim* is not explicit in the *passuk*, it is nevertheless treated as Biblical since it is a detail of many other (Biblical) *Halakhot*.

The approach taken by R' Avraham Aligari is unique, and his willingness to understand Rambam literally, on the conceptual level, stands in contradistinction to his contemporaries. It is hard to say

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301 The concept of *Shiurim* relates to many *Halakhot*, those mentioned here are just examples.

why his attitude was not more popular, and the resolution of *Maggid Mishne*, through the creation of subcategories, generally remained the key to understanding Rambam. Be that as it may, independent of his conclusion, the work of R' Avraham Aligari remains an important contribution to the study of *Shoresb Sheini*.<sup>302</sup>

R' Eliyahu Alfandari<sup>303</sup> took a similar route, though his starting point was not *Shoresb Sheini* per se. He set out to clarify the terminology employed by Rambam in the aforementioned *Halakhot* of Aveil 2:1 and Aveil 2:7<sup>304</sup>. In doing so, he considered all of the literature on the topic that was available to him and outlined the various approaches and difficulties, respectively. He criticizes the attempt to interpret *Maggid Mishne* as saying the same thing as Rashbatz. He goes to great lengths to argue with and disprove R' Betzalel Ashkenazi, who strongly advocated this understanding. Apparently, R' Eliyahu did not consider the approach of Rashbatz to be a viable explanation of Rambam. His understanding seems to follow that of R' Avraham de Boton<sup>305</sup>, that *Halakhot* derived from a *gzeira shava* or *Halakha l'moshe misinai* are in fact Biblical, as opposed to the other hermeneutic devices that will generate Rabbinic *Halakhot*. He also appears to accept the possibility of differentiating between the terms *midivreihem* and *divrei soferim* in the manner already suggested<sup>306</sup>.

In a similar attempt to that of R' Avraham Aligari, R' Eliyahu Alfandari explores the connection between *Shoresb Sheini* and *Peirush HaMishnayot*. In this context, he examines the origin and nature of the

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302 The discussion in Lev Sameach is very lengthy and detailed, both in dealing with the other commentaries as well as the original aspect of the presentation. Full justice has not been done here, but the salient points have been presented.

303 Constantinople, 1670-1717

304 *Seder Eliyahu Rabba V'zuta* p. 68

305 In the "second version" in Lechem Mishne, Ishut 4:6

306 As mentioned, this only means that *divrei soferim* can also be referring to Biblical laws, whereas *midivreihem* will be used exclusively as Rabbinic.

## D'oraita, D'rabanan and Divrei Soferim: Interpretations to Shoresh Sheini of Sefer Hamitzvot

*drashot* in general and how the concept of a *drasha* is compatible with the idea that everything was taught to Moshe at Sinai. R' Eliyahu's conception of *drashot* leads him to conclude that although all *drashot* conceptually belong in *Shoresh Sheini*, when it comes to *Halakha*, we can make the distinction between different methods. Therefore, *gzeira shava* and *Halakha l'moshe misinai* are considered more reliable and in *Halakha* will have the status of Biblical laws.

R' Eliyahu Alfandari went to great lengths to clarify the various directions that the discussion of *Shoresh Sheini* took. His own answer tries to account for all the factors but seems to fall short of doing that. It does not preserve a consistency between the different works of Rambam and renders the terminology virtually meaningless. This latter point would not be so significant (and indeed he was not the first to cause this result), if not for the fact that his original intent was to clarify the terminology.

R' Aryeh Leib Horowitz<sup>307</sup>, another commentator on *Sefer HaMitzvot*, also presents a lengthy discourse on *Shoresh Sheini*<sup>308</sup>. His basic premise is that *Shoresh Sheini* deals only with the count of the *Mitzvot*, and Rashbatz and *Maggid Mishne* shared this understanding. He also strongly disagrees with any attempt to differentiate between types of *drashot*. The main task of R' Aryeh Leib Horowitz is to determine what criteria caused Rambam to include in the count even *Mitzvot* that appear from the Talmud to have been learned from *drashot*. To this end, he extensively and methodically demonstrates why the inclusion of these *Mitzvot* is legitimate. In accomplishing this, he resolves an aspect of Ramban's attack that had not been properly addressed: the fact that Rambam did list many *Mitzvot* that are learned from *drashot*.

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307 Lithuania, late 17th century

308 Marganita Tava, Sefer HaMitzvot

R' Chanania Kazis<sup>309</sup>, also in a direct commentary on *Sefer HaMitzvot*<sup>310</sup>, makes a similar attempt, although somewhat more detailed. He also took the approach of Rashbatz as the proper understanding of *Shoresb Sheini*, to the point where he is surprised that Ramban could maintain otherwise.

In addition, R' Chanania Kazis takes for granted the distinction between the usage of *d'rabanam* or *midivreibem* and *divrei soferim*, as the answer to the inconsistencies in Mishna Torah. He takes this so far as to say that where there are implications in *Sefer HaMitzvot* to the contrary, this is the result of translation mistakes, the translator not being aware of the nuanced difference. We now know that this claim is unfounded. In the original Arabic manuscripts of *Sefer HaMitzvot*, those words were written in Hebrew and were copied accurately in the translations.

Like R' Aryeh Leib Horowitz, R' Chanania Kazis primarily focuses on determining what factors caused Rambam to include many *Mitzvot* in *Sefer HaMitzvot*, despite the rule of *Shoresb Sheini*. This he also does at length and with great clarity.

Despite the last two authors' appreciation for the nuances involved in the discussion, both chose the straightforward approach of Rashbatz. Thus, both go back to the understanding that all *Halakhot*<sup>311</sup> that meet the criteria for inclusion in *Shoresb Sheini* in fact have Biblical status, and *Shoresb Sheini* is only excluding them from the formal count of *Mitzvot*.<sup>312</sup>

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309 Italy, d. 1704

310 *Kin'at Soferim*, Sefer HaMitzvot

311 An exception is the Halakha of the maternal relatives in Eidut 13:1 and Ishut 4:6, where R' Chanania actually does rule that they are Rabbinic.

312 Both of these works are extremely long, and a proper study of each raises many interesting points. What is mentioned here is an outline of their general approach and basic conclusions.

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### Summary

To summarize, interpretation of the *Shoresh Sheini* in *Sefer HaMitzvot* underwent several stages in a process lasting several centuries. Like any such phenomena, the approaches that can be traced to certain periods are not precise changes that occurred from one day to the next, and there certainly are exceptions within these trends.

During the generation of Rambam and immediately thereafter, the words of Rambam in *Shoresh Sheini* were understood literally. Rambam's contemporaries understood him to be saying that all *Halakhot* learned from hermeneutic tools are given Rabbinic status. Such a position had radical ramifications in practical *Halakha* and posed a possible theological challenge to the authenticity of *Halakha*. Consequently, this opinion was argued with and rejected by Ramban, followed by such noted authorities as R' Shlomo ben Aderet and R' Yitzchak bar Sheshet.

As the works of Rambam gained popularity, Mishna Torah became a main corpus of *Halakha*, the most widely accepted since the Talmud<sup>313</sup>. There was now a need to resolve any perceived conflict between Rambam and the Talmud, and, as much as possible, to reduce conflict between the opinions of the earlier authorities<sup>314</sup>. To this end, we see *Shoresh Sheini* addressed in two different contexts. The first is a direct interpretation of *Shoresh Sheini* - the words of R' Shimon ben Tzemach Duran saying that this rule only affects the count of the *Mitzvot*. Since the entire question is a formality, the

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313 For a list of communities that accepted Mishna Torah as authoritative see H. Davidson, *Moses Maimonides* [New York: Oxford University Press, 2005] p. 280-281.

314 At least with regard to practical rulings. Obviously there are numerous disputes in Halakha, this rule however potentially creates an entire body of Halakha which will be affected by the argument. See above regarding a "safeik".

seriousness of the argument is reduced, if not completely avoided. The second context is the commentaries to Mishna Torah, where Rambam appeared to have followed the principle of *Shoresb Sheini*. The first of these is R' Vidal de Tolosa in *Maggid Mishne*, whose words themselves became a question among later commentators. According to some, R' Vidal de Tolosa subscribed to the approach of R' Shimon ben Zemach, but others say his interpretation was distinctly different.

Consequently, some suggested that there are differences between words that hitherto had been understood to be synonymous; *d'rabanam*, *midivreibem*, and *divrei soferim*. Likewise, the words of R' Vidal de Tolosa left room for the suggestion that Rambam made distinctions within the 13 exegetical principles, a category that was otherwise treated as one body.

At this point, we see a willingness developing on the part of some authors to understand Rambam more literally, that at least some *Halakhot* he indeed considered legally Rabbinic. This change can be understood, possibly, in light of the universal acceptance of the *Shulchan Arukh* as the authoritative code of *Halakha*. Once Rambam was no longer the primary source for legal rulings, a more controversial reading of Mishna Torah did not automatically mean a controversial ruling. Furthermore, although Rambam's contemporaries were disturbed by the theological implications of *Shoresb Sheini*, the later authors were not fighting that particular battle. Returning, at least partially, to a literal understanding of Rambam was therefore not as threatening.

While the earlier authors on the topic adopted, for the most part, relatively simple explanations of Rambam, the approaches became more and more complex as time went on. An attempt was made to discover the true intent of Rambam while taking into account the words of the earlier commentaries. Thus developed the more detailed and nuanced approaches that sought to resolve all the various difficulties.

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### Conclusion

As has been presented, none of the suggested approaches are perfect. Each one raises a different question in its attempt to answer the others. It is not our place to claim that any one is more correct than another. It appears, however, that one must take into account the complexity of Rambam's writings. Throughout his works, we see legal, theological and philosophical principles intertwined, resulting in a fascinating *weltanschauung*. To properly understand the intent of Rambam in *Shoresh Sheini*, it is necessary to consider it in light of these factors. The nuanced studies found in the later commentaries on *Sefer HaMitzvot* began to incorporate a broader outlook. It is quite likely, however, that a full analysis of Rambam's approach toward tradition and the role of man in the interpretation of the Torah will yield a more satisfying and holistic understanding.