

Maimonides' Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

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Abstract:

This article develops a new understanding of Maimonides' ideas of *d'rabbanan* and *divrei soferim* in his *shoresh sheni*. My contention is that contextually, these terms refer to those things which were 'rabbinically generated'. These rabbinically generated laws were not transmitted at Sinai; they were derived and developed over the course of Jewish scholarship's long and rich history, through the traditional principles of exegesis. In *Sefer Hamitzvot* and *Commentary on the Mishnah*, Maimonides distinguishes between the unchanging laws which were revealed at Sinai and transmitted through the generations, and the laws which were generated by the Rabbis in later generations. The latter are subject to repeal and amendment at later stages in history, while the former are not. Nonetheless, Maimonides considers these rabbinically generated laws to have the same status as those received directly from Sinai. Maimonides thus describes two types of laws, both derived from interpretation of scripture. The first type originates directly from Sinai, these are constant and unchanging, while the other type is rabbinically generated and evolves through the generations.

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

Section I

Maimonides offers a new and unique approach to the challenges of the Karaite rejection of the authenticity of the oral law. While acknowledging the centrality of a continuous tradition from Sinai, Maimonides allows for the existence of equally binding laws which developed after Sinai. In this way Maimonides addresses the challenge of "machloket," dispute, which seems to contradict an authentic transmission. This historical realism is consistent in Maimonides' other writings.

During the Middle Ages, Karaism posed the chief challenge to Rabbinical Judaism. The Karaites contended that while the Rabbis of the Talmud claimed to be the sole authoritative interpreters of scripture, they actually possessed no authentic tradition. In fact, the Karaites claimed that the rabbinic claim of a 'continuous tradition' beginning at Sinai and extending throughout the Talmudic era was no more than a fabrication. As proof, the Karaites pointed to the following facts.

1. Scripture does not allude to the 'Oral Law' anywhere.
2. Rabbinic interpretations of certain verses blatantly contradict the clearly intended meaning of these verses.
3. The existence of so many disputes, both in legal analysis and in customs, fatefully undermines the existence of any notion of 'tradition.'
4. The Rabbis have historically lacked any consensus upon which to base their authority. Hence any interpretation of Scripture may claim legal validity.

The major expositions of the Oral tradition that we find in *Sefer HaGiluyim*¹⁸¹, *Kuzari*¹⁸², and *Sefer HaKaballah*¹⁸³ were all written as

181 R' Saadiah Gaon, Babylonia 892-942

defenses of the Oral Tradition in the face of the Karaites. In all of these works, the Oral Law is presented as largely tradition from Sinai, for the most part devoid of the human creative process. Since the Karaites would accept nothing but a divine authority as the legitimate basis for the laws, the Oral Law is defensively presented as largely based on divine authority. Thus Raavad opens his *Sefer HaKaballah*:

This book of Tradition (“*Sefer HaKaballah*”) was written to inform rabbinical students that all of the words of our Sages (of Sainted memory), both of the Mishnah and the Talmud, constitute a tradition from one great sainted scholar to another from the head of the Talmudic Academy and his colleagues to another head of the Talmudic Academy and his colleagues, all from the Men of the Great Assembly who received the tradition from the Prophets, all of Blessed Memory. For the scholar of the Talmud, and certainly of the Mishnah, never uttered anything, even minor, which was original except for Ordinances which were unanimously agreed to in order to make a fence around the Torah. And should someone with heretical thoughts say to you that since the Sages argue in certain places and therefore their traditions are suspect, you answer him sharply and inform him that he is a heretic in rabbinical eyes. For the Sages were never in dispute concerning the commandment itself but only in details for they had the central command from their teachers but didn’t bother asking concerning the details¹⁸⁴.

182 R' Yehuda Halevi, Spain, 1075-1141

183 R' Avraham ben David HaLevi, Spain, 1110-1180. Also known as Raavad I, not to be confused with Raavad II of Posquieres, the famous critic of Mishnah Torah.

184 All translations by the author

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

Raavad's view of the Oral Law as largely derived through tradition, with only the details disputed due to human error, was the view of many, if not all, of Maimonides's predecessors. It has remained the predominant view throughout the history of traditional Jewish thought, and still underlies contemporary Orthodox theology. It is still widely viewed as the point of contention between mainstream Orthodox Judaism and its contending streams of Judaism, such as Conservative and Reform. These contending branches have consistently employed what they regard as the human creative role in their interpretation of the history of Halachah in order to delegitimize the relevance of the Talmud and Jewish legal tradition for modernity.

The view that the oral law is a continuous tradition is predicated on the belief in the truth of traditional Rabbinical Judaism. The weaknesses of this view, however, are two-fold: it appears to dismiss the existence of dispute throughout the entire rabbinic literature, and it also ignores the historical context of much of Talmudic literature. The dichotomy between preserving the authenticity of a continuous oral tradition, and acknowledging historically recorded disputes in rabbinic literature provides an intellectual challenge to the believing Jew. This essay attempts to demonstrate that Maimonides, in several of his writings, presents us with a creative solution.

Maimonides' rebuttals of the first three Karaite contentions (mentioned above) are as follows:

1. *"There is no allusion to the oral law in scripture"*:

Maimonides begins his introduction to the Mishnah Torah with a verse stating that God told Moshe that He would give him "the Torah and *Mitzvot*"¹⁸⁵. Maimonides sees an allusion to the Oral Law in this verse, based on the Talmudic passage in Berachot 5a. The appearance of the two distinct terms 'Torah' and '*Mitzvot*'

185 Shemot 24: 12

indicate that Moshe was given both the written law, and the oral law. Maimonides writes:

“All of the commandments which were given to Moshe at Sinai were given together with their interpretation, as the verse states, “I will give you the tablets of stone, and the Torah and the Mitzvah”. ‘Torah’ refers to the written law, and ‘Mitzvah’ refers to its interpretation. We are commanded to observe the written law according to the interpretation of the ‘Mitzvah’. This ‘Mitzvah’ is called the oral law. “

2. *“Rabbinic interpretations of verses seemingly contradict the intended meaning”:*

Maimonides response to the first Karaite contention answers this challenge as well. So long as the interpretation of scripture is from God, by definition this is the intended meaning. This, however, assumes that the interpretation presented by the Rabbis is in fact from God, and was revealed to Moshe at Sinai.

However, there exists another class of laws, which were not revealed at Sinai, but rather were rabbinically generated (as will be explained below). As such there is no claim being made that the interpretation is the intended meaning of the scripture. This undermines the challenge of the Karaites regarding intended meaning of the verses. See section V below for more on this.

3. *“The existence of dispute contradicts an authentic tradition”:*

Maimonides’ strategy in countering this contention differs from that of his predecessors. His argument is that the existence of dispute simply proves that in the case of that disputed law, there was not a tradition. Maimonides does not accept the claim, made by others including the Raavad, that there may have been human errors in the transmission of Halachah. Rabbinic dispute indicates lack of tradition in this area as far as he is concerned.

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

In what is clearly a critique of opinions such as that of Raavad cited above, Maimonides writes in his *Introduction to the Commentary on the Mishnah*:

Those that are of the opinion that laws which are disputed [in the Talmudic literature] also originated at Sinai, but are disputed as a consequence of a mistaken or forgotten transmission, that is, one voiced a correct tradition and the other side faulty tradition, or just simply forgot, or did not pay sufficient attention to his teacher [as the Raavad holds, for example] – this is from the worst of opinions and is the opinion of those who lack any understanding, and are careless in fundamental principles and thereby cast doubt and dispersion on those who have transmitted the Torah and is thereby useless and void. On the contrary, it causes a lack of faith for it belittles the Talmudic Sages¹⁸⁶.

This excerpt clearly expresses Maimonides' belief that the view of the Oral Law as rooted largely in tradition does not support faith in the integrity of the oral Law, but, on the contrary, undermines it, for it subjects that tradition to attacks of inaccuracy and fabrication. For if disputed laws were products of faulty transmission, who is to say that one can ever rely on tradition? In Maimonides' opinion, it appears, the dogmatic defense of the tradition in the light of historical facts to the contrary works against that very tradition¹⁸⁷.

186 Author's translation based on Shilat edition of *Introduction to the Commentary on the Mishnah*.

187 It is interesting to note that Maimonides makes a similar point in his Guide to the Perplexed:

I am not satisfied with the proofs brought by the Metukallim who claim that they have vigorously proven creation ex nihilo. I refuse to delude myself into believing them to be 'rational proofs'. Someone who erroneously claims he has proven something does not strengthen that claim, but, on the contrary, weakens

Where Maimonides' strategy differs from that of the Raavad, and others¹⁸⁸, is in respect to the third contention, namely that the existence of so much Talmudic dispute clearly contradicts an authentic tradition. Maimonides basically conceded this point to the Karaites; he acknowledges that there is no comprehensive, authentic tradition. Nonetheless, the concession is only partial because it claims that in only specific areas of dispute is there no tradition. This, however, doesn't mean that no oral tradition can exist. Maimonides' response is thus far more comprehensive than other major Jewish philosophers because it allows for both tradition and creatively generated dispute to exist within the corpus of Jewish law.

Maimonides' reply to the third Karaite contention avoids the problem of historical accuracy. However, a legal-philosophical problem is created. If we are to contend that a significant part of the traditional rabbinical corpus is not rooted in tradition from Sinai, in what sense can Rabbinic Judaism be considered authentic? How can the Talmud, the basis of all Rabbinic Judaism, view itself as the expression of the Divine Will, revealed historically at Sinai? These are significant questions, which Maimonides most likely considered, and so we shall seek the answers within the corpus of his work.

4. *The Rabbis have historically lacked any consensus upon which to base their authority.*

Maimonides' response to this contention is in his introduction to the *Mishnah Torah* where he provides the foundation of the legal authority

it and creates an opening to debate it. For once proofs are demonstrated to be fallacious; one is forever dissuaded from accepting the truth of the theory. In this quote from the Guide, Maimonides confirms his stance in the Introduction to the Commentary of the Mishnah: One cannot compromise methodology even in proving something one believes to be true. The ends do not justify the means even when in defense of fundamental beliefs.
188 E.g. R' Sherira Gaon *Epistle* and *Seder Tannaim ve-Amoraim*.

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

of the Talmud. However, this discussion is beyond the scope of this article.

Section II

Divrei soferim cannot be simply understood as being of mere rabbinical authority. In the Mishnah Torah it is clear that many scriptural laws are considered to be of divine authority but are not listed in the 613 Mitzvot.

Maimonides' views on laws derived from scripture through the thirteen principles of exegesis have been the subject of much controversy, and a wide range of interpretation. Maimonides' does explicitly state in his *Shoresb Sheni* of *Sefer HaMitzvot* that laws derived through exegesis, as opposed to laws stated explicitly in scripture, are assumed to be *d'rabannan* (unless the Talmud states explicitly that it is from the Torah), but the overall corpus of Maimonides' *Mishnah Torah* simply does not sustain such a proposition. In the myriad laws that appear in *Mishnah Torah* that are derived from scripture, there is no indication that their status is different from those laws explicitly stated in scripture. As a result, we are faced with an apparent discrepancy within Maimonides' writings, and this has served as a source for a broad spectrum of opinions. Each commentator presents a different solution in order to explain the apparent conflict between Maimonides' pronouncement in *Shoresb Sheni* and his wider legal corpus.

Scholars have outlined a gradual evolution in traditional interpretations of Maimonides' controversial statement about laws derived from scripture, from understanding Maimonides literally (as rabbinic), to a more "revisionist" interpretation of the terms *d'rabannan* and *divrei soferim* as Torah laws. These 'revisionist' understandings are commonly viewed by scholars as misrepresenting Maimonides' intent and thereby denying his 'bold' assertion. The

most famous scholarly work on this topic is Neubauer's *HaRambam al Divrei Soferim*. Neubauer examines the commentary of medieval commentator Rashbatz¹⁸⁹ who claimed that Maimonides did not mean to imply that *d'rabannan* meant "rabbinical" but merely that laws derived via rabbinical exegesis would not be listed among the 613 commandments: Neubauer states:

Rashbatz plays an important role in the history of commentaries on *shoresb sheni* and can be viewed as the founder of the methodology of 'misrepresentation' [*gilui panim*] – that is, the methodology which interprets the words of Maimonides not in accordance with their apparent meaning but rather by distorting the simple meaning of his words¹⁹⁰.

Neubauer's charges of "misrepresentation" and "distortion" are based on his difficulty with recognizing that an entire corpus of Maimonides's code might force someone to understand *d'rabannan* not in the usual sense. In fact, even "literalists" like Nachmanides did not seem obligated to understand *d'rabannan* literally. However, Neubauer's discomfort with such a re-definition of Maimonides is not uncommon, nor is it confined to non-religious academia. A prominent Orthodox Torah scholar and authority on Maimonides, Rabbi Yoseph Kapach, like Neubauer, understands the term *divrei soferim* literally, as meaning rabbinic. His position is that while there are particular instances, such as the specific case of *kidushei kesef* - betrothal through monetary payment¹⁹¹ Maimonides changed his

189 R' Shimon ben Tzemach Duran, Algiers 1361-1444

190 Neubauer *HaRambam Al Divrei soferim* Jerusalem: Mossad Harav Kook, 1957 p. 32

191 In Nashim chapter 1 Halachah 1 of Mishnah Torah Maimonides states that "betrothal of a woman by giving her something of monetary value is 'divrei sofrim'. This is in spite of the fact that the Talmud (Kidushin 2a) derives this

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

mind several times in his lifetime. Originally Maimonides held that *kidushei kesef* was rabbinic, but later in his life changed his mind, and held that it was from the Torah. Therefore the standard texts of the Mishnah Torah have to be emended not to read *divrei soferim*, because in the final revision Maimonides held it to be a Torah law. Nonetheless, according to Kapach, Maimonides's position throughout the Mishnah Torah is that laws derived through exegesis are literally *d'rabbanan*.

I take objection to Kapach's argument. His position concerning *kidushei kesef* seems improbable, given the known fact that Maimonides continually edited and re-edited all of his works during his lifetime¹⁹². In addition there are literally hundreds of Talmudic laws derived through exegesis which clearly have the status of being *d'oraita*. They are not listed in the *Sefer HaMitzvot*. Therefore according to Maimonides they are to be considered rabbinic. As an example, Maimonides writes in *Hilkebot P'sulei Hamukdashin*¹⁹³ that there are three types of intention that render an animal sacrificed unfit:

1. An intention that changes the name of the sacrifice (“*lishma*”)
2. An intention that changes the place of the sacrifice (“*notar*”)
3. An intention that changes the time of the sacrifice (“*pigul*”).

Maimonides clearly rules¹⁹⁴ that all three kinds of thought render the sacrifice unfit on a *d'oraita* level. Nonetheless, the only thought

law from scripture. Many commentators on Mishnah Torah, including Ramban, took exception to Maimonides' apparent claim that *kidushei kesef* is Rabbinic.

192 See Davidson, N (2005) *Moses Maimonides; the man and his works* Oxford. p.

166. See also Lieberman, S. (1948) *Hilkebot Yerusalmi le-Ha-Rambam* introduction p. 6

193 Collecting writings (vol. 2 Midivrei Sofrim pp 549 ff. and especially p. 551-2)

194 Pesulei Hamukdashin 16: 1

rendering the sacrifice unfit that is listed in the *Sefer HaMitzvot* is the thought that changes the time of the sacrifice, as Maimonides writes in *Sefer HaMitzvot*¹⁹⁵:

If the meat of the sacrifice is eaten on the third day it will not be acceptable, and he who sacrifices it will not be credited, for it is *pigul*, and he who eats it will bear sin. The meaning of this verse¹⁹⁶ is known *by tradition* to be speaking about a sacrifice which has been rendered unfit through a thought at the time of sacrifice...¹⁹⁷.

In *Mishnah Torah*, Maimonides treats all three intentions as having equal Torah status. *Lishma* and *notar* are of the same *d'oraita* status as *pigul*. Yet, according to Maimonides, the first two are derived through exegesis of verses, while the third is stated in the *Torah*¹⁹⁸. For this reason, only *pigul* appears in the *Sefer HaMitzvot*, where Maimonides only lists *Mitzvot d'oraita*. Hence, Rav Kapach's thesis is clearly wrong in this case, as it is in many other examples¹⁹⁹.

195 Sefer Hamitzvot, Negative commandment 132.

196 Vayikra 7: 18 "If some of the flesh of his feast thanksgiving peace offering was intended to be eaten on the third day, it is not acceptable." (Artscroll translation)

197 emphasis added by author

198 Pesulei Hamukdashin 13: 2

199 For example, in Maachalot Assurot 9: 1 Maimonides writes that the prohibition of milk and meat applies to eating, cooking and deriving benefit. There he brings sources for the prohibitions of eating and cooking from scripture. Likewise, these two prohibitions appear in his Sefer Hamitzvot 140, 141. The prohibition of deriving benefit is clearly treated as a Torah prohibition as is evident from Maimonides' comparison between it and other Torah prohibitions of benefit which one is obligated to bury (ibid. 9: 3). Nonetheless the prohibition of deriving benefit is not listed separately as a commandment because it is derived from exegesis and not from the verse itself.

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

In a similar vein, in a recent major work on the history of rabbinical exegesis, Jay Harris²⁰⁰, basing himself on Rabbi Kapach's conclusion²⁰¹, presents the following exposition of Maimonides' views on exegesis:

Because they are the product of human intelligence, because they are subject to dispute, and because they are often quite distant from the plain meaning of scripture, they simply cannot have the authenticity of laws explicitly stated in scripture, or laws that are part of the tradition originating from Sinai. They are, therefore, of rabbinic authority. (Harris 1998).

The statement that laws derived from scripture through exegesis “cannot have the authenticity of laws explicitly stated in scripture” is based on Rabbi Kapach. However, Harris's statement that because “laws are the product of human intelligence”, they “simply cannot have the authority of laws explicitly stated in scripture” is, in actuality, fundamentally rejected by Maimonides. For if Harris' claim would be true, how would we explain Maimonides' strong rejection of laws derived through prophecy?²⁰² Maimonides not only rejects halachic jurisprudence originating in prophecy, but he rejects any role of prophecy in interpreting the Torah? Only human intellect, not under the influence of divine prophecy, can interpret and decide the Torah. In all the cases brought in this section, the scholars make the same fundamental error of assuming that when Maimonides uses the term *d'rabannan* in must mean literally ‘of rabbinical authority’. In the next sections we will show that this is not an accurate reading of Maimonides' intent, either in *Shoresb Sheni* or in *Mishnah Torah*.

200 Harris, Jay. (1998) *How Do We Know This*

201 Harris (1991) *Nachman Krochmal : guiding the perplexed of the modern age* New York : New York University Press p. 224 footnote 32

202 Yesodei Hatorah 9. 1

Section III

Maimonides in his Introduction to the Commentary on the Mishnah distinguishes between interpretations originating at Sinai which are not subject to dispute; and laws which evolved later, including those based on reason and those derived through exegesis, which are subject to dispute. I will show that Maimonides consistently takes the position that many laws were derived through exegesis by later generations of Rabbis, and were not received at Sinai.

In *shoresb sheni* Maimonides explicitly assumes familiarity with his introduction to his *Commentary on the Mishnah*. In the latter essay, Maimonides outlines the entire structure of the Oral Law, both Divine and rabbinic, and delineates specific categories, the first three of which will be of importance to the issues that we are discussing here:

1. The First Category – laws received directly from Moses at Sinai, these were received from God. These laws were revealed to Moses and transmitted in the form of interpretation of Scripture. They are either the plain meanings of the words, or exegeses of Scripture. These laws are never subject to dispute, for if they are challenged, the response is that they are known through tradition and therefore cannot be challenged. Laws of the first category are referred to by Maimonides as 'accepted laws', to indicate that they were never disputed in history. For example, the verse '*pri etz badar*' refers to the *Etrog* fruit through a tradition that we have from Sinai. The Talmud case presents an exegetical exposition demonstrating that this is the meaning of the verse. Nevertheless, Maimonides claims that this exposition is only meant to show that the interpretation can be sustained by the semantics of the verse. However, it is not through rabbinic exegesis that we know the interpretation, but rather through a tradition from Sinai.

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

2. The Second Category – laws heard directly from Moses at Sinai, where he received them from God. These are termed explicitly in the rabbinical literature as '*Halachot l'Moshe m'Sinai*.' These also are not subject to dispute. The difference between the first category and the second is twofold: Laws of the first category are interpretations of scripture, whereas those of the second category are purely from tradition, and are not connected to any verse. In addition, laws of the second category are *explicitly* referred to in Talmudic literature as *Halachab l'Moshe m'Sinai* whereas those in the first are not.

3. The Third Category – laws which are derived through logical methodology. These laws *are* therefore subject to dispute.

According to Maimonides, the first two categories are traditions originating directly from Moshe at Sinai, and therefore are *Halachab l'Moshe m'Sinai*. The third category, states Maimonides, comprises laws derived through logical methodology. The major difference between the first two categories and the third is that the laws in the first category originate at Sinai, whereas the laws in the third category originate later in history. This last category includes laws that are a consequence of empirical reasoning, as well as laws that are derived through rational exegesis of verse. Because they are generated later in history they are subject to dispute. Maimonides's central thesis claims that there is a wide category of laws that are not traditions but were generated through rabbinic rationale over time. It is these laws that are disputed in the Talmud. As an example of this category, Maimonides quotes a Mishnah in the eighth chapter of tractate Berachot that records a dispute between Hillel and Shammai concerning the order in which one should clean the table and wash hands before *Birkat Hamazon*. This dispute is clearly rooted in logical reasoning and not as an interpretation of a verse.

Nonetheless, I would argue that it is clear that Maimonides is also including in this category laws derived from biblical exegesis²⁰³. In fact, I would argue that the third category includes both laws derived through logical reasoning that is purely rabbinic, not attached to Mosaic tradition or to biblical texts, as well as biblical exegesis

203 My reading of Maimonides deviates from that of the Chavot Yair²⁰³ who believed that Maimonides' first category includes all laws derived through the Thirteen Principles of Exegesis, while the third category includes those laws which are totally based on reason (sevara), such as disputes concerning the order of blessings to be recited for the Kiddush or how a person is permitted to greet someone during the recitation of Shema. Consequently, according to the Chavot Yair's reading, Maimonides is claiming that all laws derived through exegesis are in fact traditions from Sinai and therefore cannot be subject to dispute. The Chavot Yair declares:

“All of his words are puzzling and I am unable to absorb them, for the Talmud is full of disputes (involving laws learned through the Thirteen Principles of Exegesis) and even a ‘gezeira shava’ which everyone agrees can only be used based upon a tradition until Moshe Rabbeinu is often subject to dispute...”!

It appears that the Chavot Yair understands Maimonides' statement - 'laws that are derived through reason' to mean logically derived laws, in contrast to laws derived from Scripture, which are apparently not "derived through reason." This reading is somewhat surprising considering both that Maimonides also states that laws in the first category 'may be derived through reason,' and that here Maimonides is clearly referring to a derivation from Scripture through reason, as is clear from his example of the derivation of Etrog from the verse “Pri etz hadar” in tractate Succah.

Thus the Chavot Yair's reading of Maimonides cannot be sustained either within the text itself, or within the background of dispute to be found in much of Midrash Halachah. Finally, Maimonides himself in Shoreshei Sheni refers to what he wrote in his 'Introduction to the Commentary on the Mishnah'. As such, we must recognize that the Third Category includes laws derived from Scripture, and only in this way do the various writings of Maimonides unite.

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

unattached to Mosaic tradition. In other words, all laws in the third category are post-Sinai rabbinically created laws, either developed purely through logic, or through biblical exegesis.

One proof that Maimonides held that many laws were derived through exegesis later in history can be found in the introduction to the *Mishnah Torah*. There he writes that “laws that were not a tradition from Moshe and that the *Beis Din Hagadol* of each generation derived through principles of exegesis and established as law were included in Rav Ashi's redaction of the Talmud. Maimonides is clearly indicating that many laws derived through exegesis were generated later in history. Therefore, according to Maimonides' criteria, they are included in the third category.

An additional proof of this argument can be found in Maimonides' discussion of the third category, where he cites a Mishnah in Yevamot (Chapter 8): 'If it is a tradition, then we accept it – but if it is derived through reason, then we have the right to refute it'. This Mishnah is cited as proof that laws derived through reason can be disputed. Considering Maimonides' well-established scholarly capacity, we can safely assume that he was aware of the context of the Mishnah. I would therefore argue that his use of this Mishnah, was not accidental, and, in fact, when Maimonides writes ‘laws derived through logical methodology,’ he is referring to exegetical as well as purely creative logical reasoning. Further support for my claim can be found in the Talmudic terms that Maimonides chooses to indicate that the laws are disputed on the basis of reasoning. The terms, including '*bemai ka misligei*' (what are they arguing about?), '*mai ta'ama d'Rebbe paloni*' (what is Rabbi X's reasoning?) and '*mai banaihu*,' (what is the difference between these two opinions) are all phrases that are commonplace in exegetical disputes. In addition, the sheer number of disputes rooted in exegesis, a number so large that Maimonides could not possibly ignore them, attests to the argument that Maimonides must also be referring to disputes of this nature.

Based upon this analysis we can resolve an apparent contradiction in Maimonides's *Introduction to the Mishnah Torah*. He opens by writing:

“All the commandments were given to Moshe at Sinai, together with their interpretations, as it is written, “I will give you the tablets of stone, the Torah and the Mitzvot” Torah refers to the written law, Mitzvah refers to its interpretation. We were commanded to obey the Torah based upon its interpretation. This ‘Mitzvah’ is called the oral law.

From this opening statement one can conclude that Maimonides understands, as do his predecessors, that the entire oral law was given at Sinai. However, later on in his introduction, he twice speaks about “laws that were not a tradition from Moshe, and which the *beis din hagadol* in each generation derived through principles of exegesis and established as law.” From this one can conclude that, in fact, there are interpretations of commandments that were not given at Sinai, but generated later in history, up until the redaction of the Talmud.

This contradiction can be resolved only by reference to the three categories cited by Maimonides in his introduction to the *Commentary on the Mishnah*. When Maimonides prefaces his introduction with the term “interpretations given at Sinai” he was referring to laws of the first category (and perhaps second). However, when he later on refers to “interpretations generated later in history” he was referring to laws of the third category.

Nowhere does Maimonides state that the third category is to be treated any differently than the laws in the first two categories. The only distinction is an historical one. Laws of the first two categories originated at Sinai, while laws of the third were created later in history. The chief consequence of this is that laws of the first two categories are never subject to dispute or change, whereas those within the third are. This is what the Talmud implies when it states: 'If it is a tradition, then we accept it – but if it is derived through reason, then we have the right to refute it'. Nevertheless, once the laws of the third category

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

are established as law by the Sanhedrin, they take on the same divine status as those laws that were revealed at Sinai.

Clearly, rabbinically generated laws are not literally 'divine,' as that would be endowing the rabbis with divine status, which is certainly a heretical idea. However, I would argue that the novel point that Maimonides makes, by virtue of not distinguishing between the statuses of the categories, is that man, through the creative power of his intellect, generates laws of divine *status*. Maimonides understands that man is created in the image of God in terms of his intellect²⁰⁴. Therefore, it follows that he is able to create laws of equal status to those revealed at Sinai. This applies to all generations in history, with the proviso mentioned in *Introduction to the Commentary on the Mishnah* that after the redaction of the Talmud, man is no longer empowered to do so. This is due solely to the acceptance of the Talmud as binding by the entire Jewish nation, and not a reflection of man's diminishing intellect.

This is stated explicitly in Maimonides' closing statement of the third category:

We also do not dismiss anything disputed by the Sages, even though they are not of the stature of Shammai or Hillel, or beyond, for God, may He be exalted, has not commanded as such, except to listen to the Sages of whatever generation the person is in, as it says "And to the judge who will live in those days, you will seek out" etc²⁰⁵. For in this manner dispute arises it shouldn't be said that they have forgotten and erred, one side thereby having received the true law and the other side a mistaken law.

204 *Moreh Nevuchim* 1:1

205 Devarim 17:9

How evident are these principles to he who contemplates them, and how fundamental are they in the Torah!

The fundamental principle that Maimonides is referring to is the creation of divine laws by man in the generations after Sinai.

Section IV

Maimonides' description of laws categorized as *divrei soferim* and *d'rabbanan* in *shoresh sheni* corresponds to his description of laws derived through exegesis in the third category discussed in his commentary to the Mishnah.

Maimonides opens *Shoresh Sheni* with a direct reference from his introduction to the *Commentary on the Mishnah* in regard to the distinction developed there between laws of the first two categories and the laws of the third category.

'We have already explained in the introduction to the *Commentary on the Mishnah* that most of the laws of the Torah are derived from the Thirteen Principles of Exegesis. Some of the laws will be subject to dispute while others, being traditions from Moshe, cannot be disputed, but nonetheless will be derived using exegetical principles. For the wisdom of Scripture is such that one may find evidence for the traditional law either by allusion or by exegetical proof. All of this was explained there. As a consequence, not everything that the Sages derive rationally using the Thirteen Principles of Exegesis is a tradition from Moshe at Sinai. On the other hand, not everything derived as such should be considered *d'rabbanan* for sometimes it will be a law that is considered from the Torah that is known by tradition. As such the general rule is [that] anything not explicitly

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

written in the Torah but derived through one of the Thirteen Principles of Exegesis in the Talmud, if explicitly stated that it is part of the corpus of the Torah (*guf Hatorah*) or that it is *d'oraita*, then it is fitting to list it [as one of the 613 *Mitzvot*], for we have a tradition that it is *d'oraita*. But if this is not made explicit, then it is *d'rabbanan*, for it is not in Scripture.'

As we have explained above (in section 1,) the term *d'rabbanan* used here has been the subject of much controversy and varied interpretation. The term is usually meant to mean 'of rabbinical authority,' in contradistinction to the term *d'oraita*, which means 'of the Torah'. Such an interpretation is unacceptable in view of Maimonides' other works, as we have already noted. In addition, the text itself does not sustain such an interpretation. In *shoresb sheni* the term *d'oraita* is not used in contradistinction to *d'rabbanan*. Instead, Maimonides refers to 'traditions from Moses,' etc. The explicit wording of the text is not the normative terminology of *d'rabbanan* versus *d'oraita*, but rather *d'rabbanan*, i.e., rabbinically derived, versus laws which are from Moses at Sinai. This is because Maimonides is directly referring to the introduction to the *Commentary of the Mishnah*, which distinguishes laws known by tradition from Moses at Sinai from those laws that were developed later in history through the rational methodology of exegesis. Hence, the term *d'rabbanan* used in *Shoresb Sheni* clearly does not mean 'of Rabbinic authority' but rather 'Rabbinically generated;' that is, not generated at Sinai, yet that does not mean they are not *d'oraita*. That is, in fact, precisely why Maimonides would avoid saying they are not *d'oraita* – because these laws, while rabbinically generated, are still of divine status. This reading of Maimonides allows us to resolve the historical difficulty of Maimonides' usage of *d'rabbanan* when referring to laws that elsewhere he clearly understands to be *d'oraita*.

The distinction that Maimonides draws in *shoresb sheni* between laws known by tradition from Moses and laws generated later in history

clearly elucidates the Talmudic text that serves as the source for the enumeration of the 613 Mitzvot:

Rav Hamnuna says: what is the meaning of the verse “Moses has commanded us the Torah as a tradition” (Devarim 33)? Torah has the numerical value (gematria) of 611. [The first two commandments] “I am [the L-rd your God]”, and “You will not [have any other gods before Me] were both heard directly from God.” (Makkot 23b-24a)

The Talmud is explaining that there are 613 commandments that were passed down as traditions from Moses at Sinai (or more accurately 611, with the other two being a tradition directly heard from God). These commandments constitute verses and their interpretations heard at Sinai. The Talmudic use of the verse “Moses has commanded us the Torah as a tradition” implies that there are other laws of equal halachic status. These other laws are *not* traditions from Moshe at Sinai but were rabbinically generated later in history. Hence the historical distinction is the natural criterion to be used in deciding which *Mitzvot* are to be included in the list of 613. Along the same lines, it is also safe to say that this Talmudic text is a strong proof of Maimonides' historical distinction in his Introduction and therefore proof that, as Maimonides states, most laws are not known through tradition but were generated later in history.

Even though both categories of law are divine, there is nevertheless a significant distinction between them, aside from whether or not they are included in the list of 613.²⁰⁶ In *Hilkehot Mamrim*, Maimonides writes:

Any High Court of Law that derived a law through the Thirteen Principles of exegesis, and acted accordingly, and

206 as claimed by Rashbatz

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

another Court of Law after them finds a reason to nullify this law, they are permitted to do so, in any way they see fit, for it says “[You shall go] to the judge who will be in those days” – meaning one is only required to follow the court of law of his generation. (*Hilchot Mamrim* 2:4)

In other words, laws derived through rational exegesis may be overturned by later courts, even of lesser authority. The point is clear: laws derived from Sinai (which are the 613) are immutable.

In summary, laws derived through biblical exegesis comprise of two categories:

1. A core set of laws received from Sinai, which were transmitted throughout history, undisputed and unchanging.
2. Laws that were part of an evolutionary process, which derive their divine status from man's divinely empowered intellect²⁰⁷.

The laws of the second category do not derive their divine status from Maimonides' opinion that all rabbinic laws are included within the scriptural prohibition of deviating from the words of the Rabbis²⁰⁸. Instead, I would argue that they are of divine status because man is empowered by God to *create* laws based on his interpretation of scripture. They are therefore subject to the stringencies of explicit divine laws.²⁰⁹

207 *Moreh Nevuchim* 1: 1

208 *Hilchot Mamrim* 1:1 and *shoresh rishon* and Ramban's interpretation of Maimonides' position there.

209 This answers Ramban's attack on Maimonides in *shoresh sheni*. Even though Maimonides defines *kidushei kesef* as *divrei soferim* it is nevertheless subject to all the stringencies of the other categories of *kidushin*.

Section V

Laws generated through exegesis do not necessarily convey the intended meaning of the verse. This introduces a major philosophic thesis concerning the limitations of divine knowledge.

Maimonides argues in *shoresb sheni*:

This foolishness (i.e. including every law that the Talmud learns from a verse as one of the 613 *Mitzvot*) increases, to the point where every time one finds a law derived through exegesis (*derash*), one thinks that on the basis of this exegesis one is required to perform an act or abstain from something, but in fact all of these laws are undoubtedly *d'rabbanan*, and I will count them among the 613 *Mitzvot*, even though the 'simple meaning' (*pashtus d'kra*) does not indicate any of these things, for the Sages have already declared "The Scriptural text never leaves its 'simple meaning.'"

The quote attributed to "the sages" is a direct quote from the Talmud in Shabbat 117a:

Rav Kahana said: When I was eighteen years old, I had finished the entire six orders (of the Mishnah) but until now I was not aware that the Scriptural text never leaves its 'simple meaning'.

Rav Kahana's statement appears as a response to a Talmudic proof based upon a verse in Tehillim indicating that armor constitutes a type of jewelry. When Rav Kahana objects that the verse has been interpreted figuratively to refer to 'words of Torah' the Talmud responds that "scriptural text never leaves its 'simple meaning'." Up until now, we have translated '*p'shuto shel mikra*' as 'simple meaning' which is the standard translation. Nonetheless, after a little thought, one should realize that this translation is not sufficient to understand

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

the Ramban's argument, for why does only the 'simple meaning' account for the authority of law taken from the verse? This demonstrates that the term '*p'shuto shel mikra*' is used by Maimonides to refer to the divine intended meaning of the verse.

This concept of *p'shuto shel mikra* as the divinely 'intended' meaning of the verse is discussed by Rabbi Naftali Tzvi Yehuda Berlin (Netziv) in the introduction to his commentary on the Chumash, *HaAmeke Davar*. There, the Netziv argues that *p'shuto shel mikra* in the Chumash is analogous to the meaning intended by the author in a literary sense. As such, the background and cultural disposition of the author are crucial in determining his literary intention.

In the case of a human author this concept is clear. However, in the case of a divine author, namely God, how is one to define the intended meaning of the verse? The Talmudic statement, 'a scriptural verse never leaves its intended meaning' is understood by Maimonides to indicate that not every exegetical interpretation represents the divinely intended meaning of the verse. Therefore, not every law derived through exegetical interpretation can be enumerated as one of the 613 commandments. This is what Maimonides means above when he declares that one should not think that "on the basis of exegesis one is required to perform an act or abstain from something."

We have established in the previous section that those laws derived from exegesis have divine status, yet here Maimonides claims that exegesis is *not* a basis for a Mitzvah. I would argue that Maimonides is distinguishing between scriptural intent and human interpretation. The 613 commandments represent explicit divine intent and are thus

contained within scripture. All other laws derived through exegesis are the product of human interpretation of the divine intent.²¹⁰

Maimonides' argument based on the Talmudic statement that 'the scriptural text never leaves its intended meaning' implies that every verse carries two meanings:

- 1) 'The divinely intended meaning that can only be known through revelation and tradition (and which is included in the 613) and:
- 2) human exegesis, which uses the semantics and syntax of the verse to create laws of *d'oraita* status.

Because the latter laws follow from the 'Thirteen Principles of Exegesis' they constitute rational extensions of the verse and are therefore of no less authority than the Divinely intended meaning. Nonetheless, since they are the product of the human mind, they cannot be called the 'intended meaning of the verse' for that can only be the product of God's mind and therefore cannot be said to be laws known directly from Moses at Sinai. They are therefore not to be enumerated among the 613 *Mitzvot*.

This leads to a theological problem. If rational exegesis is not the divine intention of scripture, Maimonides is limiting divine knowledge of the commandments to those directly in the scripture. If God's knowledge is infinite, He must have intended this rabbinically

210 One cannot simply interpret the term *d'rabbanan* in this context as meaning 'rabbinical in authority', (which would in turn bring us back to the point where Maimonides would indeed be claiming that laws derived through exegesis are Rabbinical in authority). This cannot be sustained and is contrary to the apparent usage that Maimonides makes of the term *d'rabbanan* in the beginning of *shoresh sheni* where he is clearly making a 'historical' distinction. Therefore the term *d'rabbanan* here too must likewise be interpreted as being rabbinically generated.

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

explicated meaning in scripture. For this reason, Maimonides is forced to voice a disclaimer:

Perhaps you think that I am avoiding listing the laws (derived through rational exegesis) because they are not true? The answer is that anything that man derives as branches from roots, which are the principles that were told to Moses at Sinai (by God), even if the one performing that act (of derivation) was Moses himself, it would not be fitting to include them (in the 613 *Mitzvot*).

Clearly, Maimonides is distinguishing human activity from divine activity, but still, given the logical nature of "Truth" as Maimonides understands it in all of his writings, how does one epistemologically distinguish between Divine meaning and rational deduction? Before we answer this question, we will first turn to the critique of Ramban.

Section VI

Nachmanides primary critique of Maimonides is that there cannot be any distinction between divine intention and exegetically derived meaning.

Nachmanides', in his comment on Maimonides' *shoresb sheni*, opens his attack on Maimonides with the following statement:

I cannot comprehend what he is saying, for if we are to say that laws based upon the Thirteen Principles of Exegesis are not traditions from Sinai and that were therefore not divinely commanded in order to interpret the Torah, then they are consequently not [divinely] true. For the only true divine laws are those that come from the 'simple' meaning of scripture. All of this is based upon the Talmudic dictum: 'a scriptural verse never leaves its intended meaning.'²¹¹ Such an opinion

211 Shabbat 63a

(i.e. Maimonides') undoes our entire tradition of the Thirteen Principles of Exegesis and, as a result, the majority of the corpus of the Talmud that is based on it.

The Rav [Maimonides] insists that the reason is not because these laws are not true. However, if in fact they are true, then what difference does it make whether they are derived through exegesis or explicitly written...?

Perhaps he [Maimonides] believes that the law derived through exegesis is true but since it is not explicitly in the verse, the verse consequently cannot be said to have been intentionally written to teach this law, and is thereby called *d'rabbanan*... or perhaps he is in doubt as to whether they are genuine rabbinical laws created in the Rabbinical courts or were taught by Moshe and are called *divrei soferim* because they are not explicitly in Scripture and are therefore not to be included in the verse "Moshe commanded us the Torah" that is the 613 commandments. Nonetheless, this is not the opinion of the (Talmudic) Sages, for they considered all laws derived through the Thirteen Principles of Exegesis as laws that are explicit in Scripture..."

Nachmanides, surprisingly, actually supports our reading of *shoresh sheini*. We see from Nachmanides that the term *d'rabbanan* that Maimonides used did not necessarily mean of rabbinic status, as is generally understood by many commentators. He acknowledged that Maimonides' position could be that they were 'taught by Moshe', and consequently cannot be considered directly commanded by God as the verse "Moshe commanded us the Torah" indicates. Indeed, this is how we proposed above to understand Maimonides' meaning. Thus, we see that Nachmanides' primary attack on Maimonides' *shoresh sheini* is not because he felt that Maimonides necessarily considered laws derived through the Thirteen Principles of Exegesis to be of rabbinical status and authority. Rather, because Maimonides claims they are not part of the intended meaning of Scripture, they can not

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

be considered of the same divine status as those laws explicitly written. Nachmanides' argument is clearly theological. He believed that laws derived through rational exegetical principles from the text have the same divine status as the text itself. For Nachmanides, as far as divine intention is concerned, scripture and exegesis constitute 'one body'²¹².

Nachmanides could not accept that the Divine Mind could be limited only to the explicit intended meaning of the text and not include any law derived from the text through exegesis. As he writes 'I cannot comprehend what he saying.' Maimonides, in Nachmanides' opinion, was limiting Divine Knowledge and replacing it with human exegesis. The limiting of divine knowledge was the central point of contention, not the issue of rabbinical status of exegetically derived laws.

Section VII

Maimonides' theory of divine meaning and exegesis can be understood by an 'uncertainty principle,' which appears also in his other writings.

Nachmanides challenged Maimonides on theological grounds. How can a law derived through logic not be considered the intention of God? In order to understand how Maimonides would respond to this we will look at two sections of *Moreh Nevuchim*.

In the first (*Moreh Nevuchim* 3: 26) Maimonides develops the view that the *Mitzvot* must have rational reasons because of the basic cosmological and theological premise that God does not do, create, or command anything without a rational intention and purpose. As a result, all reasonable people must believe that all *Mitzvot* have a rational purpose. As his primary example, Maimonides presents the

212 Ramban in 'critique of shresh sheni' and 'introduction to commentary on the Torah'

laws of sacrifices. He claims that while we may be able to explain, in view of the purpose, why sacrifices should have been instituted in the first place; 'but the fact that one sacrifice is a lamb and another a ram; and the fact that their number is determined – to this one can give no reason at all, and whoever tries to assign a rationale will go crazy trying to find one.'

This statement is of profound theological significance. Maimonides is, in fact, implying that while one may be informed of the divine intention, this intention can never account for details, which will possess some quality of arbitrariness. This contention immediately raises a question: if in fact we are assuming that all divine acts, including commandments, are with rational purpose, why should details be arbitrary? Aren't details also Divine acts, or commandments, and are therefore of rational purpose? One is inclined to interpret Maimonides' opinion epistemologically: While man can be informed of God's general 'rational purpose' one can never be informed of the rationality of the details. However, if this is true because man's mind is human and therefore limited, and God's mind is infinite and Divine, why should one expect man to be informed of God's general 'rational purpose'? In which case Maimonides' argument for 'reasons for the commandments' begins to break down, and we are back to our original question.

We can clarify this point with a statement Maimonides makes later in *Moreh Nevukhim* (3:34):

'Do not be surprised if the Torah plan for the world is not achieved with every individual, or if it is inevitable that certain individuals, even while directed by the Torah, will not reach through this perfection, just as natural processes which underlie nature will not be effective in each individual case, for everything (i.e. nature and Torah) has one Divine source and creator'.

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

Maimonides' statement above implies that both Torah and natural law are both equally subject to a certain 'uncertainty principle,' which places limitations on Divine intentions with respect to details. I would argue that one can apply this 'uncertainty principle' to Maimonides' thesis on laws derived through exegesis. If we make the analogy between a natural process, (and even a *Mitzvah*), and a verse in the Torah, each of which is governed by a certain Divine intention. In the case of the natural process, this 'intention' is the well being of each individual of the species; in the case of the *Mitzvah*, it is the perfection of the individual; and in the case of the verse, it is the intended command. So too, just as within the natural process there will be individuals not affected by the intended process, or in the case of the *Mitzvah*, there will be individuals who will fall short of completion, in the case of the verse there will be laws derived that are not direct consequences of the Divine intention of the verse.

The essence of rabbinical exegesis is an emphasis on 'details' in the verse – the extra words, the specific words or phrases and other minutia that are carefully analyzed. As a consequence, exegesis can be no more 'informed' of the divine intention than the details of any divinely directed process, which, in the opinion of Maimonides, is always subject to an 'uncertainty principle'. This, then, is the philosophical underpinning of the expression 'every verse has a 'simple' (intended) meaning in addition to its meaning derived through exegesis.' The 'uncertainty principle' that characterizes all divinely generated processes always produces a bifurcation between the divine intention and the details of the process. As a result, the laws derived through the Thirteen Principles of Exegesis are not necessarily synonymous with the 'intended' meaning of the verse, and therefore are called *d'rabbanan*. For as far as they are derived from details and are not part of the Divine Intention, their exegesis is in fact rabbinically generated.

However, one can still object that natural and anthropological (*Mitzvoth*) processes are not analogous to exegesis, for natural/

anthropological processes involve a diverse spectrum of individuals who will not necessarily react or behave identically in the face of the same natural or divine law. In exegesis, however, the 'object' of interpretation is God's own word, and God certainly could find the proper syntax and/or semantics to convey one and only one idea.

One response to this is to be found in Maimonides himself, in his *Introduction to the Commentary on the Mishnah*, where he states:

Much disagreement occurred between them (the Rabbis) at the time of in-depth study in many things, for the analysis of each person differs in accordance with his intellectual abilities and his different view of fundamentals.

As such, Maimonides apparently understood that the methodology of exegesis, because it is so contingent on the rational analysis of verses, will inevitably vary from one person to another, given difference in intellect and priorities.

Further elaboration on this point can be found in another statement in Maimonides' *Guide of the Perplexed*. Maimonides states (MN 3:17) that while he believes that there is no direct divine providence on the individuals of all terrestrial species (with the exception of man); there is divine providence on the celestial spheres. This is because the celestial spheres' movements are mathematically precise, thereby being in total submission to the Divine Will. This being the case, there can certainly be no dispute with respect to their motion. Perhaps then, a verse should be more properly compared to the notion of a sphere, which is precise and not subject to any of the uncertainty that is found in the sub-lunar terrestrial world, for there can clearly be no disagreement as to the motions of the spheres.

However according to Maimonides even celestial spheres are subject to uncertainty. This idea can be to be found in Maimonides'

Maimonides's Philosophy of the Evolutionary Structure of Jewish Law and of Natural Processes

arguments against Aristotle's theory of the eternity of the world²¹³. According to Aristotle, the entire world is necessarily subject to natural law, and therefore can never be subject to a Divine will. In other words, nature is self-explanatory within natural law. Maimonides proceeds to argue against this based on the very fact that even those objects that are most subject to natural law - the celestial spheres - nonetheless exhibit a certain arbitrariness with respect to individual position and motion. We can only explain this by invoking Divine will, thereby refuting natural determinism.

One consequence of Maimonides' argument, and the one that is important for our purposes here, is that any process created by God, even one as exact and precise as the movement of the celestial spheres, will always be subject to a some uncertainty. Semantics and syntax of the Biblical text should not be essentially different. While the Divine intention was surmised, the choice of words and framer, which is always be subject to the 'uncertainty principle,' given the natural variation in the way people think, will give rise to different interpretations, both in historical and contemporary scholarship.

This is the fundamental reason that Maimonides believes that successive Sanhedrins can reinterpret the Torah and therefore change exegetically derived laws throughout history. When Maimonides invokes the verse "You shall go to the judge in your time", the necessary implication is that the Torah recognizes the fact that the thinking and values of people change over history. In brief, Maimonides recognizes that the structure of most of the oral law is one of a naturally evolving and organic process.

As we remarked at the end of section IV, the process of evolving exegesis was 'frozen' in history with the redaction of the Talmud in

213 *Moreh Nevukhim* 2:19

the fifth century by Rav Ashi²¹⁴. What distinguishes the evolutionary nature of the Oral Law from other evolutionary processes is that the evolutionary process of the Oral Law is deliberately frozen at certain points in history so that a vital balance between creation and tradition, hermeneutics and authority, is sustained. This freezing process took place at different points in Jewish history and created the canonical status of the Mishnah, Talmud and even of other works such as the *Mechilta*, *Sifra*, *Sifrei* and *Tosefta*. Through this ‘freezing’ process, the act of Rabbinical creation and originality does not submerge and essentially erase long-rooted legal traditions and the historical authenticity of the process is not compromised. Rabbinical creation then is not *ex nihilo* reasoning but a veritable interpretation of tradition that sustains the Divine core driving the process. This is the panoramic view of Torah mi-Sinai that Maimonides bequeathed to all future generations and it has allowed the Torah to flourish throughout all of history to this very day.

214 The process was actually frozen with the redaction of the Mishnah by Rebbe in the second century, but this constitutes an entirely different discussion

