

## SURVEY OF RECENT HALAKHIC LITERATURE

### *TREES AND PLANTS: THE CASE OF THE PINEAPPLE*

In the United States the presence of pineapple is ubiquitous on festive and not so festive occasions. Not so in pre-World War II European communities. Immigrants to this country embraced the pineapple as an affordable treat rather than as an expensive luxury. But the pineapple was not embedded in their culinary culture and hence there was no accompanying tradition for its halakhic characterization. Cultivated on relatively low-growing plants, it was simply presumed to be analogous to a vegetable.

Long ago, Socrates declared, “The unexamined life is not worth living.”<sup>1</sup> The halakhic counterpart would be “The unexamined foodstuff may not be consumed.” The Gemara, *Berakhot* 35a, declares that if a person is in doubt with regard to a rule governing blessings he dare not partake of the food in question until that doubt is resolved: “Let him first go to a wise man to teach him blessings so that he not commit *me’ilah*,” i.e., illicit appropriation of property belonging to the Deity.<sup>2</sup>

The American Torah community has achieved a level of halakhic knowledge and sophistication such that unexamined premises are no longer regarded as acceptable as a matter of course. That sophistication has brought with it a keen awareness that many heretofore unexamined halakhic issues require analytic reflection. The status of food products in general is one such area and that of the pineapple is a prime example. Some simply refrained from eating pineapples because they became aware of the existence of an issue, albeit one that, more often than not, they could not articulate in a knowledgeable manner. The result: A small, but erudite, cadre of young scholars have focused attention upon the halakhic

*I wish to acknowledge the assistance of Rabbi Joseph Cohen of RIETS and the Technion Medical School and Miss Isabelle Sehati of the Benjamin N. Cardozo School of Law. Particular thanks to Rabbi Moshe Schapiro of the Mendel Gottesman Library of Yeshiva University for his ongoing assistance far beyond the call of duty.*

<sup>1</sup> Plato, *Apology*, p. 35a, 5–6.

<sup>2</sup> Cf., *infra*, note 78 and accompanying text.

status of the pineapple. Not surprisingly, reflection led to doubt and doubt is the mother of controversy and, even to some extent, of heated scholarly debate. Beginning with a small group of cognoscenti, awareness has spread in diffuse concentric circles. With diffusion, awareness of technicalities recedes while confusion remains. The underlying issues governing classification of fruits and vegetables are both technical and complex and hence require a degree of elucidation before the status of the pineapple can be meaningfully analyzed.

### I. Criteria of Trees

Is a pineapple a vegetable or a fruit? Presented in that manner, the question is whether the blessing “who creates the fruit of the earth” or “who creates the fruit of the tree” is the appropriate blessing to be recited before partaking of pineapple. Of course, the question has no effect upon the blessing recited upon pineapple juice or pineapples consumed as an incidental ingredient in other cooked or baked foods. However, the question should more appropriately be rephrased as “Pineapple: Plant or Tree?” because the answer to that more fundamental question also has ramifications with regard to mingling diverse species, hybridization,<sup>3</sup> *terumah*, *ma’asrot* and, most significantly, *orlah*, i.e., the fruit produced by a newly-planted tree that, as commanded in Leviticus 19:23, may neither be consumed nor used for other benefit during the first three years following planting.<sup>4</sup> Unlike the *mizvot of terumah* and *ma’asrot*, the prohibition of

<sup>3</sup> Cf., however, Palestinian Talmud, *Kilayim* 5:7, where a distinction is drawn between classification for purposes of hybridization and classification for purposes of blessings.

<sup>4</sup> Ritva, *Sukkah* 35a, states that criteria for classification as a fruit or vegetable are identical both for purposes of determining the appropriate blessing and fruitage subject to *orlah*. See also R. David ibn Zimra, *Teshuvot Radvaz*, III, no. 531. Cf., *Nishmat Adam* 41:5 and R. Samuel ha-Levi Wosner, *Teshuvot Shevet ha-Levi*, VI, no. 165. See also R. Meir Aravah, *Me’ir Oz* 203:3–4 and 203:6. However, *Shakh*, *Yoreh De’ah* 294:5 and 295:7, indicates that status with regard to *orlah* cannot be inferred from status with regard to blessings. R. Yechiel Michel Epstein, *Arukh ha-Shulhan*, *Orah Hayyim* 203:4, suggests that it is possible that some foodstuffs may be classified as vegetables for purposes of the blessing but as a fruit for purposes of *orlah* because the blessing is recited only if the tree is an *ilan gamur*, i.e., a “proper” tree. The Palestinian Talmud, *Kilayim* 5:7, speaks of an *atad* that is a tree for purposes of *kilayim* but not for the blessing of “who creates the fruit of the tree” because its fruits are “not significant” (*lo hashbivi*). *Teshuvot Radvaz*, III, no. 531, notes that many early-day scholars regarded the blessing for sugar to be that of a fruit but asserts that sugar is nevertheless not subject to *orlah* because only trees that bear fruit that are separate and distinct from the tree itself are subject to *orlah*. Radvaz notes that the verse reads “And you shall plant all manner of food trees and you shall treat its *fruit* as *orlah*”

*orlah* extends to fruit grown in the Diaspora<sup>5</sup> as well as to the produce of the Land of Israel. Most commercially sold pineapples are the product of the first year of growth. In its natural habitat the pineapple will bear two or three and, at times, four crops. Hence, if the pineapple is a tree, virtually all pineapples would be *orlah* and classified as non-kosher.

### A. Early Sources

The *locus principis* of the halakhic distinction between a tree and a plant is a statement of the Gemara, *Berakhot* 40a:

... we recite “who creates the fruit of the tree” in those cases in which, if you harvest the fruit, the *gavavza* remains and again yields fruit but when, if you harvest the fruit, the *gavavza* does not remain to yield [fruit] again, we do not recite “who creates the fruit of the tree” but “who creates the fruit of the ground.”

A number of distinct definitions of the Aramaic term “*gavavza*” and of its cognate Hebrew term “*geza*” are found in early-day sources, not all of which are unambiguous in meaning. Consequently, there is much

---

(Leviticus 19:23) rather than “you shall treat its *wood* as *orlah*.” Sugar does not grow on the tree; it is *the tree*, i.e., the sap yielded by the stalk of the sugarcane. Cf., *Nishmat Adam* 51:10.

<sup>5</sup> *Tur Shulhan Arukh, Yoreh De’ah* 294:8 and *Shulhan Arukh, Yoreh De’ah* 294:8, rule definitively that the restrictions of *orlah* apply equally to all produce whether grown by a Jew or by a non-Jew. See also *Teshuvot ha-Ge’onim* cited by R. Chaim Joseph David Azulai, *Birkei Yosef, Yoreh De’ah* 294:6. Rambam, in his *Commentary on the Mishnah, Orlah* 1:2, expressed a differing opinion but reversed himself in his *Mishneh Torah, Hilkhot Ma’aser Sheni* 10:5. Cf., *Sefer Yere’im*, no. 75 and the commentary of *Tosefet Re’em, loc. cit.* R. Moshe Sofer, *Teshuvot Hatam Sofer, Yoreh De’ah*, no. 286, suggests that produce grown by a non-Jew may be biblically permissible but prohibited by rabbinic decree. R. Jacob of Karlin, *Teshuvot Mishkenot Ya’akov, Yoreh De’ah*, no. 67, pp. 272–276, is the sole latter-day authority who permits *orlah* grown by a non-Jew. That view is rejected by *Hazon Ish, Orlah* 1:11 and R. Shlomoh Zalman Auerbach, *Minhat Shlomoh*, I, no. 71, sec. 1.

Most authorities, including Rambam, *Hilkhot Ma’asrot* 10:15, rule that there is no obligation of *neta reva’i* in the Diaspora. *Shulhan Arukh, Yoreh De’ah* 294:7 cites two conflicting opinions. Rema, *Yoreh De’ah* 294:7, cites an additional opinion that limits the obligation to *kerem reva’i*, i.e., a similar obligation with regard to grapes. In light of controversy among early-day decisors, *Shakh, Yoreh De’ah* 294:17, advises that in the Diaspora both *neta reva’i* and *kerem reva’i* should be redeemed without a blessing. *Arukh ha-Shulhan, Yoreh De’ah* 294:8, draws attention to the fact that *neta reva’i* does not apply to produce grown by a non-Jew.

disagreement among early-day authorities with regard to the definition of a tree for halakhic purposes.<sup>6</sup>

1) Rashi, *ad locum*, defines the term “*gavavza*”<sup>7</sup> as “the branch (*anaf*) of a tree.” Rashi’s definition, in turn, is subject to further interpretation. Rashi seems to understand the Gemara as defining a tree as a structure having a “*gavavza*,” or branch, that survives from year to year and bears fruit. *Sefer ha-Agudah, Berakhot*, chap. 6, sec. 146, cited by *Magen Avraham, Oraḥ Hayyim* 203:1, comments, “... for such is the wont of a branch to endure long and if fruit is harvested this year it will come again another year on the selfsame branch.”

Indeed, R. Schneur Zalman of Liadi, both in a halakhic section of his *siddur, Seder Birkat ha-Nehenin* 6:6, and as quoted in a note appended to *Shulḥan Arukh ha-Rav, Oraḥ Hayyim* 203:1, understands Rashi’s use of the term “branches” (*anafim*) literally and hence as restricting the meaning of “*gavavza*” in this context to denote branches exclusively. In that comment, *Shulḥan Arukh ha-Rav* also describes a “vegetable” as including any botanical structure “whose *geza* (stem) remains all winter but the branches fall off in the winter and regrow from the stem in the summer.”<sup>8</sup> It should be noted that *Sefer ha-Agudah* speaks of a tree as a botanical structure that produces fruit on a multi-year basis from branches that survive from year to year, whereas R. Schneur Zalman speaks of branches

<sup>6</sup> For comprehensive surveys of the halakhic distinctions between trees and plants, see R. Joel Friedman, *Ha-Torah ve-ha-Arez*, III (Tevet 5757), pp. 398–431; Rabbi Aravah’s encyclopedic compendium on *Oraḥ Hayyim, Meir Oz* 103:2; and R. Yifrach Perlmutter, *Kodesh Hillulim*, no. 38. As discussed herein, the primary ramifications of those dichotomous categorizations are with regard to blessings and *orlah*. Parallel categories exist with regard to the blessing “who created perfumed trees” and the prohibition against making use of trees on *Shabbat* recorded in *Eruvin* 33b and 100a. See *Shulḥan Arukh, Oraḥ Hayyim* 336:6 and 409:3 as well as *Taz, Shulḥan Arukh, Oraḥ Hayyim* 336:4. A discussion of definitional criteria for those purposes is presented in *Kodesh Hillulim*, no. 38, secs. 33–39.

<sup>7</sup> The term is a homonym having different meanings in different contexts but all usages are associated with “wood.” Rashi himself, *Shabbat* 154b, *Ketubot* 27a, *Bava Kamma* 22b, *Bava Kamma* 59b, *Hullin* 8b and *Niddah* 8b, defines the term in subtly different ways. For a comprehensive discussion, see responsa appended to R. Dov Ber Rabinowitz, *Teshuvot Dvar Emet* (Poltava, 5673).

<sup>8</sup> *Shulḥan Arukh ha-Rav* does not identify the author of that opinion and indeed his grandson, *Zemah Zedek, Berakhot* 40a, s.v. *ve-al peirot*, reports that he could not locate the source. Nevertheless, it seems clear that *Shulḥan Arukh ha-Rav*’s reference is to Rashi but that *Zemah Zedek* understood Rashi as adopting the alternative position expressed herein. See Rabbi Friedman, *Ha-Torah ve-ha-Arez*, III, 401.

that regrow from the trunk or stem.<sup>9</sup> Alternatively, Rashi's use of the term "*anaf*" might be understood, not as a reference to a branch exclusively, but as a reference to any above-ground structure that yields multi-year harvests.<sup>10</sup> That broad definition, standing alone, would encompass many perennials, including bananas,<sup>11</sup> papaya<sup>12</sup> and the like. Elsewhere, the

<sup>9</sup> R. Malkiel Zevi Tennenbaum, *Teshuvot Divrei Malki'el*, V, no. 143, states that the stem must regrow in the same spot from which the original stem emerged because only if the branch or stem regrows at the same site is it considered to be the original stem that has survived. Earlier, R. Joseph Chaim of Baghdad, *Teshuvot Rav Pe'alim*, II, *Orah Hayyim*, no. 30, wrote that "it is reasonable to assume that so long as the tree endures and yields new fruit even if [the new fruit] does not appear at the same site as the original fruit" the criterion has been satisfied. Cf., responsa appended to *Dvar Emet*, p. 1b.

<sup>10</sup> *Teshuvot Shevet ha-Levi*, VI, no. 165, explains that Rashi employs the term "branches" to indicate the absence of a stalk or trunk. *Shevet ha-Levi* rejects the position of *Teshuvot Rav Pe'alim*, II, *Orah Hayyim*, no. 30, who declares that vegetation having a hollow stalk is a plant rather than a tree. Accordingly, *Shevet ha-Levi* concludes that Rashi concurs with the position of the Ge'onim and that, according to both Rashi and the Ge'onim, papayas are fruit. *Shevet ha-Levi* further contends that the opinion expressed in the *siddur* of R. Schneur Zalman of Liadi and that appears in the note appended to *Shulhan Arukh ha-Rav*, *Orah Hayyim* 203:1, applies only to the question of the blessing to be pronounced. The obligation to recite an appropriate blessing can always be satisfied at least *post-factum* by the more inclusive "who creates the fruit of the ground." Moreover, asserts *Shevet ha-Levi*, the opinion included in the margin of the *siddur* was intentionally omitted by the author from the actual text of *Shulhan Arukh ha-Rav* 203:1 and hence, in effect, was retracted by the author but later appended by the editor of *Shulhan Arukh ha-Rav* as a marginal note on the basis of the earlier-published *siddur*. Accordingly, *Shevet ha-Levi* concludes that he regards papaya as subject to *orlah* but does not protest the permissive practice of others based upon their reliance on *Teshuvot Rav Pe'alim*. R. Ovadiah Yosef, *Yehaveh Da'at*, IV, no. 42, also maintains that papaya is not subject to *orlah*. R. Joseph Shalom Eliashiv is quoted in *Halikhot Sadeh*, no. 38, p. 4, and in R. Uriel Eishental, *Megillat Sefer* (Jerusalem, 5767), no. 21, sec. 5, as ruling that papayas are subject to *orlah* at least as a matter of doubt. R. Ya'akov Yitzchak Weisz, *Minhat Yizhak*, IX, no. 108, rules in a similar manner. See also R. Moshe Sternbuch, *Teshuvot ve-Hanbagot*, III, no. 333. See *infra*, note 51. The status of papaya is also the subject of discussion by R. Judah Amitai, *Tehumin*, XXVI (5766), 57–60.

<sup>11</sup> See R. Ishturi ha-Parhi, *Kaftor va-Ferah*, chap. 56; *Bet Yosef*, *Orah Hayyim* 203:3; *Be'er ha-Golah*, *Orah Hayyim* 203:3; *Mishnah Berurah* 203:1; *Kodesh Hillulim*, no. 38, sec. 46; as well as R. Simchah Levy and R. Saul Reichberg, *Mishpetei Erez* 1:4, sec. 7. See also *infra*, notes 25 and 84.

<sup>12</sup> See *Kaftor va-Ferah*, chap. 56; *Teshuvot Rav Pe'alim*, II, *Orah Hayyim*, no. 30; Rabbi Friedman, *Ha-Torah ve-ha-Arez*, III, 426; *Kodesh Hillulim*, no. 38, sec. 42; R. Schneur Zalman Revach, *Tenuvot Sadeh*, no. 5 (Nisan-Iyar 5756), p. 34; and *Mishpetei Erez* 1:4, sec. 3. Cf., *Megillat Sefer*, no. 21, sec. 6; Rabbi Friedman, *Ha-Torah ve-ha-Arez*, III, 93; R. Ovadiah Yosef, note appended to *Yehaveh Da'at*, IV, no. 52; R. Joseph Efrati, *Halikhot Sadeh*, no. 38–39 (Sivan 5745), p. 14; and *Mishpetei Erez* 1:6, sec. 3. See also *supra*, note 10 and *infra*, notes 50 and 72 and accompanying texts.

Gemara, *Bava Mezi'a* 119a, defines *geza* as “that which sees the sun,” i.e., that which grows above ground.<sup>13</sup> That understanding of Rashi is reflected in the comments of a grandson of R. Schneur Zalman, R. Menachem Mendel Schneersohn, *Zemah Zedek, Berakhhot* 40a.<sup>14</sup>

2) The Ge'onim maintain that the term “tree” denotes an above-ground structure that survives from year to year.<sup>15</sup> Accordingly, the Ge'onim understand “*gavavza*” as denoting any stem or stalk and hence their position appears to be identical with *Zemah Zedek's* interpretation of Rashi. Long before *Zemah Zedek*, the sixteenth-century authority, R. David ibn Zimra, *Teshuvot Radvaz*, III, no. 531, stated unequivocally that Rashi's position is identical with that of the Ge'onim.

However, there is ambiguity with regard to whether classification as a fruit is limited to the produce of species that yield perennial growths from the same branches that survive from year to year, as assumed by *Shulhan Arukh ha-Rav*, or whether trees that shed their branches annually and regrow other branches<sup>16</sup> are also classified as trees. Language reflecting both views is found in early-day sources and both versions seem to be based upon alternative understandings of the position of the Ge'onim.<sup>17</sup> *Magen Avraham* 203:1, quoting *Sefer ha-Agudah*, declares that to qualify as a tree,<sup>18</sup> the fruit must be produced “from the branch itself.”<sup>19</sup> That

<sup>13</sup> See also Palestinian Talmud, *Shevi'it* 1:6 and *Bava Batra* 5:2; Rambam, *Hilkhot Ma'aser Sheni* 10:13; as well as *Teshuvot ha-Rashba*, III, no. 236.

<sup>14</sup> *Zemah Zedek* is cited by *Kezot ha-Shulhan, Badei ha-Shulhan* 49:6. See also Mahari Fulda, commentary on the Palestinian Talmud, *Ma'asrot* 4:4 and R. David Ortinberg, *Tehillah le-David* 203:2.

<sup>15</sup> See *Mordekhai, Berakhhot*, no. 131; *Ozar ha-Ge'onim, Berakhhot* 40b, *Teshuvot*, p. 91; Rabbenu Hananel, *Berakhhot*, (Jerusalem, 5750), addenda, p. 49; Me'iri, *Berakhhot* 43b; *Piskei ha-Rid, Berakhhot* 40a; *Piskei Ri'az, Berakhhot* 6:3, sec. 2; *Bet Yosef, Orah Hayyim* 203:1; Raaviah, *Berakhhot*, no. 113; *Halakhot Gedolot* (Machon Jerusalem edition, Jerusalem, 5751), *Hilkhot Berakhhot*, chap. 6, p. 7b; *Sefer ha-Eshkol*, I, *Hilkhot Berakhhot*, no. 29; and *Shibbolei ha-Leket, Seder Berakhhot*, no. 160. Cf., *Tosafot, Berakhhot* 40a, s.v. *iteih*.

*Bah, Orah Hayyim* 203:1, maintains that, if any portion of the stem remains above ground, the plant is a tree. See also *Halakhot Gedolot, Hilkhot Berakhhot*, chap. 6, p. 66; *Bet Yosef, Orah Hayyim* 203:2; *Levush, Orah Hayyim* 203:3; and *Shibbolei ha-Leket, Seder Berakhhot*, no. 160.

<sup>16</sup> Cf., *supra*, note 9.

<sup>17</sup> See *Teshuvot Radvaz*, III, no. 531 and sources cited by *Me'ir Oz* 203:2. See also *Teshuvot Shevet ha-Levi*, VI, no. 165. Cf., *Nishmat Adam* 51:7, s.v. *ve-od*.

<sup>18</sup> *Shulhan Arukh ha-Rav* seems to require not only that the root but also that the trunk must remain from year to year, while in his *siddur* the same author seems to restrict the definition of a fruit to produce yielded perennially by the same branch.

<sup>19</sup> R. Meir Shalom Halberg, *Bi'ur Din ha-Ananas le-Inyan Berakhah u-le-Inyan Orlah*, 2<sup>nd</sup> edition (Av 5777), p. 14, note 37, asserts that if one branch produces a

choice of language is designed to exclude fruit grown other than from the same branch. If so, the position of the Ge'onim is entirely identical to R. Schneur Zalman of Liadi's understanding of Rashi. On the other hand, R. David Ortinberg, *Tehillah le-David* 203:1, while acknowledging *Magen Avraham's* understanding of *Sefer ha-Agudah*,<sup>20</sup> states that, according to the Ge'onim, "If wood remains above the ground even if all the branches fall off... it is called 'the fruit of the tree.'" In effect, then, so long as a portion of the stalk or stem survives and causes fruit to be produced perennially, the structure is a tree.<sup>21</sup> That is the understanding of *Bah*, *Orah Hayyim* 203:1, and *Derishah*, *Orah Hayyim* 203:1.<sup>22</sup> That is apparently how R. Schneur Zalman of Liadi understood the Ge'onim and how *Zemah Zedek* understood both Rashi and the Ge'onim.

3) Rosh, *Berakhot* 6:23, defines "fruit of the earth" as "that which must be planted each year."<sup>23</sup> *Tur Shulhan Arukh*, *Orah Hayyim* 203:2, cites the Ge'onim and Rosh as two distinct opinions.<sup>24</sup>

Rosh's position is ambiguous. Raspberries,<sup>25</sup> for example, are not replanted annually but the fruit is not produced perennially by the same

second branch (as he believes is the case with regard to the pineapple) the result is tantamount to fruit grown from the first branch. R. Alexander Joshua Schechter, *Inyan Zemah Ananas (Pineapple) im Dino ke-Yerek o ke-Ilan*, p. 3, note 12, finds no source for such a requirement. Indeed, it is expressly contradicted by *Teshuvot Rav Pe'alim*, II, *Orah Hayyim*, no. 30. Cf., *supra*, note 9.

<sup>20</sup> Rabbi Halberg's dismissive rejection, p. 14, of *Tehillah le-David's* clear reading of *Sefer ha-Agudah* is unwarranted.

<sup>21</sup> R. Moshe Levy, *Tenuvot Sadeh*, no. 5, pp. 20 and 26, seeks to demonstrate that, according to the Ge'onim, not only is a species whose stem withers and regrows the next season to be categorized as a plant, but the same is the case with regard to a tree whose stem is manually cut to ground level before it decays and then regrows *in situ* and produces fruit. Rabbi Revach, *Tenuvot Sadeh*, no. 5, pp. 30–31, strongly disagrees. Rabbi Revach cites *Kaftor va-Ferah*, who categorizes sugarcane as a fruit despite the fact that sugarcane (and eggplants) are cultivated in that manner.

<sup>22</sup> Cf., Rabbi Halberg, p. 9, who seeks to reinterpret *Derishah*.

<sup>23</sup> See also *Tosafot ha-Rosh*, *Berakhot* 40a and *Rabbenu Yeruham*, *netiv* 16, *Sefer Adam ve-Havvah*, sec. 3.

<sup>24</sup> Cf., however, *Bah* 203:1, who understands Rosh as espousing the same opinion as the Ge'onim.

<sup>25</sup> There is considerable controversy concerning the blessing to be pronounced upon eating raspberries (generally referred to in rabbinic writings by the Russian-Polish word "mallines" and in modern Hebrew as "petel") *Taz*, *Orah Hayyim* 204:8, states that, contrary to the position of a certain R. Joseph, Maharam of Rothenberg ruled that the appropriate blessing is "who creates the fruit of the tree." *Hayyei Adam* 51:9; *Mishnah Berurah* 203:1; and *Arukh ha-Shulhan*, *Orah Hayyim* 203:4–5, rule that the blessing is "who creates fruit of the tree." Cf., *infra*, note 46. See also R. Eliezer Waldenberg, *Ziz Eli'ezer*, I, no. 17. *Shulhan Arukh ha-Rav* 203:3, rules that the blessing is "who creates fruit of the earth." R. Jacob Emden cites both opinions in

stem; rather, the roots survive and produce new stems each year. According to Rosh, the status of such produce as fruit is ambiguous. That point was first raised by R. Malkiel Zevi Tennenbaum, *Teshuvot Divrei Malki'el*, V, no. 143.<sup>26</sup>

A second source for the distinction between a fruit and a vegetable is the Tosefta, *Kilayim* 3:13: "Any [plant] whose leaves [and fruit] sprout from 'its root' (*me-ikkaro*) is a vegetable; any [plant] whose leaves [and fruit] do not sprout from 'its root' is a tree."<sup>27</sup> Parallel passages in the Palestinian Talmud, *Kilayim* 5:7 and *Ma'asrot* 4:4, declare, "That which [its leaves] rise from its trunk (*me-gizo*) is a species of tree; from its [leaves rise from its] roots is a species of vegetable." The import of those texts is subject to interpretation and may or may not represent an additional distinguishing criterion. There are three possibilities: (i) The Tosefta and associated texts are limited to establishing a restrictive definition of a tree

---

his *Siddur Bet Ya'akov*. A host of other authorities express varying degrees of doubt. See the opinion of R. Zevi Pesach Frank, cited by R. Yitzchak Rosenthal, *Kerem Zion*, V (Sivan 5735), p. 74, and the two lengthy responsa written by the author's son and the son's father-in-law appended to R. Dov Ber Rabinowitz' *Devar Emet*. See also Mordechai Shomron, *Emumat Ittekha*, no. 97 (Tishrei 5772), pp. 48–52; Rabbi Friedman, *Ha-Torah ve-ha-Arez*, III, 398–428; R. Yehudah ha-Levi Amichai, *Ha-Torah ve-ha-Arez*, V (Tevet 5760), pp. 149–155; Rabbi Friedman, *ibid.*, pp. 156–157; R. Meir Mazaz, *ibid.*, p. 158; Rabbi Friedman, *Emumat Ittekha*, no. 115 (Nisan 5777), pp. 77–83; and *Mishpetei ha-Arez* 1:4, sec. 1. An exchange between R. Shlomoh Yosef Zevin and R. Yehudah Leib Gordon appeared in *Yeshurun*, II (Nisan 5757), pp. 157–175.

The status of bananas would similarly seem to be subject to the controversy between the Ge'onim and Rosh. If so, the practice of reciting "who creates the fruit of the earth" is based upon the rule that, if the nature of the produce is doubtful, the more inclusive "fruit of the earth" is recited. Even so, bananas cultivated in the Diaspora would not be subject to *orlah* because doubtful *orlah* grown in the Diaspora is permitted. See R. Ben-Zion Abba Shaul, *Or le-Zion*, II, no. 46, sec. 39, p. 306 and R. Ovadiah Yosef, *Yabi'a Omer*, VIII, *Orah Hayyim*, no. 26. See also, *infra*, note 84.

<sup>26</sup> R. Shalom Mordecai Schwadron, *Teshuvot Maharsham*, I, no. 196, reports that raspberry bushes do not produce fruit the first year. Fruit is not produced from the original stems until the second year. The third year, fruit is produced from the second year's stems, etc. However, *Divrei Malkiel* reports having read in botanical works that at least some of the original branches continue to produce raspberries for more than one year.

<sup>27</sup> Basing himself on Rosh, *Berakhot* 6:23, *Bah*, *Orah Hayyim* 203:1, interprets the word "*ikkaro*" as meaning, not "its fruit," but "its trunk" and understands the word as denoting any plant whose leaves and fruit sprout from the tree itself rather than from a branch. According to *Bah*, a vegetable grows directly from a root or a stalk whereas a tree's leaves and fruit always grow from a branch. A plant qualifies as a tree only if it grows branches and the branches, in turn, yield leaves and fruit.

only for purposes of *kilayim* and hybridization.<sup>28</sup> (ii) The texts are to be understood in a manner compatible with the already-cited opinions,<sup>29</sup> i.e., either that the term “*ikkaro*” connotes a “root” or that it refers to a stalk or stem as distinct from a branch.<sup>30</sup> Implicit in those interpretations is that only perennials can be candidates for classification as fruit. Indeed, the Gemara, *Berakhot* 48a, in distinguishing between a fruit and a vegetable, speaks only of a multi-year criterion.<sup>31</sup> The Tosefta may be presenting the characteristics that serve to indicate whether the botanical species yields produce on a single year or a multi-year basis or it may formulate a principle that was presumed to be axiomatic by the Gemara, *Berakhot* 38a, *viz.*, that the structure must yield fruit from a branch or stalk rather than from its root, but does not enter into a description of how many yields it must produce. If so, the Tosefta serves either to explicate or to supplement the distinction drawn by the Gemara, *Berakhot* 40a. (iii) A third possibility is that the Tosefta may be understood as positing an entirely different distinguishing criterion that is rejected by the Gemara, *Berakhot* 40a.

There is further ambiguity with regard to Rosh’s understanding of the Tosefta as distinct from Rosh’s own halakhic ruling. Rosh, *Berakhot*

<sup>28</sup> See *Tosafot*, *Berakhot* 40a, s.v., *iteih*; *Shitah Mekubbezet*, *Berakhot* 40a; Ritva, *Hilkhot Berakhot*, sec. 9 (published as an addendum to the Mosad ha-Rav Kook edition of *Hiddushei ha-Ritva*, *Berakhot*, Jerusalem, 5743); *Teshuvot Rav Pe’alim*, II, *Orah Hayyim*, no. 30; as well as *Arukh ha-Shulhan*, *Orah Hayyim* 203:6 and *Yoreh De’ah* 294:18. See also Palestinian Talmud, *Kilayim* 5:7. Cf., *Shakh*, *Yoreh De’ah* 294:5.

<sup>29</sup> Cf., the view of R. Elijah of Vilna, expressed in his commentary on the Palestinian Talmud, *Bi’urei ha-Gra*, *Ma’asrot* 4:4, to the effect that the criterion of producing a fruit from a stalk or a stem rather than directly from the root is relevant in application only in instances of doubt with regard to proper classification. Cf., *infra*, note 43 and accompanying text. For explication of the doubt to which *Bi’urei ha-Gra* refers, see *Hazon Ish*, *Orlah* 12:3.

<sup>30</sup> See Rabbi Friedman, *Ha-Torah ve-ha-Areẓ*, III, 406–413. However, *Bah*, *Orah Hayyim* 203:1, understands the Tosefta as distinguishing tubular vegetables from other produce and as establishing the principle that any food that develops to maturity beneath the ground is a vegetable even if it need not be planted anew each year. See also *Nishmat Adam* 51:7, s.v. *ve-lakhen*. *Ba’al Halakhot Gedolot* and Rashba had a different version of those sources according to which the distinction is between a crop in which the earliest stages of growth is a “leaf,” i.e., a soft structure, in which case it is a vegetable, or whether the earliest stage is “wood,” i.e., a hard structure, in which case it is a tree. See *Bi’ur Halakha* 116:3.

<sup>31</sup> See, for example, Ritva, *Hilkhot Berakhot*, sec. 9, who cites this phenomenon as the sole distinguishing criterion of a fruit. *Me’ir Oz* 203:2 expresses doubt with regard to whether plants that do not survive longer than one year but that produce multiple crops within a single year satisfy that criterion. The issue is whether the criterion of a tree is survival and blossoming for multiple years, as is the case in most climates, or simply for multiple growths not necessarily a year apart, as often occurs in the tropics.

6:23, presents his previously-cited analysis of the distinction between a tree and a vegetable and then cites the Tosefta without further comment. Is the Tosefta cited by Rosh as a contradictory view or as presenting a supplementary criterion?<sup>32</sup> R. Ishturi ha-Parḥi, *Kaftor va-Ferah*, chap. 56, regards the Tosefta as adding to the definition of a tree in the sense that the statement of the Tosefta is, in effect, an elaboration of the concept of the term “*gavavza*” recorded by the Gemara, *Berakhot* 40a.<sup>33</sup>

As understood by *Kaftor va-Ferah*, not only must a tree yield perennial crops but those crops must be produced by a *gavavza*. *Kaftor va-Ferah* describes the leaves of a vegetable as arising from its roots “layer upon layer as the layers of an onion... and the stalk does not wither but decays.” *Kaftor va-Ferah* cites the Tosefta and apparently understands the crucial distinction to be whether the structure from which the leaves emerge is hard or soft. Trees are wooden, i.e., hard, whereas vegetables are soft. Therefore, trees wither whereas the soft texture and moisture of plants that produce vegetables cause them to rot. Thus, the essential criterion of a tree is that, unlike a plant, the produce of the tree grows from a *gavavza*; that is, its *geza* is wooden.<sup>34</sup> Similarly, the earlier-cited note appended to *Shulḥan Arukh ha-Rav*, *Orah Ḥayyim* 203:1, emphasizes that “branches [of a tree] produce leaves and fruit, not the *ikkar* (trunk or stem) which is hard; but a species of soft tree whose leaves and fruit are produced by the *ikkar* itself is not at all a tree for purposes of the blessing....”<sup>35</sup> A soft stalk is regarded as merely an extension of the root, hence not a *gavavza*.

Rema, *Shulḥan Arukh*, *Orah Ḥayyim* 203:2, in accordance with the opinion of the Ge’onim, rules that only species whose branches survive

<sup>32</sup> If Rosh is understood as classifying any species that need not be replanted as a tree these sources must be understood as presenting an entirely novel distinguishing criterion that is rejected by the Gemara, *Berakhot* 40a. See *Nishmat Adam* 51:7, s.v. *aval. Derishbah*, *Orah Ḥayyim* 203:1, apparently assumes that Rosh regarded the Tosefta as presenting an additional criterion in stating that produce that grows entirely from a root is always a vegetable.

<sup>33</sup> See *infra*, notes 50–52 and 54 and accompanying texts.

<sup>34</sup> See also Rashba, *Berakhot* 43b. Cf., Rashi, *Eruvin* 34b, s.v. *ozradin*.

<sup>35</sup> Although it appears from the statement of *Shulḥan Arukh ha-Rav* that he regards the Tosefta as an elucidation of the Gemara’s description of *gevvinva*, the Gemara, *Berakhot* 40a, declares that wheat is not a tree because “when the [wheat] kernel is removed there remains no *gevvinva*.” According to the Tosefta and *Shulḥan Arukh ha-Rav*, even if the *gevvinva* were to remain, the wheat stalk would not be classified as a tree because it is soft and malleable. See Rabbi Friedman, *Ha-Torah ve-ha-Arez*, III, 409, note 5.

from year to year are to be considered trees.<sup>36</sup> The marginal note appended to *Shulhan Arukh ha-Rav* 203:1 states, “One should be concerned (*yesh lahush*)” for the opinion that “even a species whose branches are shed in the winter and regrow in the summer” is a plant and accordingly recite the blessing “who creates the fruit of the earth.”

Thus, all authorities recognize that only perennials qualify as trees. But there is controversy among early-day authorities themselves, as well as among latter-day interpreters of their views, with regard to how those positions are to be understood regarding whether, in order to qualify as a tree, fruit must be produced (i) from a trunk or stalk that survives above ground; (ii) from a branch; (iii) from the original branch; or (iv) either from the original branch or from a branch regrown on the same spot.<sup>37</sup>

## B. Latter-Day Sources

Other decisors present additional criteria, which they apparently presume to have been accepted as a matter of course by early-day authorities. Some of those criteria may reflect a nuanced, albeit unstated, understanding of the previously-cited Tosefta; others cannot be understood in that manner. Some or all of those positions seem to be based upon the notion that the words in which commandments were transmitted to Moses had certain meanings in common parlance<sup>38</sup> and that any further halakhic delineation was designed to supplement, rather than to supplant,<sup>39</sup> those meanings. As a result, there are common sense criteria born of linguistic usage that are integral to the halakhic definition of a biblical term.<sup>40</sup> Such definitions

<sup>36</sup> Rambam’s position is subject to varying interpretations. See *Teshuvot Radvaz*, III, no. 536 and *Nishmat Adam* 51:7, s.v. *aval. Arukh ha-Shulhan, Oraḥ Hayyim* 203:4, opines that Rambam does not accept the criteria of *Berakhot* 38a because he regards them to have been rejected by other Amora’im. *Arukḥ ha-Shulhan* defines an *ilan gamur*, i.e., a “proper” tree, as a tree that survives the winter.

<sup>37</sup> See *supra*, note 9.

<sup>38</sup> Cf., *Teshuvot Hatam Sofer, Yoreh De’ab*, no. 338, who offers as a possible basis for the halakhic criteria of death the explanation that the definition was “a tradition received from the physicians of antiquity,” i.e., the criteria reflect the readily understood meaning of the term at the time of its usage in Scripture.

<sup>39</sup> *Teshuvot Shevet ha-Levi, ibid.*, precludes such preemptive definition of the word “tree” by noting that, in conjunction with *orlah*, Leviticus 19:23 uses the term “עץ,” which he understands to be translated as “wood,” rather than “*ilan*,” which connotes a tree.

<sup>40</sup> A civil law parallel may be found in Justice Potter Stewart’s oft-quoted statement in *Jacobellis v. Ohio*, 378 U.S. 184 (1964) regarding the legal import of a commonly used term: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture

may, or may not, be circumscribed or expanded by a tradition transmitted to Moses at Sinai.<sup>41</sup>

If that is the case, the Gemara's perplexing quandary, *Berakhot* 40a, regarding the blessing to be pronounced over wheat is readily understood. The Gemara records an opinion to the effect that the Tree of Knowledge was the wheat plant and questions why, then, is not the appropriate blessing to be recited over wheat "who creates the fruit of the tree"? If biblical terms are defined solely by the Oral Law tradition the question is misplaced. If a tree is that which the Oral Law defines as a tree, one cannot ask why the species of wheat that served as the Tree of Knowledge is not a tree. That query must have been based upon an assumption that, unlike present-day wheat, the wheat present in the Garden of Eden

---

involved in this case is not that." In the case of classification as fruit the dictum might be: "I know that it isn't a fruit when I don't see x, y or z."

<sup>41</sup> This thesis certainly seems to underlie the ruling of *Arukh ha-Shulhan*, *Yoreh De'ah* 384:18, to the effect that, with regard to *orlah*, the crucial criterion is that the tree be an *ilan gamur*, i.e., a "proper" tree, from which classification "bushes" are excluded. Accordingly, *Arukh ha-Shulhan* distinguishes between criteria of a tree for purposes of *orlah* and for purposes of the appropriate blessing.

*Megillat Sefer*, no. 21, sec. 4, presents an entirely different analysis of the underlying rationale that prompted latter-day authorities to formulate the supplemental criteria in defining a tree. *Megillat Sefer's* analysis applies equally to categorization with regard to *orlah* and with regard to blessings: Plants and vegetables draw nutrients directly from the ground. Fruits that grow on trees are certainly nurtured by the ground as well, but only through the mediation of the tree that "metabolizes" the nutrients that are drawn from the ground and processed to produce fruit. The primary indication of a tree serving that function is that its branches survive from year to year. That phenomenon reflects the role of the tree as a durable and immediate source of genesis of the fruit it yields, just as the earth is a durable and immediate source of genesis of plants and vegetables. Thus, as will be discussed later, failure to yield fruit beyond a three-year period, a hollow stem, soft texture, diminution in quality or quantity of annual yield, and decay that disqualify a plant from classification as a tree, negate such classification because they indicate that the structure that yields produce is merely a conduit for the nutritive power of the earth in which the plant grows rather than a distinct font and reservoir of nutritive vitality. Ability to produce fruit the first year may also be an indication that the plant, regardless of its external appearance, is but a conduit; it would take more than a year for a veridical tree to develop independent nutritive capacity. Comparison to females who cannot themselves bear progeny immediately upon birth but achieve gestational capacity only after developmental growth would be an apt analogy. Perhaps overreaching in applying this thesis, *Megillat Sefer* suggests that production of crops over a period of some years serves as an indication of a tree only in northern (or southern) climates that have a winter season but not in the tropics. *Megillat Sefer*, somewhat fancifully, reasons that it is the hardness necessary to survive cold weather that demonstrates independent vitality inclusive of the power to reproduce. See *infra*, note 53.

grew from a thick tree-like structure<sup>42</sup> and that the plain meaning of the word “tree” would indicate that “who created the fruit of the tree” would be appropriate. An alternative blessing would be appropriate only if there is an accompanying Oral Law criterion that is included in the definition of a tree, a criterion that was not present in the Tree of Knowledge. It is that Oral Law circumscription of the word “tree” that the Gemara seeks to elicit. The missing criterion, the Gemara responds, was the capacity to yield multi-year crops. In this case, the yield of multi-year produce is an Oral Law expansion of the necessary criteria of a “tree.”<sup>43</sup> Some definitions may be, and indeed many are, then limited or expanded by a tradition handed down to Moses at Sinai.

*Hazon Ish*, *Orlah* 12:3, in effect, criticizes Radvaz for advancing one such criterion on the basis of the latter’s own intuition (*mi-sevarah denafesheih*) without a talmudic source or early-day precedent. Inherent in

<sup>42</sup> See R. Ezekiel Landau, *Zlah*, *Berakhot* 40a, s.v. *u-pasak ha-Rambam*, who assumes as a matter of course that if the Tree of Knowledge was wheat the structure from which it grew was an actual tree. Cf., *Teshuvot Shevet ha-Levi*, VI, no. 165.

<sup>43</sup> This thesis explains why, as will be shown, according to some authorities, a soft or hollow plant that yields produce on an ongoing basis is not a tree. But this leads to a somewhat counterintuitive result. In common parlance people would not be expected to refer to a hard stalk or a thin reed having no hollow as a tree even if such a structure might manifest all the statutory criteria of a tree. Hence, since the human lexicon does not recognize it as a tree, it would be not a “tree” but for the fact that it is halakhically defined as a tree. Conversely, there are species that to all visual appearances look like a tree yet do not produce fruit until decades after planting and then blossom for but a single year beyond which the tree does not survive. Monocarpic palms blossom only once between 30 and 80 years after planting and then die. Most dramatic is the talipot palm, a native of Southeast Asia, that gives fruit only once after it has grown to be as high as 90 feet tall. More familiar are Agave species, including the century plant, which flowers and dies when it is twenty years old, and the smaller Caribbean agave. See Charles Reynolds, “These Plants Die to Multiply,” *The Ledger*, November 6, 2014. Presumably, since such trees do not satisfy the halakhic criteria of a tree, those species are not “trees” despite linguistic convention. If so, the role of the Oral Law, at least in this instance, must be limited to adding a necessary condition to the definition of a tree, i.e., that the structure must yield fruit on a multi-year basis, but does not serve to establish a sufficient condition. And that must be because Halakhah is concerned with the definition of a tree rather than with the definition of a plant or a vegetable. That which is not a tree is a vegetable-yielding plant by default. Only if that is the case can it be understood why linguistic failure explicitly to categorize as a plant a species excluded from categorization as a tree *ipso facto* results in categorization as a plant. This would also serve to explain the position of *Bi’urei ha-Gra*, Palestinian Talmud, *Ma’asrot* 4:4, who maintains that the criterion announced by the Tosefta does not apply to species regarded with certainty as vegetables. See *supra*, note 29. He makes no such parallel statement with regard to a tree. Indeed, such a conclusion would be contradicted by the Gemara’s statement, *Berakhot* 40a, regarding the Tree of Knowledge. Cf., Rabbi Schechter, p. 5, note 19.

*Hazon Ish's* objection is a refusal to assign such a broad role to a common sense notion of the meaning of a biblical word. *Hazon Ish* justifies Radvaz by citing Gra's comment on the Palestinian Talmud, *Ma'asrot* 4:4, to the effect that the criterion advanced in that text in distinguishing between a plant and a tree is limited to a species whose classification is ambiguous but has no application at all with regard to that which is "definitely a vegetable."

Numerous authorities have advanced additional criteria in establishing dichotomous classes of trees and plants. Some appear to be self-evident axiological hallmarks while others may have been deduced from the Tosefta or even from the Gemara, *Berakhot* 40a:

1) R. Jacob Hagiz, both in *Halakhot Ketanot*, I, no. 83 and *Leket ha-Kemah*, *Yoreh De'ah* 249:7, categorizes plants growing to a height of less than a single *tefah*<sup>44</sup> as vegetables rather than as trees for purposes of *orlah*.<sup>45</sup> *Nishmat Adam*, 51:7, s.v. *aval nir'eh*, dismisses that contention on the basis of comment of the Gemara, *Sotah* 53b, that speaks of a shrub less than a *tefah* in height as having the appearance of a tree. If trees are rigidly defined by Oral Law criteria, appearance should be irrelevant and a plant lacking a necessary criterion could not be misperceived as a tree. Moreover, both Rashi and *Tosafot*, *Sukkah* 35a, state that pepper is subject to *orlah* despite the fact that it is a low-growing plant that "does not rise above the ground." Assuredly, in common parlance, a low-growing shrub would not be termed a tree. R. Malkiel Zevi Tennenbaum, *Teshuvot Divrei Malki'el*, I, no. 143, suggests that any plant that does not reach a height of three *tefahim* should be regarded as a shrub rather than as a tree. *Arukh ha-Shulhan*, *Yoreh De'ah* 294:18, without giving a precise definition of the minimum height of a tree, rules that low-growing shrubs such as raspberries are not to be considered trees, at least for purposes of *orlah*.<sup>46</sup> R. Jacob Hagiz, *Halakhot Ketanot*, I, no. 83 and *Leket ha-Kemah*,

<sup>44</sup> A *tefah* is one-sixth of an *amah*. For an extensive discussion of the diverse opinions concerning the length of an *amah*, see J. David Bleich, *Contemporary Halakhic Problems*, VII (Jersey City, 2012), 211–214.

<sup>45</sup> See also *Ziz Eli'ezer*, II, no. 15.

<sup>46</sup> In ruling that raspberries are exempt from *orlah*, *Arukh ha-Shulhan*, *Yoreh De'ah* 294:18, makes the sweeping statement that *orlah* applies only to "a real tree (*ilan gamur*)" but "[raspberry bushes], as is known, are not in the category of a tree (*einem be-darga ilan*)." *Arukh ha-Shulhan* does not discuss bananas, papaya, pineapple or even sugarcane. Perhaps *Arukh ha-Shulhan* regarded only low-growing plants as failing to resemble a tree. *Arukh ha-Shulhan* rules only that plants such as raspberries are not to be categorized as trees for purposes of *orlah* but acknowledges that the blessing to be pronounced before raspberries is "who created the fruit of the tree." Elsewhere, *Arukh ha-Shulhan*, *Orah Hayyim* 203:4–5, states even more clearly and emphatically

*Yoreh De'ah* 294 as well as R. Chaim Joseph David Azulai, *Mahazik Berakhah*, *Orah Hayyim* 203:2, adopt that position with regard to a plant that grows to less than a *tefah* in height.<sup>47</sup>

*Hayyei Adam* 51:9; *Nishmat Adam* 51:7, s.v. *ve-al*; and *Mishnah Berurah* 203:2, rule that the appropriate blessing for produce grown on plants less than three *tefahim* in height is “who creates the fruit of the earth,” not because such plants are regarded as shrubs rather than as trees, but because the yield of such shrubs “is not very significant as a fruit (*lo hashbivi kol kakh pri*).”<sup>48</sup> However, *Magen Avraham* 203:1 rules that the appropriate blessing is “who creates the fruit of the tree.” *Magen Avraham* was certainly unconcerned with whether or not a species of that nature was perceived to be a plant rather than a tree.

2) As noted earlier, R. Schneur Zalman of Liadi, *Seder Birkat ha-Nehenin* 6:7, maintains that a plant that grows fruit on its trunk or stalk rather than from branches is not a tree.<sup>49</sup>

3) In *Halakhot Ketanot*, I, no. 83 and *Leket ha-Kemah*, *Yoreh De'ah* 249:7, R. Jacob Hagiz rules that eggplants are vegetables on the basis of his independently advanced rationale that, unlike trees, the eggplant grows on a hollow stalk.<sup>50</sup> *Halakhot Ketanot* regards a solid trunk or stalk as a necessary condition for classification as a tree.<sup>51</sup> Consequently, the papaya, which grows from a reed-like structure, is a vegetable. *Teshuvot*

---

that the Palestinian Talmud’s distinction between categorization of a tree and a plant is drawn with regard to the prohibition against *kilayim* but not for purposes of determining the appropriate blessing. *Arukh ha-Shulhan* expresses astonishment that some decisors rule that the appropriate blessing for raspberries is “who creates the fruit of the earth.”

<sup>47</sup> Cf., *Ma'amar Mordekhai* 203:3 and R. Jacob Ettlinger, *Arukh la-Ner*, *Sukkah* 35a.

<sup>48</sup> That concept is primarily used to describe the fruitage of wild or “barren” trees (*ilanei serak*) that produce some type of primitive fruit. The blessing ordained for such fruit is “who created all things” because such fruits are “not significant.” See *Magen Avraham* 203:2.

<sup>49</sup> Cf., *Kezot ha-Hoshen*, *Badei ha-Shulhan* 59:6, who points out that sugarcane yields sugar from its trunk but is nevertheless considered to be a tree by many early-day authorities.

<sup>50</sup> R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, III, no. 333, understands that *Halakhot Ketanot* focuses upon the characteristic of a hollow stalk not because a hollow stalk is an intrinsic characteristic but because a hollow stalk indicates that the stalk is weak and readily bent. Rabbi Sternbuch unconvincingly interprets *Halakhot Ketanot*’s use of the word “hollow (*hallal*)” as connoting “weak,” which, in turn, is the reason that the plant will not survive for multiple seasons. He accepts eggplants as vegetables but rules that the papaya is a fruit. Thus, Rabbi Sternbuch assumes that *Halakhot Ketanot*’s criterion is actually that of *Nishmat Adam* 51:7, s.v. *ve-Gemara*.

<sup>51</sup> *Ziz Eli'ezer*, II, no. 15, similarly maintains that a plant having a hollow, reed-like stem is a vegetable.

*Rav Pe'alim*, II, *Orah Hayyim*, no. 30, comments that it is reasonable to assume that such a distinction is correct. Again, as presented, that criterion seems to be born of the customary usage of the term "tree."

*Pri ha-Adamah*, *Berakhot* 8a, dismisses that criterion as without basis in the writings of early-day authorities. R. Samuel ha-Levi Woszner, *Teshuvot Shevet ha-Levi*, VI, no. 165, points out that the stalk of the plant on which wheat grows is hollow but, nevertheless, the Gemara, *Berakhot* 40a, declares that wheat is not to be considered a tree only because it does not yield crops from year to year. Apparently, then, concludes Rabbi Woszner, the fact that wheat stalks are hollow is irrelevant.

4) *Nishmat Adam* 51:7, s.v. *be-Gemara*, maintains that the presence of a hard stalk indicates that the plant is a tree whereas a soft stalk indicates that it is a vegetable. That distinction was advanced much earlier by R. Ishturi ha-Parhi (1280-1355), *Kaftor va-Ferah*, chap. 56, as part of an 800 year old controversy concerning the *hazil*, or eggplant. However, *Nishmat Adam* further asserts that the presence of a hard stalk or of a soft stalk is always contingent upon whether the growth is from the *jeza* or from the root. In plants in which subsequent growth is from the root, the stalk never becomes hard. Thus, the two criteria are linked in that one is not manifest without the other.<sup>52</sup> Presumably, that is because a soft stalk is regarded merely as an extension of the root. If so, both criteria are derived from the Tosefta and are dogmatically prescribed rather than definitional in nature.

5) *Kaftor va-Ferah*, chap. 56, formulates another criterion in declaring that a plant that dries up and withers after it ceases to bear fruit is a tree whereas a plant that decays and rots is a vegetable.

In presenting those criteria *Nishmat Adam* and *Kaftor va-Ferah* are undoubtedly elucidating the statement of the Tosefta, which they understand as presenting an additional criterion in the definition of a tree: (i) As stated explicitly by the Tosefta, the primary criterion is that the fruit grow from a branch or a stalk rather than from a root. (ii) *Kaftor va-Ferah* and *Nishmat Adam* presume that a branch is hard rather than soft. *Nishmat Adam*, in effect, conflates those two criteria in stating that one does not exist without the other. (iii) In stating that if the stalk withers rather than rots the plant is a vegetable, *Kaftor va-Ferah* implies that vegetables rot because they grow from the root, apparently assuming that what grows from the roots is soft and hence subject to decay. If so, all three criteria

<sup>52</sup> *Kaftor va-Ferah* can be understood as declaring that a soft stem is, by definition, a root and, quite obviously, produce growing directly from a root is a vegetable.

are essentially identical and inherent in the statement of the Tosefta.<sup>53</sup> Moreover, the Tosefta's formulation of the distinction between a tree and a vegetable may well be included in the very concept of *gavavza* described by the Gemara, *Berakhot* 40a. The Gemara defines a tree as a structure that yields multi-annual crops. It stands to reason that the characteristics reflected in the distinction drawn by the Tosefta are responsible for that phenomenon.

6) *Kaftor va-Ferah* reports that in hot climates the eggplant produces multi-annual crops and hence is to be defined as a tree subject to the prohibition of *orlah*. An eggplant that does not survive for more than three years will never yield permissible produce. Consequently, *Kaftor va-Ferah* rules that in a temperate locale, in which the eggplant does not produce fruit for more than three years, all eggplants are forbidden. *Teshuvot Radvaz*, III, no. 256, also expressly recognizes that there are some species that are always *orlah* because they do not yield fruit beyond the first three years.

Radvaz writes that he assumed the eggplant he encountered in the Land of Israel to be a tree and that since it did not yield fruit for more than three years its yield was always forbidden.<sup>54</sup> Radvaz cites the dictum of the Palestinian Talmud, *Orlah* 1:1, to the effect that a species that is not subject to *orlah* is not subject to the rule that fruit produced during the fourth year,<sup>55</sup> known as *neta reva'i*, which must be eaten only in Jerusalem as is the rule with regard to *ma'aser sheni*, and comments that there is no parallel dictum expressing the converse, *viz.*, that a species that does not yield produce during the fourth year is also not subject to *orlah*.<sup>56</sup> Thus, according to Radvaz, a tree that does not yield fruit the fourth year is nevertheless subject to *orlah* even though it will never produce permissible fruit.

<sup>53</sup> Rabbi Revach, *Tenuvot Sadeh*, no. 5, p. 36, asserts that the crucial distinction between a tree and a plant is that the former is hard whereas the latter is soft. In effect, the soft structure of a plant demonstrates that it is simply an extended or elongated root. Accordingly, he regards each of the various distinguishing criteria formulated by latter-day authorities as indicative of hardness or softness. He asserts that a tree is not sufficiently hard to be capable of growing fruit the first year; if it does yield fruit in the first year it is because it is a plant. Similarly, a tree that is hard is capable of multi-year crops; if it is not capable of multi-year crops it must be because it is a plant. That explanation, if accepted, renders application of *Megillat Sefer's* thesis, *supra*, note 41, unnecessary in applying the rationale underlying that criterion.

<sup>54</sup> That is also the view of *Ziz Eli'ezer*, II, no. 15.

<sup>55</sup> Cf., however, R. Abraham Danzig, *Sha'arei Zedek*, *Sha'ar Mishpetei ha-Areẓ* 6:18 and *Binat Adam*, *ibid.*, sec. 4.

<sup>56</sup> See also *Teshuvot Rav Pe'alim*, *Orah Hayyim*, II, no. 30.

R. Abraham Azulai, in his commentary on *Levush, Orah Hayyim* 203:3, disagrees with *Teshuvot Radvaz* and rules that eggplants are always permissible. *Hazon Ish, Orlah* 12:3, understands the position of Maharam Alshich as being in fundamental disagreement with *Teshuvot Radvaz* in that Maharam Alshich maintains that only plants that survive for more than three years are subject to the prohibition of *orlah*.<sup>57</sup> Neither R. Chaim Joseph David Azulai, *Birkei Yosef, Yoreh De'ah* 294:4, nor R. Shalom Mordecai Schwadron, *Teshuvot Maharsham*, I, no. 196, make mention of growth of crops beyond three years in duration in their citation of Maharam Alshich. Indeed, in referring to the permissibility of eggplants, *Birkei Yosef* explicitly reports that by the third year the yield of the eggplant is barely edible but rules the eggplant to be permissible for that very reason rather than because it does not yield produce beyond three years. *Birkei Yosef* and *Teshuvot Maharsham* certainly did not share *Hazon Ish's* understanding of Maharam Alshich.<sup>58</sup>

Nevertheless, as understood by *Hazon Ish*, Maharam Alshich establishes the principle that only species that yield fruit beyond the three-year period of *orlah* are trees whose produce is subject to that prohibition—precisely the opposite of the view of *Kaftor va-Ferah* and *Teshuvot Radvaz*, who maintain that the fruit of a species that does not yield fruit for more than three years is always *orlah*.<sup>59</sup> Maharam Alshich seems to assume that the crucial distinction between a tree and a plant is that a tree is

<sup>57</sup> Rabbi Halberg, p. 18, asserts that, according to *Hazon Ish*, Maharam Alshich's requirement for three annual crops is simply an indication that the fruitage grows from the stalk rather than from the root.

<sup>58</sup> Those authorities take note only of Maharam Alshich's criterion that only a tree whose produce is not diminished in quality during the initial three-year period of growth is subject to the prohibition of *orlah*. See *infra*, note 73 and accompanying text.

<sup>59</sup> Maharam Alshich certainly does not argue that a species that does not survive the period of *orlah* is *ipso facto* permitted because no botanical species is subject to a total prohibition. His position is that capacity for multi-year crops is intrinsic to the definition of a tree as implied by the Gemara, *Berakhot* 40a. If so, contrary to Rabbi Schechter's assertion, p. 6, it is logical that the years are reckoned from germination rather than from transplantation of a portion of an existing plant. Moreover, there is certainly no basis for Rabbi Schechter's argument that, despite the fact that transplantation resets the three-year period of *orlah*, the three-year period for determining whether or not the species should be subject to *orlah* should be reckoned from the usual time of propagation, i.e., transplantation of a portion of an existing plant. The ramification of that rule would be that a plant that grows from germination of a seed would also not be subject to an *orlah* even though it would survive and bear fruit for a much longer period. Quite to the contrary, if the issue is classification of a species, it would seem that status should be determined by conditions of natural reproduction rather than by phenomena established by human convention.

durable and a plant is not. In his opinion, survival and production of fruit for a multi-year period is synonymous with durability.<sup>60</sup>

For Maharam Alshich, as cited by *Hazon Ish*, that factor is apparently definitional, i.e., a tree by its nature produces crops on a multi-year basis. Other authorities, including *Hazon Ish*, establish the same criterion with regard to *orlah* on other grounds. R. Abraham I. Kook, *Iggerot Re'iyah*, II, no. 465, was asked if there are any botanical species that are always forbidden. His response was that, unlike species of the animal kingdom, it is not possible that any botanical species be absolutely forbidden. Much in the same vein, *Hazon Ish*, *Orlah* 12:3, s.v. *ve-nir'eh*, writes that the yield of a plant that produces fruit for a period of no more than three years cannot be prohibited as *orlah*<sup>61</sup> because "it is not logical"<sup>62</sup> that the yield of a plant should always either be entirely prohibited or subject to the restrictions of *neta reva'i*.<sup>63</sup> In making that assertion, *Hazon Ish* somewhat tentatively assumes that the criterion is actually productivity beyond four years because the yield of the fourth year is also subject to the restrictions of *neta reva'i* and the Torah would not prohibit a species whose yield cannot, at some time, be freely enjoyed. However, *Teshuvot Radvaz*,

<sup>60</sup> Rabbi Friedman, *Ha-Torah ve-ha-Arez*, III, 425, assumes that in defining a tree the three-year fruiting period is not intended to be a precise *shi'ur*. Rabbi Friedman states that a plant that does not thrive beyond "four or four and a half years" is also not a tree. Why that period of time and not an even higher one is left unexplained.

<sup>61</sup> *Hazon Ish* states that "it is not logical" that the Torah would entirely forbid a species but acknowledges that he has no explicit source for that assertion. However, R. Ya'akov Kanievsky, *Kehillot Ya'akov*, X (Bnei Brak, 5716), no. 56, finds a source for *Hazon Ish*'s position in the Palestinian Talmud, *Kilayim* 1:4. The Palestinian Talmud records that, as a matter of fact, all fruits are edible raw, with the exception of a fruit known as "*pishmin*" which is edible only after cooking. If *Kaftor va-Ferah* is correct in assuming that a plant that never produces fruit for longer than three years is also subject to *orlah*, then the eggplant is a "tree" subject to *orlah*. But the eggplant cannot be eaten raw. If all fruit other than *pishmin* are edible when eaten raw, the eggplant could not be a "fruit." Hence, if it is accepted that a plant that does not bear fruit for more than the three years is nevertheless subject to *orlah*, there is no reason why the eggplant should be exempt other than that it is not regarded as a tree because the fruit cannot be eaten raw. The only reason that it cannot be a fruit is that it does not survive for more than three years. See also R. Jacob Weidenfeld, *Teshuvot Kokhav me-Ya'akov*, nos. 16–17.

<sup>62</sup> Even assuming, as does *Hazon Ish*, that it is "not logical" that the Torah would prohibit an entire horticultural species, the notion that the Torah would not prohibit a product that may be enjoyed during the fourth year, albeit in a limited manner, does not strike this writer as self-evident. Radvaz and Rabbi Kook certainly make no mention of survival beyond the third year.

<sup>63</sup> Cf., *Me'ir Oz*, p. 205.

III, no. 256, explicitly declares that a tree need not yield fruit beyond a three-year period to be subject to the prohibitions concerning *orlah*.

That position gives rise to additional questions. Clearly, according to all authorities, if a plant will continue to bear fruit but is uprooted during its initial three-year period of growth and replaced with a new seedling because a new seedling will yield more or better fruit, and hence be more profitable, the produce of the new seedling is *orlah*. The nature of such species is to bear fruit perennially; only human intervention prevents them from doing so.<sup>64</sup>

Unclear is the status of a tree that regularly bears fruit for a longer period in its natural habitat but when transferred to a different climate ceases to yield fruit within the three-year period, e.g., the eggplant as described by *Kaftor va-Ferah*.<sup>65</sup> According to Rav Kook and *Hazon Ish*, since such species do not bear fruit beyond a three-year period in their new locale, would such trees be subject to *orlah*?<sup>66</sup> *Hazon Ish*, *Orlah* 12:3,

<sup>64</sup> Cf., *Teshuvot Maharit*, II, *Yoreh De'ah*, no. 34.

<sup>65</sup> Cf., Rabbi Friedman, *Ha-Torah ve-ha-Arez*, III, 420.

<sup>66</sup> It is not necessarily halakhically instinctive that trees and plants are dichotomous categories and that a single species is always either a fruit or a vegetable at all times and all places. The issue is whether any of the various distinguishing criteria is in the nature of a *siman* or a *sibbah* or, in a different idiom, a necessary, defining condition or an accident. Nevertheless, it is certainly arguable that statutory criteria are species-defining and that all successive generations of any species retain their halakhic identity despite anomalous characteristics that may become manifest as a result of mutation, climate conditions, or some other factor. That is certainly the case with regard to animal species.

*Pnei Mosheh's* elucidation of the text of the Palestinian Talmud, *Kilayim* 5:7, is instructive. As earlier discussed, the Palestinian Talmud, following the Tosefta, *Kilayim* 7:3, declares that a plant that produces fruit from its stalk is a species of tree whereas a plant that produces fruit from its root it is a plant. That statement is met with an objection: "Behold the *keruv* (cabbage) produces fruit from its stalk and was accepted as a vegetable." The response of the Palestinian Talmud is, "Here it is certain; there it is doubtful." *Pnei Mosheh* comments that "at times" the leaves of a cabbage sprout from its stalk but the plant is nevertheless treated as a vegetable. The response, "Here it is certain; there it is doubtful," *Pnei Mosheh* explains as meaning that the general principle applies only with regard to growths that are always of one sort or the other "but the *keruv*, even though you find that, at times, it appears that its leaves sprout from the stalk, nevertheless, in the majority of cases they [sprout] from its root. Therefore, with regard to *kilayim*, [since] it is doubtful whether leaves sprout from its stalk or its root, as is the manner of other species of *keruv*, that which is doubtfully prohibited must be adjudicated stringently. It is with regard to that which always sprouts from its stalk that [the Sages] said, 'It is a species of tree.'"

*Pnei Mosheh* understands the Palestinian Talmud as defining a species of *keruv* rather than as categorizing an individual plant. When the characteristics and identity of a species are known, anomalous criteria manifested by an individual plant are irrelevant. Unknown or identified species that do not uniformly manifest a defining

comments that it is logical to assume that the nature of a species is determined by the manner of its growth in its place of origin. Since it is a tree subject to *orlah* in its natural habitat it must be regarded as a tree subject to *orlah* in its transplanted locale as well. Applying the same principle to a tree originating in a place in which it cannot survive beyond three years, such a tree should never be subject to the prohibition of *orlah* even if transferred to a locale in which it yields crops for more than three years.

If a tree that produces fruit during its first year of growth is exempt from the prohibition of *orlah* the same question should arise with regard to a species that yields fruit during the first year in its place of origin but not when transferred to a non-tropical locale and vice versa. According to *Hazon Ish*, it would stand to reason that the status of the species with regard to *orlah* is to be determined by the species' nature of growth in its place of origin.

Commenting with regard to the status of trees that produce fruit within the first year of growth, R. Ovadiah Yosef, in a note appended to *Yahaveh Da'at*, IV, no. 52, states that such status is determined on the basis of when a tree commences to yield fruit in its particular place of growth rather than in its natural habitat. It is difficult to understand why the criterion that the tree produce fruit beyond the initial three-year period and the criterion that the tree not bear fruit during the first year should not be determined in the same manner, i.e., either both should be contingent upon when and for how long the tree yields fruit in its natural habitat or both should be determined in terms of conditions in the place of actual cultivation. If so, with regard to each of these questions, resolution of the matter would be subject to the controversy between *Hazon Ish* and R. Ovadiah Yosef.<sup>67</sup>

*Shibbolei ha-Leket*, *Seder Berakhot*, no. 160, raises the related, and perhaps more fundamental, question with regard to a single species that in its natural habitat sometimes grows in a manner manifesting criteria of a tree and sometimes the criteria of a vegetable. *Shibbolei ha-Leket* rules that such a structure is always to be treated as a tree. According to *Shibbolei ha-Leket*, the underlying principle seems to be "wherever a tree,

---

criterion must be regarded as doubtful and examined for purposes of classification as a vegetable or a fruit. When contradictory criteria are present in different members of the same species of unknown provenance, the status of the species is doubtful. In elucidating the meaning of that statement of the Palestinian Talmud, *Pnei Mosheh* seems to take it as a basic principle that identity as a tree or as a plant is not established by means of the characteristics of any given structure but as a result of identification as a member of a species.

<sup>67</sup> Cf., *infra*, note 72.

everywhere a tree,” i.e., a species whose members can even at some time or at some place manifest the criteria of a tree has the capacity to be a tree and hence is always a tree.<sup>68</sup> It is then arguable that according to *Shibbolei ha-Leket* the capacity to behave as a tree in one locale is evidence that the species is indeed a tree, which is then its status in all locales. According to *Shibbolei ha-Leket*, it may be argued that a species transferred to a locale where it bears fruit for more than three years should be regarded as a tree and that the converse is true as well. It is also arguable that the same should be the case with regard to a tree that does not bear fruit within its first year in either its place of origin or place of cultivation. That is, the fact that the tree fails to bear fruit within the first year in either its place of origin or its place of cultivation demonstrates that the species is a tree and maintains that status in all locales.<sup>69</sup>

7) *Hazon Ish* formulates yet a further rationale not found in other sources for the criterion that a plant is to be defined as a tree only if it survives and produces fruit beyond a three-year period. *Hazon Ish* asserts that a plant that cannot endure for more three years cannot be defined as a tree whose original *gavavza* survives to bear fruit as stipulated by *Bera-khot* 40a. *Hazon Ish* understands the term “*iteih le-gavavza*” as meaning that the tree continues to exist for three years. *Hazon Ish* seems to say that if a plant does not yield produce for more than three years it is because it is not the original root system that produces the second and third crops but new roots that develop. That phenomenon *Hazon Ish* regards as tantamount to replanting.

8) *Teshuvot Radvaz*, III, no. 531, reports that, upon arriving in the Land of Israel, he found that even the most pious ate the *hazil* which seemed to him to be *orlah*. The *hazil*, or eggplant, was—and remains—a staple of the Mediterranean diet. Upon reflection, he concluded that any seedling that yields produce within the first year of planting is a vegetable.<sup>70</sup>

<sup>68</sup> This would lead to the rather strange conclusion that a tree presumed not to be subject to *orlah* because it does not survive for more than three years when its seeds are transferred to a tropical climate where it can, and will, survive much longer would retroactively become subject to *orlah* when in its original habitat as well.

<sup>69</sup> The notion that “softness” and first-year growth are indicative of growth from an extended root as asserted by Rabbi Revach, *supra*, note 53, or that those phenomena are indicative of the absence of direct nutritive influence of the trunk, as theorized by *Megillat Sefer*, *supra*, note 41, is difficult to reconcile with this analysis of *Shibbolei ha-Leket*. According to those lines of reasoning in each of the cases discussed, the structure should always be treated as a plant or, perhaps more logically, should be categorized as a tree or a plant on the basis of conditions in the place of cultivation.

<sup>70</sup> Cf., the apparently earlier responsum of Radvaz, *Teshuvot Radvaz*, IV, no. 296, in which that criterion is absent. It is likely that Radvaz’ conclusion is limited to

R. Eliyahu Yisra'el, *Teshuvot Kol Eliyahu*, II, *Kuntres Maḥaneh Yisra'el*, no. 54, reports that he found in the margin of *Teshuvot Radvaz* a note to that effect authored by a certain Rabbi Samuel Garmizan citing a number of earlier authorities<sup>71</sup> as well as the text of a Tosefta that is not found in published editions. *Birkei Yosef*, *Yoreh De'ah* 294:4, similarly ascribes such a position to a number of sixteenth-century Palestinian scholars, including R. Avraham Azulai and R. Chaim Vital. *Teshuvot Rav Pe'alim*, II, *Orah Hayyim*, no. 30, includes that factor as one of his considerations in excluding the papaya from the prohibition against *orlah*.<sup>72</sup> However, R. Jacob Ḥagiz, *Halakhot Ketanot*, I, no. 83 and *Leket ha-Kemah*, *Yoreh De'ah* 294:7, terms Radvaz' explanation a "weak reason" and declines to rely upon that criterion.<sup>73</sup>

9) R. Avraham Azulai, in a note appended to *Levush*, *Orah Hayyim* 203:3 and *Yoreh De'ah* 294:3, reports that he heard in the name of R. Moses Alshich that, unlike the produce of trees, the eggplant crop diminishes in quality over time and hence becomes increasingly bitter from year to year. *Birkei Yosef* further reports that Maharam Alshich accepted eggplants as excluded from *orlah* because only trees whose fruit improves from year to year are subject to *orlah*. Consequently, eggplant, whose yield in the first year following planting is "good and sweet" but the second year is somewhat bitter and the third year is "very bitter and can be eaten only with difficulty" is a vegetable. *Teshuvot Maharsham*, I, no. 196, points to the comment of Ramban, *Commentary on the Bible*, Leviticus

---

species that grow from seeds but that the fruit of a tree grown from a transplanted branch is prohibited as *orlah* even if it yields fruit within the first year. See R. Judah Amitai, *Teḥumin* (5766), p. 60. That point is made explicitly by *Teshuvot Rav Pe'alim*, II, *Orah Hayyim*, no. 30, and is readily inferred from the words of Radvaz and *Teshuvot R. Avraham ben ha-Rambam* quoting his father and cited in the opening section of *Ma'aseh Roke'ah*.

<sup>71</sup> See *Ma'amar Mordekhai* 203:3 and *Kisei Eliyahu*, *Yoreh De'ah* 294:1.

<sup>72</sup> Rabbi Amitai, *Ha-Torah ve-ha-Arez*, p. 59, reports that in its native tropical habitat the papaya bears fruit within the first year of planting but that in Israel production of fruit may be delayed up to one and a half years. R. Ovadiah Yosef, in a note appended to *Yahaveh Da'at*, IV, no. 52, rules that status as a tree is determined by place of growth rather than by the conditions of its natural habitat. Cf., R. Abraham Leib Bonowitz, *Kerem Zion, Pri Hillulim*, p. 73. However, *Ḥazon Ish*, *Orlah* 12:3, adopts a contradictory view with regard to trees that cease yielding fruit within three years of growth. Cf., *supra*, notes 66–70 and accompanying texts.

<sup>73</sup> See also R. Shlomoh Yosef Zevin, *Soferim u-Sefarim* (Tel Aviv, 5719), I, 112, who questions reliance upon Radvaz' distinction because it has neither a talmudic source nor a precedent in the writings of early-day authorities. Cf., *Ḥazon Ish*, *Orlah* 12:3, who questions the distinction but finds support for its acceptance in the classification of the *keruv* by the Palestinian Talmud, *Ma'asrot* 4:6.

19:23, who indicates that the produce of the first three years of a tree is “sparse and lacking in taste and aroma and the major portion of [such fruit] spoil.”<sup>74</sup> R. Ben-Zion Uziel, *Mishpetei Uzi’el, Mahadura Tinyana*, III, vol. 2, nos. 80–81, finds support for Maharam Alshich’s criterion in the verse “And in the fifth year shall you eat its fruit *to increase* unto you its produce” (Leviticus 19:25).

10) The size and weight of the pineapple becomes progressively smaller each year.<sup>75</sup> However, the sweetness of the pineapple is enhanced during each year of successive growth. It is questionable whether Maharam Alshich’s distinction is limited to decreasing quality or whether it also applies to decreasing size, weight, or quantity of the fruit produced even though quality is unaffected or even enhanced.

11) R. Ya’akov Kanievsky, *Kehillot Ya’akov*, X, no. 56, citing the Palestinian Talmud, *Kilayim* 1:4, asserts that only fruit that can be eaten raw necessitates the blessing “who has created the fruit of the tree.”<sup>76</sup>

## II. Pineapples: The Halakhic Dilemma

### A. *Orlah*

As noted earlier, it has long been commonly assumed that the pineapple does not grow on a tree and hence its appropriate blessing is “who creates the fruit of the earth.” Recently, however, that assumption has been challenged by R. Meir Shalom Halberg of Lakewood, who disseminated a pamphlet titled *Bi’ur Pri ha-Ananas le-Inyan Berakhah u-le-Inyan Orlah* (2nd edition, Av 5777) in which he questions the longstanding practice of treating the pineapple as a plant rather than as a tree. Three separate responses defending the established practice quickly followed. R. Ben-Zion Halberstam’s *Teshuvah be-Inyan ha-Ananas le-Inyan Berakhah u-le-Inyan Orlah* is a vigorous rebuttal of that view. The second is a balanced presentation authored by R. Alexander Joshua Schechter, *Inyan Zemah Ananas (Pineapple) im Dino ke-Yerek o-ke-Ilan*. A third response by R. Meir Aravah, author of the compendium *Me’ir Oz*, appeared in the Israeli publication

<sup>74</sup> Ramban, *Yevamot* 122a, qualifies that categorization of *orlah* by stating that such is the nature of uncultivated fruit but that if the agronomist “tends to the tree it will produce fruit of exceedingly good quality” even during the period of *orlah*. Cf., *Teshuvot Maharsham*, I, no. 196.

<sup>75</sup> Rabbi Schechter, p. 6, note 20, points out that this is true only of Smooth Cayenne pineapple. Other species, *viz.*, the Queen and Spanish pineapples, either do not produce smaller pineapples each year or yield a greater quantity of fruit.

<sup>76</sup> See *supra*, note 61.

*Ha-Ozar*, no. 18 (Av 5778), pp. 91–102. Although unreferenced by those authors, their exchange of views evokes a certain degree of *déjà vu* mirroring a controversy between Israeli scholars published some years earlier. The Israeli discussion had its root in questions that had been raised concerning the status of pepper with regard to *orlah*. R. Schneur Zalman Revach, head of Ha-Machon le-Mitzvot ha-Teluyot ba-Aretz and well-known as the author of *Tola'at Shani*, published an article in *Tenuvot Sadeh*, no. 5 (Nisan-Iyar 5756), in which he unequivocally permits pepper,<sup>77</sup> bananas, and strawberries but makes no mention of pineapples. Shortly afterward, R. Joel Friedman authored a lengthy and comprehensive article published in *Ha-Torah ve-ha-Aretz*, III (Tevet 5757), 398–432, in which he strongly advocates the position that the pineapple is a fruit. In responding to that publication, Rabbi Revach, *Tenuvot Sadeh*, no. 17 (Nisan-Iyar 5758), made it abundantly clear that his original discussion is equally applicable to pineapples. That response is reprinted in Rabbi Revach's *Helkat ha-Sadeh*, I (Bet Uziel, 5759), no. 15.

The issue with regard to the blessing can be obviated with relative ease. A person wishing to eat pineapple might at the same time partake of small pieces of both a fruit and a vegetable and recite the two appropriate blessings, thereby overcoming the need for a separate disputed blessing for the pineapple. Or, as is the case with any such irresolvable doubt, a person may recite the more inclusive of the two blessings, *viz.*, “who creates the fruit of the earth.”<sup>78</sup> There is, however, a more serious problem that cannot be avoided. If the pineapple is a fruit that grows on a tree, virtually all commercially available pineapples are *orlah* and hence entirely forbidden. Resolution of the issue requires a determination both of matters of fact and of Halakhah.

The first step in resolving the problem is examining the nature of the pineapple to determine whether it meets the criteria of a tree formulated by early-day authorities. Determination of the status of the pineapple both for the blessing to be recited and for *orlah* is directly contingent upon the halakhic definition of a tree.

Absent human intervention, the pineapple would yield fruit on a three-year basis; crops would grow from the stem of the mother stalk for

<sup>77</sup> Cf., R. Moshe Levy's opposing view regarding pepper that appears in the same publication. See also *Teshuvot ve-Hanhagot*, III, no. 333.

<sup>78</sup> This is not to imply that a person ignorant either of a botanical fact or a halakhic provision may avail himself of this expedient. As noted, *supra*, note 2 and accompanying text, the Gemara, *Berakhot* 35a, declares that a person ignorant of a fact or of the relevant halakhic provision should seek out a scholar for appropriate instruction. See *Mishnah Berurah* 202:85.

at least an additional two years. According to Rosh, since a second or third planting is unnecessary, the pineapple must be a tree. According to a literal reading of Rashi, as accepted by R. Schneur Zalman of Liadi, *Seder Birkat ha-Nehenin* 6:6, the pineapple does not appear to qualify as a fruit because it has no branches. According to that understanding of Rashi, growth from the stalk itself is compatible with status as a plant. According to the Ge'onim, if we assume that all multi-year growths from an above-ground structure are indicative of a tree, it follows that, since the pineapple is a multi-year crop and grows from a stalk, it is a fruit. Since, in any event, Rema, *Orah Hayyim* 203:2, rules in accordance with the opinion of the Ge'onim, it would seem that the normative ruling would be that the pineapple must be considered to be a fruit that grows on a tree.

Moreover, even if, according to Rashi, classification as a tree requires the presence of “branches,” the pineapple may yet be a fruit. A three-fold issue arises with regard to applying the criterion of growth from a branch: (i) The initial yield of the pineapple is not from a branch. The pineapple grows as a circular cluster of stems emerging from the ground. A crown forms at the top of the central stalk from which the fruit emerges. Thus, the pineapple grows from the stalk or trunk itself rather than from a “branch.” Although the pineapple has no branches it does have suckers or ratoons from which new crops grow of themselves. The ratoons grow from the central stalk of the pineapple just above ground level. After the first harvest the central stalk is destroyed and one or more suckers continue to grow from the stem and produce the ratoon crop.<sup>79</sup> In other words, the “mother” plant dies but the ratoon it produces survives and propagates. The second year’s pineapple grows from one or more ratoons and the third year’s fruit is produced by ratoons grown from the sprouting of the second year’s ratoon. The first issue is, do such ratoons qualify as “branches”?<sup>80</sup> (ii) Furthermore, assuming that the ratoon qualifies as a “branch,” does classification as a tree require that the new crop grow from existing branches or does growth of fruit from a newly-grown but different branch also serve to establish status as a tree?<sup>81</sup> (iii) If subsequent growths are regarded as produced by branches, does the first year’s

<sup>79</sup> It is also possible to grow pineapples by planting the crown or slips that appear individually below the fruit or by planting a pineapple seed.

<sup>80</sup> Cf., *Hazon Ish, Orlah* 12:3.

<sup>81</sup> See *supra*, note 9 and accompanying text. Rabbi Friedman, *Ha-Torah ve-ha-Areẓ*, III, 422, contends that that this is the phenomenon described by Rambam, *Hilkhot Ma'aser Sheni* 10:19. If so, Rambam would categorize such a species as a tree but would also regard each ratoon as a new plant and hence its fruit as subject to the biblical prohibition of *orlah* for a new three-year period. However, contrary to Rabbi

growth that arises directly from the stalk serve to establish that the plant is a vegetable rather than a tree?<sup>82</sup>

Of direct relevance to resolution of those issues is the controversy between *Ba'al Halakhot Gedolot* and the Ge'onim with regard to the blessing to be pronounced over sugar. *Ba'al Halakhot Gedolot* rules that the appropriate blessing is "who creates the fruit of the tree" while the Ge'onim rule that the blessing is "who creates the fruit of the earth." Radvaz asserts that the controversy regarding the blessing to be pronounced prior to eating sugar is a fundamental one, *viz.*, whether sugarcane is a tree or a plant. Radvaz understands the position of the Ge'onim to be that a botanical structure is categorized as a tree for halakhic purposes only if it has branches that themselves yield fruit and also continue to do so over a multi-year period.<sup>83</sup> *Kaftor va-Ferah* similarly states that, according to the Ge'onim, sugarcane is not a tree. *Kaftor va-Ferah* states that the reason sugarcane is not a tree is identical with the consideration he presents with regard to bananas, *viz.*, "its leaves and fruit are produced by its roots."<sup>84</sup> Since sugarcane and pineapple seem to share all salient characteristics that distinguish a tree from a plant it should follow that, according to Radvaz and *Kaftor va-Ferah*, the status of sugarcane and pineapples should be identical. The controversy is whether sugarcane is or

Friedman's assumption, Rambam does not state that each branch yields fruit for only a single year.

Teshuvot *ha-Rashba*, III, no. 527, regards such growths as subject to the restrictions of *orlah* by virtue of rabbinic decree. Rabbi Friedman, *Ha-Torah ve-ha-Areẓ*, III, 422, note 14, notes that the pineapple ratoons typically yield fruit only the second and third year. The result is that there would be no growth of pineapple not subject to *orlah*. Rabbi Friedman asserts, without supporting sources, that it is not likely that the Sages would have promulgated an ordinance that would have effectively prohibited an entire species. That is a far more limited claim than *Hazon Ish's* assertion that the Torah itself would not prohibit an entire botanical species.

<sup>82</sup> Rabbi Halberg, p. 15, argues that a plant whose first yield is from its root but subsequently produces "branches" above ground that yield fruit crops is to be classified as a tree. Rabbi Halberg's view is based upon a tenuous inference from the language of *Seder Birkat ha-Nehenin* 6:7 included in the *siddur* of R. Schneur Zalman of Liadi. If so, even assuming that the original growth of the pineapple is from its "root," the ratoons that yield subsequent crops must be considered to be branches.

<sup>83</sup> *Magen Avraham* 203:1 similarly cites *Sefer ha-Agudah* in stating that the branch must endure and bear fruit. See also *Tehillah le-David* 203:1. Rabbi Halberg, p. 14, however, interprets those sources as meaning, not that the branches themselves must survive, but only that the trunk or stalk that produces branches must survive.

<sup>84</sup> Rabbi Halberg, p. 22, interprets that as meaning that the root decays and rots as is the case with regard to the banana and that *Kaftor va-Ferah* is describing sugarcane whose root decays in the same manner. That, of course, is highly unlikely; but, if so, since pineapple roots do not decay, the pineapple would be a fruit.

is not a tree and the reason or reasons underlying that controversy apply, *mutatis mutandis*, to pineapples as well.

However, as recorded in the published editions of *Ba'al Halakhot Gedolot*, that authority declares that all decisors are in agreement that sugarcane is indeed a tree but that the appropriate blessing is “who creates the fruit of the earth”<sup>85</sup> for an entirely different reason. The Machon Jerusalem edition of *Ba'al Halakhot Gedolot* (Jerusalem 5751) reads, “It does not yield fruit and we do not eat its fruit... as is the case with *shuta de-pirha*.”<sup>86</sup> The *Ozar ha-Ge'onim* version states simply, “because it is comparable to *shuta de-pirha*.” The import of that comment is certainly that sugarcane is a tree but that its sap is not a fruit.<sup>87</sup>

Other than establishing that *Ba'al Halakhot Gedolot* maintained that sugarcane—and hence pineapple as well—is actually a tree, the foregoing in itself adds little to the clarification of the issue with regard to the status of the pineapple. *Kaftor va-Ferah* and Radvaz are the major exponents of the position that there is a fundamental controversy with regard to the status of sugarcane. According to them, absent other considerations, there would be an identical controversy with regard to pineapples. *Ba'al Halakhot Gedolot* would reject that view and maintain that, according to both sides of the sugarcane controversy, a pineapple is a fruit subject to *orlah* and whose blessing is “who creates the fruit of the tree.” *Shulhan Arukh, Oraḥ Hayyim* 203:15, in accordance with a host of authorities, rules that the blessing to be pronounced over sugar is “by whose word all things were created” but records no parallel ruling with regard to *orlah*.

<sup>85</sup> Rambam, *Hilkhot Berakhot* 8:5; *Sefer Mizvot Gadol, esin*, no. 27; and *Shulhan Arukh, Oraḥ Hayyim* 202:15, rule that the appropriate blessing is “by whose word all things were created.” Three different reasons have been advanced in explanation of that ruling: (i) Sugar produced from the cane has the status of fruit juice. (ii) The cane itself cannot be eaten; only the sap from which sugar is made is of nutritional value. Hence, sugar is not “fruit of the tree.” (iii) Sugar is produced by boiling the cane in the process of which the nature of the original cane is transformed. See *Bi'ur Halakhah* 202:15.

<sup>86</sup> In the Gemara, *Berakhot* 36a, the words appear separately, i.e., “*shuta* and *pirha*” rather than “*shuta* of *pirha*,” defining “*shuta*” as “leaves and buds” and “*pirha*” as a particular species of fruit. It is possible that the correct reading of the text of *Ba'al Halakhot Gedolot* is “*shuta u-pirha*.” The import would then be that sugarcane is not planted with the intent of eating “*shuta* or *pirha*,” i.e., any yield of the plant because sap is not fruit. *Ba'al Halakhot Gedolot* addresses the question of the blessing but not the issue of *orlah*. *Teshuvot Radvaz*, III, no. 531, addresses both issues.

<sup>87</sup> R. Joseph B. Soloveitchik, *Reshimot Shi'urim, Berakhot* 36a, expressively presents the same concept in stating that for *Ba'al Halakhot Gedolot*, fruit must have the “*zurah* (form or appearance) of fruit.” Cf., *supra*, note 4.

## TRADITION

As has been discussed earlier, in addition to the controversy among early-day authorities regarding the criteria of a tree, numerous latter-day authorities posit additional criteria that must be satisfied in order to categorize a botanical structure as a tree. Does the pineapple manifest those criteria? Furthermore, a number of quite different considerations have been identified that may militate against a conclusion that the criteria required by the Ge'onim and latter-day authorities for classification as a tree are present in the pineapple:

1) According to many authorities, a plant that yields fruit during its first year of growth is not a tree.

2) According to many authorities, a plant that does not yield fruit for more than three years is not a tree. Nevertheless, sugarcane, considered to be a tree by many early-day authorities, also fails to yield a crop for more than three years. The reason must be that regrowth from a shoot of the original plant is regarded as growth from the original plant. If so, the ratoon should also be regarded as a "branch" of the original stalk.

However, Rabbi Schechter, p. 7, points out that when additional pineapple crops appear it is only because the pineapple stalk is prevented from collapsing upon its own weight by being attached to an upright pole or the like. A tree is defined as a plant that yields a second and third crop naturally. It may be the case, he argues, that if human intervention or assistance occurs, any further growth is not to be considered the ongoing yield of the "tree." Although a fallen pineapple might take root of itself and reproduce, any resultant crop would be the result of a new implantation of a portion of an existing crop rather than as an additional yield of the original stalk. That contention is contradicted by *Teshuvot ha-Rashba*, I, no. 399.

3) Conventional trees produce perennial crops from branches or stalks that survive from year to year. Even if fruit grown from newly developed branches is a sufficient criterion of a tree, that may be so only because the original trunk and branches survive as well.<sup>88</sup> The original pineapple stalk withers completely and dies before a second crop is produced.

4) Conventional trees yield fruit perennially from branches that survive from year to year to produce an entirely new crop each year. Ratoons begin to sprout and produce new fruit shortly after growth of the first crop has commenced but long before it is completed. If so, the ratoon itself, and hence its fruit, it is argued, should be considered part of the original growth.<sup>89</sup>

<sup>88</sup> See Rabbi Halberg, p. 2 and Rabbi Schechter, p. 4, note 12.

<sup>89</sup> See Rabbi Halberg, p. 2 and *Megillat Sefer*, chap. 21, sec. 4.

5) As noted earlier, it is questionable whether the criterion of being crop-bearing for a minimum of three years is satisfied by production beyond the first year of a reduced quantity of fruit or of a reduced yield in terms of the weight of the fruit produced.

6) Even taking account of ratoon crops, the pineapple does not ordinarily yield fruit beyond the third year. However, even absent human intervention, the pineapple may at times yield fruit the fourth year as well.<sup>90</sup> *Hazon Ish* is somewhat ambiguous with regard to whether survival of a tree must be longer than the prohibited period of *orlah* because it is “not logical” that the Torah would prohibit an entire vegetable species or whether *Hazon Ish* presumed the plant must survive to yield fruit beyond even the restricted four-year produce of *neta reva’i*. According to *Hazon Ish*, it may be the case that only a plant that survives for more than four years is a tree.

Moreover, the three-year period of *orlah* is not defined as either three calendar years or three crops. The years of *orlah* commence on the fifteenth of Shevat and conclude with the third ensuing *Rosh ha-Shanah*, i.e., a tree taking root any time before the fifteenth of Shevat concludes its first year of *orlah* six and a half months later on the following first day of Tishrei. Thus, the three-year period of *orlah* may actually be only two and a half years in duration. Consequently, it may be possible that even the plant’s third yield occurs after the years of *orlah* have expired. If the third crop is produced after the prohibition against *orlah* has lapsed, the pineapple does yield fruit that is permissible.

Furthermore, Rabbi Halberg, p. 3, contends that pineapples do not survive for more than three years only because they grow from a crown, slip, or sucker but if grown from planted seeds the pineapple will reach a fruit-bearing stage much later and yield fruit beyond the sixth year following planting.

7) The Tosefta seemingly adds a new criterion in declaring that a tree produces leaves and fruit from its branches or stalk whereas a plant produces leaves and fruitage from its roots. Unlike a conventional tree, the pineapple produces leaves both from its stalk in the form of ratoons and from its roots.<sup>91</sup> Since the Tosefta does not address such an anomalous

<sup>90</sup> Rabbi Revach, *Tenuvot Sadeh*, no. 17, reports that the pineapple is capable of producing some fruit beyond the three-year period. However, without elaborating, he dismisses that point as insignificant because the yield would be meager.

<sup>91</sup> Rabbi Revach, *loc. cit.*, dismisses that point as well because he similarly regards the fact that the root also yields fruit sporadically to be irrelevant. Rabbi Revach, *Tenuvot Sadeh*, no. 5, pp. 33 and 38, points to sugarcane as an example of such a species that is nevertheless regarded as a fruit by many early-day authorities.

## TRADITION

situation it is not clear that the Tosefta's criterion is relevant to categorization of such an "interspecies." Nevertheless, if it is presumed that production of leaves by the root indicates that the structure is a plant because only plants are capable of doing so whereas trees do not have that capacity, it would follow that the pineapple is a plant. If, however, the Tosefta reflects the notion that capacity to produce fruit from a branch is the determining criterion of a tree, it would follow that the pineapple is a tree.

8) Although disputed by other authorities, Rash Sirillo, *Kilayim* 5:7, regards leaves and fruit that sprout close to the ground as products of the root.

9) The ratoons that produce second and third year crops develop their own roots. Some scholars seem to recognize that the ratoons may, at least at times, sprout above ground from the original pineapple stalk but nevertheless assert that the ratoon pierces through the outer layer of the stalk and develops its own descending root system. Hence, each yield is tantamount to a first-year growth and is the sole crop produced by that ratoon.<sup>92</sup>

10) The pineapple grows upon a crown that emerges from the central stalk. The stalk of the pineapple, since it is soft, should be considered an extension of its root. Or more simply, a soft stem may be a root by definition.<sup>93</sup> Alternatively, the stalk of a pineapple, since it is soft, should be considered a "leaf." If so, since that "leaf" *cum* stalk sprouts directly from the root rather than from a stalk, the plant should not be considered a tree.

<sup>92</sup> The ratoons do develop their own roots but they continue to draw nutrients as parasites attached to the mother stalk. It is for that reason that natural ratoon crops develop much more quickly than crops grown from suckers severed from the mother stalk and planted independently. See D.P. Bartholomew *et al.*, *The Pineapple: Botany, Production and Uses* (New York, 2003), p. 13 and C. Py *et al.*, *The Pineapple: Cultivation and Uses*, (Paris, 1987), p. 417. Consequently, the ratoon growing from the pineapple stem should be considered simply as an enlargement of the original "branch." See Rabbi Schechter, p. 3. Nevertheless, Rabbi Schechter argues that, since the original stem withers and is destroyed, its sucker should not be considered a branch but an independent stem. If so, according to *Shulhan Arukh ha-Rav*, both the leaves and the fruit should be regarded as growing on the stem rather than on a branch and hence, according to *Shulhan Arukh ha-Rav*, classified as a vegetable. Rabbi Halberg, however, would maintain that the ratoon should be deemed a "branch" rather than a new stem despite the fact that the original plant dries up and withers. Particularly since the root of the original pineapple sprout continue to serve the ratoon, Rabbi Schechter, instead of arguing that survival of the original roots is irrelevant, rather strangely argues that those roots assume the identity of the new ratoon. See Rabbi Schechter, p. 6, note 19.

<sup>93</sup> See *supra*, note 52 and accompanying text as well as Rabbi Aravah, *Ha-Ozar*, p. 94.

Although without clear precedent in early-day sources, the last two considerations seem most compelling. An independent root system intuitively seems to be an indication of a separate identity. Almost equally intuitive is the notion that a “soft” structure is not a tree while a “hard” texture is the hallmark of a tree.

## B. Doubtful *Orlah* in the Diaspora

Even if it is accepted that the pineapple is a tree, there is a further question as well with regard to the permissibility of pineapple in the Diaspora. A large majority of pineapple plants do not survive more than three years. If so, unless known to be otherwise, does application of the principle of *rov* result in a determination that all pineapples are *orlah*? That would certainly seem to be the case with regard to pineapples grown in Israel where doubtful *orlah* is prohibited. However, the rule with regard to fruit cultivated in the Diaspora is that *safeq*, or doubtful, *orlah* is permitted.<sup>94</sup> Are pineapples grown in the Diaspora to be classified as *orlah* certain by virtue of application of *rov* or is the presence of even a small minority of trees that survive and yield fruit during the fourth year sufficient to render any particular pineapple doubtful, or *safeq*, *orlah* and hence permitted when grown in the Diaspora? R. Ezekiel Landau, *Zlah*, *Berakhot* 36a, rules that doubtful *orlah* is permissible even when it is known that the majority of such produce is *orlah*.<sup>95</sup>

There may be additional reason to regard pineapples as having the status of doubtful *orlah* that is entirely permissible in the Diaspora.<sup>96</sup> Although, as cited earlier, Rema rules in accordance with the position of the Ge'onim, there are authorities who maintain that the pineapple is not encompassed within the Ge'onim's classification of a tree and there are other authorities who maintain that additional criteria lacking in the pineapple are axiomatic to the definition of a tree. Moreover, Rambam, *Hilkhot Ma'akhalot Assurot* 10:11, rules that in the Diaspora even produce from an orchard whose fruit is known with certainty to be *orlah* is permitted other than to a person who has witnessed the fruit being harvested.<sup>97</sup>

<sup>94</sup> See *Shulhan Arukh*, *Yoreh De'ah* 294:9.

<sup>95</sup> See also R. Samuel Landau, *Shivat Zion*, no. 49.

<sup>96</sup> Another “doubt” that may perhaps be considered is the opinion of *Teshuvot Mishkenot Ya'akov*, *Yoreh De'ah*, no. 67, that in the Diaspora produce grown by a non-Jew is not subject to *orlah*.

<sup>97</sup> Rabbi Friedman, *Ha-Torah ve-ha-Arez*, III, 426, on the assumption that pineapples yield only a single crop in Israel because of an intervening winter but that in warmer climates they produce fruit for four or five years, considered all pineapples grown in Israel as *orlah*. However, since pineapple grown in the Diaspora may be the

Assuming that none of the considerations discussed above is of sufficient weight to be deemed halakhically dispositive, do those opinions, singly or in combination,<sup>98</sup> give rise to a degree of halakhic doubt that triggers the principle that doubtful *orlah* is permissible as applied to fruit grown in the Diaspora?<sup>99</sup> R. Jacob Weidenfeld, *Teshuvot Kokhav me-Ya'akov*, no. 16, raises a question of that nature with regard to raspberries.

Somewhat surprisingly, the underlying issue is actually one that arises with regard to adjudication of doubt concerning rabbinic prohibitions. The general rule is that doubtful matters regarding rabbinic prohibitions are to be resolved permissively. Is that canon of halakhic decision-making limited to matters of empirical doubt or does it extend as well to unresolved

---

produce of the fourth year he concludes that all pineapples grown in the Diaspora are permissible as *safek orlah*. R. Schneur Zalman Revach, *Tenuvot Sadeh*, no. 17 (Nisan-Iyar 5758), challenges Rabbi Friedman's factual assumption.

<sup>98</sup> The "doubt" regarding whether the principle includes halakhic doubt is not a doubt to which the principle applies. As demonstrated by Bertrand Russell, "La théorie des types logiques," *Revue de Métaphysique et de Morale*, vol. 18, no. 3 (May, 1910), pp. 263–301, a proposition describing a class of propositions is not itself a member of that class. That paradigm of Russell's Theory of Types is the paradox: "All Cretans are liars." I am a Cretan. Therefore, I am a liar. But if I am a liar, then when I declare "all Cretans are liars" that statement is a lie. If so, Cretans tell the truth. If I tell the truth when declaring that all Cretans are liars, then I am also a liar etc., etc. The paradox is obviated when it is realized that the proposition "All Cretans are liars" describes only other propositions uttered by Cretans but that the proposition "All Cretans are liars," which describes a class of other propositions, is excluded from the class of propositions it describes. A proposition describing or limiting the class of propositions subject to the rule applicable to doubtful *orlah* is not itself a member of the class of propositions concerning doubtful *orlah*. See also J. David Bleich, *The Philosophical Quest: Of Philosophy, Ethics, Law and Halakhah* (Jerusalem, 2013), pp. 110–111.

<sup>99</sup> See also *Tiferet Yisrael*, *Orlah* 1:5; *Zlah*, *Berakhot* 36a; R. Jacob Algazi, *Ar'a de-Rabbanan*, no. 321. According to some authorities, that rule may be applicable in the Land of Israel as well. *Tosafot*, *Yevamot* 81a, s.v. *mai*, asserts that the biblical sanctity of the Land of Israel lapsed upon the exile of the people of Israel and consequently the prohibition against *kilei ha-kerem* is only rabbinic in nature. *Mishneh la-Melekh*, *Hilkhot Ma'akhalot Assurot* 10:11, asserts that, according to *Tosafot*, obligations with regard to *terumot* and *ma'asrot* continue only by virtue of rabbinic edict. *Pri ha-Adamah*, I, 25b; *Minhat Hinnukh* 246:8; R. Shlomoh ha-Kohen, *Teshuvot Bikkurei Shlomoh*, no. 25; and *Arukh ha-Shulhan*, *Yoreh De'ah* 294:10, maintain that, since the sanctity of the Land of Israel has lapsed, the rule that doubtful *orlah* is permitted applies in the Land of Israel as well. *Arukh ha-Shulhan* points out that Rambam, disagreeing with *Tosafot*, rules that the sanctity of the Land of Israel has not lapsed but that *terumah* and *ma'asrot* are not biblically binding because the majority of Israel no longer dwells in the Land of Israel. See also *Yabi'a Omer*, VI, *Yoreh De'ah*, no. 24, s.v. *bar min dein* and note appended to *Yehaveh Da'at*, IV, no. 52.

doubt regarding matters that are the subject of disagreement between halakhic decisors?

*Pri Megadim*, *Yoreh De'ah*, *Siftei Da'at* 104:5, suggests that the principle does not apply to matters of halakhic dispute<sup>100</sup> because the doubt is not genuine in the sense that only a doubt that is not resolvable qualifies as a doubt for this purpose. Doubt with regard to halakhic decision-making involves only a “lack of wisdom” because wiser men would be capable of definitively adjudicating the issue in controversy. That is also the position of *Sha'ar ha-Melekh*, *Hilkhot Yom Tov* 2:6.

Much earlier, *Teshuvot Radvaz*, II, no. 486, and IV, nos. 19 and 297, discussed the more general principle that matters of doubt with regard to rabbinic prohibition are resolved in accordance with the permissive opinion. Radvaz excludes from the ambit of that principle matters of halakhic controversy other than disputes left unresolved by the Gemara and marked as unresolvable by application of the term of “*teiku*.” Radvaz maintains that other controversies are resolvable if pursued assiduously.<sup>101</sup> Quite consistent with that position, *Teshuvot Radvaz*, III, no. 531, excludes matters subject to halakhic controversy from the ambit of the canon regarding doubtful *orlah* in the Diaspora as well.<sup>102</sup>

<sup>100</sup> *Pri Megadim* suggests that disposition of this issue may be contingent upon which of the two lines of reasoning expressed by *Shakh* regarding a particular matter is accepted. However, in his *Sha'ar ha-Ta'aruvot*, *Ha-Helek ha-Sheni*, chap. 1, s.v. *ve-bineh lah be-lah* and in *Eshel Avraham*, *Orah Hayyim* 656:8, *Pri Megadim* states that the rule applies to unresolved halakhic controversies as well. In his introduction to *Hilkhot Pesah*, *Ha-Helek ha-Rishon*, chap. 2, sec. 5, he tentatively ascribes an opposing position to *Levush*.

<sup>101</sup> See also *Knesset ha-Gedolah*, *Orah Hayyim* 260, *Bet Yosef*, sec. 6 and *Teshuvot Maharashdam*, *Even ha-Ezer*, no. 165.

<sup>102</sup> There is, however, ample reason to distinguish in this regard between *safek orlah* and a *safek de-rabbanan* and to exclude only matters of controversy from the rule pertaining to doubtful *orlah*. *Mishneh la-Melekh*, *Hilkhot Tum'at Zara'at* 2:1, observes that were a certain rule based upon a *halakhah le-Mosheh mi-Sinai* it could not apply to a matter of doubt predicated upon a halakhic issue because “such cannot be termed a doubt for everything is clear in Heaven.” In addition, R. Akiva Eger, in a responsum including in *Drush ve-Hiddush* (Brooklyn, 5709), p. 179, asserts that, despite the rule that a *safek mamzer* is biblically permitted to marry a person of legitimate birth, that is so only if the doubt is not with regard to a matter of fact but with regard to a matter of Halakhah. R. Akiva Eger's reasoning is that the Torah could not have excluded that type of doubt from the prohibition because “in the Torah there is no doubt with regard to law.” Arguably, that principle should apply as well to a doubtful *orlah* permitted by the *halakhah le-Mosheh mi-Sinai* regarding *orlah* in the Diaspora. However, R. Isaac Elchanan Spektor, *Ein Yizhak*, I, *Even ha-Ezer*, no. 11, *anaf* 3, takes exception to R. Akiva Eger's position. There is a similar rule with regard to tithing of animals. The obligation to sanctify the tenth animal pertains only if the obligation is known with certainty. The Gemara, *Berakhot* 58a, indicates that if

On the other hand, *Ma'amar Mordekhai*, *Orah Hayyim* 203:3, rules that any doubt that no one knows how to resolve constitutes a genuine doubt. Moreover, Radvaz' distinction seems to be contradicted by the explicit statement of the Gemara, *Avodah Zarah* 7a: "R. Joshua ben Korḥah said, '[With regard to matters pertaining to] Torah [law] follow the stringent [authority]; with regard to matters pertaining to [the law of the] scholars follow the lenient [authority].'" Consequently, it is not surprising that other authorities, including Rema, *Hoshen Mishpat* 25:11; *Shakh*, *Yoreh De'ah* 242; *Kizur Hanbagot Hora'at Isur ve-Hetter*, sec. 10; and *Bet Shmu'el*, *Even ha-Ezer* 155:34, express the opposite view.<sup>103</sup>

*Kokhav mi-Ya'akov* strongly endorses that view even with regard to doubtful *orlah* and finds support for that position in *Pnei Yehoshu'a*, *Berakhot* 36a, s.v. *mai da'atekha*, and *Shulḥan Arukh*, *Yoreh De'ah* 294:13. The latter source is a ruling regarding a species of fruit whose status with regard to *orlah* is the subject of a talmudic controversy between R. Eliezer and R. Akiva. *Shulḥan Arukh* rules according to the stringent opinion of R. Eliezer with regard to the produce of the Land of Israel but according to the permissive opinion of R. Akiva with regard to the produce of the Diaspora. That conclusion is entirely compatible with the view expressed by *Ma'amar Mordekhai* 203:3 to the effect that the controversy between the Ge'onim and Rosh cannot be resolved and is therefore adjudicated permissively in the Diaspora.

Rema's ruling, *Orah Hayyim* 203:2, declaring the appropriate blessing to be "who created the fruit of the earth" is not in conflict with *Shulḥan Arukh's* ruling that that species is regarded as a tree in the Land of Israel for purposes of *orlah*. The default position regarding blessings is "who created the fruit of the earth" but insofar as *orlah* is concerned the matter remains the subject of doubt. Consequently, rules *Ma'amar Mordekhai*, even *orlah* whose status is doubtful because of halakhic controversy is permissible in the Diaspora.

In the context of resolving matters of rabbinic doubt there is a controversy whether halakhic "doubt" includes not only factual doubt but

---

there is an irresolvable halakhic controversy regarding the obligation of a particular animal or animals such animals are excluded from the obligation. That source was cited earlier by R. Moshe Shapiro, *Emek Yehoshu'a* (Pietrkow, 5670), I, 79, in making the same point with regard to the rule concerning tithing of animals.

<sup>103</sup> See also *Mas'at Mosheh*, *Orah Hayyim*, no. 1; *Teshuvot Even Yehoshu'a*, no. 15; *Emek Yehoshu'a*, I, 79; *Teshuvot Divrei Malki'el*, V, no. 140; *Erekh Lehem*, *Yoreh De'ah*, no. 294; *Teshuvot Zur Ya'akov*, no. 107; *Teshuvot Maharsham*, I, no. 196; as well as *Yabi'a Omer*, VI, *Yoreh De'ah*, no. 24 and *Yehaveh Da'at*, IV, note appended to no. 52.

doubt regarding matters of “lack of wisdom” as well. It is to be anticipated that the similar principle, to the effect that “doubt” with regard to *orlah* in the Diaspora should be resolved permissively, includes doubt arising because of conflicting halakhic views as well.

In short, adjudication based solely upon the expressly stated opinions of early-day decisors may result in a finding that the pineapple is a fruit.<sup>104</sup> Acceptance of one or more of the additional criteria formulated by latter-day authorities would yield the opposite conclusion. If the latter opinion is accepted there is no problem regarding *orlah* even with regard to pineapples grown in the Land of Israel.<sup>105</sup> The controversy between those scholars is essentially whether consideration should be given to criteria that are not directly expressed in the writings of early-day authorities. The majority of contemporary scholars regard the ultimate status of pineapple as subject to halakhic doubt with the result that pineapple crops cultivated in the Land of Israel are prohibited as doubtful *orlah* while those grown in the Diaspora are permitted.<sup>106</sup> That position also entails the conclusion that the appropriate blessing is “who creates the fruit of the earth.”

<sup>104</sup> This is the thesis of Rabbi Halberg’s *Bi’ur Din ha-Ananas*. It is also the position of *Shevet ha-Levi*, IV, no. 165, regarding papaya. It is not clear what his position is with regard to the produce of a tree that does not yield fruit for more than three years. If it is established that pineapple can produce fruit beyond a three-year period his conclusion would apply to pineapple as well. This is also the position of Rabbi Friedman, *Ha-Torah ve-ha-Areẓ*, III, 426 and *Emunat Itkha*, no. 115, regarding pineapples cultivated in Israel that thrive for more than three years.

<sup>105</sup> This is the position of Rabbi Revach in *Tenuvot Sadeh* no. 5 and no. 17 as well as in *Helkat ha-Sadeh*, I, no. 15 and of Rabbi Ben-Zion Halberstam’s *Teshuvah be-Inyan ha-Ananas*.

<sup>106</sup> This is the position of Rabbi Perlmutter, *Kodesh Hillulim*, no. 38, sec. 46, and of the numerous authorities who regard papaya as doubtful *orlah*. This is also the position of Rabbi Friedman, *Ha-Torah ve-ha-Areẓ*, III, 426, regarding pineapples grown in the Diaspora that may be the produce of the fourth year.