

Literature, Politics, and the Law: On Blacksmiths, Tailors, and the Demolition of Houses

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I. Introduction

In 1962, Haim H. Cohn, at the time the Attorney General of the State of Israel, approached Shmuel Yosef Agnon and asked him to contribute to a collection of articles being prepared to commemorate the seventy-fifth birthday of Pinhas Rosen, then Minister of Justice. Agnon, who had not as yet been awarded the Nobel Prize but was nevertheless the most widely acclaimed living author in Israel, agreed, and the same year contributed a collation consisting of seventeen short stories, entitled "A Small Book of Tales."¹ One of the stories in this collation is *The Kilikov Trial or a Life for a Life*, which is quoted here almost in full.²

I have still not concluded all my praise for Kilikov, for not for its worldly qualities alone is Kilikov to be extolled, but it is to be praised for the judicial decisions of its judges. What are the decisions of its judges? It is told that once, during the Polish wars, a gentile killed his friend in Kilikov. Maliciously or accidentally? From the judgment it emerges that he was killed with malice. He was put in jail and convicted of killing, as a man is convicted when murdering another with malice.

When the murderer was taken out to be hanged it was remembered that he was a blacksmith by profession and that in all Kilikov there was no other blacksmith. And indeed a city cannot cope without a blacksmith, who serves the needs of many.

They investigated and found that in the city there were two tailors but that they could make do with one. The judges reconvened and said: instead of the blacksmith we shall hang one tailor and we shall let the blacksmith live, for the city cannot manage without a blacksmith but one tailor will suffice.

They acquitted the blacksmith and brought him back from the hangman's house and in his stead they hanged one of the two tailors living in the city. Which of the two I do not know, but I do know a poem which the wise man Mordechai Ben David Starlisker, known as Marbad Set, composed about it, the conclusion of which hints at its beginning:

Here there are two who are tailors
One is put on trial and he will be punished severely
Then shall the country see your wisdom and be fearful
And thereafter no man shall willfully offend.

We shall let Kilikov be for the time being, and move to Jerusalem, where the Supreme Court was asked to deal with the issue of the demolition of a house belonging to a terrorist. In March 1997, Mussa Abed al-Kadr J'emimat left the village of Zurif in the Hebron District and blew himself up in a coffee house in Tel Aviv. Three women sitting in the coffee house were killed and several others were injured, many of them children and infants. As had occurred in many other cases in the past, the Military Commander of Judea and Samaria made use of the powers conferred upon him by Regulation 119 of the Defense (Emergency) Regulations 1945 (hereinafter, Regulation 119) and issued an order for the demolition of the house in the village of Zurif, where the terrorist, his wife, and four children lived.³ The terrorist's family petitioned the High Court of Justice for an injunction to prevent the demolition. The petition was dismissed by a majority of two judges to one.⁴ The short judgment was primarily comprised of the opinions of President Aharon Barak and Justice Mishael Cheshin. President Barak dismissed the petition. For him, the decisive factor was that the demolition of the houses of suicide-terrorists would be likely to deter other terrorists from committing terrorist acts in the future. Justice Goldberg agreed with President Barak.⁵ Justice Cheshin, in the minority, upheld the petition. In his view, demolition of the house was contrary to the fundamental principle of law that the courts will only punish a person who has actually committed a crime.

Let us now return to the fictional Kilikov, where, following the committal of the murder, the judges held that it was necessary to take the life of the innocent tailor, whose connection to the murderer was completely coincidental: bad luck led him to live in the same city as the murderer. In Kilikov, too, so it appears from the story, the killing of the tailor had a deterrent effect: so that "thereafter no man [would] willfully offend."

There is, of course, a significant difference between the demolition of houses belonging to innocent persons and the taking of innocent lives. Indeed, the taking of life is infinitely worse than the confiscation of property or its destruction. However, it would seem that the special gravity associated with the taking of life does not negate the basic similarity between the issues emerging from the judgment and Agnon's story, respectively. In both cases society is required to cope with the need to harm innocent people in order to defend the peace and security of that society. The degree of harm caused to the innocent aggravates the dilemma, but does not change its essence. This conclusion also emerges from the stance taken by Justice Cheshin, whose judgment in the *J'emimat* case includes a number of references to the implied analogy between the demolition of the house of persons who have not committed any crime and

the taking of lives of persons who are innocent.

The purpose of this article is to consider Agnon's short story alongside the opinions of two justices of the Supreme Court in the *J'emimat* case—those of President Barak and Justice Cheshin. The purpose of this combined investigation is not to engage in an analysis of the legal issues relating to the demolition of houses, a highly complex matter which lies at the center of the *J'emimat* case as well as in the center of a number of other decisions of the Supreme Court;⁶ it is also not an attempt to find an answer to this question through any literary context. The combined discussion which follows aims to examine the manner in which artistic expression accentuates the central dilemma with which both the legal and the literary texts are concerned, as well as to discuss a number of points of similarity and dissimilarity in the effects and functions of legal versus literary texts.

II. The Demolition of Houses in Jerusalem

We all tell stories in order to present our case, to persuade, to gain respect and confirmation. All of these stories "are based on selections, distortions, suppressions and emphases which are both deliberate and non-deliberate," which are jointly "means of emphasis and deletion."⁷

To the list of human stories, one can, of course, add the stories told by jurists, and among them the judgments, which are the legal stories emanating from the judges.⁸ The judgments, like other stories, make continuous use of the same methods: selections, emphases, suppressions, and the like, whose purpose is to lead or direct to the objective which the author desires to attain. Naturally, the "means of emphasis and deletion" which every judge selects, whether knowingly or not, help blur one facet of the matter being considered by the judgment, emphasize another and draw the author closer to the objectives which he wishes to reach. This is also the situation in the *J'emimat* case. President Barak and Justice Cheshin start from the same premise—the need to decide the legality of the demolition of the terrorist's house—however, each one creates a text of an entirely different character by emphasizing certain factors, ignoring others, and choosing certain rhetorical tools. I shall illustrate this phenomenon by referring in detail to the respective opinions of the judges.

The judgment of President Barak is written in a dry, factual style. It is free of any personal or emotional overtones or display of feeling on the part of the writer concerning the horrifying terrorist act in consequence of which the court was required to sit in judgment, or in relation to the need to decide on the destruction of the home of a woman and her children. In contrast, these feelings are clearly reflected in the parallel choice of language of Justice Cheshin. Thus, in his judgment, President Barak calls J'emimat a "terrorist" (and not a "suicide-murderer," as Justice Cheshin chooses to call him); the acts of the terrorist

and their terrible consequences are described by President Barak in a purely factual manner (whereas Justice Cheshin describes them as "the murder of innocent souls"); President Barak chooses to define the demolition of the house as an outcome which is indeed "grave" for the family of the terrorist, but states that it is not a "punishment"; it is rather a "deterrent." He prefers not to refer to the issue of the innocence or guilt of the family members. Possibly, the reason for this choice of dry, unemotional language is the desire of the writer not to appear angry and feelings following the murder have led him to authorize the demolition. However, for the reader, the very brevity of the descriptions acts as a rhetorical tool which gives rise to an extremely powerful emotional reaction. It should be remembered that the words of President Barak are directed towards a particular community. Among this community of Israelis, who are well-aware of the circumstances in which the text is written and its background—repeated acts of terrorism, as a result of which hundreds of Israelis have lost their lives or have been injured—the dry descriptions of President Barak make a statement which tends to emphasize and accentuate the horror of terrorism, whereas it is likely that the use of extravagant descriptions would have tended to lessen the effect. Accordingly, the restrained descriptions actually help to create an emotional atmosphere or climate which makes it easier to accept the result reached by the judgment: the need to demolish the house because of the deterrent value of that act.

The sentences selected by President Barak in his judgment are short, sharp, and follow one after another in a concise and direct logical process—which does not permit delays or diversions—towards their goal. This linguistic structure is particularly prominent in the final paragraph of the judgment, which summarizes the rationale behind the general principle of law applied in Israel in relation to the demolition of houses:

We are aware of the fact that the demolition of the structure damages the home of the first Petitioner and her children. That is not the purpose of the demolition order. It is not a punishment. Its purpose is deterrence. At the same time, its consequences are grave for the family members. The Respondent believes that this is vital in order to prevent further harm to the lives of innocent persons. He is of the view that pressure from the families is likely to deter the terrorists. There is no complete guarantee that this measure is efficacious. But within the framework of the few measures which are left to the State to defend itself against "living bombs," this measure too should not be scorned.

Barak's linguistic selections direct the readers to a single conclusion. When "grave consequences" are set opposite the possibility of "preventing further

harm to the lives of innocent persons" a simple equation is established which has an inescapable result: the demolition of the house. President Barak introduces a statement which is in essence a narrative amounting to a clear, simple, and inevitable determination, both from a legal and moral point of view; it possesses a simple theoretical nature and at least the semblance of being devoid of emotional considerations. Helping to achieve this result is the stress which the judgment places on the foreign dimensions of the event. The village of Zurif, it would appear from the judgment, is part of an area in which the decisions are made by the "Military Commander" who has jurisdiction in that area only, and who derives his powers from old mandatory legislation which also is valid only in that area. In contrast, Justice Cheshin neutralizes the foreign elements of the situation by means of the nexus which he establishes between the incident, a Basic Law—which in fact comprises a chapter of the constitution of the State of Israel (Basic Law: Human Dignity and Liberty)—and local traditions (his citations from religious sources). The result of the "means of emphasis and deletion" adopted by President Barak and his choice of drafting and text is the blurring of the dilemma lying at the heart of the situation being adjudicated by him, or at least the transformation of a dilemma which in reality is extremely complex and difficult into one which is one-dimensional in nature.

As will be seen below, Justice Cheshin chooses to define the issues otherwise, and, making use of the same materials as are before President Barak, creates a completely different narrative. The two sides of the equation applied by President Barak (damaging the home of the terrorist's family compared to saving the lives of innocent people) are not mentioned by Justice Cheshin. In contrast, he introduces into the legal arena, with great stress, a component which in his view is central and which is completely absent from President Barak's judgment. Reference here is to the "fundamental principle of law," namely the principle that only a person who has committed a crime is to be punished. Justice Cheshin indeed points to the legal grounds leading him to uphold the petition, but the legal argument is far from being at the center of his thinking. The judgment leads us down a surprisingly winding path towards a final result which is at polar extremes to that reached by President Barak. It commences with a paragraph a few sentences long—all of which reiterate the same concept: Regulation 119 of the Defense (Emergency) Regulations confers on the Military Commander power not only to order the demolition of one house in the village of Zurif, but also the destruction of all the houses in the village, or all the houses in the street in which the terrorist lived, or larger portions of the house in which the terrorist's dwelling was located. If this is the case, he states at the end of the passage, "*prima facie*, the Commander acted within the boundaries of his powers, and why, therefore, should the claim of the Petitioner be heard?" The irony in this statement is clear. On the face of it, it appears to support the position of the Military Commander and confirm that he acted within his powers; however,

In fact, the deliberate reiteration of the significance of this power instills in the reader a harsh impression of the draconian nature of that power, which in practice enables the demolition of an entire village in response to the crimes of a single person. From here, it is a short way to the conclusion which Justice Cheshin wishes to reach: the introduction of grave reservations about the very use of powers under Regulation 119, even if used only with respect to the demolition of a single house. From this premise, Justice Cheshin leads us towards a selection of well-known quotations from ancient sources:

This fundamental principle we have all known and repeated from the beginning of time: a man will bear his iniquities and for his own sins shall he be put to death. As the prophet said: "The soul that sinneth, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son: the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him" (Ezekiel 18:20). No one is punished unless he is given due warning and no one is sanctioned save the guilty party alone. This is the law of Moses and it is written in the book of the law of Moses: "The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall be put to death for his own sins" (II Kings 14:6).

These values lead us directly towards the early days of our people, and current times are like those days: it shall no longer be said that "the fathers have eaten sour grapes and the children's teeth are on edge" (Jeremiah 31:29).

This combination of sources, as set out by Justice Cheshin, give his words a powerful moral foundation. By means of this combination the author directs us towards a fundamental and profound level, possessing a mythical and axiomatic value which extends beyond Regulation 119, and which in the judge's view supersedes it. Justice Cheshin seems to point us towards treasures of ancient wisdom in order to draw from them the truth which must be applied in the case at hand. From this level, located in the national-collective but at the same time universal dimension, Justice Cheshin returns surprisingly to the personal dimension, and with it he closes his judgment:

I experienced great mental turmoil before I was able to say the things I am saying now. This is the law [Torah] I learned from my teachers and this is the law I know. I can do no other.

The contents of this paragraph reveal the feelings of the judge and the emotional and mental processes which he underwent prior to reaching his determination. This disclosure has the power to carry with it even those who hold a contrary view when starting to read the judgment: opponents to the judgment

may find themselves swayed as awareness, understanding, and even support for the opposite view emerge from the judgment, feelings which may once have been the province of the writer until that "great turmoil" which swept through him caused him to make the decision which he eventually rendered. Justice Cheshin succeeds in creating a very personal narrative, and together with its primary purpose—formulating and rationalizing a judicial determination—it possesses appreciable aesthetic value and strength. However, the resulting effect is similar to the effect which is created by the judgment of President Barak: the obfuscation of the quandary lying at the heart of the situation being considered. The rhetoric of the judgment diverts the attention of the reader from the specific dilemma, namely, injury to the innocent versus protection of the public, towards the fascinating picture of a judge struggling with the dictates of his conscience, his fundamental legal and moral values and personal sense of justice, and the dictates of the hour, that "great turmoil," described by Justice Cheshin, which in essence is the heart of the judgment. It is fascinating, and beautiful and important, but it diverts us from the quinescence of the dilemma with which the judgment should deal.

III. "Literary Stories" versus Other Stories

I have considered the various choices made by President Barak and Justice Cheshin in their judgments. These are choices which certainly possess good and proper grounds from the subjective view points of the writers; however, it should be remembered that they include, as do all choices, an element of personal preference. Thus, in the same way as Justice Cheshin prefers to concentrate on the question of the supremacy of a fundamental principle of law and elaborate on his personal judicial difficulties, this time President Barak prefers not to give any hint of his doubts or personal feelings.¹⁰

One may ask whether—when considering the process of adjudication—there is room for this type of accentuated preference. Do not choices and preferences concerning the shaping of text, necessarily create a certain distortion of reality, whereas adjudication and the process leading towards it are actually supposed to reflect reality? Is not a judge required to describe things as they actually are, and refrain from any preconceptions or use of measures which may "falsify" his description of the true state of affairs? Is not the judge required to refrain from various selections and choices, which help him reach the results which suit him, but which at the same time do not permit a true and "pure" perception, in so far as possible, of the issue which he is judging? Is not the creation of a narrative of one type or another contrary to the very nature of the judge's function? This is not the place to expand on these complex issues, which apparently do not have an easy answer.¹¹ Similarly, it would seem that even if this is an undesirable phenomenon, judges are incapable of delivering judgments

free from all of these personal choices and preferences.¹² In any event, the significant point is that there is no room for questions of this type when we are dealing with artistic texts (literary or otherwise), and only when we are dealing with such texts.

In this context, there is a distinction between "literary" stories and all other stories. When reference is to an artistic, literary text it is clear from the beginning that authors are not required to limit themselves in any way. They are not required to reflect any reality whatsoever and are entitled and permitted to "distort" reality as they wish. Their choices and preferences, their deletions and emphases, and their rhetorical tools are all fitting means which are subject to their free and full personal choice. This is the nature of literary writing. This, in the terminology of Jacques Derrida, is "the lawless law of fiction."¹³

In this context, Dan Miron writes:

All these stories [the stories which are not literary] being based on selections, "distortions," repressions, and deliberate emphases, the artistic story contains great power in presenting the fundamental essence of the tale and the act of narrative, as all these means of emphases and deletion are part of its declared character, with a right to selection and "arbitrariness" which is embedded in its aesthetic substance.¹⁴

On this basis, I would like to examine the literary text in comparison with the legal text and consider whether the former is indeed more powerful in presenting the fundamental essence of the story.

IV. The Hanging of the Tailor in Kilikov

The tale of *The Kilikov Trial* is primarily constructed from a short and tight factual description of a number of incidents. It does not contain an express declaration of the propriety of the result—the hanging of the tailor. In this way it is, of course, distinguishable from the judgment in the *Jenimat case*, which discloses, as is required of every judicial decision, the clear stance of every one of the judges in relation to the question of the demolition of the house. At the same time, this limited story itself emphasizes the essence of the problem with which the judgment is concerned, as well as the dialectic connected with it, in a sharp and powerful manner which is absent from the judgment. Accordingly, from certain points of view, it is more disturbing than the judgment.

Initially, I shall consider some of the linguistic and plot choices in the story. The story tells of an event which took place "once during the Polish wars," not in a Jewish area nor in a Jewish community, but in a Polish community. At the same time, the incident occurred in an area where there was a Jewish community. It is told that the event itself was known to the members of the Jewish community, and one of them, as is pointed out at the conclusion of the story,

even composed a poem about it. By means of these choices, the story creates a complex synthesis between elements which are both local and foreign. The result is the positioning of the plot in a dimension which is at one and the same time both near and far. On one hand, it is characterized by a foreignness which enables us to examine the incident in an objective manner, free of inter-communal, religious, cultural, and other contexts; and on the other hand, it is positioned close enough to enable us to accept the story as something conceivable, which is likely to take place even in the community of the storyteller, as a matter which has local significance alongside its foreign significance.

This complexity is also presented in another way. I have mentioned Agnon's choice of a minimalist narrative structure. The story does not refer to the question of the innocence or contributory guilt of the non-Jew who is murdered. The circumstances of the murder are not mentioned. Nothing is said of the character or personality of the murderous blacksmith nor indeed of the tailor hanged in his stead. The story as a whole is free of any hint of emotional or psychological attributes. However, there is a good reason for all these choices: all these details are subordinate to the essence. They are not necessary to the question which arises. On the contrary, had they been mentioned, they would have tended to obscure that question. Similarly, the story does not contain any commentary on the facts being related. The hanging of the tailor is not defined as punishment, nor is it defined as an act which is not punishment. The story merely states that these are the facts. This is what happened in Kilikov. Every woman and man will decide their own position with regard to these facts.

What is left is only the refined narrative, at the center of which stands a man brought to his death by circumstances outside his control. This man is every woman and every man. The innocent tailor, the gentle Pole, could also be a Jewish tailor, or an Arab woman in the village of Zurif.

From one vantage point, the story may be considered part of the long literary tradition which contains satirical descriptions of legal systems, whose purpose is to emphasize the power of law to do wrong or distort, and through which is presented, in the words of Jean-Jacques Lecercle, "an *contrario* defense of an ideal of judicial fairness and the correct administration of justice."¹⁵

The satire is directed, *inter alia*, towards ridiculing the mistakes and wrongdoing of society, in order to cause us to react with the appropriate disapproval towards various deviations from proper and desirable norms.¹⁶ Indeed, it seems that in the light of the outrageous reversal of justice in Kilikov, the reader's conviction of the vital importance of the principle *nullum crimen nulla poena* is significantly strengthened. This principle, which means that only the performer of a certain act is subject to punishment, is a fundamental principle recognized in every system of law and in every cultured society (hereinafter, "the principle of personal responsibility"). Deviation from this principle, such as that described in the story, violates our sense of justice, and causes us moral outrage.

Agnon's short story awakens and strengthens the rationale underlying the principle of personal responsibility by the use of irony. The expression "praise for Kilikov" in the opening sentences of the story possesses, so it seems, a clear ironic significance, as does the poem concluding the story, and indeed as does the story as a whole. The irony is created by the incongruity between the act (the murder committed by the blacksmith) and the consequences of that act (the hanging of the tailor).¹⁷ This incongruity cries out. To those exposed to it, it gives rise to the feeling that they are witnesses to a moral abomination. This is the "fundamental essence" of the story and the dilemma which lies at its center; the same dilemma which became blurred in the judicial decision in the *J'enninar case*. In this manner, Agnon managed to achieve the result which we often see in the legends and parables of Talmudic sages: the clear and sharp presentation of a complex situation, by means of a brief and sparing sketch.

I have noted that the story of *The Kilikov Trial* does not contain an express determination of the question of the propriety of the result reached by the judges—the hanging of the tailor. However, it still remains to be examined whether one may infer a certain stance from it. It seems that the hanging of the tailor is portrayed in the story as an act which is abhorrent from the moral point of view. Nevertheless, one cannot ignore a number of details which emerge from the story, which have the effect of emphasizing the dilemma bound up within the issue. In this brief text, Agnon twice asserts that the blacksmith is essential to the welfare of the community: "And indeed a city cannot cope without a blacksmith, who serves the needs of many" and "for the city cannot manage without a blacksmith." Similarly, the final line of the poem that concludes the story reveals that following the hanging of the tailor the "rule of law" strengthened and "thereafter no man shall willfully offend." Accordingly, one may ask the specific question whether ultimately the public good required the hanging of the tailor, as well as the more general question: should an innocent man be killed in order to prevent consequences more serious than his death?¹⁸ That was, for example, the dilemma of Agamemnon: whether to sacrifice his daughter Iphigenia in order to save his ships or whether to refrain from doing so, even at the price of the lives of other people.

The story of *The Kilikov Trial* is rife with expressions which direct the reader towards Jewish *Halachic* sources: "A Life for a Life" (*nefesh tachat nefesh*), which is the subtitle of the story, "accident" (*shogeg*), and "malice" (*zadon*). These expressions refer to the same Jewish-cultural sources to which Justice Cheshin alludes in his judgment, the literature of the sages and Biblical sources. However, contrary to the implications emerging from Justice Cheshin's judgment, these sources also do not provide a definitive answer to the questions posed above nor does it resolve the question of the relationship between violations of the rights of an individual and the good of the public. On one hand, there are the Biblical sources which are quoted by Justice Cheshin in his judg-

ment, which proclaim a complete commitment to the principle of personal responsibility—and one should also point out the *Halacha* from the era of the *Mishnah* forbidding the killing of even one Jewish soul to save the lives of many¹⁹—but alongside these are *Halachic* sources which justify certain deviations from both principles when it becomes necessary for the public good. Thus, the *Talmud* tells of a man who rode on a horse on Saturday in the days of the Greeks, and the court ordered that he be punished by stoning, even though according to the *Halacha* the court could not order a man to be stoned for such an offense. The grounds for the decision were the needs of the hour. The court wished, by means of this extraordinary punishment, to deter and prevent future offences.²⁰ The *Rambam* (Rabbi Moshe Ben Maimonides) held that on occasion it is permitted to violate the rights of an individual where this is necessary for the public good: "In the same way as a doctor amputates the arm or leg of a person in order that he should live, thus, the court may hold at a certain time that some commandments may be temporarily disobeyed."²¹ These examples are indeed not identical to the facts of the story, but they point to a certain ambivalence on the part of Jewish law with regard to the need to injure an individual beyond the requirements of the law, where such an injury is vital to the public good.

Does the ironic dimension of *The Kilikov Trial* assist us to identify the definitive determination or position taken on the issue being considered by the story? In my view, the use of irony in *The Kilikov Trial* is primarily a way of perceiving the complexities of the situation. This perception includes a criticism concerning the morally problematic nature of the situation being described, but does not advocate a positive stance, such as a stance proclaiming that there is a duty to refrain from hanging the tailor. Thus, it is possible to imagine an ironic description of a situation, which even if perceived to be undesirable or morally outrageous, leaves one no choice but to resign oneself to it, perhaps in accordance with the position of the author who, for example, perceives the human condition as a whole as ironic. In other words, irony does not necessarily pose a definitive operative determination or course of action which conforms to the moral feelings which arise as a result of the ironic description. Indeed, it seems that the story leads to a certain mode of thinking which cannot be ignored. Perhaps, looked at broadly and comprehensively, it was right to sacrifice the tailor on the altar of the general good? Can there be situations where it is proper to protect the public at any price, even where the price entails relinquishing moral logic? Agnon demonstrates how hopeless are such questions.²²

This dialectic, which brings to the fore the problematic nature of the situation and simultaneously points to it as being incapable of being properly and definitively resolved, does not allow us the relative tranquillity achieved by virtue of a legal decision, whether it is a decision such as the one reached by President Barak or a decision such as that of Justice Cheshin. The Agnon story poses the

question, with all its force, with all its moral unpleasantness, stripped of any pretense of being directed towards securing the interests of the whole. In the same way, Yoseph Dan comments: "Questions to which the answer is very easy when one talks of national interests, become insoluble when one talks of the fate of an individual."²¹ Accordingly, this story—which comes to no conclusion and which from a certain point of view perhaps hints at an inability to reach an absolute, correct conclusion in this type of dilemma—is more disturbing than the judgment.

Paradoxically, the reason for this difference is the influence of the artistic design expressed by the literary text. It is actually this design, which is *prima facie* intended to distance the text from its realistic, down-to-earth dimensions, which transforms the dilemma lying at the heart of the story of *The Kilikov Trial* to one which is clear and powerful, and gives it depth and layers which are absent from other texts. It makes us focus on the individual, and it gives that individual's fate depth and meanings that are absent from other kinds of texts. While the legal text "translates" the conflict into several general "closed truths," almost every sentence in Agnon's story opens new directions of thought and considerations. It makes us look at the conflict as a part of a web, which cannot be fully conceived, a web which remains hidden in the judgment. These examples illustrate in a highly expressive and powerful manner the vital character and important function of the literary statement within the context of a legal determination.

V. Conclusion

The issue of the demolition of houses is, in actual fact, a political one. The political situation, which represents the current power relationship equations, makes the legal outcome possible. The judgment gives the issue a legal garment which hides those dimensions. But this pretext is upset by Agnon's short story, which demonstrates how a similar situation is resolved by means of exposed power. Thus, literature reveals the true nature of the conflict, which itself overpowers the ethical and humanistic questions that are inevitably a part of it.

Martha C. Nussbaum explains the manner in which good literature influences us:

Good literature is disturbing in a way that history and social science writing frequently are not. Because it summons powerful emotions, it disconcerts and puzzles. It inspires distrust of conventional pieties and exacts frequently painful confrontation with one's own thoughts and intentions. One may be told many things about people in one's own society and yet keep that knowledge at a distance. Literary works that promote identification and emotional reaction cut through those

self-protective stratagems, requiring us to see and to respond to many things that may be difficult to confront—and they make this process palatable by giving us pleasure in the very act of confrontation."²²

Possibly, a person who, in certain circumstances, permits the violation of the rights of an individual innocent of any guilt, where he believes that this is required for the good of the whole, stands at the top of a slippery slope. Possibly, one who stands at the top of such a slope cannot help but slide to its depths. Agnon sketches for us the bottom of such a slope. He does not propose a definitive solution to the question of the inevitability of the descent to its depths. us to look at the slope and consider the significance of the slide, however, he forces This perception is the painful confrontation between goals which must be achieved and the moral feelings which stand as an obstacle to their achievement, the confrontation which is hinted at in the words of Nussbaum: the confrontation between the safety of the whole and the rights of an individual, which is left indistinct in the legal text, and exposed in all its sharpness in the artistic text. The internal result of such confrontations, as is demonstrated by the judgment in the *J'venimar case*, is always personal. There are those who will halt at the peak of the slope in the light of this internal confrontation. There are those who will say that there is no choice, and on occasion that we are obliged, even at the tremendous price which was accepted by the judges of Kilikov, to reach the bottom. And there are those who, luckily, will not be required to render a normative and binding judgment in this matter, but will wish to point out to us the sheer-ness of the slope.

Notes

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¹See *Commemorative Volume for Pinchas Rosen*, edited by Haim H. Cohn (13-23).

²The story was republished in Shmuel Yosef Agnon's *Takhrikh shel sipurim* (196).

³The Defense (Emergency) Regulations are mandatory legislation valid in the area of Judea and Samaria. What follows are relevant sections from Regulation 119(1): "A Military Commander may by order direct the forfeiture to the Government . . . of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is

satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of any offence against these Regulations. . . . And when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything in or on the house, the structure or the land."¹⁷

H.C.J. (High Court of Justice) 2006/97 *Ganimat v. OC Central Command* (hereinafter, the *J'enirnat case*). This document has not yet been published.

¹⁸Justice Goldberg, in a judgment comprising only four lines, also refers to the consideration of deterrence, and holds that it is sufficient that it is believed with the discretion of the Military Commander regarding the necessity for the demolition.

¹⁹Other judgments rendered by the Supreme Court of Israel on this issue include: H.C.J. 4772/91 *Hizran v. Military Commander of Judea and Samaria*, 46(2) P.D. 150; H.C.J. 2722/92 *Alamrin v. Military Commander of the Gaza Strip*, 46(3) P.D. 693; H.C.J. 6026/94 *Nazal v. Military Commander of the Gaza and Samaria*, 48(5) P.D. 338; and H.C.J. 1730/96 *Sabiah v. Military Commander of Judea and Samaria*, 50(1) P.D. 353.

²⁰See Dan Miron, *Histaklut be-ravneker* (276).

²¹The place of the narrative and its various functions in legal texts is a subject which in recent years has received considerable attention. See, for example, Richard Delgado's "Story-Telling for Oppositionists and Others: A Plea for Narrative" (*Michigan Law Review*, 1989); David Ray Papke's *Narrative and the Legal Discourse* (1991); Bernard S. Jackson's *Law, Fact, and Narrative Coherence* (1991); Robert Cover's *Narrative, Violence, and the Law* (1992); Gary Minda's *Postmodern Legal Movements* (1995); Robin West's *Narrative, Authority, and the Law* (1993); Ian Ward's *Law and Literature: Possibilities and Perspectives* (1996); Thomas Ross's *Just Stories* (1996); Linda H. LaRue's *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (1995); Barry R. Schaller's *A Vision of American Law: Judging Literature and the Story We Tell* (1997); Shulamit Almog's *Law and Literature, Halacha and Aggadah* (1997); *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (1996); Bert van Roermund's *Law, Narrative, and Reality* (1997); and Michael Thompson's *Reproducing Narrative* (1998).

²²In his view, Regulation 119 of the Defense (Emergency) Regulations (1945) must be interpreted in accordance with the Basic Law: Human Dignity and Liberty and the values of the State of Israel as a Jewish, free, and democratic State. In the light of this doctrine, he held that the demolition order must be invalidated.

²³It is interesting to note that President Barak does not always refrain from referring to his personal feelings. Thus, for example, in a judgment dealing with the censorship of plays, President Barak includes a description of his difficult

experiences as a Jewish child during the Holocaust, and of the impact of these experiences on the shaping of his beliefs with regard to the issues being adjudicated. See H.C.J. 14/86 *Laor v. The Council for the Censorship of Films and Plays*, 41(1) P.D. 421. From this one may conclude that President Barak does not refrain from exposing his feelings in his judgments as part of an overriding policy, but refrains from such exposure or chooses to make use of his feelings as may suit his particular needs in shaping the judgment at hand.

²⁴Those issues are elaborated in my article, "The Appellant's Eyes Grew Dim": Between Narrative and Normative," which is forthcoming in *Bar-Ilan Law Studies*.

²⁵Indeed, there is a contention to the effect that we always reach judgments or decisions on the basis of our personal world-view or communal-cultural context and not only on the basis of the entire body of information which may be gathered in relation to a particular matter. See, for example, the writings of Jerome Frank, especially "The Judging Process and the Judge's Personality" (100-18), from *Law and the Modern Mind* (1930), as well as Frank's *Courts on Trial: Myth and Reality in American Justice* (1950).

²⁶See Jacques Derrida's "How to Avoid Speaking: Denials" (23).

²⁷See Miron (276).

²⁸See Jean-Jacques Lecercle's *Philosophy of Nonsense* (87). Examples of descriptions of this type may be found in Voltaire's *Candide*, Charles Dickens's *Bleak House*, and William Goodwin's *Caleb Williams*.

²⁹See J. A. Cuddon's *The Penguin Dictionary of Literary Terms and Literary Theory* (828).

³⁰For the definition of irony in this spirit, see Cuddon (460). This incongruity, which ensues from the reader's reasonable expectations being disturbed, also provides the story with its comic impact.

³¹For a description of the philosophical debate in this connection, see Daniel Statman's *Moral Dilemmas* (28-31).

³²*Tosefet Terumah* (7, 23). This example is also cited by Statman, who adds that this rule of law has certain reservations (29).

³³See *Babylonian Talmud, Yebamoth* (2). See also *Yerushalmi, Hagiga* (Chapter 2, Rule 2).

³⁴*Mishne Torah, Mamrim* (B.D.).

³⁵Perhaps Agnon acts here as Richard Rorty's "liberal ironist," the person who knows that the question "Is it right to deliver *n* innocents over to be tortured to save the lives of *mXn* other innocents?" and other questions of this kind are unanswerable. See Rorty's *Contingency, Irony, and Solidarity* (xv).

³⁶See Yoseph Dan's *The Foreigner and the Mandarin* (171).

³⁷See Nussbaum's *Poetic Justice: The Literary Imagination and Public Life* (7-8).

Works Cited

- Agnon, Shmuel Yosef. *Takhrikh shel sipurim*. Jerusalem: Schocken, 1984.
- Cohn, Haim H., ed. *Commemorative Volume for Pinhas Rosen*. Jerusalem: Students Union of the Hebrew University Publishing House, 1962.
- Cuddon, J. A. *The Penguin Dictionary of Literary Terms and Literary Theory*. 3rd ed. London: Penguin, 1992.
- Dan, Yoseph. *The Foreigner and the Mandarin*. Masada: Ramat-Gan, 1975.
- Derrida, Jacques. "How to Avoid Speaking: Denials." *Languages of the Unsayable: The Play of Negativity in Literature and Literary Theory*. Ed. Sanford Budick and Wolfgang Iser. New York: Columbia UP, 1989. 3-70.
- Frank, Jerome. *Courts on Trial: Myth and Reality in American Justice*. 1950. New York: Atheneum, 1967.
- . *Law and the Modern Mind*. 1930. Garden City: Doubleday, 1963.
- Lecerle, Jean-Jacques. *Philosophy of Nonsense: The Intuitions of Victorian Nonsense Literature*. London: Routledge, 1994.
- Miron, Dan. *Histaklut be-ravnekher*. Tel Aviv: ha-Kibuts ha-me'uha, 1996.
- Nussbaum, Martha C. *Poetic Justice: The Literary Imagination and Public Life*. Boston: Beacon, 1995.
- Statman, Daniel. *Moral Dilemmas*. Atlanta: Rodopi, 1995.