The One Who Is More Violent Prevails- Law and Violence from a Talmudic Legal Perspective

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Law and Violence: Antithesis or Symbiosis?

The relationship between law and violence is indeed a fundamental problem that
touches the most essential features of the concept of law and the understanding
of its political and social functions. For this reason, any jurisprudential doctrine
or political theory will not be complete without addressing this conceptual problem.
While its explicit formulation emerged only in modern jurisprudential writings,
a careful and accurate survey of pre-modern sources discloses its reverberations
throughout legal and political thought. Schematically, we could speak of two basic
legal approaches to the problem. There is the antithetical approach in which law
and violence are perceived as separate and contrasting notions, and hence as mutually exclusive. There is the symbiotic approach, which views law and violence as essentially interwoven notions; this latter approach requires entirely different conceptual tools from the antithetical one.

The antithetical approach reflects one of the basic insights of modern jurisprudential and political thought, according to which law is essentially assigned the
function of displacing violence in the public sphere; its job is to uproot and minimize resorting to violence as a means of solving conflicts or determining legal rights and statuses. The political and social role of the law is to regulate violence,
to constitute an alternative to violence, thus controlling its eruption into public life and minimizing its appearance. This antithetical approach is deeply rooted in the political thought of Spinoza and Hobbes and subsequently, has penetrated deep into the core of modern legal and political thought.1

In contrast with this approach, various trends in the 20th century called for an end to the traditional naivete or the intellectual dissimulation; they have sought to uncover the mutual dependency between law and violence, and to illuminate the deep connections between them. According to this approach, violence as a phenomenon is an indispensable feature of law and exists beyond law as well as within it. In the same manner that it serves to achieve extra-legal ends, violence also serves to achieve legal goals. In this light, the traditional distinction between law and violence required a new formulation, one that distinguished legitimate violence from non-legitimate violence.2 One of the pioneering thinkers in developing this view

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1. A brief analysis of this view in the writings of Austin, Bentham and Holmes can be found in P.J. Riga, "The Nature and Obligation of Law: Relationship of Power and Violence to Law" (1983) 24 Texas L. J. 149.
2. In fact, the symbiotic approach is based on a neutralized notion of violence and so differs from the antithetical approach. In other words: while the antithetical approach is compatible and coherent
was Walter Benjamin, who argued that violence was indispensable to law and acknowledged that violence functions as source of authority for the law and hence also for its services. According to Benjamin, we should not view the law as a counter-phenomenon to violence, but rather talk about the law's violence, viz., 'law-preserving violence', as opposed to the violence that undermines the legal conditions by displacing or crumbling the state's power, viz., 'law-making violence'. In fact, the diagnosis that violence accrues under the authority of official legal institutions, in various forms, is not a dramatic innovation. As a matter of fact, we can hardly conceive of law without violence. On the other hand, it would be wrong to conflate them, since if law was completely equivalent to violence, it would not be an evident and noticeable phenomenon. Therefore, the key question in this respect is: what is legitimate violence in the service of law? And how are we to distinguish it from violence that works against the law?

Following these questions, 20th century post-modern thinkers and legal scholars tried to characterize in different ways the distinction between legitimate and illegitimate violence and to define the justifications and constraints of law's violence. Derrida emphasized the different modes the law uses to silence violent acts, and the role violence plays as a constitutive element for the establishment of law and its authority. Robert Cover underscored the connection between law's violence and the centrality of hermeneutical processes in applying the law. These intellectual trends emphasized the monopoly of law over extra-legal violence, and considered it to be unlawful and delinquent. The law was thus conceived as essentially dependent on violence, and as an effort to use violence to counteract the more destructive and lethal violence—the extra-legal violence that threatens the basic values of the law itself.

In what follows, I would like to shed light on various aspects of the law/violence problem. To begin, our proposed discussion is not only a theoretical analysis, but

with the definition of violence as inappropriate aggression, and therefore views violence as a condemned act, the symbiotic approach neutralizes its normative sense and treats it in descriptive terms. Basically, neutralizing violence enables its legitimization. Hence the two approaches essentially differ in their fundamental views on the question of whether violence as a phenomenon carries normative sense at all.


4. J. Derrida, "Force of Law: The 'Mystical Foundation of Authority'" in D. Cornell, M. Rosenfeld & D. G. Carlson, eds., Deconstruction and the Possibility of Justice (New York: Routledge, 1992) 13. Derrida's remarkable essay enlightens three fundamental features of the law—its universality (the law always tends towards universality), the essentially of rights (the law operates to maintain, and thus is inseparable from, rights) and its concern with self-preservation (the law is bound up with the silence of its own force, and is self-preserving). For a good reflection, out of many others, on Derrida's claims see R. Buonamano, "The Economy of Violence: Derrida on Law and Justice" (1998) 11:2 Ratio Juris 168.

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also carries a historical dimension that draws its perspective from the relationship between modern and pre-modern conceptions of the law/violence problem. This is in contrast to the approach to the phenomenology of law taken in the above-mentioned works. Given its appearance in pre-modern law systems, the advantage of adding a historical dimension to this problem lies in its potential contribution for developing a different perspective on the relationship between law and violence. Adding the perspective of pre-modern and non-western legal systems exposes how, when characterized as either antithesis or symbiosis, the relationship of law to violence is misleading, or at least inaccurate. Moreover, the perspective moves the discussion of the relationship between law and violence away from an abstract and conceptual level to the extra-legal realm where violence occurs. Stated otherwise, rather than dealing with the tension between law and violence, I shall try to analyze the specific circumstances that legitimize extra-legal violence. The significance of this legal transference, as we shall demonstrate, is some kind of recognition of extra-legal violence as an acceptable solution for various legal problems, in which violence is tolerated, or even accepted by compromise. In other words, our approach to the law/violence problem will first examine the question: is there any interest in preserving the law/violence distinction? And what is earned by this distinction?

Specifically, the focus of our discussion is the legitimization mechanisms of extra-legal violence and the modes of justification that arose for them. To this end, we will seek to understand the jurisprudence that recognizes extra-legal violence as a legitimate procedure, and to trace its underlying assumptions and conceptual applications. The basis of our investigation will be an analysis of the Talmudic legal norm kol dea 'lim gavar (in Aramaic; lit. = the one who is more prevails; henceforth: KDG). This norm, as we will demonstrate, appears in Talmudic literature as an appropriate solution for cases that could not be decided by the ordinary legal procedures. In other words, our current interest is in the circumstances in which adjudicative uncertainty becomes a cause for excluding the case and giving an advantage to the violence of the conflicting opponents. In this light, we must ask: what is the justification for violence as a legally recognized procedure? And what underlies the conception of the relationship between law and violence in this norm?

Obviously, such an inquiry gives rise to additional questions regarding wider aspects of violence as a normative phenomenon and the processes of adjudication. For this reason, the following discussion will attempt to focus on KDG as a private case of prima facie legitimization of extra-legal violence. In the analysis, we will seek to characterize three types of justifications: one that reduces extra-legal violence to quasi-legal, or pre-legal, procedures, a second that is based on the link

6. The original meaning of the Aramaic root a.m is: strong, aggressive and big. According to Natan ben Yehiel (11th century Jewish lexigraph) there is a semantic connection between the Aramaic verb and the Arabic root a.l.m which in its second and forth derived stems means to cause pain, suffer, agony etc. (Arukh Completum, Vienna: Menorah publication, 1926 s.v. aim, vol 1:97 (H)). The use of this term in Talmudic literature is widespread, and alongside the physical meaning it also denotes a normative status, of the Mishnah (Babylonian Talmud Sabbath 12a), court (Babylonian Talmud Gitten, 36b) and more. However the formula kol dea 'lim gavar is manifesting the possessive right achieved by the aggression of the stronger.
between violence and the concept of natural law, and a third that considers further 

modes of dependence between law and violence.

Even so, due to the immense scope of the topic, we shall sharpen the focus by 

stating that our purpose is neither to survey the entire history of the legal norm KDG, nor to supply exhaustive explanations as to its appearances in different histo-

torical and textual contexts, but to draw schematic outlines of the history of KDG 
as a conceptual and theoretical problem. Our pivotal point of discussion, therefore, 

will be limited to the various mechanisms of legitimizing extra-legal violence.

Violence as *Judicium Dei*: Medieval Duel and Ordeal

Understanding the basic features of KDG will be made easier by comparing it to 
similar legal norms that existed and were practiced in medieval customary law, in 

which extra-legal violence was also recognized as a legitimate procedure. This 
recognition was well known in two legal procedures, or more precisely two legal 

institutions—the duel (Latin. *duellum*) or trial by combat, and the ordeal (Latin. 
*ordalium*). These institutions were conceived as completing acts of ordinary legal 

procedures, which were usually activated in cases that could not be solved in the 
courtroom. Acknowledgment of the duel as a legalized procedure was originally 
practiced by the Germanic tribes, the Celts and the Francs in the early medieval 
period, from which point it was extended to the entire continent during mid and 
late medieval period.

Various explanations and justifications were suggested for these praxes in those 
days, in which the common idea of all was to view them as evidential procedures 

leading to a correct and justified consequence since they reflected the deity's adju-
dication (*judicium Dei*). Theoretically speaking, the duel was conceived as a correct

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7. The ordeal seems to have been confined to Germanic legal practice. The ordeal is in fact a test 
employed under fixed conditions to discover the will of God in matters involving the innocence 
or guilt of human beings. Ordeals can be divided into three types according to their aims: (1) 
natural, as when arrows are shot to determine which road to take (*Ezekiel* 21:21), as when priests 
are chosen by lot in Rome or in Tibet, as when the choice of animals to be sacrificed in the Temple 
is determined (*Mishnah Tamid* 4:3-5:1), or as when settlers want to know who is to rule etc; (2) 
truth of property or ownership claim; (3) guilt or innocence when a charge is preferred against 
someone. This last type could be perceived as unilateral procedure when fire, water swallowing, 

lots, etc. are used on a suspected violator and multilateral procedure when battle decides the issue. 
For more on this, see Morton W. Bloomfield, “Beowulf, Byrhtnoth, and the Judgment of God: 

8. The Romans saw the duel as a barbaric habit lacking any legal value. In contrast, there are many 
indications that the duel was practiced as legal procedure in antiquity. The appearance of the 
duel as an accepted legal procedure in Europe was due to the influence of Germanic tribes. 
Following them, the duel became a common legal practice all over Europe. An extensive leg-
islation of the duel's rules is found in the orders of Lewis the Pious, the Frankish King from 819 
A.D. Using this fact and other sources, we can estimate that during the ninth century this practice 
was widespread all over Europe. From the Germans this practice was transmitted to France, where 
it flourished mainly during the period of the customary law—the twelfth century—and the 
nightly culture developed there. The Frankish kings saw there a means for limiting the judicial 
power of the independent vassals. Therefore, it was a form of legal procedure open to every free 
man, and in some cases, such under the kingship of Louis the Sixth, the right to participate in 
duels was bestowed also for slaves.

Change” (1975) 104 Daedalus 133.
and justified procedure, for the deity's power was understood not only as a meta physical feature, but rather as expressed through interventions applying law and justice in earthly life. Therefore, the long hand of the deity's power was conceived of as standing up for the righteous and the innocents, and strengthening their physical force. The similarity of the duel and the ordeal is not coincidental, and their justification mechanisms make them similar legal procedures. The duel as well as the ordeal placed the accused before a real danger whose outcome signified innocence or guilt, and in both procedures, the results were considered the deity's verdict. Therefore victory in duel, and survival of an ordeal, were interpreted as indication of heavenly adjudication and not as an arbitrary result.

We should note that neither the duel nor the ordeal were regarded as common religious acts addressing the deity's will; rather, they were considered legal procedures with a clearly institutionalized dimension. Duelling was in fact an act of calling upon the deity to intervene by expressing His position on the case at hand. Revelation of the deity's will through a duel or an ordeal was not conceived as miraculous, but as a natural recruitment of heavenly powers to assist earthly efforts to discover truth and apply justice. The legitimization of these extra-legal procedures derived from a worldview that acknowledged the intensity of divine intervention and obscured the gap between humanly and heavenly acts. Therefore, making known the 'word of God' during battle was complementary to ordinary procedures. In other words, violence in the battlefield was not conceived as a totally arbitrary and human act, but as an expression of divine justice revealed through physical combat. This might be described as an institutionalization of miracles, or as an attempt to control the uncontrollable—to systemize arbitrariness through physical and violent acts. The conceptual platform of these practices was problematic in many senses. And indeed, engaging the deity's power, institutionalizing miracles and ascribing legal meanings to arbitrary aggressions were still considered extreme ideas and were rejected from different angles during the medieval period, until finally these practices became aristocratic modes of fighting for proving self honor.

10. The idea that God is revealed through violence is deeply rooted in the theology of the Bible where God is described as warrior which reveals its power in the battlefield. This idea of course stands on the basis of Jewish and Christian apocalypses that visualize the day of the Lord as a harsh battle and therefore describe the expected revelation as ultimate violence. On the Biblical image of God as a warrior, see P.D. Miller, "God the Warrior: A Problem in Biblical Interpretation Apologetics" (1993) 61 Semeia 135; M. Brettler, "Images of YHWH the warrior in the Psalms" (1965) 19 Interpretation 39. On the biblical idea of the 'Day of the Lord', see G. von Rad, "The Origin of the Concept of the 'Day of Y'" (1959) 4 J. Semitic Stud. 97. Idem, Holy War in Ancient Israel, trans. and ed. by M.J. Dawn (Grand Rapids, MI: Eerdmans Pub., 1991). A different opinion is suggested by Weiss, see M. Weiss, "The Origin of the 'Day of the Lord'—Reconsideration" (1966) 37 Hebrew Union College Annual 29.

11. Since the ninth century the church decisively objected the duel as legal procedure and rejected referring to it. Nevertheless despite the church's voice, which was in fact officially cancelled in most of the West-Latin countries, the duel continued to be practiced in Europe until the sixteenth century. Since then the duel was shifted from a legal procedure to a social institution that supplies honor, namely an institution used to recover dishonor or to refute accusation in cowardice. See R. Baldick, The Duel: A History of Dueling (New York: Clarkson Potter, 1965); VG. Kiernan, The Duel in European History: Honour and the Reign of Aristocracy (Oxford: Oxford University Press, 1988).

In jurisprudential terms, the legitimization mechanism of the duel as a legal procedure reflects a way of treating uncertain cases within a religious form-of-life that takes seriously the divine role in making justice and exposing truth. From a judicial standpoint, the mechanism legitimizing the duel as a legal procedure in effect expresses a way of dealing with the phenomenon of legal uncertainty, and a perspective that views its existence as a moment in which the case exceeds the bounds of the law and is transferred for adjudication via an alternative procedure.

This view is a kind of legal dualism that recognizes two legal systems—ordinary and common law on the one hand, and heavenly law, on the other, activated when ordinary law is circumscribed and paralyzed.

It should be noted that such a dualistic worldview is not alien to the Talmudic spirit and it appears in several manifestations in Talmudic thought. For example, the determination 'exempt from humanly judgment but liable to the heavenly judgment' expresses recognition of the existence and validity of heavenly justice in parallel to human legal standards. This parallel justice system in fact adds a moral dimension to halakhic norms.

Nevertheless, the similarity between European and Talmudic legal dualisms is only superficial. The viewpoint associated with the European duel considers the earthly consequences of violence as the epiphenomenon of heavenly justice. Such relations blur the border between human deeds and the deity's actions, and through this lack of distinction violence is justified and the participants of the duel are absolved of moral responsibility. On the other hand, the Talmudic norm of 'exempt from humanly judgment but liable to the heavenly judgment' draws a clear line between heavenly law and human law, and in so doing neutralizes the intervention of the former in the latter. The Talmudic phrase ‘exempt from humanly judgment but liable to the heavenly judgment’ thus keeps the heavenly law transcendent to

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13. This idea is quite early and it appears already in Tannaic sayings, ‘R. Joshua said: There are four acts for which the offender is exempt from humanly judgment but liable to the heavenly judgment. They are these—(1) To break down a fence in front of a neighbor’s animal [so that it gets out and does damage]; (2) To bend over a neighbor’s standing corn in front of a fire; (3) To hire false witnesses to give evidence; and (4) To know of evidence in favor of another and not to testify on his behalf’ (Babylonian Talmud Baba Kama 55b). Later in the Talmud, we find additional examples such as ‘… a case of a man who does work with Water of Purification or with the [Red] Heifer of Purification … the case of one who placed deadly poison before the animal of a neighbor … the case of one who entrusts fire to a deaf-mute, an idiot or minor [and damage results] … the case of the man who gives his fellow a fright … the case of the man who, when his pitcher has broken on public ground, does not remove the potsherds, who, when his camel falls does not raise it … the Sages hold that he is exempt from humanly judgment but liable to the heavenly judgment’ (Babylonian Talmud Baba Kama 56a).


15. It should be noted the medieval Halakhic sources oriented in Germany mention duel and ordeal as widespread practices in the local legal systems differing from Jewish legal practices. For example, Rabbeinu Gershom Me’or HaGolah (960?-1028) in one of his Halakhic writings presents his solution to suspicious stolen property as against the solutions suggested in the local legal systems: ‘… and every non-Jewish is suspicious in that lost property which didn’t returned [that object, should] put his hand in the fire according to the local rules of the gentiles. And on Reuben’s property they made time for dueling …’ (Joel Mueller, Réponses par de Célèbres Rabins Français et Lorrains (Vienne: 1881) # 97 at 54-55).
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As we will demonstrate in what follows, the legitimizing mechanism of the Talmudic norm KDG is essentially distinct from the legitimizing mechanism of violence under the European practice of the duel, and their difference is derived from the absence of deity's intervention in justice making and exposing the truth.

What is then the legitimizing mechanism of KDG? And why is it sometimes preferred over ordinary procedures?

In order to explore this question, we will briefly survey the main appearances of this norm in Talmudic literature and in major post-Talmudic trends. Subsequently we will analyze the legitimizing mechanism of violence underlying this norm and attempt to understand the relationship between law/violence relations represented therein.

**Kol deAlim Gavar: An Ambivalent Norm**

Literally, the Talmudic expression *Kol deAlim Gavar* means ‘the one who is more violent prevails’. Its appearances in post-Talmudic literature carry ambivalent meanings and therefore its normative status is also expressed and evaluated differently. This ambivalence is mainly articulated in the fact that the term KDG signifies an appropriate norm, on the one hand, while on the other hand it denotes a highly condemned and undesirable normative state-of-affairs that leads to political anarchism. There is a significant gap between the two meanings of this term, which vary in different contexts. This gap between the normative meanings of the term KDG raises several interesting questions: does it reflect contradicting approaches to the idea of violence, or does it perhaps represent a common conceptual idea? And what is the nature of this justification or condemnation of violence?

We will now seek to outline the norm KDG and to expose the semantic fields of the principle expressed by it in Talmudic and post-Talmudic literature, in an attempt to make sense of its ambivalence and to demonstrate its peculiarity in the two aspects discussed, namely the legitimizing mechanism of violence and the law/violence relationship. We shall begin by understanding the different meanings of this norm and then proceed to explain the conceptual ideas that determine their meanings.

**The Legal Norm**

The term KDG appears in several Talmudic discussions as a proposed solution in cases where uncertainties about the factual or legal conditions prevail. It should

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17. Some readings of this expression tend to blur the meaning of violence carried in the term ‘a’lim’. Therefore they prefer the following translations: ‘the stronger one prevails’ or ‘the stronger shall prevail’. However, the reasonable semantic connection to the Arabic meaning (see supra note 6) supports our translation that also carries the meaning of violence.

be mentioned that KDG in Talmudic literature does not appear as common practice for resolving hard cases, and in fact its appearance is quite limited. Notwithstanding the marginality of KDG as a legal norm, its appearance, followed by discussion, leaves no doubt as to its existence and to its being recognized a valid norm in the sage’s view. However, while the rabbis of the Talmud do not provide an account on the nature of KDG and on the legitimizing mechanism of violence contained in it, post-Talmudic discussions are much more centered on the question of how this norm validates violence, and on identifying the circumstances that justify referring legal cases to violent confrontation between opposing sides.

The clear appearance of KDG is attributed to R. Nachman (early 4th century Babylonian scholar), who viewed KDG as an appropriate solution for proprietary cases where two contradicting and equivalent claims were raised regarding the right of possession. The Talmudic discussion on R. Nachman’s saying locates KDG alongside other known solutions for doubtful cases—dividing the subject matter between the claimants or giving to judicial discretion:

[If there are two claimants to a property and] one says: ‘It belonged to my fathers’, while the other says: ‘To my fathers’ [without either of them bringing any evidence], R. Nachman says: ‘kol dea ‘lim gavar’.

Why, [it may be asked], should the ruling here be different from the case in which two deeds [of sale or gift relating to the same property and] bearing the same date are presented in court, in which case Rab rules that the property should be divided between the claimants, and Samuel rules that the judges should assign it according to their own discretion?19

R. Nachman’s view here is indeed expressed very briefly, and it lacks any explanation about the nature of KDG and why it is an appropriate and justified solution. Locating KDG together with the solutions of Rab and Samuel sharpens the occasional aspect of KDG. While deciding the doubtful case, according to Rab and Samuel, is done on the authority of the judges and within the limits of law, according to R. Nachman the solution lies outside the court and is disconnected from its authority. R. Nachman therefore extends the legal procedure beyond the court verdict and the judge’s discretion, and according to him, the results of the claimant’s physical confrontation are also legally meaningful.

The Talmudic discussion preceding R. Nachman’s saying presents KDG as an alternative to court possession of a property until sufficient evidence is collected for one of the claimants. According to this text, the question that stands at the base of KDG is: how should the court function in doubtful cases that cannot be solved using ordinary legal procedures? More precisely, the question is one of the court’s authority and duty to protect properties subject to unresolved conflicts. The positions taken by Talmud scholars thus are centered on two basic questions: (1) Is it appropriate to charge the court with property whose status is unclear, or should we transfer it outside court and leaving it for the claimants fight? (2) Should the

court return property whose status is unclear and which was already in the court's possession?

There was a certain riverboat about which two men were disputing. One said: 'It is mine,' and the other said: 'It is mine.'

One of them went to the court and appealed to them [the judges]: 'Impound the boat until I bring witnesses to prove that it belongs to me.' [In such case] would we impound the boat or not?

R. Huna says: 'We should attach it,' and R. Judah says: 'We should not.'

[The court having attached the boat], the man went to look for his witnesses but did not find them, whereupon he requested the court to release the boat, leaving it to the stronger to obtain possession (KDG). In such a case should we release [it] or not?

R. Judah says: 'We should not release it.' R. Papa says: 'We should release it.'

The accepted ruling is that we should not attach in the first instance, but if we have attached we should not release.  

Here the Talmudic discussion is constructed towards the conclusion that adopts R. Judah's position that in doubtful cases, a court should not intervene in ordinary procedures and should not make any change upon the claimant's requests, nor leave it to violent resolution in the absence of sufficient evidence for either party. In other words, the court should not take possession of the property until relevant witnesses are brought to court. In this context, KDG is presented as a supplication to the court on behalf of one of the claimants, requesting the court to remove its authority from this case and leave it to the balance of power between the disputants. This request by one of the claimants is in fact a request that the court maintain an indifferent attitude towards this case and to avoid any further intervention. Thus, KDG is not presented as a natural solution for doubtful cases, consistent with R. Nacham's saying, but rather as an optional solution that the law recognizes, but is considered only because of the claimant's appeal.

The common feature of these two expressions of KDG as a principle is the fact that both supporters—R. Nachman and R. Papa—view it as expressing the recognition of the limits of the court's authority in cases that are unresolved through ordinary legal procedures. KDG, according to these two sages, is derived from the silencing of the court and from its self-restraint not to intervene in doubtful cases that cannot be decided according to ordinary procedures. On this count, of course, the resemblance between the European duel and the Talmudic norm is easily identifiable; both the doubtful cases paralyze legal authority and become a sufficient cause for removing the case from the court and transferring it to the dynamic of violence. Legal doubt, or legal uncertainty in general, is in fact a transitional point for cases unsolved in court to migrate to the arena of backyard wrestling. However,

20. Ibid.
it seems that this similarity exhausts the phenomenological resemblance as the basis of legitimization for each is totally different.

Attention should be paid to the fact that the above cases demonstrate how KDG is proposed in cases of factual doubts. In the forthcoming Talmudic passage, we can see that this idea is also extended to significant legal doubts. The next Talmudic context is the fifth chapter of tractate Gittin, which is constructed over a list of the Sage’s rulings all based on the same ratio legis, that is, the interests of peace (mipnei darkei shalom lit. = on the account of the interests of peace). One of these rulings is the following: “The pit that is nearest the [head of the] watercourse is filled from it first (and meanwhile the owner of the pit has the right to dam the watercourse), in the interests of peace.” This ruling actually determines the privilege of the nearest pit owner to take advantage of the water based on the rationale that this will prevent conflicts between the beneficiaries of the water. Later on in the Talmudic discussion a similar rationale is raised, and due to this similarity between the cases and for the sake of harmonizing the Tannaic ruling with the Talmudic, they discussed the matter to clarify their sayings:

It has been said [Where fields] adjoin a river, Rab says: ‘that the owners lower down have the right to draw off water first,’ while Samuel says that the owners higher up have the right to draw off water first.

So long as the water is allowed to flow, both agree that no problem arises. Where they differ is on the question of damming for the purpose of watering. Samuel says that those above can draw off water first, for they can say ‘We are nearer to the source,’ while Rab holds that those below can draw off first, for they can say ‘The river should be allowed to take its natural course.’

R. Huna b. Tahalifa said: Seeing that the law has not been determined one way or the other, each must fend for himself (KDG).

As opposed to the Tannaic rationale in the Mishnah, the Talmudic discussion views the problem of privilege here not as derived from the ideal of preventing conflicts between the owners, but rather from considerations of principle regarding who has the right to use the water first. At this point, a significant gap between the two perspectives is introduced. While according to the Mishnah, the solution should be drawn from the moral principle of preventing conflicts and supporting peaceful regulations, the Talmudic answer—KDG—leaves the owner’s conflict unresolved and free to solved by the balance of their power, without taking any position. This resolution, of course, encourages violent struggle between the conflicting neighbors.

21. Textually this ruling follows a series of rulings dealing with various regulations regarding the prosperity of society or fixing public norms such as ‘for the order of the world’ (Tikon haA’olam. Lit. Correcting the world), see The Mishnah, trans. J. Neusner (New Haven and London: Yale University Press, 1988); Gittin, Chapter 4 at 472-74; 5:3, at 474; ‘for the good order of alter’ at 475, and more.

22. Babylonian Talmud Gittin, 60b.
The discussion opens with the Sage’s disputation about who has the right in principle to use the river water—those located downriver (Rab) or upriver (Samuel)? The conclusion of this discussion by R. Huna b. Tahalifa shifts the focus from the question of privilege to the factual determination of the appropriate norm, and ends with the conclusion—‘Seeing that the law has not been determined one way or the other, KDG’. Here we see that KDG does not derive from a paralysis of the ordinary legal procedures, but from the difficulty in identifying the appropriate norm in face of the disputing positions of Talmudic scholars.

This extension is indeed nontrivial and demands an explanation as to why disagreement among the scholars, or the lack of determination between their positions, is a cause for expropriating the case from the legal sphere and relegating it to the violent struggle outside court! Moreover, the Talmudic literature is full of unsolved disagreements between the Sages. Does one then conclude that, according to R. Huna b. Tahalifa, we should turn to violent practice whenever a scholarly disputation is unsolved? Answering these questions is much beyond our discussion, which seeks to deal with the nature of the legitimization mechanisms of violence in doubtful cases. For our purposes, we will only need refer to the basic structure this norm, in which judicial doubt becomes a cause for relegating the case to the violent struggle of the conflicting sides.

The fact that referring to violence in the above cases in not described or explained as referring to divine adjudication (judicium Dei) demands that we seek for different directions of understanding and justifying their rulings. As mentioned, KDG is not elaborated or discussed in the Talmud itself, but only in post-Talmudic literature that reflected the existing norms. In the following, we will investigate several modes of dealing with the problem of the law/violence relationship used by post-Talmudic scholars who reinterpreted KDG and gave it a different rationale that neutralizes violence.

Neutralizing Violence: Competence and Pre-Legal Procedure

The first mode of neutralizing the violent aspect of KDG, which reduces KDG to a legal procedure based on fair competition and not the balance of violent power, is attributed to R. Hananel b. Hushi’el (Qairouan, d. 1055/56). The key for this hermeneutical move lies in the conceptual distinction between ‘aggression’ and ‘competition’—a distinction that for our concern is quite subtle but nevertheless

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23. I deal with those questions elsewhere. Apparently the position attributed to R. Huna b. Tahalifa reflects late editorial rationale which prefer to bestow the Sages’ disputations a canonical status, and therefore has the interest of preserving the disputation and not deciding on one side or the other. Yet we should also note that R. Huna b. Tahalifa’s pattern generally is not followed apart from very few exceptions. One unique example can be seen in on of the writings of Rabbi Meir b. Barukh of Rottenberg (1215-1293), in which he avoids determining the dispute between his Rabbinical authorities and therefore he ruled KDG—‘...since it is unclear for us whether the right ruling is according to Rashi’ (Solomon b. Isaac; 1040-1105) or Rabbenu Tam (Jacob b. Meir; 1100-1171) ‘...we say KDG and if partners are stronger in holding the eastern [side] they obtain possession’ (in Mordekhai on Babylonian Talmud Baba Bathra, ch. 507 at 86a [on the Alfasi’s pages]).
crucial. Competition as aggression also demonstrates physical power and not a pure balance of rights, but on the other hand, competition as opposed to aggression is a fair confrontation, for the opening positions are equal. Therefore, KDG according to R. Hananel b. Hushi’el is not a recognition of the arbitrariness of the most powerful side’s superiority, or a view that violent aggression is a way for resolving legal cases; rather, it is a recognition of the appropriateness of the result of a competition held under fair conditions. R. Hananel’s distinction is sharpened by the comparison between the above case regarding the ownership of the riverboat and the early Tannaic verdict “Two hold a garment—one of them says: ‘I found it’ and the other says: ‘I found it;’ One of them says: ‘it is all mine,’ and the other says: ‘it is all mine’ … [the garment] shall then be divided between them”.

And R. Hannael wrote there … that case of the riverboat is where it was possessed by none of them, but placed down in the street or in a place where their access is equal and therefore KDG. However, our case [= in the Mishnah] is when they are both occupying it [= the garment]—we do not expropriate it from their hands to say KDG.

The hermeneutical efforts of Talmudic and post-Talmudic scholars to harmonize the various rulings widespread in the Talmud are also demonstrated in this quotation. The question then arises as to why, in the doubtful case where ‘Two hold a garment’ is equal division, and not KDG, offered as an appropriate solution? R. Hananel’s answer distinguishes between two distinct situations of conflicting claims for full ownership in which court is helpless—a situation where the conflicting sides both occupy the subject and thus leaving it in their hands means encouraging the violent and aggressive struggle between the two, and a situation where they do not have any possession and so their conflict bears a more competitive character.

The basis for this distinction between aggression and competition is rooted in R. Hananel’s saying that re-describes the Talmudic cases: the doubt regarding the ownership of the riverboat is portrayed as ‘a place where their access is equal’ and therefore the results of the struggle could be taken into account as a solution. Nevertheless, in the case of ‘Two hold a garment’, the situation is not competitive but simply aggressive, and therefore is disqualified from the application of KDG. Therefore, KDG according to R. Hananel is limited only to struggles classified as fair competition and not for a state-of-affairs where the point of departure—‘they are both occupying it’—invites aggression. This principle was later formulated by one of the halakhic authorities, R. Isaiah b. Mali di-Trani (Italy, 1220–before 1260): ‘it is not lawful that we say to the violent: attack the weaker, take what he possesses and earn it’. R. Hananel’s interpretation therefore expresses the lack of satisfaction

25. Heb. bemakom shyd shneihem shavah, lit. = wherein their physical possession is initially equal.
with the *prima facie* legitimization given to aggressive violence in the Talmudic norm.  

Another example of grappling with the *prima facie* legitimization given to violence can be found in the saying of R. Asher b. Yechiel (Toledo, 1250–1327). As opposed to R. Hananel, whose position reflects an eastern tradition, R. Asher b. Yechiel represents a hermeneutical tradition which is probably rooted in the *Tosafot* academies of the twelfth or early thirteenth century in northern France. He deals with the *prima facie* legitimization of violence on two hermeneutical levels. Firstly, he significantly narrows the circumstances under which we legally recognize the superiority of the more violent claimant. Secondly, he gives KDG a new meaning based on an economical rationale. R. Asher b. Yechiel thus reduces KDG from an extra-legal procedure to a pre-legal procedure to be completed in court:

This KDG is a law that the one who is stronger at the first time [my emphasis—J.D.] possesses the object until his friend brings a proof against him. As long as he doesn’t bring a proof, even if he becomes stronger, we do not take it out of from him. For it seems unlikely that the Sages would regulate a norm that leaves the claimants fighting and in disputation for their entire lives—today he is the stronger and tomorrow his friend will be the stronger one.

Rather, the Sages ruled that the one who is more violent this time [my emphasis—J.D.] prevails, and they trusted in that that the one who is right is more likely to produce evidence on his behalf. Moreover, the one who is right will take a greater risk to earn what is his, more than the other will risk himself by stealing it. Additionally, [the one who steals will say]: why should I take a risk today if tomorrow he [= the real owner] will bring proof and take it from me?!

First, R. Asher describes KDG as a ruling made by the Sages, namely as a secondary regulation (Heb. *takkanah*) that attempts to achieve a more appropriate or more just solution.  

He thereby seeks to degrade the normative value of KDG. Yet at the same time, his main innovation is in the essential insight, similar to R. Hananel above, that it is impossible to understand KDG as normative justification for violence—‘For it seems unlikely that the Sages would regulate a norm that leaves the claimants fighting and in disputation for their entire lives—today he is the stronger and tomorrow his friend will be the stronger one’. Therefore, violence is not ratified as a final procedure for determining ownership, but rather as a quasi-temporal means of determining possession until relevant proofs are brought to court and the case is solved according to ordinary evidential procedures.  

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27. As a matter of fact, his response of reinterpreting this Talmudic norm in a manner that weakens the moral problematic is indeed typical of post-Talmudic scholars who are trying to resolve problematic aspects of the Talmudic regulations.

28. *Piskei ha-Rosh on Babylonian Talmud Baba Bathrah*, ch. 3:22 at 368. His position is appearing elsewhere in his writing and widely quoted in medieval Halakhic literature.


30. A parallel stance is founded in a contemporary Halakhic authority, R. Menachem b. Shlomo HaMeiri (1249-1315): ‘And you have learned in your own way that whenever two are arguing
interpretation runs counter to the view of violence as a legitimate procedure for determining doubtful cases, and limits its legal meaning in two senses. First, violence is efficacious only as a primary act for determining possession, and therefore, the problem of ownership is not subject to the claimant’s struggle over the long term. Second, the period of possession of the property through violence is not absolute, but limited until the submission of the relevant proofs to the court. KDG is thus reduced to a technical-temporal solution that is not a substitute for the essential evidence necessary for determining ownership, but a temporal aid—‘the one who is stronger at the first time possesses the object until his friend brings a proof against him.’

The attitude reflected in the above passage again exposes the fundamental distinction between viewing the duel as a legal procedure and KDG. The above saying of R. Asher clearly denies viewing the power of the person whose physical might prevails as evidence of his legal rights. The status of this does not constitute the discovery of legal facts nor an irreversible legal right; rather, it standardizes the possession of the property as part of the due process. Denying the view according to which violence is an acceptable method for determining legal facts is more explicit in the second part of R. Asher’s saying, in which he enumerates three reasons for KDG that naturalize its aggressive aspect and reject the legal advantage of violence. The three reasons that R. Asher counts are in fact three psycho-economic presumptions that explain KDG as pre-legal procedure. These three presumptions, in his view, supply the basic rationale for KDG as a norm.

The first reason explains why KDG does not waive the legal rights of the weaker side, since we should presume that the real owner, even if he is the weak party in the struggle over the property, will succeed in obtaining sufficient proof for his case—‘they trusted in that that the one who is right is more likely to produce evidence on his behalf’. This presumption, according to R. Asher, assures the real owner’s confidence against the temporary possession of the stronger, for the Sages who regulated KDG presumed that he would bear the required burden of evidence. Nevertheless, this presumption is also based on the assumption that a proprietary right achieved through KDG is a limited and temporary right that should not impinge on the real owner’s rights.

The illustration of KDG as a pre-procedure is expressed in the following reasons: The constitutive rationale of KDG according to them is economical logic that encourages the procedures of legal inquiry to be temporarily postponed in the absence of sufficient evidence for either of claimants. The core of this economic logic is predicated on the assumption that excluding the case and leaving it to the claimants to struggle is a means of promoting the evidential procedure.

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about one matter—one says: ‘It is mine’ and the other says: ‘It is mine’; one says: ‘It belonged to my fathers’ and the other says: ‘It belonged to my fathers’—and it cannot be resolved, it is not in the possession of either party, and the thing is not handled by court, or by any person; It is not under the jurisdiction [of the court], and the one who is more violent prevails. After one of them has overcome the other, [the court] will consider the claims for expropriating it from him.’ (Beit HaBechirah to Baba Bathra at 34b).
In this manner, the temporary exclusion of the case from the court in fact encourages the real owner to produce the required evidence to prove his ownership, and discourages the liar from perpetuating his lie—'Moreover, the one who is right will take a greater risk to earn what is his, more than the other will risk himself by stealing it'. It is clear then that KDG is not an alternative to ordinary legal procedure under the court's authority, but rather a calculated tactic meant to positively encourage the real owner, and on the contrary to discourage the liar and weaken his claim.

We have thus seen two post-Talmudic interpretative moves that seek to naturalize the aggressive aspect of the prima facie legitimized violence based on KDG: an interpretative move that reduces KDG to a fair competition, and a more radical move that diminishes the legal value of extra-legal violence and which views it as a halfway phase designated to promote ordinary evidential procedures. In what follows, we shall turn our attention to a number of additional aspects of KDG that indicate different directions of justifying extra-legal violence.

**Anarchy, Moral Transgression and Cause of Heresy**

Alongside the attempts to preserve the Talmudic norm of KDG while deconstructing the violent and aggressive aspects of it were widespread views that considered KDG as a condemned and undesirable normative state of affairs, or an expression of illegitimated violence. These views are well articulated in hermeneutical and contemplative compositions, which could be entitled non-legal intellectual literature; namely, a kind of literature that is freer to deviate from the original meaning of KDG as rooted in the Talmud. These views differ from the above interpretive moves in that they recognize an essential deficiency in the very idea expressed by KDG, and therefore view KDG as condemned and disqualified norm, despite the fact that it reflects an appropriate norm in Talmudic terms.

Such a critical approach towards the expression can be seen in Rashi's (Solomon b. Isaac; Troyes, France, 1040–1105) commentaries on the Bible in which he is not deterred from explaining verses that describe various forms of anarchy using the term KDG. For example, in this manner he explicates the corruption described by the prophet Ezekiel (22:6) as 'each one has used his power to shed blood in you' through the term KDG. In a similar manner he illustrates the meaning of Zechariah's prophecy regarding the great panic that will catch the Gentiles in the days to come—'Everyone will seize the hand of his neighbor and raise his hand against his neighbor's hand' (14:13)—as total anarchy and the domination of the principle of KDG.

Another example can be seen in the following view, which characterizes KDG as a condemned norm with ethical and theological attributes. According to this manifestation, KDG expresses an immoral and corrupt normative state of affairs that leads to actual heresy and a denial of the existence of God. According to this idea, there is an essential causal relation between morality and the belief in the existence of God, and, correspondingly, between immorality and heresy. KDG is the link that creates the logical and causal continuum between ethical and religious deviation.
All this is for legitimized violence means admitting to the absence of authority or sovereignty:31

For this [robbery] causes heresy for they would say: 'there is no law and no Judge therefore the one who is more violent prevails (KDG)'; for the severity of the sin of [robbery] is not due to the essence of this sin but due to the evil brought about by it—because the sinner in robbery might clean his conscience and say: 'there was no crime for there is no ‘God who judges earth'32 and consequently he becomes 'companion to a destroyer'33

Drawing the conceptual line between lack of law and sovereignty with the term KDG reflects the antithetical approach to law and violence mentioned above, by which law is indeed perceived as contradicting and excluding violence and vice versa.34

Together with these critical readings of KDG is another reading that views KDG as a condemned and inferior normative state-of-affairs on the one hand, but ascribes it a moral value on the other hand. This dialectical attitude could serve a key for the gap between the two meanings of KDG, and might even supply an explanation for the nature of the mechanism of justifying violence and the compatibility between law and violence in general. This attitude, as will be shown, posits that violence is a norm applying to the concept of natural law.

Violence and Lex Naturalis

One approach that resolves the ambivalence of KDG as a norm appears in the theo-political doctrine of R. Yosef Albo (Spain, 1380–1444). Albo’s approach is eclectic, merging together different systems of thought, philosophical and theological alike. It draws on Islamic literature on the one hand, and Christian scholastics on the other hand. Influenced by the thinking of St. Thomas Aquinas (1224–1274), the structure of Albo’s jurisprudential view is based on the same typology of the law—the theory of ‘triple legal systems (religions).’35 According to his typology, there are three systems of law:36 natural law (lex naturalis), human law (lex humanitus posita) and

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32. Paraphrase based on Psalm 58:11.
34. Indeed, this is a fascinating example of theological and literary critique of the law that uses the narrative to undermine the legal approach altogether. The violent possibility offered by the law and which expressed by KDG are seen as enormously dangerous. The implicit recognition that there are cases that may not be susceptible to judicial resolution is tantamount to admitting that there are times when the divine judge is absent. (There is no law and no Judge and therefore the one who is more violent prevails.)
divine law (*lex divina*). These three systems stand in a clear hierarchical relation based on their source of validity, extension and functionality. Natural law is essentially universalistic, independent of any temporal or geographical context, and has a relatively modest aim: to supply basic norms for the minimal survival of society. Human law is a product of human intelligence and therefore corresponds to spatial and temporal conditions. A supplementary value of human law, according to Albo, is its pedagogical aspect. In contrast to these two systems, divine law is the outcome of revelation, and its aim is to impel human beings towards religious and spiritual achievements. In contrast to Christian legal views, that were certainly in its background, these three legal systems do not abrogate each other, and are not structured on an eschatological scheme. In other words, one system of law does not annul the validity of another, and in fact, Albo claims, they reflect the structure of the history of the religion.

This legal theory is very interesting for our purposes, mainly because Albo also seeks to offer it as the theoretical base for a general theory of halakhah. In this context, the most important fact is the extension of this theory into a political doctrine that also provides a brief phenomenology of violence.

Albo's legal typology, as I read it, is transferred to the socio-political sphere where a distinction is made between three political and moral views (in his words: 'three opinions', 'three sects') that base their social order on three distinct principles—violence, domination and worship. Unlike the synchronized typology of law mentioned above, the socio-political typology reflects three phases in the evolution of religion and politics—the era of natural violence (recognized according to the biblical narrative with the generation of the flood), the era of political domination (from the flood until the revelation of the Torah) and the religious era (subsequent to the

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37. 'There are three kinds of law, natural, positive and divine. Natural law is the same among all peoples, at all times, and in all places. Positive is a law ordered by a wise man or men to suit the place and the time and the nature of the persons who are to be controlled by it, like the laws and statutes enacted in certain countries among the ancient idolaters, or those who worship God as human reason dictates without any divine revelation. Divine law is one that is ordered by God through a prophet, like Adam or Noah, or like the custom or law which Abraham taught men, instructing them to worship God and circumcising them by the command of God, or one that is ordered by God through a messenger whom He sends and through whom He gives a law, like the Law of Moses.' (Joseph Albo, *Sefer Ha-’Ikkarim (Book of Principles)*, trans. by I. Husik (Philadelphia, PA: The Jewish Publication Society of America, 1930), Article one, ch. 7 at 78-79.)

38. 'The purpose of natural law is to repress wrong, to promote right, in order that men may keep away from theft, robbery and murder, that society may be able to exist among men and everyone be safe from wrongdoers and oppressor' *ibid*.

39. 'The purpose of the positive law is to suppress what is unbecoming and to promote what is becoming, that men may keep away from indecent according to human opinion. Herein lies its advantage over natural law, for positive law also controls human conduct and arranges their affairs with a view to the improvement of human society, even as natural law' *ibid*.

40. 'The purpose of divine law is to guide men to obtain true happiness, which is spiritual happiness and immortality. It shows them the way they must follow to obtain it, teaches them the true good that they may take pains to secure it, shows them also real evil that may guard against it, and trains them to abandon imaginary happiness so that they may not desire it and not feel its loss. And in addition it also lays down the rules of right that the political community may be ordered in a proper manner, so that the bad order of their social life may not prevent them from attaining true happiness, which is the ultimate end of the human race to which they are destined by God. Divine law is therefore superior to positive law’ *ibid*. 
giving of the Torah). By anchoring his theory of ‘triple legal systems’ in Old Testament narrative, Albo gives realistic meaning to his legal theory. For our sake it is very important to address the way in which he characterizes natural society and the place of violence in it:

According to these three opinions of Cain, Abel and Seth, respectively, all mankind are divided into three classes. One class follows the opinion of Cain, and thinks that the most important human occupation is agriculture. They feel hostility towards political rulers and desire to kill them, as Cain killed Abel. A second class follow the opinion of Abel, thinking that politics is the most important pursuit, and risk their life for political activity like Abel, because they think that it leads to human perfection, as we are told concerning their Roman rulers. So kings risk their lives for the sake of power, which is natural to them as it was to Abel, who was the first shepherd and ruler and lost his life on that account. The third class follows the opinion of Seth, thinking that the important thing is to worship God, and despite power and the other pleasures. …

But the opinion of Cain was widely prevalent among his descendants, and hence the earth was filled with violence on their account, their belief being that man has no superiority over animal, and the one who is more violent prevails (KDG). Therefore they were corrupt and lived like animals. For this reason it was decreed that their name should be wiped out from the earth in the flood.⁴¹

The three political worldviews are therefore symbolically represented through the three sons of Adam, and in accordance with them the universal population is divided into three types of societies. Since our interest is in examining the normative aspects of KDG and the relationship between law and violence, we will limit our focus to the two first societies.

The first society is agrarian⁴² and is deeply hostile to government and dominance by an elite, a society whose political order is characterized by natural violence. The naturalistic view widespread in this society does not conceive of normative behavior as separate from nature and natural constraints, but as rooted in nature and deriving from it. Viewed through the lens of this society, normativity is not autonomous, but dictated by natural forces and at the same time reflective of them. Therefore, violent behavior in their view is normative, and the violence of KDG is a code of behavioral normativity. It is in this sense that Albo understands KDG as reflecting the basic principle of social order in the pre-cultured society in which the essential gap between nature and culture—‘their belief being that man has no superiority over animal, and the one who is more violent prevails’. The second society is an authoritarian society whose political structure is based on the principles of dominance (potestas) and authority (auctoritas). The high regard for political authority and government in this society is not only an expression of

⁴² It is not really clear whether he sees an essential linkage between violence as a norm and the agrarian society. Nevertheless, it is plausible that such a linkage is reflected in his view of the feudal structure in which he is willing to locate in the tri-functional typology he develops. On the other hand, perhaps this linkage is a consequence of his hermeneutical move that connects this structure to Adams’ three sons and mainly to the tension between Cain and Abel.
power, but rather a moral aspiration for human perfection marked by self-dominance and self-control. Moral ideals engaged with self-government are well known to us from the Sophistic moral worldview and from the political logic of ancient Rome, and indeed Albo's denotes Roman culture as ratifying this identification. Placing government as a moral ideal, according to him, inculcates a passion for domination and the willingness to fight and endanger oneself for the sake of a moral value. The way in which Albo seeks to distinguish between these moral doctrines with a high degree of sensitivity describes the moral theory of law, domination and authority as a human effort to establish a 'second nature', a moral nature superior to the naturalistic nature that constitutes the inferior.

It is worthwhile to pause here to consider two interesting points in Albo's writing. Firstly, the distinction he makes between the two political-legal views coincides with the distinction between the Stoic and Sophistic legal theories which at its latest stage is known as the distinction between *jus naturale* and *jus civile*. The interesting feature in Albo's move is the manner in which he identifies in this classical distinction the footprints of the distinction between law and violence. A social order based on natural law actually adopts violence as a basic norm, while a social order based on human law is woven around concepts such as domination, authority and positive law. Secondly, Albo addresses natural law as a complicated and dialectical issue. Natural law, according to him, is a double-faced legal-political agenda. On the one hand, he is acquainted with the idea that natural law reflects moral intuitions about universal and eternal norms. On the other hand, he insists that a worldview that supports natural law in fact legitimizes violence as a habitual and accepted behavior. Hence, the relationship between law and violence is also an evolution in the development of society from naturalistic-violent to a society based on positive law.

Nevertheless, Albo points out that the existence of a conceptual connection between the notion of natural law and the violence deeply embedded in the norm KDG. This observation actually reduces the distinction between law and violence to the distinction between positive law and natural law, while the naturalistic violence characterizing natural law is the violence addressed by the norm KDG. In other words: according to Albo, the justification of violence concealed in KDG is equal in extent to the legitimization and normative value of violence in natural law. Removing a case from court to the struggle in the courtyard is therefore a regression from positive law to natural law.  

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43. Albo's distinction between violence and political power definitely recalls the distinction made by H. Arendt in her concluding analysis of both notions: "Power and violence are opposites; where the one rules absolutely, the other is absent. Violence appears where power is in jeopardy, but left to its own course, it ends in power's disappearance" (On Violence (New York: Harcourt, Brace and World, 1969) at 56).

44. The identification of the fundamental justification of KDG in reference to Natural Law was made by S. Atlas, "Kol de'A'lim Gavar" in Pathways in Hebrew Law (New York: American Academy for Jewish Research, 1978) at 76-82 (H). Atlas's analysis of Talmudic discussions and post-Talmudic commentaries lead him to associate the Halakhic category 'hefker' (ownerless property and renunciation of ownership) with the idea of Natural Law. Regarding that, it should be noted that in classic Roman Law there exists a conceptual connection between legal categories of ownerless (*derelictio, res nullius*) with Natural Law. An example of such connections can be seen in the following "Quod enim nullius est, id ratione naturali occupandi conceditur" (Digesta 41.1.1).
Stabilizing Law by Violence

As we have seen, for Albo, reduction of the law/violence problem into a question of positive-natural law actually describes the legitimization mechanism of KDG as equivalent to the validity and legitimacy of natural law. The step towards extra-legal violence is thus a normative withdrawal into an inferior stage in the evolution of the legal-political culture.

We shall now consider a different type of justification for extra-legal violence, one which exposes the latent advantage hidden in KDG. As shown above, R. Asher b. Yecheil's position saw KDG as a pre-legal procedure whose target is to promote the relevant discussion in court. This position views extra-legal violence as an event that is ultimately concluded in court with ordinary legal procedures. This position is explicit in the commentaries of the Talmud that seek to rationalize that KDG as a norm that is not an alternative to the law, threatening its power and authority, but rather ultimately, one that contributes to the preservation of its status and to the strengthening of its authority. An explicit expression of this view appears in the saying of R. Samuel b. Meir (Ramerupt, France, 1080/85–1174) that explains the preference of extra-legal violent procedure over the conventional procedures for doubtful cases, such as division or judicial discretion:

… Maybe the witnesses will show up and testify who is the owner and as result of that court's verdict will be broken and refuted for they already ruled division or judicial discretion. For this reason the court is not getting involved in that case and therefore the one who is more violent prevails.

Similar to R. Asher b. Yecheil's approach, R. Samuel b. Meir also does not regard the Talmudic cases as essential doubts, but as doubts to be solved when suitable evidence is ultimately brought before the court. Consequently, extra-legal violence is perceived as an appropriate solution in contrast to erroneous verdicts that might be reversed once sufficient evidence is brought before the court. For this reason, extra-legal violence is practiced as means of preventing possible embarrassment on a future occasion when evidence is submitted to the court. In other words: extra-legal violence is the court's flotation device that spares it from possible contradiction and shame. This explanation seems to emphasize a different aspect of the law/violence problem, namely, the supplementary value of KDG by which extra-legal violence contributes to the strength of the law itself. Extra-legal violence therefore serves the law and saves it from inconsistencies and self-contradictions that might enfeeble verdicts or without which would leave them seeming 'broken and refuted'.

An outstanding expression of such logic that describes KDG as an extra-legal

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45. Quoted in R. Israel b. Pethahiah Isserlein (1390-1460), Terumat ha-Deshen (Jerusalem: 1990) at ch. 352 at 313.
46. There are two medieval versions of R. Samuel b. Meir's position. Alongside the one quoted above there exists a similar one which make the same claim in different terms: 'Maybe the witnesses will show up and refute the verdict ruled by the court, therefore the court is not troubled for them to judge a case likely to be a distortion, rather leave the parties and KDG until witnesses come and clarify the case'. (R. Samuel b. Meir commentary on Babylonian Talmud Baba Bathra at 35a).
procedure designated to protect the court from making mistaken judgments can be seen in the following anonymous source:

The reason for the ruling KDG is that court is not required to address their case for there is no loss of money for both of them and no urge to reach a decision. Accordingly it is comfortable to leave them to do what they wish and we should not give an erroneous verdict. Therefore the one who is more violent each time owns it, until the other one will overpower him, either by arm or by evidence.  

Here we see again a clear explication of the motives that lie beyond the legitimization of the extra-legal violence, and which link KDG to the fear of erroneous judgments. According to this description, the interest of preserving the court’s dependability overrides the concern about arbitrary consequences reached through violence. In a different way, one might also say that extra-legal violence is a kind of solution that is evidently unjust, but thanks to its legitimization it ratifies the justifiability of the ordinary legal procedures.

**What does the Law Earn from Violence? Concluding Reflections**

Above we sought to stand on a different aspect of the law/violence relationship by focusing on the legitimate transference of a case from the realm of law to the realm of extra-legal violence. In this sense, we wanted to shed light on the problem of justifying extra-legal violence and the logic that this legitimization is based on. As we saw, transference from the legal to extra-legal violence is usually done on behalf of uncertain adjudication undetermined by ordinary legal procedures, which for that reason become a cause for moving beyond the law. Metaphorically speaking, uncertainty and doubt are the passing points or a departure gates for the ‘beyond the law’ violence. In the cases analyzed above, legal doubt signifies the limits of law and the edge of law’s power to dominate just regulations among the conflicting parties.

As we saw, the legitimization mechanism of violence in the European duel could not serve as an explanatory model for the Talmudic norm KDG, for there is no base for identifying violence as a revelation of Judicium Dei. Nonetheless, we did point out three legitimization mechanisms in the post-Talmudic Rabbinic literature. One neutralizes violence and reduces it to competitive venture which can also be viewed and evaluated in economical terms as pre-judicial procedure. The second is based on the recognition of violence as a justified norm according to natural law, and the third is based on acknowledging the utility of violence for the law itself.

All three represent different ways of dealing with the legitimization of extra-legal violence in different levels. The third explanation is the most striking and deserves special attention, since it represents the violence-law relationship from an innovative perspective. In contrast with former explanations, the antithetical as

47. This source is found in a 16th century collection of mid-medieval commentaries on the Talmud and Rabbinic responsa collected by Bezalel b. Abraham Ashkenazi (Jerusalem, 1520-1591/4). See *Shitah Mekubbezet, Baba Bathrah* 34b (Jerusalem, n. d.) at 148.
well as the symbiotic (judicium dei, competition, natural law, etc.), this explanation emphasizes the direct interest the law has in extra-legal violence. In other words, this explanation not only views extra-legal violence as compatible with the law, but also as serving the law and supplying a meaningful contribution to its status.

In fact, our analysis pointed out the opinion that legitimizing extra-legal violence might benefit the law itself in a very complex manner. This formula can be demonstrated in two aspects both emphasizing various advantages—a tactical and a strategic one.

At the tactical level, we can view the moment court decides when and where to intervene or to adopt a passive position not as moment of powerlessness, but rather as an expression of control and power. Put differently, the manifestation of the court’s power is not only recognizable by judicial activism but also by judicial passiveness, and mainly by the liberty court enjoys in deciding when and where to hold an activist stance or a passive one. In that respect the authority to decide whether to intervene in conflicts is stronger than the official authority of actual interventions in different realms.

To the same extent that judicial activism elevates the court above its declarative function, the court is also elevated by judicial passiveness that puts it in a voluntary stance through enjoying the choice whether to react to the call for justice or to avoid it. In other words, nonjusticiability and paralyzed courts do not necessarily express the weakness of adjudicative ability, but rather a powerful stance no less, or perhaps even more, than judicial activism.48 The question of authority and power in that respect contains a paradoxical structure in which the silencing of court's action and judicial procedures in fact reconfirms its dominant power and superiority.

However, R. Samuel b. Meir’s interpretation exposes an additional advantage achieved by the legitimization of extra-legal violence. According to this view, by legitimizing extra-legal violence, the court's image accumulatively earns a benefit in the long run perspective. That is, the extra-legal violence saves courts from contradictions and embarrassments and preserves the coherent and consistent image of the law. According to that, when the court's decisions might present it in an unfavourable light is the time for the law to recognize the legitimacy of extra-legal determinations.49

48. In that sense the tactical advantage here is certainly related to the question of justiciability, where the court is provided with techniques for refraining from deciding cases on the merits when doing so would be imprudent. Though the doctrine of justiciability generally addresses the interface of political and legal issues, our exposition here offers an understanding that stretches the court's nonjusticiabilities to the border of law and violence.

49. Justiciability is usually explained through three approaches: (1) The classical approach which inquires if there exist affirmative grants to the limits of jurisdictions; (2) The functional approach that takes pragmatic, efficiency oriented inquiries to the ability of the judiciary to resolve the controversy; (3) The prudential approach which includes sensitivity to the necessity of judicial respect for other branches of government, and the potential for embarrassment of incoherency or inconsistency. See L.A. Smith, “Justiciability and Judicial Discretion Standing at the Forefront of Judicial Abdication” (1992-93) 61 Geo. Wash. L. Rev. 1548.