For the individual admiring his/her surroundings, it is obvious from the beginning of his/her awareness that there exists an order in this world. The explanation is obvious too: Our world is a world created, and its creator (God or the Gods) has gone to the trouble of laying down laws for his creatures; one kind for the lamb and another kind for the wolf. Furthermore, it is understood that mankind, is also a part of the world which has been created, and therefore, to which the divine laws (such as the commandments declared or interpreted by Zeus, Manu, Moses, Mohamed, etc.) both apply and refer to.

However, the question is whether the same laws refer to us the same way as the rest of the world. In addition, are human beings considered to be social creatures the same way as wolves, ants or bees? If this is the case, then our existence is a pre-determined one. But if we are not, then we are able to lay down new laws for ourselves – in direct opposition to the other creatures which inhabit this planet. Taking this a step further: if we are self-determining, how far does our individual freedom concerning the exercising of a certain right extend? Can we do ‘what we want’ or ‘what we must want’? Are there any kind of barriers to our legislative activity (and if so what are they)?

The historical change of the doctrine of creatable law

The answer to the question asked above has significantly changed over time. As with almost every reflection, this one also begins recounting the deeds of the classic(al) Greeks. Since we still cannot find the legal precedents established there, namely the jurisprudence, the nature of Greek law has instead been revealed at the junction of politics and philosophy; with regards to the constellation and constitution of poleis. In short, coexistence was defined then along the following lines: the set up of cities and poleis is given by nature/ the gods, but its implementation depends on the decision of people.1

The argument that human association follows the order of natural laws/rules, or the physis, just like the association of wolves or ants produces two counter-arguments. First of all, experience has shown us that this is simply not true since the constitution of poleis varied. Second of all, ‘nature’ can not be perceived as a determination independent of human beings. Nature cannot be perceived as empirical because nature bears the mark of human interference to an exponentially progressive extent. On the other hand, it can also not be realized philosophically, as the concept of a ‘nature’ (in and of itself) is merely a

1 The most well-known formulation of this very last thought stems from the sophist Protagoras: "Man is the measure of all things." (Recapitulated in Plato’s Theaetetus, Section 152a.)
philosophical product.\textsuperscript{2} The ideas of ‘natural’ and ‘human’ are not completely contradictory to each other, however they do represent two poles in a system where each both defines, and is defined by the other.\textsuperscript{3} Our world is characterized by duality, and as declared in an often quoted sentence of Kant: “Two things fill the mind with ever new and increasing admiration and awe, the more often and steadily reflection is occupied with them: the starry heaven above me and the moral law within me.”\textsuperscript{4} In accordance with this line of thinking, our world really consists of two worlds: a natural and a moral world.

The dilemma concerning the priority and relation of physis and nomos also refers to the character and basis of law. It asks whether law is the product of nature or of humans. In the first case, the law is given by nature, meaning it is a natural formation. However, in the second case, it is created by human(s) (signaling an artificial formation). The answer shows how extended the freedom of human practice (or will) really is; whether it is confined only to the sphere of cognition or whether applies to the area of creation as well. The answer was, even in the antiquities, that law is an artificial product beyond all rebuke, and at least in part, (with regards to positive law), a series of actions voluntarily committed by humans. Therefore, by the later centuries questions in relation to the presence, proportion and significance of the ‘natural’ element present in law were relegated as to how ‘artificial’ and ‘natural’ share the law. Thus, if our political ‘society’ (our polis) and in general our world possess dual construction, then our law (a product of our world) must as well. That leads directly to the idea of ‘double law’ or ius duplex.\textsuperscript{5}

It is well known that originally ius, fas and mos have common roots, and these roots are sacral. This idea of self-determination is also seen in the Roman law and jurisprudence: “Jurisprudence is the knowledge of things divine and human, and the science of what is just and unjust.” The law arose out of the undifferentiated norm and agglomerated from moral/custom norms (physis) appearing as written norm (nomos). Nevertheless, from the very first moment of this phenomenon, law bore the mark of this duality (of human and divine/natural momentum) further, namely in the duality of ius scriptum and ius non

\textsuperscript{2} “The philosophy distinguished from myth appeared and the nature was discovered, namely the first philosopher was the human who discovered nature.” Leo Strauss: \textit{Natural Right and History}. Chicago: University of Chicago Press, 1953.

\textsuperscript{3} “NATURE (the art whereby God hath made and governs the world) is by the art of man, as in many other things, so in this also imitated, that it can make an artificial animal.” And a bit later: “For by art is created that great LEVIATHAN called a COMMONWEALTH, or STATE (in Latin, CIVITAS), which is but an artificial man.” Thomas Hobbes: \textit{Leviathan}. (1660) ‘Introduction’

\textsuperscript{4} I. Kant: Critique of Practical Reason (1788)

\textsuperscript{5} See also: Juhász, Zita: ‘De iure non scripto, avagy a korai jogfogalom duplexivitása.’ [De iure non scripto, alias the duplexivity of the early definition of law] 5 \textit{De iurisprudentia et iure publico} (2011/1) [www.dieip.hu]; Linda Ellis – Marius Tiberius Alexianu: ‘Duplex Ius: Conflict and Competition between Romano-Byzantine Law and Folk Law in the Balkans.’ In Linda Jones Hall (ed.): \textit{Confrontation in Late Antiquity: Imperial Presentation and Regional Adaptation}. Cambridge: Orchard Academic, 2003. Certainly, natural law has many forms. In this article we rely on the classical version, that sets the natural law „above” the human law in so far that it is blocked voluntarily from the human interposition, and is instead given „objectively”.

\textsuperscript{6} Ulpian D.1.1.10.2.: „Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque injusti scientia.”
scriptum.\textsuperscript{7} What complicates the web of \textit{second nature} further is the \textit{convention} sanctioned by the human.\textsuperscript{8} The next question relates to the relationship between the two natures. For many years the merit of unwritten/divine/natural law was seen as indisputable against written/human/positive law.\textsuperscript{9}

This relation changed in the modern era when the priority which had once been assigned to the human being by the sophists, returned again: “Custom is a second nature which destroys the former.”\textsuperscript{10} The two halves of law became equal with each other via the concept of natural law in the modern era – not irrespective of the deconsecrating of philosophical and legal thinking. The most radical step in this direction was taken by the father of natural law and international law, Grotius. He carried on from the work of Aristotle, namely the division of natural right (\textit{ius naturalis}) and voluntary right i.e. “a \textbf{LAWFUL RIGHT} in the strictest sense of the word law” (\textit{ius voluntarium}).\textsuperscript{11} He organized divine law under human law, which he designated as a voluntary right.\textsuperscript{12} Although the

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\item[7] Even concerning the relationship between speech and writing Greek philosophy viewed the written as being inferior to the spoken. Hence, exposition, argumentation and education had to happen in speech. E.g.: “If he […] has the power to show by his own speech that the written words are of little worth, such a man ought not to derive his title from such writings, but from the serious pursuit which underlies them.” He, who expresses his thoughts in words has ‘the name “philosopher,”’ that is, “lover of wisdom.” ‘On the other hand, he who has nothing more valuable than the things he has composed or written, turning his words up and down at his leisure, adding this phrase and taking that away, will you not properly address him as poet or writer of speeches or of laws?’ Plato: ‘Phaedrus.’ 278c-e. Plato in Twelve Volumes, Vol. 9 (Transl. by Harold N. Fowler) Cambridge, MA: Harvard University Press – London: William Heinemann Ltd., 1925.

\item[8] To the debate of nomos - physis see also G. B. Kerferd: \textit{The Sophistic Movement}. Ch. 10. Cambridge U.P., 1981. Platon exposits the myth in the presentation of Protagoras according to which “Zeus feared that the entire race would be exterminated, and so he sent Hermes to them, bearing reverence and justice to be the ordering principles of cities and the bonds of friendship and conciliation.” Plato: ‘Protogoras.’ 322c. (Transl. by Benjamin Jowett.) This law i.e. voluntary law, social norm (\textit{nomos}) wining over the law of nature (\textit{physis}) is needed for organizing order.

\item[9] E.g. “[11] We have said that there are two kinds of just and unjust actions (for some are written, but others are unwritten), and have spoken of those concerning which the laws are explicit; of those that are unwritten there are two kinds. [12] One kind arises from an excess of virtue or vice, which is followed by praise or blame, honor or dishonor, and rewards; for instance, to be grateful to a benefactor, to render good for good, to help one’s friends, and the like; the other kind contains what is omitted in the special written law. [13] For that which is equitable seems to be just, and equity is justice that goes beyond the written law.” Aristotle: \textit{Rhetoric}. I, 13. 1374a. (Transl. by J. H. Freese) Aristotle in 23 Volumes. Vol. 22., Cambridge and London: Harvard University Press – William Heinemann Ltd., 1926.

\item[10] Blaise Pascal: \textit{Pensées}. 93. New York: E. P. Dutton & Co., Inc., 1958; and he goes on in 94: “There is nothing he may not make natural; there is nothing natural he may not lose.”

\item[11] Hugo Grotius: \textit{The Rights of War and Peace}. (Transl. A. C. Campbell) Washington – London: M. Walter Dunne, 1901 (Hyperion reprint edition 1979) p. 21. And here comes the definition of \textit{ius naturalis}: “Natural right is the dictate of right reason, showing the moral turpitude, or moral necessity, of any act from its agreement or disagreement with a rational nature, and consequently that such an act is either forbidden or commanded by God, the author of nature.” Ibid.

\item[12] “Now the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things. To which it does not extend. […]
\end{itemize}
\end{footnotesize}
Greeks had already formulated that natural law has no system of sanctions they believed that this was due to the power of fate and destiny to rule and order everything. Over time this trust in the power of fate and destiny disappeared. Although the validity of natural law was universally acknowledged, its role, in regards to precedence over positive law was disputed.13

For the Romans, thinking in regards to natural-and positive law-centered primarily on the matter(s) of the duality (of) and distinction between the philosophical and practical legal aspects of the two. The famous thesis of Celsius - *ius est ars boni et aequi*14 - was for his contemporaries astounding and moreover outrageous much in the same way that observing it from the aspect of our recent legal conception tuned onto positivism.15 Much more realistic was the warning of Paulus: *...non omne quod licet, honestum est*16. However, even harsher is the way Modestinus composes: *...legis virtus haec est: imperare, vetare, permettere, punire...*17. This thesis enjoys absolute priority for the legal praxis: law is what was created as voluntary/positive law and applied. Nevertheless, the demand for ordering the legal praxis under moral gauges (ultimately justice and equity) carried through maintaining the idea of law being above voluntary/positive law. Additionally, even in the works of the greatest proponents of legal positivism, voluntary law is recognized as possessing enough validity to remain independent of supposed law.18 More precisely, the basic position is converse. After the independence of positive law from superior law that which remained, was law but not in a purely positive form.

For seizing on this duality, there is an eligible and often used distinction, namely the distinction of the definitions of *ius* and *lex* or law and act, even if this distinction is riddled with inaccuracy.19 Law is the sum, non-creatable in its completeness, written and positive in its non-completeness. Act, on the other hand, is the part, creatable in its completeness, and as such, likely written and positive.20 This same duality makes the simultaneousness of

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14 "Law is the art of what is good and just." D. 1.1.1.

15 "...the fact that Celsus used *bonum et aequum* as an argument in order to correct strict law– must have shocked his contemporaries. Celsus, however, obviously took great pleasure in this. [...] Celsus was the first and until the late classical legal science, only jurist who used among his arguments that of *bonum et aequum*." H. Haussmaninger: "Publius Iuventus Celsus - The Profile of a Classical Roman Jurist." In: W. Krawietz – N. MacCormick – G. H. von Wright (eds.): *Festschrift Summers*. Berlin: Duncker & Humblot, 1994, P. 253

16 "...Not all that is permitted is honest."D. 50.17.144. pr.

17 "...The strength of a statute is commanding, forbidding, permitting, punishing D. 1.3.7.

18 Such is the thought of natural law identified with divine law by J. Austin, or “minimum content of Natural Law” by H. L. A. Hart.

19 Concerning the precision of archaic laws see also e.g. Hamza Gábor: *Jogősszehasonlítás és az antik jogrendszerek*. [Legal comparison and the antique legal systems] Budapest: KJK, 1998, P. 125-130

20 The extension from the acts towards law is provided by the introduction of types of law e.g. perpetual law, natural law, divine law [*lex aeterna, lex naturalis, lex divina*] by St. Thomas Aquinas or the so called laws metaphorically termed laws by John Austin. „If this rule is composed in writing then it is called law that is ‘written disposition’ by
On the Creatable Law

the thesis that the law is both creatable and non-creatable (as well as the temporal change of this relationship) possible. Mátyás Bódig divides this temporal change first into two major eras, the pre-modern and modern eras, 21 (with the end of the 18th and beginning of the 19th century being the border between the two). From the legal historical aspect, this time period is marked by the creation of the first modern codes, such as the stellar Code civil.22 The difference between these two eras is that the function assigned to law was apprehended differently.

Essentially, the difference between the functions of law and legislation appears in the expectation of assuring the legal community of legal equality. The first part of this, relates to the coherence of the society in question as that of a reproductive society and the determining component of its identity. This “coherence” is the law in modern circumstances. The same laws, and the same constitution above all, unifies us into a society organized politically, i.e. state. 23 Furthermore, this state is a nation state, a phenomenon relatively new in history, in spite of forces and attempts of projecting it further back. 24 Before this, communities had been ordered by the complicated, hierarchical structure of identities and loyalties into the local and universal togetherness.25

The second question relates to the first one: if the law is not responsible for creating a community among people, then it also can not serve as the common denominator in assuming legal equality. On the contrary; pre-modern and even medieval law is anchored

Izidor. Hence, act is not the same as law but its manifestation.” St. Thomas Aquinas: Summa theologiae. Secunda secundae, 57. 1. 3.


23 It is the lack of this legally binding force – “the contract” – that in accordance with the theories of contracts separates the state of nature from the state of citizen.

24 The flash back of “nation” becomes possible due to the fact that the elements connecting only with the achievement of middle-class status – nationality in a sense of ethnicity (natio), political loyalty (fidelitas) and the political community (communitas) – separately or partly connected had already existed earlier. See also Szűcs, Jenő: ‘A nemzet historikuma és a történetszemlélet nemzeti látoszöge. Hozzászólás egy vitához.’ [The historicum of the nation and the national viewing angle of historical aspect. Remarks on a debate.] In Szűcs, J.: Nemzet és történelem. Tanulmányok. [Nation and history. Essays.] Budapest: Gondolat, 1974, P. 92

25 „The ‘society theory’ of Middle Ages records from the glossators through scolastics and Dante to early modern times five different kinds of basic human coexistence, of which the lowest four are: the ‘societies’ of village, town, province and kingdom (universitas vicri, civitatis, provinciae, regni) organized under the highest social organism and societas publica : the universitas populi Christiani embodied in the church.” Szűcs, J.: »Nemzetisége« és »nemzeti öntudat« a középkorban. ‘[‘Nationality’ and ‘national consciousness’ in the Middle Ages.] In work cited. P. 213
on and characterized by a variety of exemptions, discharges, privileges, patents, numerous discriminations and in a word, inequality, all stemming from the natural-divine order.26

The modern political-legal order based on the thesis of popular-sovereignty places the function of formal-rational law on organizing the community and bringing them to a common point. Thus, this order is not a result of the divine or natural order but one of the will of the holder of sovereignty i.e. the people, regardless of however slowly and gradually the political institution (political representation) developed which was able to channel this will. In the modern era, the legislation created by way of human will had to reckon with what it uses its ability for i.e. what role it destines to the laws created by humans. The answer to this question constitutes the next borderline being within the paradigm of modern legislation at the turn of 19th and 20th centuries.

In accordance with the conception of legislation in the 19th century, “what the law has as function is to draw the frames of the political existence of the nation, the borders of the competence and autonomy of state and society and to ensure the maintenance of clarified relations that can be accepted as rightful to the members of society.”27 This approach equates with the liberal concept of the limited or “minimal” state and is rooted in the doctrine of natural law in the 18th century. This doctrine relied on both constitutional and non-constitutional legislation to anchor the conditions of the order and way of coexistence, as well as competition and cooperation in a simple, transparent and durable way (permanently if possible) and finally to guard them against any inner or outer attacks. This was meant to be fulfilled by the major constitutions and laws of the era, which were often declared immutable.

This phenomenon is exactly that which is cancelled by the legislation of the 20th century since it ascribes a totally different role to legislation. This new role is the so called social control, in which the law receives an instrumental function. Alongside the regulative function traditionally assigned to law and legislation – namely to answer the same repeatedly asked questions, and cases – the directive function, took on responsibility for answering those new questions in a new way i.e. adjusting to changing circumstances. Thus, in the 20th century the regulative state was usurped by the interfering state, which was then usurped by the engineering state, which uses law as the means of social engineering. Against the constant, immutable law, this brings along the dominance of law flexible, constantly adjusting to circumstances, always changing, and the new concept of legislation.28

26 „In the Middle Ages the mechanisms of legislation were established in a way that the defining social inequalities were manifested in them. The law created or acknowledged anchored the hierarchical relations that had already existed even before the law...” Bódig, M.: ‘A jogalkotás jogelméleti problémája’ [The legal theoretical problematics of legislation], P. 115-116
27 ibid. 117. o.
28 Bódog Somló already perceived this development at the beginning of 20th century: „The interference of the state is diffusing on a continually bigger circle. However, the freedom of the people is also increasing with the changing of the current interference. Increasing state control, with increasing political freedom: that is the direction of development; – state control expending to everything and perfect freedom to determining or changing this regulation: that is the ideal of development.” These are the final lines of his famous book - Allami beavatkozás és individualizmus. [State interference and individualism] Budapest: Politzer, 1903.
The barriers of creatable law

Thus, creatable law is the settlement of law as the object of voluntary, moreover tendential interference, the merits of which had gathered more and more ground throughout legal history. The meridian of creatable law, at the same time the pole and the correlation point of the abridgment of legislation, is the absolute power of legislature. This concentration was enabled by the engagement of legislation and sovereignty. The definition of this sovereignty as plena potestas was introduced by Jean Bodin. The conception of chief power understood as full powers was transferred from regal sovereignty to popular sovereignty and made the legislative power not limited or limitable by anything imaginable. The tip of the iceberg to this conceptional change was the tracing back of law to act, its identification with that, just as it was expressed in the credo of the exegetic school. Leaving the question unanswered, whether there was any moment in history when these full powers had their way, we can accept it as a theoretical model that – as a discretionnary legislative power – can serve as the “absolute zero” to the examination of limiting legislative power. In the following, we will examine the scale of these barriers and the way they can generally be observed in moderate civil states. The barriers will be divided along the lines of extra-legal and inner-legal, evoking the old distinction of Gyula Eörsi.30 I. The first group of barriers standing in the way of legislative power is that of the extra-legal barriers.

(a) The barriers of power result from the character and embedded nature of power in the law. We find the relationship between law and state and the fact commonplace that the prevalence of law is guaranteed by the state acquiring a monopoly on the use of legitimate force (Max Weber). Hence, law is order of force (Hans Kelsen) and that is why legislation is the exercising of the power of legislature (Rechtsmacht: Bodog Somló).31 Thus, the fortitude concentrated and exercised by the (power of the) state is not needed only in so far as – besting the other local or particularistic social powers - it can enforce the prevailing of legal norms – hazarding the consequences (if there are any) of being paralleled with political adversaries during the forthcoming democratic elections but it is also the constitutive element of the definition of law.32 Theoretically, we refer to this momentum by composing the authoritative, preemptive character – namely the demands on the binding

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29 „The exegetic school espoused the theory that the whole body of civil law was in the Civil Code and that every legal solution has to arise from the text of the Code indirectly, or by induction or deduction. Every legal solution will be solved eventually during investigating the expressed or hypothetical will of legislature.” The words of E. Gaudemet cited by Varga Cs.: A kodifikáció mint társadalmi-történelmi jelenség. [Codification as social-historical phenomenon] Budapest: Akadémiai, P. 124
31 Somló – adapted from John Austin – derives the definition of law from this Rechtsmacht „means[ing] the rules of a power meeting generally obedience, extending to a broad circle and constant type, most superior.” F. Somló: Juristische Grundlehre. [Legal basic study] Leipzig: Felix Meiner, 1917, P. 105
32 E.g.: „In general, legislation the special acting form of state authority, the controlling power of state, the determining and defining way of establishing legal norms.” Drinóczi, Timea – Petrétei, József: Jogalkotástan. [Doctrine of legislation] Budapest – Pécs: Dialóg Campus, 2004, P. 73
force overtaking any other norm – of the law. As can be later seen in Section 2.a, the barriers of power can be found in the legal institutions of the separation of powers.

(b) The barriers of expedience can be placed under the range of public policy with the help of a classification coming into fashion nowadays. In this approach legislation serves as a means to reach the goals appointed by the (major) politics. However, the goal rationality of Weber has to be bested at three levels - sometimes not compatible with each other – in the legislation in order to reach the goal set. The first of the three levels is the rationality of power and politics. The question is what sort of consequences does an act (for example the introduction of property-tax or the privatization of health care) have for the party in power/in the opposition. Secondly, the rationality of state administration values how a political decision can be executed. Can the decision be executed in time and at expenses that following the goal assigned by the decision still remains rational? Finally, the rationality of object (profession-departmental policy) values the effects of the decision to the area given (in our example on the tax incomes or health care) from the aspect of rationality. The balance of these three is what truly makes a legislative decision rational.

(c) Significant to endeavors of politics and public policy is also the economy, which is worth mentioning individually, moreover since it is a particularly hard barrier. The border between the logics of I do “what I want” or “what I must want” i.e. the division of political voluntarism, is not a clear one. Economical acts and conditions cannot be violated, even with any kind of intended declaration or a law enacted with any level of majority. And if the legislature neglects this, the political groups mentioned in Section 1.a will without a doubt, remind him of it. Before the legislation of the ruling power the same kind of barrier is set via the judgment of civil society, with the help of publicity, the general public, media, and other vehicles of opposition.

(d) The barriers of correctness are also of a political nature as far as a public statement on the method and order of coexistence is manifested in them. Traditionally, this is formulated as the rightness of law. Its most pregnant version is the thesis of lex inusta non est lex written by St. Augustine i.e. the (human) law unrighteous loses its legal quality, even its binding force.33 The connecting of justice and rationality is in the centre of the rationalist natural legal – rather neuro-legal - concept of Kant. In his system law is a part of the moral.34 This thought – manifested as “justice”, means the historical realization of the community of rational, autonomous creatures in the “empire of goals”- resurrected again with the Neo-Kantianism at the turn of 19th-20th century. Nevertheless, Stammler places correct law no longer amongst natural law but amongst that positive law created in some way in accordance with the “social ideal”. That trend gives the barrier of content of legislation, and eventually it examines the moral rightfulness and verifiability of this content.

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33 Nor in this categorical formulation is the thesis the requisite of bygone days: Gustav Radbruch declared recently with regards to the Nazi legislation, that laws unequitable „to an intolerable extent” causing the state of „legal injustice” (gesetzliches Unrecht) instead of that which we must obey „supra-legal justice” (übergesetzliches Recht). See also: G. Radbruch: ‘Gesetzliches Unrecht und übergesetzliches Recht.’ In: Rechtsphilosophie. [Legal philosophy] Stuttgart: K. F. Koehler, 1956, pp. 347-57.

2. The other group of barriers constraining the legislation into frames more visible to us is that of inner-legal barriers. Law cannot only react on itself but it can also control, even constrain its own functioning. Naturally, “self-control” is the constraining of legislature with regards to content. In this definition, a legal barrier is also the barrier of power. Thus, the inner barriers are in direct contact with the external ones.

(a) If legislation is the exercising of power, then here the thesis of Montesquieu can be also applied: power can and must only be constrained by power. Power namely wants to acquire full power and if we want to defend freedom, we have to constrain it. Only another power can constrain it, which can only be approached if the unified sovereign power is divided into pieces which are in opposition to each other. Its institutionalization within the law is the separation of powers, commonly known as the system of checks and balances. And if the separation of powers falls into the system of the political pluralism in the 20th century, which is characterized by the resultant of the effort of power agents coordinative, then arrive at the present day: namely to legislation placed in a complicated political field of force and constrained by this field of force.35

However, jurisdiction can set a bar against the will of legislature not only by jurisdiction of public law but also by operating ordinary courts. This was something well known by all legislatures, from Justinian up to the absolutist monarchs. It was also known, that interpretation is the place where the will of legislature falters, which is why legislature tried the impossible undertaking of forbidding interpretation. More precisely, attempt was not impossible, theoretically it only requires the raising the level of autonomy afforded to jurisdiction to such extent so that it is equivalent to the idea and function of law itself.

(b) To this day, the heritage of natural law is preserved by the barriers of international law even in their evolution and character. Already Gaius identified the jus naturale with jus gentium and the area of jus naturale as a philosophical abstraction but the area of jus gentium as a legal abstraction was tackled in Rome. The natural legal character appears in the first modern documents of human rights as well – referring to the fact that these rights are not granted by the state or the sovereign but the human as a human being is entitled to them via their birth. Nowadays this phenomenon of human rights constraining the sovereigns prevails too, and has become positive and institutionalized to a high degree in the international political-legal system. Actually, it can and must be valued as a rejection of the binding power of international legal norms and the demand made of full powers if that state (more precisely the political power possessing the state power) refuses - on grounds of its own sovereignty - attempts at intervention and constraint arising from international organizations and forums.

(c) The barriers of basic rights must be distinguished from the inner legal institutional system of the separation of powers. Both stem from the same source of natural law, and they often carry the same content as human rights. This is especially true in relation to the rights afforded by constitutional freedom and the human rights of the first generation. There is nothing accidental about this. The innovations of the same social-political processes were

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35 Naturally, the „separation” of powers placed between emphasized quotation marks existed also in the past: as an order of power between persons, estates, institutes divided and balanced from the mixed administration of the Roman Republic through the battles between the Papacy and Holy Roman Empire up to the feudal structures.
institutionalized in the international norms in the same manner as the inner (constitutional) legal documents and norms.

Concerning the mechanism of the operation of human rights barriers (both historically and analytically) it was desired that *absolute* barriers be set as a first step in front of the *absolute* (legislative) power. The following supposition that *no law can be enacted* concerning the matter defended by a basic right can be called a standard text. As step two, the constraining of legislature can be nuanced so that basic rights still do constitute an absolute barrier i.e. even basic rights can be constrained. However, constraint of basic rights is generally only possible with special conditions i.e. it needs an especially strong verification. The usual gage of this verification (following the practice of German constitutional court) is the test of *eligibility-necessity-proportion*. As step three, the constraint of constraining basic rights has to be considered i.e. those cases – those basic rights of special status – which cannot be constrained even in the event of the existence of conditions mentioned before. Thus, they still set an absolute barrier to the legislature.

From the basic rights defending certain special legal objects and setting barriers before legislation, we must distinguish the principle of *equality* as playing the role of a *formal barrier*. Equality – and the *prohibition of discrimination* deduced from that - does not have its own guarantor. Before legislative regulation referring to *every object*, it sets the formal requirement that if legislature creates law, it should do so, so that it does not conflict with the theory of equal treatment and the prohibition of autocratic distinction.

(d) The *barrier of law dogmatics* stems not directly from legal directions but from their dogmatic processing. Legal dogmatics helps the legal practice via the establishment of definition(s), system(s) and method(s) and regulates between theory and praxis, and science and praxis. In order to be able to do so, the law must first be molded into an autonomous and coherent system that is able to complete its social functions. In accordance with one

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37 Tamás Győrfi designates four of these possibilities: 1. those rights that cannot be limited „because after deliberation they always prove to be heavier than any other aspect put in the other scale pan” (e.g. the right to life and dignity); 2. those, „against which nothing can be put in the other scale pan” (e.g. the prohibition of unnecessary and cruel torture); 3. those that reflect „already the result coming after deliberation” (e.g. basic institutions of constitutional criminal law); and 4. the formal barrier of prohibition of discrimination. Győrfi, T.: *op. cit.* P. 93

formulation of the autonomy thesis “legal reasoning is a viable and vital form of public practical reasoning that is able to serve the task assigned to it because of its autonomy from moral and political reasoning.” Thus, this part of autonomy is the autonomy of argumentation and verification – within this the constitutive role of dogmatic reasoning.

The nature of legal dogmatic barrier standing in front of legislation can be demonstrated by the metaphor of “chain-novel” introduced by Dworkin for the introduction of the fixity of interpretation. Let us imagine that more writers cast lots in favor of writing a common novel. Who has drawn number one will write chapter one, who has drawn number two, will go on with chapter two and so on, so that the novel will be made out of the parts connecting as a chain. In this case, the writer of the first chapter has full freedom in picking the genre, era, characters, topic, etc. The others coming after him find themselves solving the challenge of interpretation and creation. It is in this way that the legislature is constructed – if it is to be created based on an apprehensive work – on the legal dogmatic antecedents set by the predecessors. However, he will also build on that work further. He is not hog-tied, nor is he however, totally free. Even if he freed himself from the traditions, he would have to take the risk of the presumable defeat of rejecting his own basis from the beginning. And such an undertaking is qualified foremost among revolutionary circumstances as rational.

Rather a formal barrier is created by the gage set in front of the legislation, which shows the standards of constitutionality. Constitutionality means due process law in the first place. The due process of law demands that the laws enacted – whatever their content is – should be cognizable and predictable. “The due process law makes the state – in first case the legislature – have the obligation to assure that the total, certain division between areas of law and certain acts are clear, unambiguous, predictable and foreseeable concerning their operation to the recipient of the norm.” Lon Fuller names eight ways how the legislature can “ruin” legislation, violating the requirements of constitutionality and rule of law. Making these mistakes “only” has the effect that the legislature writes itself out of the community of civilized states.
Epilogue

It is easy to recognize that the barriers introduced in Sections 1. d. and a 2.a., 2.b. and 2.c are the heirs of the conception of *superior law*. Although the idea of the power of divine law and natural law constraining and overwriting human law has long since passed, in another way, this thought lives on further, in that besides the *acts optionally creatable in accordance with the will*, the *law* is still more than the arithmetical total of acts. And this surplus is exactly what makes the law law, and what exceeds the range of legislature. Perhaps it will acquire possession on this terrain, but with this motion—as a converse King Midas—even the gold will become clod in his hands and what he thinks is law, is not law but a pure commend of power now.