The Idiosyncracies of Legislating Numbers*

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A. Introduction

The Pythagorean suggestion that all things are numbers[1] reveals how deeply the latter are embedded in our culture as a representation of the magical or rational order of our cosmos. At the same time as helping us make sense of the world of objects, they also regulate it, not in the normative manner of the law, but by setting predictable patterns that are to be expected to recur, but can also be pursued in order for the 'normal' course of things to be maintained or restored. When these two systems of interpretation and regulation of our universe, namely the law and numbers, overlap, analysis is clearly urgently called for. However, this relationship remains oddly under theorised with great repercussions both in legislation and law application.

This paper moves on two levels, which are intertwined and at constant interplay. On a specific level, I deal with a particular case of numbers in the law, namely that of age restrictions in the exercise of human rights. Despite their obvious importance, such restrictions are rarely justified thoroughly and specifically. There is insufficient grounding for the selection of one number over another and sometimes such grounding is even altogether missing. The same justificatory void is noticed in other contexts, in which numbers come into legislative play, such as the introduction of quotas for the representation of political parties in national and the European Parliaments. I will try to point out the problems and outline the general framework of the idiosyncratic task of setting those number thresholds.

The above analysis takes place against the background of my broader concern, which is the place of numbers in the law in general. I will pose and begin to answer the question of how the law ought to make sense of numbers and the numerals representing them. I will also address the question as to why the law opts for one specific number instead of another.[2] I will further examine whether there is a danger

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1 *B. Rusell*, History of Western Philosophy, New York 1946, p. 53.

2 Großfeld seeks to answer some similar questions in *B. Großfeld,* Zeichen und Zahlen in Recht -

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of arbitrariness during the enactment of laws containing numbers given that the validity and correctness of the latter are seldom questioned substantively and that it is often forgotten that, inspite of their purely formal system, they too refer to real states in the natural world. In particular, I will be looking at whether the legislator can choose a number randomly[3] and I am also discussing the relation between contingency and the law. If it is proven that arbitrary choices can indeed be made, then perhaps the whole historical role of positive law might begin to be seen doubtfully, especially in view of the insufficient grounding of legislative choices. I will be seeking to address the issue of whether there is indeed a risk of the choice of a legal age being random and therefore peremptory, and argue that such a choice ought not to be opposed to constitutional principles. That argument is also grounded on and supported by the case studies of legislative material referred to in this paper.

I must make a very important introductory remark concerning the methodology of this paper. Its arguments first arose in a Greek context and were partly informed by German case law and constitutional theory. Thus it is from those two very closely related legal orders that I drew the empirical and judicial data substantiating my points. However, the issue of age in law as well as that concerning the formal substantive testing of laws for rightness recur in all legal orders. To that extent, the arguments of this paper are relevant irrespective of the legislative context.

B. Numbers and the Law

From the transcendental-mythical perception of numbers that prevailed in all known civilisations from ancient Greece to the Middle Ages,[4] numerals gradually began to represent absolute, irreducible entities drawing their validity from rational thought.[5]

Zahlen in Rechtsgeschichte und Rechtsvergleichung, Tübingen 1993, pp.76 et seq. His examples are telling: Why is it the case that the failure to have a valid ticket on mass transportation means bear a monetary penalty amounting to twenty times the price of the ticket and not thirty or fifteen times that price? Or why should a travel agent that has caused damage to a customer by action or omission be obliged to refund three times the amount that the latter has already paid instead of double that amount?

[3] Cf. *I. Strangas*' interesting theses in his Introduction to Law, Athens 1991, pp. 25 et seq; *I. Strangas*, Justice and Procedure, in Festschrift In Memoriam N. Vervessos, 1991, pp. 354-374; *I. Strangas*, Zur Struktur der Anwendung praktisher Prinzipien, in *Th. M. Seebohm (ed.)*, Prinzip und Applikation in der praktischen Philosophie, Mainz/Stuttgart 1991, pp. 189-221.

[4] *E. Cassirer*, Philosophie der symbolischen Formen, Part 2. Das mythische Denken, originally published in 1925, here quoted from the 1977 edition published by Wissenschaftliche Buchgesellschaft in Darmstadt, p. 174. Cassirer mentions that Philolaos in Ancient Greece sought the nature of 'numbers and their powers' not only in human speech and achievements but also in the actions of gods and demons. For the myth-creating aspect of numbers in Ancient Greece, the Bible, and the Middle Ages see *B. Großfeld,* Kernfragen der Rechtsvergleichung, Tübingen 1996, p. 219 et seq.

[5] A classic read on numbers is *R. Dedekind*, Essays on the Theory of Numbers, Dover 1963. Crump offers a very interesting and comprehensive anthropological account of the use of numbers both as magical entities and as expressions of universal rationality in *T. Crump,* Anthropology of Numbers, Cambridge 1990.

The number is defined as the 'limit and order' (Ordnung); it is the means of calculating; it guarantees precision and facilitates the communication between people co-existing in a congruent polity.[6] Its characteristic trait is an especially high degree of personalised generality. As Cassirer points out, 'each number has a particularly personalized nature and force'.[7] This is what made natural scientists introduce the concept of *value*. Value is defined as the product of the multiplication of a number by a unit (*Zahl mal Einheit gleich Grösse*).[8] Time was also attributed a value to facilitate the calculation of temporal durée.[9] The measurement of height, width, length, weight became possible in the same manner. With their incorporation in the law, the time unit and the number help organise social co-existence. The introduction of deadlines in contracts proves this at a glance. The recognition on behalf of the legal order of the importance of calculable time in civil claims is consistent with the historical role of law as a safeguard of the balance and stability of transactions.[10]

There is nothing very original about the institution of a particular number in a law: it is set by the legislator based on a specific case or a range of real or hypothetical cases[11] and aims at the rational and fair regulation of a problem. Naturally, the enactment of a law and the subsequent 'legalisation' of a number in reality aim at the materialisation of a particular policy.[12] Laws have this essentially active political role despite the rhetoric that their 'regulatory objective'[13] is the generality of the rule because they seek to compromise or resolve a social conflict, and at the same time, maintain their validity beyond that particular conflict with the use of general, abstract concepts for the delivery of their meaning. Since it is not the concern of the legislator to grasp the abstract problem that dictated the formation and wording of a particular law, a problem emerges with the clarity of the meaning of a law, when it is called upon to transcend its historical context, i.e., the conflict that originally led to its enactment.[14]

This fact leads to a qualitatively new parameter: although legislation is the outcome of negotiations and compromises between interest groups and

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[6] Cf. *R. Schmidt*, Zahlen im Recht, in *C.W. Canaris, U. Diederichen (eds.)*, Einige Bemerkungen, Festschrift für K. Larenz zum 80. Geburtstag, Munich 1983, pp. 559-570.

[7] *Cassirer*, *supra* note 4, at p.172.

[8] *Schmidt*, Zahlen im Recht, *supra* note 2, p. 562, believes that the characteristic 'generality' of a number is directly connected to its individualisation by any other unit, which leads literally to its practical inapplicability.

[9] For an interesting and comprehensive collection of philosophical essays on time see *R. Le Poidevin and M. MacBeath (eds.),* The Philosophy of Time, Oxford 1993.

[10] *N. Papantoniou*, General Principles of Civil Law, Athens 1983, pp. 231 et seq. and 460 et seq.

[11] *J. Vollmuth*, Prüffragenkataloge als Instrument der Bedarfs und Wirkungsprüfung, in *Bundesakademie für öffentliche Verwaltung (ed.)*, Praxis der Gesetzgebung, Eine Lehr- und Lernhilfe, 1984, pp. 178-184; also *Bundesministerium des Inneren (ed.)*, Handbuch zur Vorbereitung von Rechts- und Verwaltungsvorschriften, Bonn 1992.

[12] *R. Rhinow*, Rechtsetzung und Methodik; Rechtstheoretiche Untersuchungen zum gegenseitigen Verhältnis von Rechtssetzung und Rechtsanwendung, Basel 1979, p. 233 et seq.

[13] Cf. *D. Tsatsos*, Constitutional Law, Vol. 1, Athens 1994, p. 382.

[14] I have broached on that issue in my previous work: *D. Melissas*, Pre-parliamentary Legislative Procedure: the Informal Legislator, Athens 1995, p. 49 et seq.

governmental bureaucracy, these negotiations are marked by a 'corporatization of interests',[15] i.e. the demand to secure the claims of organised groups without taking legislative planning into account.[16] Such haphazard compromises and concessions on behalf of the government, under the pressure of interest groups and due to the transformation of power constellations, are bound to have a bearing on the law at hand.

Therefore and despite the fact that a central concern of the legislative body is the diachronic durability of the law in the midst of social changes and conflicts, frequent amendments have an exactly opposite effect, which disturbs legal stability and poses many problems in law application.[17]

To return to the specific theme of this paper, although at first sight changing a number seems trivial and inconsequential as far as the social stock that it regulates is concerned, in reality such a seemingly minor amendment can set a wide range of social, economic, and political powers in motion, thus achieving everything but the original goal of stability through time. For instance, fluctuating age restrictions concerning the awarding of a professional license, access to vocational training, or the introduction of an age ceiling in a profession, contribute to the reduction or increase of unemployment amongst young people as well as policy shifts in the areas of education and labour.

C. The Special Nature of Setting an Age Signifier

Despite the importance of the legislative choice of one numeral signifying age over another, as discussed above, such a choice in reality is not grounded convincingly, if at all!

The correctness of the universal adult franchise is rarely ever doubted nowadays in most countries around the world. There is also no question that the 18th year of age has been legislatively promoted as the threshold insofar as restrictions are concerned. That choice was made on 'the basis of a different approach' to the one that puts forward the 'maturity of biological features of the person' or his/her 'physical abilities', and it focuses on the 'critical element of self-determination, that is the freedom of will', which is assumed to have been reached at the end of basic or further and vocational education as well as when the 'criterion of the socialisation process set by the Constitution' is met.[18]

Since determining an age restriction is considered as rather unimportant and it is therefore not tested in the public sphere, there are perhaps constitutional norms

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[15] See *St. Alexandropoulos*, Corporatist Representation Trends and Greek Reality, 4 Parliamentary Review 1990, pp. 64-79; For the role of guilds in Greece see, *G. Mavrogordatos*, Professional Associations in Contemporary Greece, Athens 1988; See also *K. von Beyme*, Der Gesetzgeber, Westdeutscher Verlag, Opladen 1997, p. 139 et seq.

[16] See *D. Melissas*, State Planning; a State-Theoretical Approach, Athens 1991, p. 29 et seq.

[17] *E. Benda*, The Welfare State, translated by P. Tsoukas, Athens 1998; *P. Noll,* Gesetzgebungslehre, Tübingen 1973, p. 95 and p. 160 et seq.

[18] See *T. Vidalis*, Age Restrictions in the Exercise of Fundamental Rights, in *D. Melissas (ed.),* Age Restrictions in the Exercise of Fundamental Rights, Athens 1994, p. 51.

according to which such a choice on behalf of the legislator is especially grounded. Or is it the case that the particular legislative option is left to chance? I seek to answer these questions in the following paragraphs. First, I shall give a brief exposition of the problem concerning the setting of a quota for the representation of political parties in parliament. That issue does not, strictly speaking, belong in the present context. However, it is important to refer to it, as it is the only numeral restriction that has been heavily criticised and debated upon politically as well as academically. Then, I go on to explore the constitutional requirement of introducing an age-signifier by examining the possible arbitrariness of setting an age-signifier and the constitutional principles regulating such an introduction.

I. Setting a Quota for the Representation of Political Parties

The Greek Special Highest Court [19] has adopted the reasoning of the German Federal Constitutional Court on the desirability and legal justification of a threshold of the popular vote for parties seeking representation in parliament:[20] the introduction of the quota is dictated by the need for the formation of viable governments and to avoid the fragmentation of the electoral power of political

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[19] Although the Special Highest Court does decide on certain constitutional issues, it is not a constitutional court. Article 100 of the Greek Constitution provides for the creation of the Tribunal and determines its competences:

Article 100 [Special Highest Court]:

(1) A Special Highest Court shall be established, which shall deal with the following matters: a) The trial of appeals under Article 58 [election results]; b) the examination of the validity and the results of referenda held under Article 44 (2); c) The rendering of judgment in relation to incompatibilities or the forfeiture of the office of deputy under Article 55 (2) [eligibility] and 57 [incompatibility of duties]; d) The remedy of conflicts between the courts and administrative authorities, or between the Council of State and the regular administrative courts of the one part and of the other part the civil or penal courts, or, finally, between the Council of Comptrollers and the rest of the courts; e) The clarification of the constitutional character or the meaning of a provision of a formal law, in the event that contrary decisions have been issued by the Council of State, the High Court or the Council of Comptrollers; f) The clarification of the nature of provisions of international law as generally accepted, in accordance with the provisions of Article 28 (1).

(2) The court mentioned in the aforegoing paragraph shall be composed of the President of the Council of State as President, and the President of the Supreme Court and the Council of Comptrollers, four Councilors of the Council of State and four members of the Supreme Court, chosen by lot every two years, as members. President of the court shall be the President of the Council of State or the President of the Supreme Court, according to seniority. In the cases specified in Subparagraphs d) and e) of the aforegoing paragraph, two professors of law of the Law Faculty of Greek Universities, also chosen by lot, shall be members of the said tribunal.

(3) A special law shall regulate matters relating to the organization and function of the tribunal, the appointment, substitution and compensation of the members thereof, and the procedure of the said tribunal. (4) The decisions of the said court shall be irrevocable. A law provision, which has been declared unconstitutional, shall cease to have any effect from the publication of the decision relating thereto or from the time specified in the said decision.

[20] Special Highest Court decisions 11, 12, 13/1994 and 58/1995; *Ath. Raikos*, Testing the Validity of Parliamentary and European Elections, 1996, p. 153 et seq.

parties.[21] The justification of those laws[22] in Germany and Greece was based respectively on the painful experience of the Weimar Republic, and on the deadlock experienced in Greece in 1989-1990, when multiple fruitless elections failed to provide a viable government. In both legal orders there was no question that the quota set constraints on the free and unobstructed founding and functioning of political parties; hinderered the fair representation of all ideological strands of the electoral body; renderered the election of independent candidates extremely difficult; and also obstructed the formation of new political constellations.[23] However, these objections, as well as the main arguments of the critique drawn from the principles of representation and the equality of vote,[24] have been overridden. The German Federal Constitutional Court consistently accepts that the institution of a quota is justifiable only in a system of proportional representation, so that the representation of the electoral body is guaranteed to as great an extent as possible, which is after all the quintessence of the principle of equality of vote.[25] Proportional representation also helps in safeguarding the function of state institutions.[26] In fact, the argument put forth for the justification of the introduction of a quota of 3% for parties and 5% for coalitions for the representation in the European Parliament by the Special Highest Court as well as by the German Federal Constitutional Court was that the existence of stronger political groups expands the operative potential of the European Parliament.[27]

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[21] See *P. Badura,* Staatsrecht, Munich 1996, p. 384; *H. Meyer*, Wahlgrundsätze und Wahlverfahren, in *J. Isensee and P. Kirchhof (eds.)*, Handbuch des Staatsrechts, Vol.II, Heidelberg 1987, pp. 269-311; *K. Stern,* Das Staatsrecht der Bundesrepublik Deutschland, Munich 1997, p. 244; *G. Theodossis*, The German Federal Constitutional Court Decision of 28th September 1990 Concerning the Electoral Law and the Court's Decisions on the Constitutionality of the Exclusive 5% Clause, Nomiko Vima, 1991, pp. 301-305; *K. Chrysogonos*, Electoral System and Constitution, Athens 1996, p. 115.

[22] For the parliamentary procedure of ratification of the quota in the German electoral law (1949) §6 VI BWahlG, see *M. Antonioni*, Grundgesetz und Sperrklausel, ZfP 1980, pp. 93-109.

[23] See *M. Morlok*, Commentary on Article 21, in *H. Bauer and H. Dreier (eds.)*, Grundgesetz Kommentar, Tübingen 1998; *G. Leibholz*, Sperrklauseln und Unterschriftsquoren nach dem Grundgesetz, in *G. Leibholz (ed.)*, Strukturprobleme der modernen Demokratie, Heidelberg 1958, is enlightening concerning the conceptual definition of the term Splitterpartei, that is, the fragmentation of political constellations.

[24] Cf. *W. Frotscher*, Die parteienstaatliche Demokratie – Krisenzeichen und Zukunftsperspektiven, DVB1 1985, pp. 917-927; *Meyer*, *supra* note 21, at p. 284.

[25] *Leibholz*, *supra* note 23, at p. 44 et seq.

[26] See *J.Frowein*, Die Rechtssprechung des Bundesverfassungsgericht zum Wahlrecht, AöR 1974, pp. 84 et seq. with an excellent bibliography and a wide selection of cases. See also *E. Lange*, Wahlrecht und Innenpolitik, Meisenheim 1975, for an account of decisions of constitutional courts in the states of the federation before the enactment of the electoral law.

[27] BVerfGE 51, 230. *J. Hahlen* argues in favour of that decision in, Europawahlgesetz ist Verfassungskonform, DÖV 1979, pp. 282-285; However, *D. Murswieck*, Die Verfassungs-widrigkeit der 5% Sperrklausel im Europawahlgesetz, JZ 1979, at pp. 48-53, heavily criticizes that decision and focuses on the argument that the European Parliament is not exclusively a legislative body and it has a different function to the Commission. See also *D. Dorr*, Die Verfassungsmässigkeit der 5% Sperrklausel im Europawahlgesetz, JuS 1981, pp. 108-112; *Theodossis*, *supra* note 21, at p. 305.

Nevertheless, German courts have rarely sought to justify the *particular* quota as opposed to *the need to introduce a quota in the abstract*. The German Federal Constitutional Court grounds particular quotas by recourse to the notions of the needs of a particular polity and the prevalent legal consciousness.[28] Thus, opting for one number over another is not a diachronic choice and a normative recurrence. On the contrary, it is determined in relation to time and the specific social and political parameters that prevail in a given state at a specific stage of its historical development. If the choosing of one number over another was not based on specific situations, the decisions of a constitutional or a common legislator would be peremptory and in constant risk of being overturned especially under the pressure of academic criticism.[29]

So, we can come to the following conclusions concerning the question of when electoral quotas, or numbers, are arbitrary and when quotas are deemed necessary: a) Firstly, the issue is examined by theory and justified convincingly by the courts only partly; that is, only as far as the need to set a quota in the first place is concerned. However, the reasons why one number is promoted over another remain unclear. b) The limitation of pure representational electoral systems clashes with the need for viable governments. c) Redetermining quotas especially in view of unofficial polls[30] can effectively exclude certain political groups. If it is established from previous electoral results or polls that a political constellation consistently has an electoral popularity of 4% in Germany or 2% in Greece, then adhering to a quota of 5% and 3% respectively de facto excludes that constellation from parliamentary life. Moreover, such exclusion is clearly unwarranted, as it does not derive from the legislative framework or the original official justification of the law in question.

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[28] BVerfGE 1, 248 (249).

[29] *Murswieck*, *supra*, note 27, at p. 50; *Antonioni*, *supra*, note 22, at p.109. Although this paper focuses on legislation, it must be noted that the problem is as difficult and perhaps even more acute in law application. The age old question of the open-texturedness of the law, first posed by H.L.A. Hart, is revealed here forcefully: How can a number be interpreted? Does it leave the judge the same amount of discretion as words or is it a 'hard case'? Is it the case then that judicial discretion can go as far as to question all the reasons supporting it? However, are numbers not introduced precisely to preclude discretion and creativity in interpretation? They are absolute, irreducible entities and as such they are supposed to offer a guarantee of unequivocal judgments. But if the judge proceeds to substantive reasoning concerning the number, then all those guarantees are automatically raised. Moreover, there is also the question of what kind of reasons are acceptable in that substantive reasoning. Clearly, the literature on substantive reasoning in judicial decision-making becomes relevant in this context. The following texts are essential reading, as they form the theoretical basis of the debate: *H.L.A. Hart*, The Concept of Law, Oxford 1994; *R. Dworkin,* Taking Rights Seriously*,* London 1977; *D.N. MacCormick*, Legal Reasoning and Legal Theory, Oxford 1978; *R. Alexy*, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification, Oxford 1989.

[30] *G. Mavris*, Polls and Political System in 20th Anniversary of the 1975 Constitution, Athens 1998.

II. The Constitutional Requirement for a Well Justified Introduction of an Age Signifier

It is commonly known that the shaping of the normative content of a law takes place mainly at the pre-parliamentary stage with the implicit or explicit participation of a plethora of agents. The outcomes of these processes of negotiations and compromises are usually accepted without significant changes by the legislative body and they are made binding.[31] The justifying report accompanying the draft law ought to reflect those negotiations and the compromises reached in the political arena. Thus, the goals of the law and the needs it comes to satisfy would be more fully understood by the representatives that are called to approve its enactment[32] and the whole procedure would become public and transparent, and thus could be more easily and publicly probed. The report would also be of decisive help in the full implementation of the law, as it would constitute a constant source of useful information on the political reasoning, the criteria, the goals of the law, as well as the ways in which it seeks to regulate and transform social stock.[33] Despite their obvious importance, more often than not, reports are laconic and do not shed much or any light on the action of the agents that interfere and partake in the shaping of the law.[34]

The prevalent view in Greek constitutional theory is that restrictions in the exercise of fundamental rights on grounds of age are not embodied in the Constitution. However, it is also generally accepted that in order for such restrictions to be valid, they ought to meet certain prerequisites of consistency with the constitutional ratio.[35] It has also been noted[36] that the classification of age restrictions derives from the Constitution. The aim of such restrictions is either to offer protection to persons of a limited social experience in the exercise of their fundamental rights, so that possible unpleasant repercussions on transactions and legal stability are prevented, or to establish the gradual socialisation of young people as a procedure of 'developing' self-determination. In the following two paragraphs, I turn more closely to those constitutional requirements.

1. Can an Age Signifier Be Set Arbitrarily?

Ancient Greek texts allude very often to the notions of contingency and randomness, or to events that diverted from a normal course which would be predictable by a reasonable person. In that sense, the *random* resembles the *coincidental*; it is not

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[31] Cf. *K. von Beyme*, *supra* note 15, at p. 56 et seq.
[32] *M. Schürmann*, Grundlagen und Prinzipien des legislatorischen Einleitungsverfahrens nach dem Grundgesetz, Berlin 1986; *H. Hill*, Einführung in der Gesetzgebungslehre, Heidelberg 1982.
[33] *H. Schulze-Fielitz*, Theorie und Praxis parlamantarischer Gesetzgebung, Berlin 1988, p. 516 et seq; *R. Herbold*, "Kosten", in *Bundesakademie für öffentliche Verwaltung (ed.)*, Praxis der Gesetzgebung, 1984.
[34] See *Melissas*, *supra* note 18, at p.140 et seq. for a thorough account of the problematic permeating justificatory reports.
[35] Cf. *D. Tsatsos*, Constitutional Law, in Fundamental Rights, Vol. 3, Athens 1988, pp. 233 et seq.
[36] *Vidalis*, *supra* note 18.

connected causally to other events and, subsequently, remains unjustified. Thomas Aquinas uses theological criteria to categorise the random. He distinguishes between the enigmatic, the plausible, and the dispersed.[37] According to Plato, the indirect distribution of offices by lot aimed at achieving equality through difference for the fair ordering of the polity.

However, our western, modern, 'rational' law defines itself in and through opposition to the random and it does not allow the latter to interfere with decision-making.[38] The law resorts to chance only for want of a better solution. Seen from a different point of view, when a legislating body seeks recourse to chance, the deadlock to which it has arrived is revealed.[39]

The normativisation of what was originally a random choice is not precluded. For instance, football teams consist of eleven players because in 19th century Cambridge University, where the rules and terms of the game were first set, ten students plus their captain resided in the same university house.

In various legal orders,[40] there is provision for the resolution of disputes by lot in the last instance. For example, resolution by lot very often provides a solution in cases of a tie in local elections or elections in unions, guilds, and associations.[41]

German case law sought to regulate this inevitable choice of the legislator by setting the following prerequisites: a) The random choice must be accompanied by a guarantee that the outcome will be accepted by the participants in the process of solving the legal question at hand. In other words, it must not depend on external events and it must not be manipulated[42] so that it does not give rise to any doubt as to whether the participants are treated equally and granted the same chances. b) When a coin is tossed, it is required that it be thrown to a height that will allow it to rotate enough times.[43]

2. Constitutional Principles Regulating the Introduction of Age Restrictions

Even if one assumes that the parliamentary sponsor of the draft law does not think in general terms, but only in terms of the specific law and the problem it seeks to solve, his/her decisions cannot be based solely on his/her democratic reason and sensitivity, that is, on transconstitutional principles that circumvent the nature and mission of the law. Setting an age restriction cannot infringe constitutional clauses, even if it is the outcome of secret negotiations of all the participants.

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[37] *O. Depenheuer,* Zufall as Rechtsprinzip?, JZ 1993, pp. 171-179.
[38] *Plato*, The Laws, translation by V. Moskovis, Nomiki Vivliothiki, 1988.
[39] *Depenheuer*, *supra* note 37, at p.178.
[40] For a comparative account of relevant rules in English, Italian, and French public law see *P. Dagtoglou*, Kollegialorgane und Kollegialakte der Verwaltung, Stuttgart 1960.
[41] Many examples of disputes being resolved with recourse to chance can be found in administrative, civil, constitutional, and procedure laws in Greece. In case of a tie, the chairpersons of local councils are selected by lot and so are the members of the Bar Associations executive councils; apartments in housing estates are distributed by lot; in certain cases, the composition of courts is determined in the same manner.
[42] For relevant case law see Neue Juristische Wochenschrift (NJW), 1991, p. 3232 et seq.
[43] VGH München, Vol. 3, No. 2, 1991; NJW 1991, pp. 2306-2307.

The actions of the administration at the stage of preparation of the draft, including the invitation of interest groups, the collection of information and data, the selection of goals, choices, means, as well as the needs that the future law is called on to satisfy, are not merely technical, organisational, or political matters.[44] The inclusion of numbers in laws is subject to constitutional requirements.

It is then rightly pointed out that if the legislative organization of a right makes its exercise unnecessarily difficult, there might be indications of unconstitutionality. It has been shown that putting forward 'special' pragmatic circumstances has resulted in the introduction of rules of questionable constitutionality that infringe upon human rights disproportionately. Considerations of space dictate that I make only the following brief remarks on that issue.

The introduction of an age restriction different from the 18th year of age is attributed to the 'nature of things' (*Natur der Sache*) that constitute the special circumstances, where laws are made to act as judges so that peremptoriness is disclosed, the legal order is safeguarded, and inequalities are prevented.[45] However, according to the German Federal Constitutional Court, this criterion is not a *legal* principle[46] and therefore it bears great risks. For instance, the special circumstances of a profession that fall within the conceptual realm of the 'special nature of things' can easily become a legislative alibi for extending the lower age limit and curtailing the upper one.

When a law sets the 21st year of age as a threshold, that choice could be characterised as a 'legislative anachronism'. A prima facie convincing reason for diverting from the general rule setting the 18th year of age as a restriction threshold could be the fact that such a diversion has been legally instituted in another state, especially if the latter is a member of the European Union.[47] But it must be noted that such a legislative import must be qualified in view of all the national, social, economic and political particularities in order for it not to pose more problems than it solves.

Perhaps, then, setting a restriction beyond the 18th year of age can be perceived as the outcome of pressure exercised by interest groups that seek to secure the 'terms of reproduction of a professional sector'[48] by demanding that the general limit be significantly transcended.

Any diversions from the 18th year must be separately justified, and its rightness be tested by its duration and not on the basis of the occasional and circumstantial pressure exercised by interest groups. Such compromises cause the temporary retreat of the government, but also more importantly, render the materialisation of the rule

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[44] *U. Karpen*, Zum gegenwärtigen Stand der Gesetzgebung in der Bundesrepublik Deutschland, Heidelberg 1998, pp. 371-396; *V. Christianos*, Shifts in ECJ Case Law, Athens 1998, p. 36 et seq.

[45] Relevant case law can be found in *F. Müller,* Juristische Methodik, Berlin 1993, p. 38 et seq.

[46] *Müller*, ibid., emphasizes: 'Es handelt sich nicht um ein eigenes, methodisch selbständig umschreibbares Kriterium, sondern allgemein um die Berücksichtigung realer Gegebenheiten der sozialen Welt für den Entscheidungszusammenhang des zu lösenden Falls'.

[47] Naturally, there is no question of a national legal order 'adopting' an age restriction, when the latter is set by a European directive or regulation.

[48] See *Alexandropoulos*, *supra* note 15, at p.74.

of law[49] as well as the principle of proportionality problematic.

Legal regulation is very commonly understood as a means for the spherical satisfaction of a political goal.[50] Putting that means-ends relation to the test amounts to testing the requirements of the principle of proportionality. Every legislative restriction in the exercise of fundamental rights is tested in light of that principle.[51] Naturally, the principle of proportionality dictates that the weighing of means and ends always involves an individual evaluation. In combination with what I have discussed earlier, this can give rise to false arguments questioning the very applicability of the principle. At the end of the day, the principle of proportionality as an autonomous criterion of legitimation and legality of State decisions does not only 'constitute a logical necessity but it also serves the social need of regulating social relations and using power in a manner that is reasonable, rational, balanced, and directly connected to its aim, apart of course from its formal validity'.[52]

Given the high level of unemployment amongst young people, high age restrictions effectively deprive the young the right to gain access to a profession, to the extent that these restrictions are set at the crucial age when one chooses a profession. Thus, we are led to the formation of closed professions, since the legislator takes into account the historic elements of the ratio of the law, but overlooks its ability to evolve, its durability or, to be more precise, its capacity to keep up with societal development.

The extension of an age restriction further than the 18th year must be justified thoroughly in the original justifying report accompanying the draft law or it must derive directly from the law itself, for instance with mention of any special skills, experience, or the exceptional dangers attributed to the profession. Otherwise, such rules can be deemed unconstitutional, because they infringe upon the right to work as well as the principle of equality. The principles of liberty and equality are set as normative principles and not only in the sense of a prohibition of arbitrariness and unjustified discrimination. They are also meant as 'equal opportunities of enjoying liberty and human rights, which is a goal that is achieved with the par participation of all the social, economic, and political life'.[53] But the same legal, constitutional, moral and political restrictions must hold as far as 'legal numbers', so to speak, are concerned. Legislators must always bear in mind that one cannot unquestioningly rely on the assumed rationality and correctness of numbers. Numbers refer to something real in the world of objects and social relations, and therefore call for interpretation and evaluation.

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[49] *Depenheuer*, *supra* note 37, at p. 171 et seq.

[50] *B. Pieroth & B. Schlink*, Staatsrecht, Grundrechte II, Heidelberg 1996; *A. Gerondas*, The Principle of Proportionality in German Public Law, To Syntagma, 1983; *V.Voutsakis*, The Principle of Proportionality: From Law Interpretation to Law Formation, in *K. Stamatis (ed.)*, Aspects of the Rule of Law, Athens 1990.

[51] *Tsatsos, supra* note 35, at p. 245 et seq; *Hill*, *supra*, note 32, at p. 37; *T. Maunz & R. Zippelius*, Deutsches Staatsrecht, Munich 1985, p. 95 et seq.

[52] *A. Manitakis*, Rule of Law and Judicial Control of Constitutionality, Athens 1994.

[53] Id. at p. 165.