TEMPORARY DE-JURIFICATION: SUNSET CLAUSES AT A TIME OF CRISIS

Antonios Kouroutakis[1]
Sofia Ranchordás[2]*

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Abstract

In the last decades, we have witnessed two contradictory tendencies in lawmaking throughout the Western world: On the one hand, there is a tendency to 'juridify' almost every single aspect of society, ensuring that almost no detail is left unregulated. On the other, at times of economic or political crisis, a part of society is 'de-juridified', that is, law disappears strategically as multiple rules are temporarily put on hold, rights are suspended and courts are deactivated. This Article focuses on this ambivalence and on the role played by sunset clauses to operationalize both temporary juridification and de-juridification.

Sunset clauses have often been used in common law and, more recently, in civil law countries to 'juridify' and 'de-juridify' since these legislative provisions provide that a specific piece of legislation shall expire automatically on a specific date. These dispositions can be used not only, to enact exceptional and temporary emergency measures (e.g. temporary policies to provide financial assistance to firms) but also to remove procedural obstacles that stand in the way of rapid decisionmaking. Temporary de-juridification through sunset clauses might seem at first sight an effective method to tackle emergencies, guaranteeing that extraordinary powers do not become entrenched. However, this Article demonstrates that in the past rights and institutions have been too easily suspended at times of crisis and temporary measures have often been extended beyond the original critical periods. Not surprisingly, this has had pernicious effects on the principle of separation of powers and the protection of human rights.

Although the mentioned ambivalence of de-juridification at times of crisis has been perceived as a problem in multiple jurisdictions, not much attention has been devoted to it in the legal literature. This Article fills this gap by analyzing the nature and functions of temporary de-juridification through sunset clauses and explaining the risks of hasty de-juridification. This Article

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[1] Postdoctoral Fellow, City University Hong Kong, LLM (UCLA), PhD (Oxford).

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[2] Resident Fellow at the Information Society Project, Yale Law School; Assistant Professor of Constitutional and Administrative Law, Tilburg Law School, The Netherlands. I would like to thank the Niels Stensen Fellowship for the financial support of my research and the Information Society Project at Yale Law School for the wonderful research environment.

provides a historical and comparative account of the implementation of temporary de-juridification through sunset clauses. Based on these lessons, we suggest a normative framework to help rethink particularly the temporary de-juridification of human rights and address the negativity which is often associated with sunset clauses.

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"*There is no cure for law but more law*."
Karl Llewellyn[3]

INTRODUCTION

[3] KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1960) 122 (in the context of teaching first-year law students, Llewellyn wrote "Details, unnumbered, shifting, sharp, disordered, uncharitable, jagged. And all this that goes on in class but an excuse to start you on a wilderness of other matters you need. The thicket presses in, the great hooked spikes rip clothes and hide and eyes. High sun, no path, no light, thirst and the thorns. – I fear there is no cure. No cure for law but more law. No vision save at the cost not plunging deeper.").

At times of crisis, *fewer* rules are often regarded as *more.*[4] Fewer rules appear to mean more expeditious decisions,[5] more effective reactions to threats to national security,[6] *more* financial support for economic sectors in

[4] 'The phrase "less is more" may have derived from attempts to define the trope known as "meiosis." For example, one mid-seventeenth-century author wrote that meiosis "is when less is spoken, yet more is understood.", *see* JOHN SMITH, THE MYSTERIE OF RHETORIQUE UNVAIL'D 56 (1657). Robert Browning popularized the phrase as an artistic ideal, Robert Browning, ANDREA DEL SARTO, *In Men and Women*, 184, 186 (1886), and Meis van de Rohe later adopted it as a slogan for modernism in architecture-reputedly provoking Frank Lloyd Wright to respond that "less is only more where more is no good."' *See*, Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 838, fn 7 (2004) In the specific context of crisis, *see* OREN GROSS & FIONNUALA NI AOLAIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006) 17 ("when a nation is faced with emergency, its legal, and even constitutional, structure, must be relaxed").

[5] In a number of countries, administrative decisionmaking procedures are relaxed at times of economic crisis in order to avoid regulatory delays. This was, for example, the position adopted in the Netherlands with the *Crisis en Herstelwet* (Crisis and Recovery Statute) which aimed to foster sustainable development and innovation in the construction and energetic sectors. The Statute authorizes the enactment of experimental regulations which can derogate from existing rules in order to facilitate the operationalization of new construction projects. See Press release of the Dutch Government, available at http://www.rijksoverheid.nl/onderwerpen/omgevingswet/crisis-en-herstelwet/werking-crisis-en-herstelwet. ("De Crisis- en herstelwet (…) stimuleert werkgelegenheid en *duurzaamheid. Door nieuwe en/of aangepaste regels kunnen ruimtelijke plannen (eerder) starten. Hierdoor zijn experimenten met duurzame vernieuwing ook mogelijk",* "The Crisis and Recovery Statute stimulates employment and sustainable growth. New zoning regulations can be implemented at an earlier stage thanks to new and/or adapted rules. Thanks to these rules it is also possible to experiment with sustainable innovation"). This Statute introduced a number of temporary dispositions with experimental purposes, namely in the construction sector to help ensure that particularly large projects would be approved in a timely manner. This was the case of the expansion of the Schiphol international airport. The Statute entered into effect in March 2010 and was originally supposed to be temporary, but it was converted into a permanent statute on March 28, 2013. The statute was itself drafted and enacted in a 'record' period of seven months, See Nico Verhey, *The fast and the furious: de Crisis- en herstelwet*, 27 REGELMAAT 140 (2012) (describing the drafting process of the Crisis and Recovery Statute); Jan Roording, *Versnelling van wetgeving: over uiteenlopende ontwikkelingen en eigenwijze actoren*, 27 REGELMAAT 126, 127 (2012) (examining the acceleration of legislation and discussing the difficulty in gathering political consensus regarding the Crisis and Recovery Statute).

[6] *See* Speech of President George W. Bush on the *Patriot Act & National Security Agency*, Washington, DC, December 17, 2005, available at http://www.presidentialrhetoric.com/speeches/12.17.05.html ("the Patriot Act tore down the legal and bureaucratic wall that kept law enforcement and intelligence authorities from sharing vital information about terrorist threats. And the Patriot Act allowed federal investigators to pursue terrorists with tools

need[7] and *less* bureaucracy. At times of crisis we observe a phenomenon called *temporary de-juridification*, that is, the strategic disappearance or suspension of law.[8] Temporary de-jurification in the context of emergencies can mean that special and extraordinary measures are enacted to respond to a certain crisis, in derogation from existing standards and rules. Certain rules—thought to be more burdensome and incompatible with wartime or economic crises—thus 'disappear', being replaced, for example, by simplified procedures or exceptional rules. To illustrate, in the European context, state aid to national firms is not generally allowed since it can impair the functioning of the European internal market. However, during the economic crisis, the European Commission allowed for more flexibility at this level, authorizing the adoption of temporary measures to ensure that

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they already used against other criminals. Congress passed this law with a large, bipartisan majority, including a vote of 98-1 in the United States Senate.").

[7] Financial intervention at times of crisis must however be limited in time, this has not always been clear in some cases. In 2014, the OECD analyzed the state intervention in the housing market in the Netherlands, suggesting the introduction of sunset clauses in measures designed to support financial institutions and the housing market in order to limit risks, see Helen M.J. Hofmans, Clement P. van de Coevering, *How to Deal with Contingent Liabilities—Lessons from the Dutch Experience*, 14 OECD J. ON BUDGETING 35, 37, 43 (2014) ("in response to the financial crisis the Dutch government has provided substantial support to financial institutions (…) and the housing market (…) [but] these measures are often perceived as 'free lunches' (…) The above findings lead to the following recommendations (…) include a sunset clause so that measures do not automatically get a permanent character").

[8] The term 'de-juridification' (or dejuridification) has often been used in different fields of law to refer to the strategic disappearance of law, often with negative repercussions for the rights of individual subjects. By adding the adjective 'temporary', we refer more specifically to the disappearance of law circumscribed to a certain period of time. This normally occurs in the context of crises when rules are regarded as hurdles to effective decisionmaking and executive action. Temporary de-jurification has however remained highly overlooked in the context of emergencies. We find more references to dejurification, for example, in the field of labor law to refer to the exemption of labor law standards (*e.g.* decent work standards), see Siobhan Mullaly, *Introduction: Decent Work, Domestic Work: Gendered Borders and Immigration*, in SIOBAHN MULLALY (ED), CARE, MIGRATION AND HUMAN RIGHTS: LAW AND PRACTICES (2015) 10 ("at the same time, dejuridification processes enacting exemptions and limitations to decent workstandards bring other questions…"). In the context of fundamental rights, dejuridification has also been described as "the abolition of privileges" and related to negative social reforms, see Marcelo Neves, *Between Under-Integration and Over-Integration*, in JESSE SOUZA & VALTER SINDER (EDS), IMAGINING BRAZIL (2007) 69-70. 'Dejurification' has also been employed in Family law, see ALISON DUCK, LAW'S FAMILIES (2003) 184 ("another goal of this legislation may have been to relieve expenditure and costs related to the litigation of child support disputes (…) but unlike other de-juridification measures which provided incentives to families to order their affairs, this was a shift towards interventionism").

European companies would continue investing in R&D.[9] Another form of temporary de-juridification occurs through the temporary suspension of legal dispositions regarding the exercise of individual rights. This is for example the case of the suspension of the privilege of the writ of habeas corpus, which has been at stake in times of crisis for centuries (see Part III). This form of de-juridification has more recently regained a place in the legal literature due to the possibility to suspend this privilege in case of suspicion of future involvement in acts of terrorism.[10]

Temporary de-juridification can also mean that the executive may be allowed to derogate from a number of constitutional principles, and even use armed force to quash insurrections during a state of emergency.[11] It is clear that at times of crisis the executive may be allowed to act as necessary, even if this implies circumventing statutes, treaties and the Constitution.[12] Although we acknowledge the existence of emergency powers, we often forget to discuss its real meaning and limits: Does the need to make

[9] Although there is already a simplified Notice from the Commission for State Aid measures, these rules were not applicable to the measures adopted in the context of the financial crisis, namely the Temporary Union Framework for State Aid Measures. See Communication from the European Commission, *The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis*, OJ C 270, 25.10.08, p. 8; Communication from the European Commission, *The Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis*, OJ C16, 22.1.2009, p.1, and Communication from the Commission to the European Council, *A European Economic Recovery Plan*, COM (2008) 800 final of 26.11.2008. In these cases, specific and temporary ad hoc arrangements have been put in place in order to deal with these cases in a timely manner. By introducing this common temporary framework, the Commission allows temporary and exceptional well targeted state aid, unblocking lending to companies and stimulating investment in R & D. The adoption of these temporary measures evidences a more flexible approach to State aid rules or even a derogation of the existing framework).

[10] *See* Amanda L. Tyler, *Suspension as an Emergency Power*,118 YALE L. J. 600 (analyzing the meaning of the suspension of the writ of habeas corpus and exploring the relationship between suspension, executive power, and individual rights in American history).

[11] *See* Jackie Gardina, *Towards Military Rule? A Critique of Executive Discretion to Use the Military in Domestic Emergencies*, 91 MARQ. L. VER. 1027, 1029 (2007) ("[the question] is not whether to use armed force in certain conditions but what limitations there should be on that use […] federal government may need to resort to armed forces to quash insurrections or execute federal laws").

[12] *See* Peter M. Shane, *Executive Branch Self-policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. OF NAT'L SECURITY L. & POL'Y 508 (2011) ("Our Constitution was founded on the hope that government can be structured to limit the ambitions of public officials who are tempted to abuse their power. What we find, instead, is a willingness to abandon the system of checks and balances to facilitate prompt action, often at the cost of individual liberties and constitutional violations. There are many ways to summarize this trend. I call it "presidentialism," the assertion that what we need in times of crisis (real or contrived) is a President free to act as necessary, even if in violation of statutes, treaties, and the Constitution").

decisions in a timely manner always justify the disappearance of law? Do we know what temporary de-juridification means for the relationship between the different political branches? And is 'less', in the sense of fewer rules and legal limits, always 'more'? This Article aims to contribute to the understanding of the concept of 'temporary de-juridification', as well as of its virtues and vices.

The word 'de-juridification' might convey a fresh and fairly unknown legal vision for states of emergency and other crises. However, the temporary suspension of laws is nevertheless far from being a recent practice.[13] Instead, it has been concretized for centuries through the so-called sunset clauses.[14] Sunset clauses are legislative dispositions that provide that a specific piece of legislation shall expire automatically on a specific date.[15] Sunset laws have been defined as "statutes under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed".[16] The idea underlying the use of these dispositions is to terminate a number of dispositions when they are no longer necessary.[17]

When adequately framed, sunset clauses should further the principle of separation of powers even in times of crisis, limiting the extraordinary powers of the executive to a short period and imposing legislative oversight.

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[13] *See* Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause,* 125 HARV. L. REV. 901 (2011) (remarking that recent debates on the implementation of the suspension clause during wartime have not taken into account historical evidence. In this article, Professor Tyler demonstrates that this is far from being a recent problem, by referring to the English tradition, the Founding period, the imprisonment of Japanese fighters, and more recently, to the detention of American citizens in the wake of the terrorists attacks of the September 11, 2001).

[14] *See* Mark D. Young, *A Test of Federal Sunset: Congressional Reauthorization of the Commodity Futures Trading Commission,* 27 EMORY L. J. 853, 854 (1978) ("statutory method of forcing legislator to make a periodic determination whether to allow a particular program or agency to continue'").See also John E. Finn, *Sunset Clauses and Democratic Deliberation,* 48 *COLUMBIA J. OF TRANSNAT'L L.* 442 (2009).

[15] For a thorough analysis of 'sunset clauses', including a historical overview of this instrument, *see* SOFIA RANCHORDAS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION (2015).

[16] BLACK' S LAW DICTIONARY (Bryan A Garner ed, 2004) [sunset law].

[17] Sunset clauses were widely used in the 20th century in the United States a instruments to combat legislative inertia, the growing power of the executive, and the existence of numerous unnecessary laws, policy programs and agencies. *See* Mark B. Bickle, *The National Sunset Movement,* 9 SETON HALL LEGIS. J. 209 (1985) (explaining that sunset provisions emerged as a reaction to the general discontentment with the uncontrolled governmental growth, excessive bureaucracy and public spending. Between 1976 and 1982, 36 legislators enacted laws containing sunset clauses). For a more recent analysis of the use of sunset clauses, see Frank H. Easterbrook; William N. Eskridge, Jr.; Philip K. Howard, Thomas W. Merrill, Jeffrey S. Sutton, *Showcase Panel IV: A Federal Sunset Law, The Federalist Society 2011 National Lawyers Convention,* 16 TEX. REV. OF L. & POL. 339, 342 (2012).

[18] By conferring a temporary character to a law, sunset clauses can tackle legislative inertia since the continued validity of a law will be contingent upon a new legislative decision.[19] These dispositions limit the duration of extraordinary powers conferred to the executive at times of crisis and reinforce the legislative oversight, guaranteeing a more frequent dialogue between the executive and parliament.[20]

While ideally, the sun should not set on legislation before an evaluation takes place, sunset clauses seem to have acquired a "bad reputation" because they have often been reauthorized without a meaningful evaluation [21] or serving solely as a "spoonful of sugar" to convince opponents in Congress to vote in favor of a controversial law.[22]In addition, since sunset clauses are often renewed without being adequately revisited, temporary de-juridification has become "democracy's snooze button": Instead of reacting to the obsolescence of legislation, the adoption of sunset

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[18] *See* R. C. Kearney, *Sunset: A Survey and Analysis of the State Experience*, PUB. ADMIN. REV. 55 (1990).

[19] *See* John Ip, *Sunset Clauses and Counterterrorism Legislation,* PUB. LAW, January, 74, 75 (2013) (analyzing the enactment of sunset clauses in the context of the terrorist threats and discussing the underlying rationale of this legislative instrument).

[20] *See* Dan R. Price, *Sunset Legislation in the United States* 30 (3) BAYLOR L. REV. 406 (1978) (providing an overview of the first examples of sunset clauses in Colorado and explaining how this instrument was subsequently enacted by other states); *see also* KATHERINE R. WILLIAMSON, REVISITING AND EVALUATING THE CONGRESSIONAL REVIEW ACT (2009). This rationale for the use of sunset clauses has also been argued in Germany, see JAN FUNKE, BÜROKRATIEABBAU MIT HILFE ZEITLICH BEFRISTETER GESETZE: ZU DEN ERFOLGSBEDINGUNGEN DER SUNSET-GESETZGEBUNG 43 (2011) [Reduction of Bureaucracy with the Help of Temporary Legislation: The Effects of Sunset Legislation].

[21]*See* Christian van Stolk, Mihaly Fazekas, *How Evaluation Is Accommodated in Emergency Policy Making* in EVALUATION AND TURBULENT TIMES: REFLECTIONS ON A DISCIPLINE IN DISARRAY 161, 169, 173 (Jan-Eric Furubo, et al eds, 2013) ("the first hypothesis relating to a decrease of the quantity and quality of evaluation used in emergency policy making is clearly supported by evidence (…) the relative absence of evaluation in the formulation of emergency legislation is not that surprising").

[22] *See* Rebecca M. Kysar, *Lasting Legislation* 159 U. PA. L. REV. 101, 135 (2011) (providing a critical overview of the use of sunset clauses in the case of tax cuts). Focusing on the field of tax law, see Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 339 (2006) (R. Kysar criticizes these dispositions for being apparatuses that "underestimate the revenue costs of legislation or fit legislation within predetermined budget constraints". By enacting sunset clauses, lawmakers try to reduce the estimation of the revenue costs of these laws and thus gather sufficient political consensus, since the calculation would only take the sunset period into account. However, in practice, the original plan was never to sunset these tax cuts but to renew them later. Moreover, Kysar adds that sunset clauses have been used to circumvent budgetary constraints and enact laws meant to last under the 'cover' of a temporary provision.).

clauses simply postpones decisions regarding extraordinary powers. [23] Therefore, sunset clauses might not always be a shield against the normalization of extraordinary emergency provisions.[24] Does this mean that sunset clauses are a 'dangerous' legislative instrument that should be banned altogether since they can be misused at times of crisis? But are extraordinary measures not supposed to be temporary during critical periods?

Our answer to the first question is clearly negative: Despite the potential downsides of sunset clauses, the problem here is *not* to include or leave out the temporary character of de-juridification during wartime or peace. Rather, the main objectives of this Article are first to demonstrate that the tendency to de-juridify as a response to changes in circumstances and economic or social crises might be necessary but it is not always a positive development. Second, this Article points out that temporary de-juridification is far from being a recent or national problem or trend, instead it started in traditional common law, and it is now expanding to numerous civil law countries. Third, this Article argues that temporary de-juridification is at times necessary to confer flexibility to the legal order, but such de-jurification must be conditioned upon the protection of foundamental rights and the separation of powers. Fourth, this Article innovates in relation to existing literature by suggesting a normative framework for temporary de-juridification.

This Article is part of a broader literature that surged after the September 11 terrorist attacks, when the use of sunset clauses was recorded in an international scale, from the United States, Canada, to the United Kingdom and Germany, [25] and Australia to tackle the phenomenon of

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[23] *See* David A. Fahrenthold, *In Congress, Sunset Clauses are Commonly Passed but Rarely Followed Through*, WASH. POST. (December 15, 2012), available at http://www.washingtonpost.com/politics/in-congress-sunset-clauses-are-commonly-passed-but-rarely-followed-through/2012/12/15/9d8e3ee0-43b5-11e2-8e70-e1993528222d_story.html ("Outdated laws were piling up. Bad ones weren't being fixed. So lawmakers turned to "sunset clauses" — expiration dates forcing Congress to reconsider old laws before they disappeared. Instead, Washington's current crisis reveals that the sunset clause has become something unintended: democracy's snooze button.").

[24] *See* Oren Gross *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*, 112 YALE L. J. 1011, 1090 (2003) (discussing the dangers of the normalization of emergency legislation).

[25] In Germany, this was the case of the *Terrorismusbekämpfungsgesetz* ("anti-terrorism Act") which, in 2002, introduced several temporary limitations to fundamental rights on the ground of the need to safeguard national security, *see Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbakämpfung)* vom 9. Januar 2002, 3 BUNDESGESETZBLATT Teil I, 361 (2002) (according to article 22 of this statute, significant limitations on fundamental rights such as data privacy, grant of entry visas, identity control are imposed. These dispositions were only valid until 11 January 2007). For a comparative study of the counterterrorism responses of different countries including the United Kingdom, Germany, France, and Canada, see MARTHA GRENSHAW (ED), THE CONSEQUENCES OF COUNTERTERRORISM (2010). In the wake of the "Charlie Hebdo" terrorism attacks in France and the growing number of European ISIS fighters in Syria, stricter counterterrorism legislative responses can be expected. This has been discussed in Germany, see Daniel Trost, *Germany set to pass 'one of the harshest' anti-terror laws in*

international terrorism.[26] The aim of this Article is not to evaluate the efficiency or explore the value of such clauses, arguing in favor or against their use.[27] Instead, it aims to shift the focus of the critique of sunset clauses to the dipole between juridification and de-juridification, that is, between the creation and the disappearance of law in the context of emergencies, questioning what we can or cannot sunset and under what circumstances. Methodologically, the analysis is not attached to one single legal order, since the cardinal subject of this paper transcends the borders and paradigms, which are located in a variety of legal orders, suffice to mention here the United States, Germany, Australia and the United Kingdom.

This Article is organized as follows. In Part I, we explore and delimit the concept of 'de-juridification', contrasting it to the term 'juridification'. Then we explain the relationship between temporary de-juridification and state of emergency since these two concepts appear to be often associated. In Part II, we present the concept of sunset clauses in legislation and we elaborate on the use of these clauses during emergencies. In Part III, we analyze how such clauses can be a formula for de-juridification and we discuss notable historical and contemporary examples. Finally, we conclude with some critical analysis of the past and the present use of sunset clauses as a 'de-juridification' mechanism in times of crisis. With part IV, we aim to draw conclusions for future reference and offer suggestions for a meaningful framework for temporary de-juridification.

Europe, EURACTIV (February 5, 2015), available at http://www.euractiv.com/sections/justice-home-affairs/germany-set-pass-one-harshest-anti-terror-laws-europe-311851

[26] For Australia, *see*, for example, Nicola McGarrity, Rishi Gulati, George Williams, *Sunset Clauses in Australian Anti-terror Laws*, 2 ADELAIDE L. REV. 307 (2012). For Canada, *see* Tobi Cohen, *Controversial Anti-terror Bill Passes, Allowing Preventive Arrests, Secret Hearings*, NATIONAL POST (Apri 25, 2013), available at http://news.nationalpost.com/2013/04/25/controversial-anti-terror-bill-passes-allowing-preventative-arrests-secret-hearings/ (referring to Bill S-7 passed in the wake of the Boston terrorist attacks, and introducing stricter anti-terrorism rules. These rules included preventative arrest provisions which would allow an individual suspected of engaging in terrorist activity to be preventively imprisoned, be secretly heard or be prevented to leave Canada to engage in terrorist activities. "The original legislation had a sunset clause of 2007 so the measures could be reviewed and, if deemed necessary, reintroduced by Parliament. The Conservatives have since tried to resurrect the bill four times, but each time it died after an election was called.").

[27] Professor Ackerman endorses the use of sunset clauses during emergencies, *see* Bruce Ackerman, *The Emergency Constitutiono*113 YALE L. J. 1029 (2004); while other authors such as Gross consider them as an ineffective tool see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional* 112 YALE L. J. 1011, 1090 (2003). A more recent evaluation on sunset clauses is recorded in literature by Finn and Ip see John E Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation* 48 COLUM. J. TRANSNAT'L L. 442 (2010); John Ip, *Sunset Clauses and Counterterrorism Legislation* 2013 PUB. L. 74 (2013).

PART I: JURIDIFICATION AND DE-JURIDIFICATION

The concept of 'de-jurification' is often mentioned in the literature,[28] but rarely defined. At first sight, this term seems to suggest "fewer rules", which might convey a positive development in a world inhabited by thousands of unnecessary rules. However, this is an oversimplification of both the phenomenon of extending the influence of law to new social areas ('juridification') and the process of making law disappear strategically ('de-juridification'). Both concepts are complex and ambivalent since they translate a deeper understanding of the interaction between the different branches of government.[29] Therefore, the understanding of the core concept in this Article—temporary de-jurification—implies first of all the study of its companion 'juridification' that has captivated the attention of the literature for a longer period of time.[30]

In this Article, we argue that both juridification and de-juridification are transnational problems since they can be found in most Western countries.[31] We live nowadays in a world of national and supranational rules, rights and institutions that aim to predict and regulate every single step we take. Juridification points out to law's attempts to 'colonize society' and

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[28] See, for example, Guy Nave, *On the Cultivation of the Efficiency and Enterprise: An Overview of Recent Trends in Higher Education in Western Europe, 1986-1988*, 23 EUROPEAN J. OF EDUCATION 7, 13 (1988) (contrasting the "juridification of British higher education" to the "de-juridification of higher education control" in other European countries like the Netherlands, France, Sweden and Finland that introduced "a new flexibility to systems of control and evaluation precisely by lessening the weight of formal legal control").

[29] *See* GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 4 (2009) ("Juridification is not the product of an imperial judiciary imposing its will or of an abdicating legislature of weak executive. (...) Juridification is, instead, the product of the interaction of these institutions, along with interest groups, parties, lobbyists, and policy entrepreneurs alike (…) Although there certainly are instances of direct struggles between the branches, an exclusive focus on these obscures another dimension of the juridification process—the interaction between and among these institutions").

[30] This is, for example, the case of GUNTHER TEUBNER (ED), JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW (1987). More recently, see Gralf-Peter Calliess & Moritz Renner, *From Soft Law to Hard Code: The Juridification of Global Governance*, 22 RATIO JURIS (2009), Available at SSRN: http://ssrn.com/abstract=1030526 (exploring the legal and non-legal governance mechanisms that compete in terms of dispute resolution and behavioral controls and the function of law stabilizing normative expectations).

[31] See, on the universality of 'juridification', Jon Clark, L. Wedderburn, *Juridification—A Universal Trend? The British Experience in Labor Law*, in JURIDIFICATION OF SOCIAL SPHERES A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW 163 (Gunther Teubner ed, 1987).

conquer new different valleys and mountains.[32] This international trend to 'juridify'[33] has been translated not only in the increase in the amount of rules and individual rights but also in a "reallocation of power to autonomous institutions such as the courts".[34]

The process of juridification is sometimes ambivalent, as we will explain in the following section, because more rules do not always mean more rights. However, as we mentioned previously, fewer rules are not necessarily better either: At the resemblance of its antipode 'juridification', de-jurification can be both a guarantee of effective solutions and an instrument which can enable potential deprivation of freedoms.[35] In Part I, we examine the concept of 'de-jurification' first by explaining where it comes from: Society was first 'juridified' due to the increasing expansion of law to more new areas of society,[36] and only then, the tendency to 'de-jurify' emerged to combat bureaucracy, red tape, and overcome obstacles that were in the way of rapid decisionmaking during emergencies. Second, we analyze the concept of de-juridification, and we explain why this tendency to make laws disappear plays an important role at times of crisis.

A. Juridification

In the beginning there was no law, only communicative rules developed within the intimacy of the family or tribes. With the growing need to interact with strangers, some form of State or sovereign powers were established to oversee these relations, giving rise in the early modern period to the initiation of a process of 'juridification'.[37]

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[32] JÜRGEN HABERMAS, THEORY OF COMMUNICATIVE ACTION: LIVEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON VOL II (1987) (translated).

[33] *See* Lars Chr. Blichner, Anders Molander, *Mapping Juridification* 14 (1) EUROPEAN L. J. 36 (2008) (analyzing the concept of 'juridification' in the European context).

[34] *See* Anne-Mette Magnussen, Anna Banasiak, *Juridification: Disrupting the Relationship between Law and Politics?* 19 EUROPEAN L. J. 325, 326 (2013).

[35] See, on 'juridification', Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW 3, 9 (Gunther Teubner ed, 1987).

[36] *See* Ken Foster, *The Juridification of Sport* (November 15, 2011). Available at SSRN: http://ssrn.com/abstract=1959909 or http://dx.doi.org/10.2139/ssrn.1959909 ("Law in liberal democracies is increasingly invasive. The realm of what is outside legal regulation annually grows smaller. Law now regulates many areas of social life that historically appeared immune from law").

[37] *See* ANDREW ELGAR, THE PHILOSOPHY OF HABERMAS 245(2005) ("as societies grow more complex, communicative competences that had been developed within the intimacy of the family or small tribal groups become inadequate for organizing fleeting and complex interactions with strangers. Law provides a medium for such interaction (…) In the early modern period, this gives rise to the initiation of a process of 'juridification').

The term 'juridification' refers thus primarily to the relationship between State and society and more specifically to the expanding role of law in our society or, in other words, the modern "explosion" of laws.[38] This expansion of the role of law to different fields of society that remained for a number of years fairly unregulated like sports, education or health, has been visible in both the direct legal incursion of law and the voluntary imposition of external norms and "an increasing resort to thinking and acting in a legal way without the imposition of case law".[39] In other words, the 'juridification of society' has been translated both in the fact that legislators have enacted more rules in numeric terms and the fact that actors have acknowledged the coercive value of these legal rules and principles, accepting their authority.[40] However, as Cicero already predicted in Ancient Rome "more laws" sometimes means "less justice".[41]

The term 'juridification' does not refer only to the growing number of rules—sometimes badly drafted—in our society,[42] but rather to the effects of the expanding dominion of law as such. These effects are perceived differently by individuals: As Robert A. Kagan explains "to some, law is primary mode of repression (…) that in actuality protects and legitimates existing political and social hierarchies. To others, law is an instrument of liberation and social progress, a realm which in courageous litigants and judges can subject the preferences and prejudices of the powerful to the constraints of reason and justice (…) And to still others, the ever-expanding juridification of life imposes a stultifying formulation of human activity, [and] burying us under piles of paperwork, efficiency-depleting

[38] *See* ANDREW ELGAR, THE PHILOSOPHY OF HABERMAS 245(2005) (reflecting on Habermas' approach to juridification. The beginning of the 'juridification' process is defined here as "the process by which modern law becomes both more extensive in its scope and is more intensively organized in terms of its fine details").

[39] *See* Steve Greenfield, Guy Osborn, J. P. Rossow, *The Juridification of Sport: A Comparative Analysis of Children's Rugby and Cricket in England and South Africa*, 36 J. FOR JURIDICAL SCIENCE 85, 87, 88 (2011) ("In legal terms, [juridification] is often used to describe growth or expansion of the legal field. (…) However, this understanding of juridification is something of a simplification and rather crude. (…) a more significant aspect of juridification can be seen not in terms of overt legal intervention but rather a more indirect incorporation of legal norms. Here the issue can be described, to use Foster's term, as a process of domestication. Rather than being focused upon direct legal incursion, this approach considers the voluntary imposition of external norms and an increasing resort to thinking and acting in a legal way without the imposition of case law or statute.").

[40] On the legitimacy of law understood as the acceptance of the process of juridification, *see, e.g.*, ANDREW ELGAR, THE PHILOSOPHY OF HABERMAS 250 (2005) ("The problem of the legitimacy of law lay at the heart of the process of juridification. The main strands of the process may now be considered in a new light").

[41] CICERO, DE OFFICIIS, I, 33 (44 B.C.) ("More law, less justice.").

[42] This is far from being a recent problem, see Ulrich Karpen, *On the State of Legislation Studies in Europe*, 7 EUROPEAN J. OF L. REFORM 59 (2006) ("the complaint that there are too many and badly drafted laws is as old as it is widespread , in Germany as in all countries of Europe").

regulation".[43] As we shall explain below, these different perceived effects of juridification may affect the limits of what should and should not be de-juridified.

On the one hand, juridification has thus been defined as the "process (or processes) by which the state intervenes in areas of social life (industrial relations, education […]) in ways that *limit the autonomy of individuals* or groups to determine their own affairs".[44] Therefore, we can relate this aspect to the first and last dimensions mentioned by Kagan: The expanding role of law limits individual autonomy since law determines increasingly more often what individuals can and cannot do. This perception has conferred a pejorative meaning to the word 'juridification' which has also been associated in this context with "the petrification of class conflict" and "social norms".[45] In the words of Teubner, "juridification is an ugly word—as ugly as the reality which it describes":[46]It refers to a crusade in search of justice at all costs, empowered by as many laws as one can carry. Juridification is therefore not only an ugly word, but it is sometimes a heavy word which can lead to ambivalent effects, "failing to achieve the desired results or doing so at the cost of destroying these structures".[47]

Juridification refers thus to more than the 'weight of rules', overregulation, bureaucracy and red tape.[48] This concept often refers to the submission of an activity to legal regulation (*expansion of law*) or more detailed legal regulation (*increasing density of law*). This tendency to expand the scope of law is often 'referred to when the formal legislature and/or the judge become competent in situations where they previously were not'. [49] This is far from being peacefully accepted, particularly when politicians seem to have the tendency to add a large number and increasingly more specific rules to the overregulated society we live in.[50] Instead, as Paul

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[43] *See* Robert A. Kagan, *Introduction*, PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION viii (2009) (introducing the new edition of this book and explaining the diferente roles of law in a society in transition).

[44] *See* Jon Clark, L. Wedderburn, *Juridification—A Universal Trend? The British Experience in Labor Law*, in JURIDIFICATION OF SOCIAL SPHERES A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW 163 (Gunther Teubner ed, 1987).

[45] EMILIOS A. CHRISTODOULIDIS, LAW AND REFLEXIVE POLITICS 97 (2001)

[46] Teubner, supra note 30, at 3.

[47] Teubner, supra note 30, at 3.

[48] *See* CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 634 (1997) ("Every move to juridification tends therefore to create complaint of bureaucracy and red tape, provoking a whiplash effect").

[49] *See* Hans Zacher, *Juridification in the Field of Social Law* in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW 379, 401 (Gunther Teubner ed, 1987).

[50] For a criticism of the excessive number of regulations and specificity of regulations, see PHILIP K. HOWARD, THE RULE OF NOBODY: SAVING AMERICA FROM DEAD LAWS AND BROKEN GOVERNMENT 38 (2014) ("specific rules supposedly provide clear metrics for enforcement. That's the

Kahn remarks, "our political culture suffers from a dangerous disposition toward juridification that undermines the exercise of political responsibility by leadership alike."[51] This reflects a more general discontent with the role of law and, above all, lawyers in our society who "may be our leading political persons, but they are also the object of an intense popular distrust".[52]

Juridification might be an 'ugly' word but it is often a necessary one. The ambivalence of this concept is reflected in the transition from a contemplative state to an interventionist one and the triumph of the rule of law over despotism.[53] As we mentioned above, law can also be an "instrument of liberation[54] and it is a weapon to fight the abuse of political power and to meet our common concerns about corruption. Juridification is thus not always associated with heavy bureaucracy but also with positive efforts "to solve policy problems by judicial means, as well as efforts to formalize, proceduralize, and automate the political process itself".[55] As Gordon Silverstein explains, in the concrete case of the United States, "juridification is not the product of an imperial judiciary imposing its will or of an abdicating legislature or weak executive (…) juridification is, instead, the product of the interaction of these institutions, along with interest groups, parties, lobbyists, and policy entrepreneurs alike".[56]

Does this however mean that the solution for this distrust should reside in the de-juridification of society, diminishing the expansion of the law? After having explained what juridification is and why it is often perceived as an 'ugly' word, it is now time to turn to 'de-juridification' and try to explore whether there is more 'beauty' in this word.

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theory, and that's just about everyone insists on them—regulators, lobbyists, and politicians (…) But the legal details often cause people to act in ways that undermine the public purpose").

[51] *See* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 68 (1999) (exploring the nature of contemporary legal scholarship and the role of the rule of law).

[52] *See* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 68 (1999).

[53] *See* Bruno Debaenst, *A Study on Juridification: the Case of Industrial Accidents in Nineteenth Century Belgium* 81 LEGAL HISTORY REV. 247, 248 (2013).

[54] *See* Robert A. Kagan, *Introduction*, PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION viii (2009).

[55] *See* GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 3 (2009) (analyzing the juridification of American politics and the movement toward law, "fear of the abuse of political power and concerns about corruption have long been met by demands for more law and less politics, for increasingly legalistic solutions to our problems, including what Lawrence Friedman calls a demand for 'total justice'").

[56] *See* GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 4 (2009).

B. De-juridification

The juridification or legalization of, for example, the use of emergency powers is important to prevent the executive from abusing them and exercising excessive discretion in turbulent times. But, in times of crisis we might just want to temporarily forget the word 'juridification' and rely on a 'de-juridification' of numerous 'legal obstacles' that might stand in the way of a solution for an economic or political crisis. Emergencies call for rapid and decisive action by the executive, including the very administrative decision of deciding whether a certain situation can be qualified as a 'state of exception'.[57]

Although juridification is often regarded as the 'enemy of discretion', in practice, excessive bureaucracy might actually hamper policy measures designed to solve crises.[58] Heavy juridification does not guarantee that better decisions will be taken within a set deadline, but rather results in 'blind' or automatic decisions.[59] In this section, we explain first the concept of 'de-juridification' and then we delve into the often necessary de-juridification at times of crisis.

1. Definition

The concept of 'de-juridification' conveys the idea of a less 'legalistic' approach to society, which governments in different countries have tried to concretize by enacting fewer rules and less clearly defined norms for conduct, alternative and less interventionist instruments to regulate social conflicts. In practice, this has been put in practice, for example, by adopting framework legislation,[60] moving from public law to

[57] Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DEPAUL L. REV. 539, 544 (2006) ("In its classic contours, an emergency calls for rapid and decisive action by the executive branch, including the act of designating the situation an emergency or a 'state of exception'. (…) Declaring an emergency means setting aside a normal state of affairs or acknowledging that such a departure has already occurred").

[58] *See* Sanford Levinson, Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and its Design* 94 MINN. L. REV. 1789, 1856 (2010) (Levinson and Balkin refer here to the 'legalization' of the use of emergency powers and 'its discontents').

[59] *See* Alex Brenninkmeijer, *Dejuridisering* 1 NEDERLANDS JURISTENBLAD, 6, 7 (2011) [Dejuridification] (discussing the problem of increasing regulatory pressure caused by intense juridification and the need to move toward de-juridification).

[60] *See* W. DUBBINK, ASSISTING THE INVISIBLE HAND: CONTESTED RELATIONS BETWEEN MARKET, STATE AND CIVIL SOCIETY (2003) ("society is becoming more juridified and there are normative objections to this process. At the same time, a process of dejuridification is taking place. This process is due to the fact that laws contain less and less clearly defined norms for conduct. Laws are turning into the so-called framework laws: laws which only become meaningful by virtue of an additional layer of content drawn up by the civil service."). Framework legislation typically outlines goals and features of legislation and establishes rules for delegation to the executive. *See* Elizabeth

contracts with private entities, and the de-judicialization of social security.[61] However, de-juridification does not only mean that unnecessary bureaucratic rules will disappear, but also that rights may be suspended and courts deactivated at times of crisis. This typically occurs on a temporary basis through the use of sunset clauses as we will explain in part II, which justifies our focus on temporary de-juridification.

De-juridification can thus be defined as the erosion of the use of law or the legal dimension of our relationship with society, leaving social subjects outside the realm of law. De-juridification should not be confused with 'deregulation' which basically refers to the removal of government regulatory controls from an industry, which, in some cases, resulted in the reregulation of multiple sectors.[62] De-juridification goes much further and refers rather to the politicization and the adoption of a less to no legal approach to societal problems or conflicts. While 'juridification' refers to the pathological growth of the power of law, de-juridification—often its symmetrical phenomenon—reflects its reduction, which can be translated in fewer procedures and rules, but not necessarily in the non-involvement of the State.[63] Instead, as a result of the de-juridification process, we might witness a broader role for agencies and a greater empowerment of private actors *vis-à-vis* public actors, namely the legislature.

According to Regina Kreide, de-juridification is concretized in three aspects: deformalization of private law (*e.g*. through the expansion of privatization processes in health, military and security),[64] missing separation

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Garrett, *The Purpose of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2004) (Professor Garrett explains that "framework legislation creates rules that structure congressional lawmaking; these laws establish internal procedures that will shape legislative deliberation and voting with respect to certain laws or decisions in the future. They are laws about the congressional lawmaking process itself. Although frameworks often have an effect on the substance of the laws to which they apply, the frameworks themselves are purely internal rules relating to a particular set of legislative actions").

[61] *See* CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 634 (1997) ("we have seen this effect most clearly in the move from public law to contract, not notably successful, in securing de-juridification. Similarly, we noted the move to de-judicialize social security adjudication").

[62] *See*, for example, GIANDOMENICO MAJONE, DEREGULATION OR REREGULATION? REGULATORY REFORM IN EUROPE AND IN THE UNITED STATES (1990).

[63] *See* ALFIO MASTROPAOLO, IS DEMOCRACY A LOST CAUSE? PARADOXES OF AN IMPERFECT INVENTION 109 (2011) (translated) ("Juridification is the offspring of 'constitutional democracy' and basic rights (…) Granted that in many cases juridification corresponds to a symmetrical phenomenon of de-juridification, albeit more contained, neither are imaginable without the state").

[64] De-juridification concretized in the privatization of public tasks can raise numerous concerns as to the quality and availability of the services, as well as accountability problems, *see, e.g.,* Andrew Bentz, *Privatization and Its Discontents*, 63 EMORY L.J. 263 (2013) (providing an overview of the multiple challenges of privatization); Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/private Governance*, 63 EMORY L. J.

of powers in a multi-level system through higher decentralization of power and the use of more alternative dispute resolution mechanisms, and exclusion of a great part of the global population from access to money, knowledge, power and judicial protection.[65] While in a juridified world, 'laws colonize society', in a de-jurified one, we face the risk that 'power and money' will end up colonizing it.[66] This risk is particularly present in times ruled by the dialectics of fear and panic.

2. De-juridification and state of emergency

The economic crisis and the diverse terrorist attacks in Europe and in the U.S., have taught us that excessive 'juridification' will not protect us from these risks. Instead, emergencies force legislators to rethink and reinvent a number of existing rules, and sometimes set aside a number of them. Indeed, any emergency—political, economic or natural—will involve a form of government action that may infringe on constitutionally protected political and economic rights and liberties.[67] Although the literature has distinguished between the maintenance of a core of constitutional rights that should remain untouched by the declaration of emergency and the need to accept some malleability at the level of economic rights, the truth is that some rights will necessarily be derogated at times of crisis.[68] However, at these times, government will often claim that this de-juridification is only temporary and assume it is possible to 'rewind' to the situation that pre-existed the state of emergency.[69]

The temporary limitation of human rights and the acceleration of legal procedures have appeared to be necessary consequences of emergency

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417 (2013) (on private military companies); JODY FREEMAN & MARTHA MINOW (EDS), GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (2009)

[65] *See* Regina Kreide, *The Ambivalence of Juridification. On Legitimate Governance in the International Context* 2 GLOBAL JUSTICE: THEORY PRACTICE RHETORIC 18, 22(2009).

[66] *See* HAUKE BRUNKHORST, SOLIDARITY. FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY 116 (2005).

[67] *See* Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DEPAUL L. REV. 539, 558-559 (2006) ("In the United States, the judiciary has tended to accede to executive or legislative action limiting individual liberties during emergency, either by postponing decision until after a crisis has concluded, or by affirming the necessity of the government's actions").

[68] For a distinction between different types of emergencies and allowed derogations from constitutional rights, *see* Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DEPAUL L. REV. 539, 559 (2006); see also Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime,* WIS. L. REV. 273 (2003).

[69] *See* Yair Listokin, *Learning through Policy Variation*, 118 YALE L. J. 480, 513, 514 (2008) (arguing that sunset clauses can be used to promote a continuous process of learning and ensure policy reversibility. Professor Listokin assumes that this reversibility can be created by including sunset clauses in legislative acts).

measures adopted to combat terrorism and provide firm and swift reactions to potential threats to national security.[70] Adequate and rapid state actions are necessary in this context since in the mind of terrorists, the target is not just an anonymous citizen, but the main victim is instead the state itself.[71] As Günter Frankenberg explains "terrorist attacks need primarily to be repelled not because they endanger innocent citizens but because they attack the very heart of the state (…) [casting] doubt on [the] capability of the state, [and threatening] the normative foundation of its existence".[72] Timely and effective responses to terrorism and other types of crises require extraordinary approaches: as the saying goes, 'all is fair in love and war'.

By distinguishing between a state of 'normalcy' and 'state of emergency', states might be requested to de-juridify on the legislative, administrative and judicial levels.[73] Such de-juridification, often translated in the temporary limitation of human rights, should however be limited and circumscribed to the duration of situations of 'exceptional and imminent danger' (article 15 of the European Convention of Human Rights). However, history has shown that this is not always the case. Legislating at times of crisis is a challenging task which implies taking into consideration an atypical scenario of creation and destruction of laws and limitation of human rights in an attempt to reconcile the present with the past and future. This challenge is developed in part II.

PART II.TIME, EMERGENCIES AND SUNSETS

[70] *See* Gabriel Malor, *How Not to Fight Terrorism*, NATIONAL REVIEW, (January 28, 2015), available at http://www.nationalreview.com/article/397317/how-not-fight-terrorism-gabriel-malor (discussing the unconstitutionality and potential ineffectiveness of a bill determining that terrorists should be stripped from citizenship, "if this legislation were passed into law, because of its constitutional infirmity it would never work as billed by its proponents. Instead, it would mobilize an army of bureaucrats at Justice, State, and Homeland Security to start sniping away at Americans' rights of citizenship and travel.")

[71] *See* Todd Sandler, *Terrorism and Counter-terrorism: An Overview*, OXFORD ECON. PAPERS 1, 2 (2014) ("Terrorists seek to circumvent normal channels for political change by traumatizing the public with brutal acts so that governments feel compelled to either address terrorist demands or divert public funds into hardening potential targets. (…) These and countless other incidents since 9/11 indicate that the government must allocate resources in an effective and measured manner to counterterrorism activities so that terrorists cannot circumvent legitimate political processes or cause significant economic losses. These losses may involve reduced foreign direct investment, lower economic growth, less trade, reduced tourism, or lost values of stock and bond indexes").

[72] GÜNTER FRANKENBERG, POLITICAL TECHNOLOGY AND THE EROSION OF THE RULE OF LAW: NORMALIZING THE STATE OF EXCEPTION 202 (2014).

[73] *See* Alan Greene, *Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Court of Human Rights* 12 GERMAN L. J. 1764 (2011).

In this part, we shift our conceptual analysis from 'de-juridification' to its temporary character at times of crisis. As mentioned earlier, emergencies are thought to be temporary and thus require measures that are terminated at the end of a certain period. In order to guarantee this termination, sunset clauses are used to prevent that the state of exception is normalized and that law keeps up with the current state of affairs, enabling the adoption of rapid decisions. However, law is usually not very 'keen on keeping up with' the evolution of society: Instead, both at the domestic and international levels, "delay is [usually] the rule"[74] and rules that were supposed to be temporary often remain after the period of crisis.[75] In fact, this is a problem common to times of war and peace, since there is a tendency for policies and laws to persist even "when [their] original rationale is no longer applicable or has been proved invalid."[76] In this part, we start by analyzing why law has a troublesome relationship with time: It appears to be challenging to strike a balance between the *past* (state of normalcy where citizens can exercise their rights), the *present* (state of emergency where it is necessary to derogate some of these rights so as to make rapid decisions) and the *future* (restoration of state of normalcy where any effects of the mentioned temporary measures must be erased). After having explained law's nostalgia with the past, we delve into the concept and functions of 'sunset clauses', arguing that this instrument could help closing the gap between state of normalcy (juridification) and state of emergency (de-juridification).

A. Law and Time

Although the idea of 'permanence' appears to be traditionally associated with legislation, law is inevitably constrained by time.[77] Laws are doomed to

[74] *See* Colin B. Picker, *A View from 40, 000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149,184 (2001) (discussing the relationship between the evolution of technology and international law and the interaction between the creation and change of international rules and technological pressures) ("it is often the case that technologically induced change to international law occurs in fits and starts, sometimes in a timely fashion and sometimes after considerable delay. Normally, delay is the rule in the formation of international law").

[75] *See* Philip K. Howard, *Showcase Panel IV: A Federal Sunset Law, The Federalist Society 2011 National Lawyers Conventions*, 16 TEX. REV. OF L. & POL. 339, 348(2012) (as Philip Howard explains, this reluctance to terminate laws is not surprising since "it is much more difficult to repeal a law than it is to pass it in the first place, because, once enacted, an army of special interests surrounds each law".)

[76] *See S*tephen Coate & Stephen Morris, *Policy Persistence*, 89 AM. ECON. REV. 1327 (1999) on the difficulty to terminate policies, *see also* Iris Geva-May, *When the Motto is 'Till Death Do Us Part': the Conceptualization and the Craft of Termination in The Public Policy Cycle*, 24 INT. J. OF PUB. ADMIN. 263 (2001).

[77] For a comprehensive law and economics analysis of temporary legislation, *see* FRANK FAGAN, LAW AND THE LIMITS OF GOVERNMENT: TEMPORARY VERSUS PERMANENT LEGISLATION (2013).

face the destiny of the mythological character *Kronos*:[78] They overthrow existing laws, have their period to reign but are destined to be overcome by the next generation. Like Kronos, legislators often experience the 'nostalgia of eternity', refusing their mortality as well as that of their rules.[79] This nostalgia of eternity is often translated, in the words of François Ost, in the '*détemporalisation*' of law, which has been at the outset of totalitarian ideologies, cultural crises and profound disconnections between law and the current status quo.[80] Professor Ost's "*détemporalisation*" suggests the image of a law that has become detached from any temporal dimension, as if it could govern forever our society. Instead of enhancing legal certainty[81] and increasing the effectiveness and deterrence effect of laws with the course of time,[82] longstanding laws become easily obsolete and are converted into sources of satire[83] (*e.g.*, outdated laws on duels) and abuse.[84]

The disconnection between time and society can be caused on the one hand by a refusal to accept evolution or change of circumstances, and on the other by rupture. Law and its institutions are the result of incremental changes and profound transitions. If law is unable to walk at the pace of society, technology and economy, it will gradually lose effectiveness and stop reflecting the current status quo.[85] The relationship between law and time should mirror a balance between continuity, evolution and rupture. This is particularly exacerbated in times of crisis since temporary phenomena such as wars, economic crises, or political instability usually require temporary and exceptional legislative measures. Rupture with the status quo might be temporary in the latter situations, but it can also become

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[78] Kronos was a mythological character, the Titan of "time and the ages, especially time where regarded as destructive and all-devouring". *See* http://www.theoi.com/Titan/TitanKronos.html

[79] *See* FRANÇOIS OST, LE TEMPS DU DROIT 14-15 (1999).

[80] id at 15-16.

[81] Specifically on sunset clauses and legal certainty, see Sofia Ranchordás, *Sunset Clauses and Experimental Legislation: Blessing or Curse for Legal Certainty*, 36 STATUTE L. REV. (2015) (exploring the different dimensions of the principle of legal certainty and arguing that temporary legislation does not necessarily create legal uncertainty. Instead, it can further it because it creates 'temporary certainty').

[82] Arguing that the legal certainty of laws decreases over time, see Anthony d' Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1(1983). According to the literature, deterrence may in fact increase if law is less predictable and sanctions are uncertain, *see* Tom Baker, Alon Harel, Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach* 89 IOWA L. REV. 443(2004).

[83] See BBC News, 'UK Chooses 'Most Ludicrous Laws', BBC News-UK (7 November, 2007), available at http://news.bbc.co.uk/2/hi/uk/7081038.stm

[84] For an analysis of obsolete rules and their abusive use, see M.J. Mitchell, *Cleaning up the Closet: Using Sunset Provisions to Clean up Cluttered Criminal Codes* 54 EMORY L. J. 1671 (2005).

[85] For an interesting study of the 'pacing problem' in the context of the regulation of emerging technologies, see GARY E. MARCHANT, ET AL, THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-ETHICAL OVERSIGHT: THE PACING PROBLEM 19-20 (2011).

permanent, when legislators are confronted with a demand for innovative institutions and instruments that replace the current status quo. [86]

The relationship between time and law is also visible in the need to set a timetable for legislation. Timing rules, *i.e*., determining whether the benefits of a rule are created sooner or later and when, for example, the President of the United States may declare a national emergency, is another dimension of the relationship between time and law, which can not only prevent the mentioned disconnection but also maximize the effects of a law in light of uncertainty.[87]

This Article focuses on the relationship between law and rupture in turbulent periods, *i.e*., in times of crisis, temporary circumstances may justify the temporary suspension of legal guarantees and institutions, the derogation from numerous rules and the allocation to the executive an enhanced role in the crisis management. This is visible not only in counterterrorism legislation but also in the context of the European financial crisis, where an 'extended executive' composed by a multitude of agencies at various levels emerged to manage the credit crisis.[88] Moreover, crises confer a fluid character to rigid laws until the critical situation comes to an end.[89] When emergency strikes, immediate top-down decisions must be taken without time-consuming procedures, bureaucratic obstacles or attempts to gather consensus of potential political opponents.[90] As we mentioned earlier, this is for example the case of the European Commission's *Temporary Union Framework for State Aid Measures*[91] or the *Dutch Crisis- en Herstelwet*. The first document allowed EU Member States to grant on a temporary and exceptional basis well targeted state aid in order to unblock lending to companies and stimulate investment in the future. The *Crisis- and Herstelwet* was a law adopted to accelerate the administrative

[86] In this context, it is important to distinguish between 'rupture' and 'revolution', *See* John D. Hashell, *The Strategies of Rupture in International Law: The Retrenchment of Conservative Politics and the Emancipatory Potential of the Impossible*, 13 GERMAN L. J. 468 (2012) ("rupture is not necessarily the same as speaking about revolution (…) because it does not necessitate any giving up of a certain system of ideas or even emancipation for that matter, because it does not necessitate any giving up of a certain system of ideas or authority, at least not in any longstanding sense.")

[87] *See* Jacob E. Gersen, Eric A. Posner, *Timing Rules and Legal Institutions* 121 HARVARD L. REV. 543,552, 558(2007).

[88] See, for the United Kingdom, Julia Black, *The Credit Crisis and the Constitution* in THE REGULATORY STATE: CONSTITUTIONAL IMPLICATIONS 92, 112-113 (Dawn Oliver, et al eds, 2010).

[89] *See* Peter van Lochem, Nico Florijn, *Does Necessity Know No Law? On the Relative Significance of Legal Quality for Governmental Action* 2 (3) LEGISPRUDENCE 231, 233 (2008).

[90] Sanford Levinson, Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and its Design* 94 MINN. L. REV. 1789, 1800 (2010).

[91] Communication from the Commission –Temporary framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C16, 22.01.2009) 1.

decision-making procedure as to complex projects and was itself an example of a temporary and complex law enacted in less than seven months.[92]

Emergency powers must be constrained in some way in order to guarantee timely legal checks of the need for additional discretion and fast-tracked decisions and legislation.[93] This is often concretized by introducing sunset clauses in existing statutes or enacting ad hoc emergency legislation.[94]

B. Emergency Legislation and Sunset Clauses

Sunset clauses[95] (or provisions) are dispositions that determine the *expiry* of a law or regulation within a *beforehand determined period.* [96] These provisions are conceived to automatically 'erase' legislation which is no longer necessary either because it has fulfilled its function or because it is no longer effective. Before the law sunsets, it is generally subject to a final evaluation. This is particularly true if there is a review clause or a Henry VIII clause providing that a law will be amended by secondary legislation.[97]

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[92] *See* N. Verhey, *The fast and the furious: de Crisis- en herstelwet* 27 REGELMAAT 140 (2012).

[93] Sanford Levinson, Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and its Design* 94 MINN. L. REV. 1789, 1805(2010).

[94] For a complete and comparative study of ad hoc legislation, see ANNA JASIAK, CONSTITUTIONAL CONSTRAINTS ON AD HOC LEGISLATION: A COMPARATIVE STUDY OF THE UNITED STATES, GERMANY AND THE NETHERLANDS (2011).

[95]It is important to distinguish between 'sunset clauses' and 'sunrise clauses': While sunset clauses determine the termination of a law or some of its dispositions, sunrise clauses, on the contrary, only determine that a law will come into effect later on a certain date. Until that period, the clause 'lies dormant'. *See* MARK FREEMAN, NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE 142 (2009) (" sunrise clause (…) is a clause in a law that provides for the coming into force rather than the terminations of the law (…) after the specific date in the future and upon the satisfaction of specific condition.").

[96] On the definition of 'sunset clause', see Parliament (U.K.), GLOSSARY, ["sunset clause"], available at http://www.parliament.uk/site-information/glossary/sunset-clause/ ("A provision in a Bill that gives it an 'expiry date' once it is passed into law. 'Sunset clauses' are included in legislation when it is felt that Parliament should have the chance to decide on its merits again after a fixed period.").

[97] On the definition of 'Henry VIII' clauses, see Parliament (U.K.), GLOSSARY, ["Henry VIII clause], available at http://www.parliament.uk/site-information/glossary/henry-viii-clauses/ ("The Government sometimes adds a provision to a Bill which enables the Government to repeal or amend it after it has become an Act of Parliament. The provision enables the amendment of primary legislation using delegated (or secondary) legislation. (…)he House of Lords Select Committee on the Scrutiny of Delegated Powers in its first report of 1992-93 defined a Henry VIII clause as: a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny. [HL 57 1992-93, para 10] The clauses

Although a sunset clause is designed to terminate a piece of legislation at a certain point in time, the latter can be reauthorized on exceptional grounds.[98] This renewal implies generally an inversion of the burden of proof: contrarily to permanent legislation, parties claiming that a sunset clause should be reauthorized must prove that this reauthorization is necessary.[99]

Sunset clauses allow for the adjustment of regulation to changing social or technological circumstances and can be included in emerging legislation to ensure that legislation returns to the pre-emergency situation. According to John Ip, sunset clauses may be motivated by four main rationales: overcoming legislative inertia, creating a temporary placeholder, allowing future decisions to be made with better information, and protection against legislative panic.[100] This Article focuses on this last rationale which is usually present in counterterrorism legislation.

Under state of emergency, more powers are concentrated in the hands of the executive, which often means that public officials are allowed to limit human rights, enacting 'extra-legal measures' to protect a nation faced with calamities or grave dangers. As Oren Gross explains, "the adequate enactment of these measures 'may strengthen rather than weaken, and result in more rather than less, long-term constitutional fidelity and commitment to the rule of law".[101] Since in times of crisis, there is a tension of 'tragic dimensions' between democratic values and responses to emergencies, this tension is often solved by introducing a sunset clause in emergency regulations.[102] Ex ante evaluations and evidence-based policy making play a limited role in critical times, meaning that legislation can be too hastily adopted without much support on available evidence.[103] In this context, sunset clauses aim to guarantee that the circumstances that justified a certain piece of legislation granting extraordinary powers to the executive are reassessed after a set period.

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were so named from the Statute of Proclamations 1539, which gave King Henry VIII power to legislate by proclamation.").

[98] *See* Anthony Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393 (1981).

[99] See Ph.Eijlander; R. A.J. van Gestel, *Horizonwetgeving: effectief middel in de strijd tegen toenemende regeldruk?: een onderzoek naar de functie van werkingsbeperkingen in wetgeving ter vermindering van regeldruk* 23 (Ministerie van Justitie, 2006).

[100] John Ip, *Sunset Clauses and Counterterrorism Legislation,* PUB. L., 74, 82 (2013).

[101] *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*? 112 YALE L. J. 1011, 1023 (2003).

[102] id at 1028.

[103] Christian van Stolk, Mihaly Fazekas, *How Evaluation Is Accommodated in Emergency Policy Making* in EVALUATION AND TURBULENT TIMES: REFLECTIONS ON A DISCIPLINE IN DISARRAY 161, 163 (Jan-Eric Furubo, et al eds, 2013).

In the United Kingdom, for example, review and sunset clauses have been favored in order to improve the scrutiny of fast-track[104] and emergency legislation, for example, in Northern Ireland[105]. In 2009, the Constitution Committee of the House of Lords analyzed fast-track legislation and pled for a presumption in favor of the use of sunset clauses in the context of emergency legislation. This committee explained that

> 'w*here fast-track bills are used, there needs to be an additional safeguard. (…) in such cases, there should instead be a presumption in favor of the use of a sunset clause. By this process, a piece of legislation would expire after a certain date, unless Parliament chooses either to renew it or to replace it with a further piece of legislation subject to the normal legislative process.*[106]

Sunset clauses have been included in different examples of emergency legislation, notably in the context of counterterrorism.[107] In the United States, a number of sunset clauses were introduced in the USA Patriot Act adopted in reaction to the attacks of September 11, 2001.[108] Sixteen sections of this act were originally meant to sunset on December 31, 2005. In the mentioned Act, sunset provisions were included in order to limit the duration of measures constraining human rights to a five-year-period.[109]

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[104] Fast-track legislation refers to legislation enacted in deviation of normal legislative procedures and timetables, namely to respond to urgent situations. In this context, we are confronted with "bills … which the Government of the day represents to Parliament [that] must be enacted swiftly … and then [the former] uses its power of legislative initiative and control of Parliamentary time to secure their passage", see Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards*, (July 7, 2009), HL 116-I 2008-09, see http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/11604.htm , full text available at http://www.parliament.uk/business/publications/research/briefing-papers/SN05256/fasttrack-legislation

[105] Northern Ireland (Temporary Provisions) Act 1972, s 1 (5);

[106] Select Committee on the Constitution, Fast-track Legislation: Constitutional Implications and Safeguards, 7 July 2009, HL 116-I 2008-09, see http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/11604.htm

[107] *See* John E. Finn, *Sunset clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation* 48 COLUM. J. OF TRANSNAT'L L. 442 (2010).

[108] See Neal Katyal, *Sunsetting Judicial Opinions* 79 NOTRE DAME L. REV. 1237 (2004) (in this article included in the special issue entitled 'The Changing Law of War: Do We Need a New Legal Regime After September 11?", Katyal discusses the application of a sunset rationale to judicial decision-making in the post 9/11 world).

[109] Examples are the interception of communications, disclosure of communication, surveillance orders. Section 224 of the USA Patriot Act contained a sunset clause of five years. However, a number of sections were renewed (for example, regarding sharing of criminal information, single-jurisdiction search warrants).

The need to constrain human rights was at the time justified by the higher level of terrorist threat. This act was however reauthorized several times in the following years following very limited review and evaluations.[110]

Other countries followed this trend to introduce sunset clauses in counterterrorism acts. In the last decade, the inclusion of these clauses has been discussed, for example, in Germany and the Netherlands, in the context of national security policies. In Germany, the *Terrorismusbekämpfungsgesetz* (counterterrorism act) introduced several limitations to human rights on a temporary basis justified by the imperative to safeguard national security. [111] A similar attempt was done in the Netherlands *(Wet Bestuurlijke Maatregelen Nationale Veiligheid)*. [112] Reviewing the opportunity and advising on the legality of this Act, the Dutch Council of State argued that a sunset clause should be introduced in this counterterrorism statute so as to limit extraordinary competences and assess periodically the necessity and proportionality of this piece of legislation. The opinion of the Council to include a sunset clause was not welcomed by the responsible Secretary of State (Dutch Minister of Justice) who refused to introduce it, affirming that "terrorism cannot be regarded as a transitory problem".*[113]* The 'good intentions' of the Dutch Council of State were here clearly misunderstood. Although terrorism is indeed a lasting problem, it is important to limit in time the extraordinary measures and competences granted to the executive in order to prevent terrorist attacks and, above all, guarantee that these are revisited after a determined period of time.

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[110] The USA Patriot Act was meant to be extinguished in 2005, but in 2005 some of its sections were converted into permanent ones, others were extended until 2010 by the USA Patriot Act Improvement and Reauthorization Act. See Christian van Stolk, Mihaly Fazekas, 'How Evaluation Is Accommodated in Emergency Policy Making', in EVALUATION AND TURBULENT TIMES: REFLECTIONS ON A DISCIPLINE IN DISARRAY (2013) (Jan-Eric Furubo, Ray C. Rist, Sandra Speer , eds), 161.

[111] *Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbakämpfung)*, January 9, 2002, BUNDESGESETZBLATT (2002), Teil I, Nr. 3, p. 361 [Act on the Combat of International Terrorism]: according to article 22 of this statute, the limitations of human rights (on data privacy, grant of entry visas, identity control) introduced namely to the *Bundesverfassungsschutzgesetz* [Constitutional Protection Act] were only valid until 11 January 2007. A day before these measures would expire, a new law extending these limitations was enacted: the *Terrorismusbekämpfungsgesetz* of 10 January 2007 introduced a package of 15 special laws, which again included the possibility to limit human rights (*e.g.* house searches at night).

[112]*Regels inzake het opleggen van beperkende maatregelen aan personen met het oog op de bescherming van de nationale veiligheid en inzake het weigeren of intrekken van beschikkingen met het oog op de bescherming van de nationale veiligheid (Wet bestuurlijke maatregelen national veiligheid), Advies van de Raad van State en nader rapport*, Kamerstukken II, 2005-2006, 30 566, nr. 4, 12 [Regulation

[113] Id at 12-13 (in the report of the Dutch Minister of Justice, it was argued that an evaluation clause—rather than a sunset clause—would suffice to guarantee that the extraordinary competences would not remain for a longer period than necessary.

Contrarily to natural disasters that are, in most cases, unpredictable, terrorism carries both certain and uncertain elements: we know it is out there and it exists, but we are unable to predict when it will occur. At times of higher risk level, (*e.g*. after the 9/11 attacks, or more recently, when the United States started launching airstrikes on Islamic State in August 2014)[114] states might need to reconsider the enactment of new emergency measures or decide to review the effectiveness and proportionality of existing ones. The use of sunset clauses can be placed in the context of a 'lesser evil logic for dealing with emergencies' that imply the suspension of human rights and the transfer of significant extraordinary powers to the executive.[115] Sunset clauses can thus serve three functions: limit unnecessary de-juridification in time, guaranteeing enhanced legislative oversight of emergency powers and ensuring that extraordinary measures adopted under political or social pressure are not normalized; gather consensus as to potentially controversial bills and emergency measures.

Sunset clauses by renewing legislative oversight, should guarantee that emergency measures do not become permanent or live beyond the political, social or economic crises that justified its enactment. "Legislative oversight of administration is a nexus of administrative-political relations (…) the behavior of legislators towards administrators when exercising their oversight powers can therefore be viewed as an operationalization of underlying normative values regarding political-administrative relations".[116] However, this operationalization can in some cases undermine or even destroy the original legislative intent. This feeling was namely alive in the 1970s with the anti-big government movement.[117] In this context, a new instrument of legislative oversight was added to the toolbox of legislators: sunset clauses. As it shall be explained below, sunset clauses were not entirely new legislative instruments in common law systems but their adoption as review and termination tools was innovative at the time.

By limiting the temporal effects of emergency legislation, sunset clauses guarantee not only that that the de-jurification that often takes place in turbulent times remains limited and legislative oversight is renewed, but also that consensus can be gathered as to potentially controversial de-juridifications.

Gathering consensus as to controversial pieces of legislation that involve the limitation of human rights can be far from a simple task. Divided

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[114] See, e.g., an excerpt of David Cameron speech, in Jason Groves, 'Terror Target Britain: More Armed Police to Patrol Streets as Threat Level is Raised to Its Highest for Years and Prime Minister Warns that We are in the Fanatics'Sights, Daily Mail (29 August 2014), available at http://www.dailymail.co.uk/news/article-2737724/Terror-attack-UK-highly-likely-warns-Home-Secretary-Theresa-May-threat-level-raised-severe.html

[115] See BOB BRECHER, ET AL, DISCOURSES AND PRACTICES OF TERRORISM: INTERROGATING TERROR 3 (2010).

[116] *See* Mordecai Lee, *Political-Administrative Relations in State Government: A Legislative Perspective* 29 (12) INT. J. OF PUB. ADMIN. 1021, 1023 (2006).

[117] *See* Mark B. Bickle, *The National Sunset Movement* 9 SETON HALL LEG. J. 209 (1985).

governments and significant political opposition are often visible in legislative fragmentation and the lack of provisions ensuring the continuity of laws or imposing future reconsiderations of laws.[118] Sunset clauses are susceptible of creating more room for political bargains and achieving swiftly the social or political consensus which without it would have been absent at the House or Senatorial levels. Opponents to a specific law or provision within it will be more willing to pass it, if there is a guarantee that the previously existing status quo will return after the sunset.[119] This occurs namely when there is a conflict of multiple interests or when information as to the potential (negative) effects of law might be lacking. This promise to erase—or 'de-juridify'—and rewind –re-juridify- can be particularly relevant in the context of economic and political crises.[120]

PART III. DE-JURIDIFICATION IN TIME

This part focuses on the de-juridification of the legal order in times of crisis pertaining to human rights jurisprudence. Throughout the times, policy makers on the national and international levels have equally relied on the politicization rather than on juridification during crisis and emergencies.[121] The close examination of the reaction of law makers in these turbulent times will show that the trend of the politicization is exemplified with the temporary sunset of human rights laws and the subsequent deactivation of the courts in combination or separately with the temporary empowering of the executive branch of the government.

The practice of de-juridification in times of crisis through the adoption of sunset clauses or similar temporary provisions is not a modern phenomenon nor confined in a single legal order. Rather, throughout the times, and in common law jurisdictions such as the United States and the United Kingdom, de-juridification seems to have occurred through the limitation of human rights provisions, or human rights guarantees, the

[118] *See* Forrest Maltzman, Charles R. Shipan, *Change, Continuity, and the Evolution of the Law*, 52 AM. J. POL. SCI. 252, 255 (2008) (in this study, these scholars argue that political conditions at the time of the enactment of a law, namely the existence of a divided government can influence the probability that a law will be amended. Sunset provisions are described in this context as 'substantial vehicles for encouraging a law to be revisited (…) and build coalitions'.)

[119] Tom Ginsburg, S. Masur, Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law* Coase-Sandor Institute for Law and Economics Working Paper No. 645 (2d Series) Public Law and Legal Theory Working Paper No. 431, available at <www.ssrn.com > 42 (2013).

[120] Forrest Maltzman, Charles R. Shipan, *Change, Continuity, and the Evolution of the Law*, AM. J. POL. SCI. 252, 255 (2008).

[121] However, the exigencies of the war forced the UK Parliament to regulate and thus juridify aspects of social policies, such as the obligation of UK nationals to register with the National Registration Act 1915 or the military service in the regular army with the Military Service Act 1916. See Ludwik Ehrlich, *British Emergency Legislation During the Present War* 5 CAL. L. REV. 433, 436 (1917).

enhancement of the role of the executive and the deactivation the courts. Although these emergency measures were adopted on a temporary basis, the principle of separation of powers was in different situations inevitably threatened. The temporary limitation of human rights guarantees has an apparent impact on human rights level of protection; while the latter, the disruption of the separation of powers, has an indirect impact on human rights since the separation of powers is perceived as a guarantee for liberties.[122]

The first subsection explores the early use of temporary dispositions to suspend the writ of habeas corpus in United States. The second subsection discusses the unremitting use of sunset clauses to de-juridify in the United Kingdom during the first and the second World War. The third subsection focuses on the reasons and causes of the de-juridification of human rights during emergencies and discusses its impact on human rights. The final subsection discusses the impact of temporary legislation on the separation of powers and the role of the Courts.

1. The seeds of dejuridification in the suspension of habeas corpus

The development of law has been a general concern for scholars with many different approaches and from different backgrounds, ranging from the conventional ones like Savigny that associate legal with societal evolution[123] to those like Watson that advocate more debated approaches based on imitation and legal transplants.[124] To put it broadly and beyond the divergent views, each generation has gone an inevitable step further. The rule of law was gradually enhanced; the spectrum of law was expanded to cover every eventuality and jus became the predominant element of the society. This inevitably led to a juridification of the social life. Likewise the development of human rights jurisprudence had an equivalent progress.[125] The legal

[122] The allocation of powers among different institutions does not encompass only functional considerations to increase efficiencies. But also it is argued that the decentralization of power prevents the development of authoritarian regimes. This idea, that the separation of powers serves the liberty of the subjects was firstly expressed by Montesquieu and later on was seconded by Madison. See MONTESQUIEU, THE SPIRIT OF THE LAWS 162 (Anne Cohler, Basia Miller and Harold Stone trs, 1989) and Madison, Federalist Papers no 47.

[123] *See* FRIEDRICH KARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW, VOL 1 (1867).

[124] *See* A. WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974) (challenging the traditional perception that there is a close connection between the evolution of law and the society in which it operates. Watson's controversial thesis is that a society's laws do not usually develop as a "logical outgrowth of its own experience". Rather, law develops by imitation since the laws of one society are primarily borrowed or transplanted from other societies).

[125] Bingham marks the most important historical events in the development of the rule of law, such as Habeas Corpus, the abolition of torture see TOM BINGHAM, THE RULE OF LAW 10ff (2010). For a more thorough account of the history of the rule of law see BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

framework on the protection of human rights progressively became more watertight and covered more areas of law.

The writ of habeas corpus has played a significant role in the process of juridification of human rights. The writ of habeas corpus served since 13th century multiple functions.[126] However, its crystallization, with the sense that we know it today, only took place in the 17th century with the Habeas Corpus Act of 1679.[127] The enactment of the Habeas Corpus Act—the 'great writ', as it is also known—is perceived as one of the most efficient guarantees for liberty. In practice, it challenges unlawful arrest and detention. Technically, habeas corpus is a procedural remedy and not a right[128] but as Dicey said, the great writ may "declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty".[129] Although important, history has shown that also this writ has been the target of temporary de-juridification throughout the times.

Interestingly, the first temporary suspension pertaining to human rights is recorded within less than a decade in 1688.[130] The temporary suspension of habeas corpus became a common practice during 18th century. During the transition to the new Hanoverian regime the first annual habeas corpus suspension act is recorded[131] while by the end of the century not only a series of successive habeas corpus suspension acts were passed[132] but also an act with a three year life spectrum, which forbade meetings of more than 50 people without prior permission from a magistrate.[133]

On the one hand, the suspension of habeas corpus removed from the courts' jurisdiction a quite sensitive area of action which is the imprisonment and detention during emergencies. The decision to maintain imprisonment or not, became a political decision with no legal implication since there was no mechanism to challenge such decisions. But this practice is rooted in

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[126] For a historical account of the writ of habeas corpus, *see* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010).

[127] 31 Cha. 2 c. 2

[128] See A.V. DICEY, INTRODUCTION TO THE LAW OF THE CONSTITUTION 120 (1982).

[129] id at 118.

[130] 1 Gul&Mar c 2; [An Act for Empowering His Majesty to Apprehend and Detain such Persons as He shall find just Cause to Suspect are Conspiring against the Government]. This act drew significant attention at the debates in the House of Commons and House of Lords. See Journal of the House of Lords 1685-1691 Vol XIV (1767-1830) 222. According to Thomson 'The passing of the Act desired by the Commons implied that henceforth extraordinary powers could only be conferred upon the executive by Parliament and for such time and in such manner as Parliament pleased", *see* MARK A THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND 1642 TO 1801 (1938) 286.

[131] Habeas Corpus Suspension Act 1722 (9 Geo I c 1).

[132] We refer here to Habeas Corpus Suspension, for example, in Act 1714 (1 Geo I st 2 c 8) 'to empower his Majesty to secure and detain such persons as his Majesty shall suspect are conspiring against his person and government' and Habeas Corpus Suspension Act 1798 (38 Geo III c 36).

[133] Seditious Meetings Act 1795 (36 Geo.3 c.8).

antiquity and in particular in Roman jurisprudence. As Cicero famously pointed out: "inter arma enim silent leges" (in times of war, the law falls silent).[134] Several centuries later on, Rousseau famously observed that in times of emergencies "the inflexibility of the laws, which keeps them from bending to events, can in some cases render them pernicious, and through them cause the ruin of a State in crisis".[135]

On the other hand, repercussions from the suspension of habeas corpus are relevant to separation of powers concerns, since the deactivation of the courts disrupts the separation of powers.[136] A prime example is recorded on the other side of the Atlantic where the suspension of the habeas corpus was incorporated in the text of the U.S. Constitution.[137] Accordingly, the de-juridification in times of crisis is exemplified accurately with the presidential suspension of the Habeas Corpus, during the American Civil War.

In particular, President Lincoln suspended the writ of the habeas corpus and, not surprisingly, a case challenging this decision was brought before the federal courts. In *Ex parte Merryman*, a case where the US Supreme Court Chief Justice Roger Brooke Taney delivered,[138] the question was whether the President had the authority to use suspension powers. [139] Even if the holding of the case was that the authority to suspend habeas corpus lay with Congress, the President disregarded the ruling and he made a pragmatic choice he had considered necessary. In fact, during a Special Session to Congress on July 4, 1861 President Lincoln responded to the Court with a historical quote that shows the extent of de-juridification: "are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[140] Lincoln went further, stressing that the constitution is silent on which branch of government has the power to suspend the privilege of the writ of habeas corpus.

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[134] CICERO, PRO TITO ANNIO MILONE 4.11 (52 BC), translation available at https://archive.org/details/oratioprotitoann00ciceuoft

[135] J. J. ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 138 (Victor Gourevitch tr, 1997).

[136] As Jackson accurately puts it, "the question of which political branch has the power to suspend the privilege of the writ of habeas corpus is a classic constitutional separation of powers question with important consequences for civil liberties". See Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus* 34 BALTIMORE L. REV. 11(2004-05).

[137] US Const., Article 1 section 9 cl 2 (Suspension Clause) ("The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.")

[138] At that time the Supreme Court Justices had circuit duties and sat as trial judges on the U.S. circuit courts, a practice that was repealed with the Judiciary Act of 1891 (26 Stat. 826). See Joshua Glick, *Comment, On the Road: The Supreme Court and the History of Circuit Riding* 24 CARDOZO L. REV. 1753 (2003).

[139] Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861).

[140] For more details of the dialogue between Chief Justice Taney and President Lincoln see Arthur T. Downey, *The Conflict between the Chief Justice and the Chief Executive: Ex parte Merryman*, 31 J. OF SUPREME COURT HISTORY, 262 (2006).

All told, the conflict between President Lincoln and the Chief Justice Taney illustrates an early tension between the Commander in Chief and the Judiciary and represents an early de-juridification on behalf of the executive branch, albeit the express and unequivocal disagreement of the judiciary branch. President Lincoln made a correct decision—or at least, a realistic one, given the situation of peril his administration faced. However, the question on which branch of the government has the power to suspend the writ of habeas corpus is still unanswered,[141] Chief Justice Taney is credited with the correct legal conclusion.[142] Progressively thought, a precedent is established according to which the existence of a state of armed conflict is a political question for the political branches of the government while the courts have a more passive role.[143] Nonetheless, it is questionable whether this precedent encompasses all cases of emergency or whether it is confined in state of armed conflict emergencies.[144]

2. De-juridification in the United Kingdom in the 20th century

A century later, across the pond, emergency laws of temporary nature,[145] also called war time acts, were clogging the statutes books due to the two World Wars that monopolized the legislative agenda.[146] The thorough examination of those laws shows an extensive de-juridification, not just confined in human rights areas, but also marked with the constant centralization of powers, since power is delegated, though temporarily, from Parliament to the executive branch.

In particular, during World War I, the Government introduced a series of emergency legislation all with temporary duration 'until to the end

[141] See Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus* 34 Baltimore L. Rev. 11, 21 (2004-05).

[142] For further discussion on the distinction between the legal and the pragmatic situation of the case see CLINTON LAWRENCE ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 25-26 (1951).

[143] *See* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950)

[144] This caveat is relevant to the phenomenon of terrorism due to its peculiar nature, between war and crime since unlike wars, there is no organized and armed conflict between states or other entities but selective attacks against civilian and governmental targets. For a more detail analysis on the issue see Bruce Ackerman, The Emergency Constitution 113 Yale L.J. 1029, 1032

[145] However, not all emergency laws were temporary, for instance the act delegating power to the executive which was passed without a sunset clause and empowered the King in Council to define the termination of the war. See Termination of Present War (Definition) Act, 1918.

[146] For a detailed analysis on the emergency legislation during World War I see H. Geraldine Lester, *British Emergency Legislation*, 7 CAL. L. REV. 323 (1919); *See* Ludwik Ehrlich, *British Emergency Legislation During the Present War* 5 CAL. L. REV. 433 (1917).

of the War',[147] or for a certain period—for instance six months thereafter.[148] In substance, a plethora of these war time acts limited rights and freedoms. Suffice to mention here the temporary suspension of the freedom of assembly, [149] the acts prohibiting the trading with the enemies, [150] the suspension of Grand Jury[151] and the act that limited the lock out or strikes in industries relevant to munitions for the war.[152] Such acts with impact on rights and freedom, in combination with temporary acts passed enhancing the role of the executive, created a de-juridified environment. This was however necessary due to the exigencies of the war. Legislative power was hence transferred to the executive affecting the separation of powers. Such acts empowered the executive, in particular the Treasurer in issues pertaining to war finance [153] and public undertakings, [154] the Home Secretary[155], the King in Council[156]. Most importantly, emergency acts with sunset clauses were passed affecting constitutional matters, and in particular political rights such as the temporary postponement of elections[157] and the suspension of the ministerial by- elections.[158]

Likewise, in the wake of the World War II another series of emergency acts was passed. The most notable was a temporary act to control the export of good to particular countries, hence limiting the freedom of contract. [159] This Act delegated the power to the government to issue regulations making it a criminal offence to export particular goods to particular countries. It provided that "this Act shall continue in force until such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came

[147] *i.e* British Ships (Transfer Restriction) Act 1915; Customs (War Powers) Act 1915; National Registration Act 1915

[148] *i.e* Special Acts (Extension of Time) Act 1915; Price of Coal (Limitation) Act, 1915.

[149] Societies (Suspension of Meetings) Act, 1917.

[150] Trading with the Enemy (Amendment) Act, 1918.

[151] Grand Jury Suspension Act, 1917.

[152] Munitions and War Act, 1915.

[153] *i.e* Finance (No. 2) Act 1915; War Loan Act, 1917; The Government War Obligations Act,1918

[154] *i.e* Statutory Companies (Redeemable Stock) Act, 1915; Statutory Undertakings (Temporary Increase of Charges) Act, 1918.

[155] *i.e* Police and Factories etc (Miscellaneous Provisions) Act, 1916.

[156] *i.e* Postponement of Payments Act, 1914.

[157] *i.*e Elections and Registration Act 1915; Parliament and Local Elections Act, 1917; Parliament and Local Elections (No. 2) Act, 1917; Parliament and Local Elections Act, 1918

[158] Re-election of Ministers Act 1915; Re-election of Ministers Act 1916; Re-election of Ministers Act, (No2) 1916.

[159] Import, Export and Customs Powers (Defence), Act 1939.

to an end, and shall then expire except as respects things previously done or omitted to be done"[160]Nevertheless, no Order in Council was ever made in regard to this Act declaring its expiration. Subsequently, the government issued the Export of Goods (Control) Order 1987[161] and the Export of Goods (Control) Order 1989[162] prohibiting the export of several goods with several countries including among others Iraq.

A case was brought before the Court of Appeal in 1995 concerning the aforementioned control orders. In essence, the argument for the appellants was that, "however broad or loose a construction is to be given to 'the emergency'", it cannot rationally be said to have continued up to 1987. And therefore, they claimed, the purported making of the aforementioned orders was an abuse of the powers given by the Act of 1939.[163] The Court dismissed the arguments of the appellants even though it was common ground that the emergency which was the occasion of the enactment was the imminence of the Second World War, with the main counterargument being that Parliament had the opportunity to repeal that Act during all those years but instead chose not to do so.[164]

The case above exemplifies the results and extent of de-juridification, especially when such de-juridification is accompanied by regulations that restrict individual rights, although temporarily, while power is delegated to the executive. Expediency ranks higher than legality, and what was initially perceived as temporary becomes normal and of permanent character.

3. Rights in Pause

Crises and their management, as it was mentioned above, have always a daunting task for the authorities.[165] In many occasions, a Promethean manner was required by policy makers. Diachronically the dilemma posed during times of crises and emergencies is reflected on the thoughts of Abraham Lincoln, who pondered: 'is there, in all republics, this inherent and fatal weakness? Must a government of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?'[166] In practice, at times of crises, the conflict arisen between liberty and public safety is solved in favor of the latter.[167]Therefore, as it is commonly said, the

[160] Import, Export and Customs Powers (Defence) Act 1939 sec 9 (3).

[161] SI 1987/2070.

[162] SI 1987/2376.

[163] R v Blackledge & others (1995) 92(23) L.S.G. 32; (1995) 139 S.J.L.B. 139;.

[164] R v Blackledge & others (1995) 92(23) L.S.G. 32; (1995) 139 S.J.L.B. 139.

[165] On the challenges of crisis management, *see* Uriel Rosenthal & Alexander Kouzmin, *Crises and Crisis Management: Toward Comprehensive Government Decision Making,* 7 J. PUB. ADMIN. RES. THEORY 277 (1997).

[166] SPEECHES AND LETTERS OF ABRAHAM LINCOLN: 1832 - 1865 257 (2008).

[167] Lord Pearce has pointed out that 'the flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings' see Conway v Rimmer [1968] AC 910, 982 (HL), and Justice

means are easily justified by the ends.[168] The priority of the policy makers is to tackle the threats for the society as a whole, while the protection of civil liberties, is set in a lower priority. Hence, for the period of the crisis, the temporary suspension of certain liberties is a common mechanism. Such mechanism leads to a de-juridification, since legal protections and guarantees are marginalized. At the international level, pertaining to international human rights, such a practice is commonly referred as derogation.[169]

Which rights would be suspended, or in other words, what would be the scope of the suspension depends on the type of crises and the needs of the emergencies. Nonetheless, not every right can be subject to suspension. For instance, the European Convention on Human Rights provides that no derogation shall be made pertaining to the right of life, to the prohibition of torture, and slavery, while no punishment shall be imposed without law.[170] As a general principle, limits to the de-juridification may exist where "the infringement is not reversible, or the damage is uncountable".[171]

A quite recent example of de-juridification is recorded in UK and is the case of the indefinite detention.[172] As a reaction to the September 11th

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Jackson, in his dissenting opinion in Terminiello v City of Chicago, said that in a state of emergency 'the choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact'. See 337 US 1, 69 (US SC) (1949).

[168] In Posner and Vermeule's words, 'civil liberties are compromised because the protection of human rights interferes with effective response to the threat'. *See* ERIC A POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 12 (2007).

[169] For instance the European Convention on Human Rights in article 15 has a derogation. See Convention for the Protection of Human Rights and Human Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 15. Regarding the legal framework of the derogation in the ECHR, see Rosalyn Higgins, *Derogations under Human Rights Treaties*, 48 BRITISH YEARBOOK OF INT'l L., 281(1976); Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies* 22 HARVARD INT'l L. J. 1, 4 (1981).

[170] See Convention for the Protection of Human Rights and Human Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 15 paragraph 2.

[171] *See* Antonios Kouroutakis, *Separation of Powers and the War on Terror* 42 BRACTON L. J. 27, 43(2010).

[172] Two cases of de-juridification due to the pause of the habeas corpus remedies and the subsequent deactivation of the courts are recorded the same period in USA, the *Padilla* case and the *Hamdi* case. However, these cases are not appropriate for comparison because the act of Congress did not have temporal limits. Both were detained based on the Presidential Military Order: "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" dated November 13, 2001. The order was issued in accordance with an Act of Congress see The Authorization for Use of Military Force (AUMF), Pub. L. 107-40. Concerning *Padilla,* the Supreme Court dismissed the claim on procedural grounds because the first instance court lacked jurisdiction, see

terrorist attacks, a bill was introduced in the House of Commons on November 12, 2001, introducing the indefinite detention of foreign nationals, suspects of international terrorism.[173] This measure was subject to a fifteen-month sunset clause.[174] The Bill passed but the Act incorporated a five-year sunset clause which was supported by several Members of the Parliament,[175] and was proposed by the Home Affairs Select Committee.[176] Consequently, Sections 21 to 23 were to 'by virtue of this subsection cease to have effect at the end of 10th November 2006'.[177] This measure was challenged before the Supreme Court (at that time House of Lords) and the Court with its decision *A v Secretary of State for the Home Department*[178] held that the indefinite detention of foreign suspects for terrorism without trial under the Anti-Terrorism, Crime and Security Act was incompatible with the Convention for the Protection of Human Rights and Human Freedoms.[179]

From the mentioned example, it is apparent that the de-juridification of human rights on a temporary basis during crisis might not be compatible with the rule of law. This de-juridification in practice means more discretion to the political branches of the government since law does not set the standards of protection. Hence, human rights protection depends on the policy making choice of the legislator, and on policy makers' discretion to balance between the specific policy and the protection of the rights.

It is noteworthy that the measure of indefinite detention was reviewed twice by an order of the Secretary of State.[180] But since the case

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Rumsfeld v. Padilla, 542 U.S. 426 (2004). About *Hamdi* the Supreme Court, held that the executive did not have the power to detain Hamdi indefinitely and deprive him of due process. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). For further analysis on the suspension clause see Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause* 125 HARV. L. REV. 901 (2011).

[173] Anti-Terrorism, Crime and Security Bill [49].

[174] Anti-Terrorism, Crime and Security Bill [49] s 28 (1) prescribed that 'Sections 21 to 23 shall, subject to the following provisions of this section, expire at the end of the period of 15 months beginning with the day on which this Act is passed' and (2) prescribed that 'The Secretary of State may by order (a) repeal sections 21 to 23; (b) revive those sections for a period not exceeding one year; (c) provide that those sections shall not expire in accordance with subsection (1) or an order under paragraph (b) or this paragraph, but shall continue in force for a period not exceeding one year'.

[175] HC Deb 21 November 2001 vol 375 col 397.

[176] Home Affairs Select Committee, The Anti-Terrorism, Crime and Security Bill 2001 (HC 2001-2, 351) [41].

[177] Anti-Terrorism, Crime and Security Act 2001, s 29 (7).

[178] A v Secretary of State for the Home Department [2004] UKHL 56.

[179] HL Deb 22 February 2005 vol 669 col 1102. 'In December 2003, the committee under the chairmanship of the noble Lord, Lord Newton, recommended that Part 4 of the 2001 Act should be repealed and replaced as a matter of urgency. But that was not done while there was still time to do it; for some reason, the Government waited until they were forced into action by the decision of the Law Lords on 16 December'.

[180] The Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2003 SI 2003/ 691; The Anti-terrorism, Crime and

was brought before the UK Supreme Court the measure was held incompatible with the European Convention of Human Rights. Lord Lloyd of Berwick articulated clearly this conclusion as he remarked that "in December 2003, the committee under the chairmanship of the noble Lord, Lord Newton, recommended that Part 4 of the 2001 Act should be repealed and replaced as a matter of urgency. But that was not done while there was still time to do it; for some reason, the Government waited until they were forced into action by the decision of the Law Lords on 16 December;"[181]

The duration of the de-juridification is another important element in the equation. A priori the duration of each crisis cannot be measured. Policy makers commonly adopt a sunset clause and before its expiration, they might renew the duration if the crisis is still ongoing. However, the promulgation of sunset clauses with indefinite duration may lead to the extension of the de-juridification beyond the crisis. As we mentioned earlier, in 1995, for example, the Court of Appeal adjudicated the validity of an emergency legislation the Import, Export and Customs Powers (Defence) Act 1939 passed at the wake of the Second World War.[182] Since no Order in Council was ever made in regard to this Act declaring its expiration, the government issued in 1987 and in 1989 orders prohibiting the export of several goods with several countries including among others Iraq. The argument for the appellants was that 'the emergency' cannot rationally be said to have continued up to 1987, and therefore, they claimed, the purported making of the aforementioned orders was an abuse of the powers given by the Act of 1939.

Nonetheless, the Court dismissed the arguments of the appellants[183] and as a result a temporary law passed during an emergency several decades ago setting limits on the freedom of trade was still active although the emergency was over. Thus it is shown how the repercussions of the de-juridification due to a crisis might have effect beyond the temporary scope of the crisis. As a MP and member of the Select Committee on Home Affairs stated[184] that

> *'As we all know, the history of anti-terrorism legislation is that when it is introduced, it is represented as temporary and as a response to some immediate crisis, but it has a habit of becoming permanent. I have therefore tabled—as have others, probably—a sunset clause which requires the Government to come back to Parliament after five years to go through the entire legislative process to obtain the powers that they seek in part 4. We picked five years—others may choose a shorter or a longer period—because there is a precedent for it'.*

Security Act 2001 (Continuance in force of sections 21 to 23) Order 2004 SI 2004/ 751.

[181] HL Deb 01 March 2005 vol 670 col 161.

[182] Import, Export and Customs Powers (Defence) Act 1939, s 9 (3). 'This act shall continue in force until such date as his majesty may by order in council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end'

[183] R v Blackledge & others (1996) 1 Cr App R 326.

[184] HC Deb 19 November 2001 vol 375 col 62.

That said, in times of crisis, sunsetting the law means that Human Rights protection depends primarily on the policy making choice of the executive branch and on its discretion to balance between the specific policy and the protection of the rights. The means are justified by the ends and rule of law is replaced by the rule of discretion. De-juridification removes the legal constraints in the exercise of power and policy makers have a broader room for maneuvers and a plethora of options for decisions. Such de-juridification, however, is not unlimited since a number of human rights guarantees are not subject to de-juridification such as the rights enlisted in the European Convention of Human Rights. In addition, such de-juridification is subject to judicial review. Courts which have a significant role in the protection of human rights, as it will be seen below, might intervene and block the de-juridification process. However, their role is mainly ex post, and in reality courts exercise this power with caution, adopting a more deferential approach in wartime. As we demonstrate in the next section, even the judiciary can be 'a victim' of de-juridification in times of crisis.

4. Deactivation of Courts

As it was mentioned above, the question on which branch of the US government, Congress or the President have the power to suspend the habeas corpus remains still unanswered. What is common ground, though, is that the suspension of the writ of habeas corpus deactivates the courts. The sunsetting of particular rights and freedoms has an equivalent impact. Hyperbole perhaps, but the Courts are the frontrunners in the juridification of our society: They implement the law, define its meaning, determine possible gaps, fill any vacuum and even challenge acts of the legislative bodies.[185]

This effect has been accurately captured in the words of the dissenting opinion of Justice Jackson in the *Korematsu* case which involved the exclusion of all Japanese and Japanese-Americans from large areas of the West Coast to concentration camps, due to the exigencies of World War II.:

> "*Of course, the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. (…) The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.*"[186]

[185] See Alexander Hamilton, Federalist Paper No 78. Such function of the US Supreme Court have received fierce criticism see Alexander M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

[186] Korematsu v. United States 323 U.S. 214, 248 (1944).

The deactivation of the Courts has a profound impact on the protection on Human Rights. Since the seminal case Marbury v Madison[187] in 1803 the vast majority of legal orders with a separation of powers system have entrusted courts with the task to protect human rights,[188] a trend that is also apparent in the commonwealth systems due to the recent developments. [189]

With the sunsetting of specific rights, courts' role becomes more passive. Courts are more keen on granting deference to the administration and to policy makers. This phenomenon is captured in a series of US Supreme Court cases decided in the aftermath of World War I. Congress passed the Rent Law[190] limited the freedom of contract for a period of two years. The passive role of the courts is apparent in the words of Justice Holmes who delivered a judgment on a case challenging the law. "But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect. In this instance, Congress stated a publicly, notorious and almost worldwide fact'.[191]

In times of normality, Courts have a central and active role on the protection of human rights. However, the role of the judge in times of crisis is limited. History and past experiences have shown that courts tend not to intervene during emergencies and in reality defer to the political branches of the government the decision making power. On the top of that, since the standards of protection are lower due to a sunset legislation, it is a matter of judicial discretion to intervene and rule unconstitutional any particular policy. Undoubtedly, when human rights protections are sunsetted the judge and the jus become an *ultimum refugium*.

Part IV. De-juridification and sunset clauses at times of crisis: recent past, present and future

In this part we ask what the real problem of de-juridification in times of crisis is: is it the fact that rights are being suspended or that new and temporary rules are being enacted to confer more powers to the executive? Up until now, we have argued that de-juridification is not per se 'bad', in fact it can be necessary to guarantee the adoption of timely decisions. In the first section of this part, we unveil that the heart of the matter is the misuse of sunset clauses to de-juridify our legal order. As we have demonstrated in our historical account, some emergency measures never seem to sunset,

[187] Marbury v. Madison, 5 U.S. 137 (1803).

[188] A case that exemplifies the advanced role of the courts on the protection of Human Rights is the Chadha case. See Immigration and Naturalization Service v. Chadha 462 U.S. 919 (1983).

[189] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* 49 AM. J. OF COMP. L. 707 (2001).

[190] 41 Stat 80.

[191] Block v Hirsh (1921) 256 US 135, 154 (US SC).

although emergency circumstances have. In section A, we delve into the past and more recent misuse of sunset clauses and explain why de-juridification and particularly sunset clauses as its instrument have acquired a 'bad reputation'. In section B, we try to make a contribution to the legal literature by suggesting a normative framework for a 'healthier' adoption of sunset clauses in the context of de-juridification at times of crisis (and beyond them).

Part IV: FRAMING DE-JURIDIFICATION

A. The recent past of sunset clauses and de-juridification

As mentioned above, the USA Patriot Act, was one of the few federal examples of legislative acts including sunset clauses. This Act, enacted in 2001 as a response to the September 11 terrorist attacks, was an example of de-juridification of human rights. In the USA Patriot Act, sunset provisions were included in order to *limit the duration* of measures constraining human rights to a five-year-period (sunset clause).[192] At the time, it was thought to be a higher level of terrorist threat. This act was however reauthorized in the following years and some of its provisions became permanent.[193]

Although existing constitutional and criminal law structures might be ill-equipped to respond to terrorism,[194] sunset clauses might be an important tool to avoid the normalization of emergency powers.[195] As demonstrated in our historical overview, the suspension of laws, human rights and the deactivation of courts in turbulent times 'eat away the foundations of republican government'.[196] This is particularly true if these emergency powers live beyond the original tragedy that originated the state of emergency. Discretion, efficient decision making and expediency are fundamental elements of de-juridification since law is not omnipresent to set processes and time consuming decision making obstacles. Hence de-juridification seems to be the appropriate medicine to combat emergencies.

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[192] Examples are the interception of communications, disclosure of communication, surveillance orders. Section 224 of the USA Patriot Act contained a sunset clause of five years. However, a number of sections were renewed (for example, regarding sharing of criminal information, single-jurisdiction search warrants).

[193] The USA Patriot Act was meant to be extinguished in 2005 but it was reauthorized.

[194] *See* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006).

[195] For a more detailed analysis of the use of sunset clauses to address temporary problems including terrorism, see SOFIA RANCHORDAS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION 62-64 (2015).

[196] *See* Sanford Levinson, Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and its Design* 94 MINN. L. REV. 1789, 1801(2010).

In that respect, sunset clauses are proven to be an adequate formula for de-juridification.

That said, de-juridification escapes the criticism and the burden is placed on the shoulder of sunset clauses. Sunset clauses are the means in this process, and what is neglected from the criticism, is not that sunset clauses fail to expire at the end of the emergency, but once normality is restored, juridification and its positive effects fails to reemerge. This is explained by a number of reasons.

Although sunset clauses have been used for centuries, sunset clauses have not been able to build a good reputation;[197] instead they are thought to be ineffective, costly and unable to impede the 'normalization of the extraordinary'. [198] The repeated extensions of counterterrorism, namely of the USA Patriot Act are a mere example of the sunset clauses' ability to terminate emergency legislation. The adoption of sunset clauses was an important tool in gathering consensus regarding the severe limitations of human rights in the name of national security.[199] These sunset provisions were supposed to guarantee that the extraordinary limitations of civil liberties would not become entrenched, but would rather be reevaluated after a determined period. This instrument was supposed to allow Congress to revisit the USA Patriot Act and, based on new information, correct possible policymaking errors by revising or repealing unnecessary rules. [200] Conversely, these sunset clauses produced the opposite effect, facilitating the long-term entrenchment that they originally designed to prevent.

The mentioned 'bad reputation' is not exclusive to emergency legislation but has been the result of the deficient implementation of sunset clauses in different fields. Firstly, although sunset clauses were originally enacted to stimulate legislative oversight and the termination of unnecessary laws, these clauses were often automatically reauthorized without serious evaluations. According to the literature, there seems to be 'an institutional bias in favor of the status quo: agreement is required to change a policy, but no agreement is required to sustain it'.[201] Maintaining policies—regardless of their effectiveness —can be pointed out as a way of ensuring the survival of organizations such as regulatory agencies.[202]

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[197] For a thorough account of the reasons why sunset clauses have developed this 'bad reputation', see SOFIA RANCHORDAS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION (2015).

[198] John Ip, *Sunset Clauses and Counterterrorism Legislation,* PUB. L., 74, 87 (2013).

[199]*See* Sara A. Chandler, *Collateral Damage? The Impact of National Security Crises on the Fourth Amendment Protection Against Unreasonable Searches* 68. U. PITT. L. REV. 217(2006).

[200]*See* Emily Berman, *The Paradox of Counterterrorism Sunset Provisions* 81 FORDHAM L. REV. 1777, 1790 (2013).

[201] Stephen Coate, Stephen Morris, *Policy Persistence* 89 AM. ECONOMIC REV. 1327 (1999).

[202] STELLA Z. THEODOULOU, CHRIS KOFINIS, THE ART OF THE GAME: UNDERSTANDING AMERICAN PUBLIC POLICY MAKING 206 (2004).

Secondly, sunset clauses have been used and abused to gather consensus regarding controversial—and often emergency—laws that would have not been adopted otherwise. The above mentioned consensus-gathering 'virtue' attributed to sunset clauses soon evolved into a 'vice' and 'sunset clauses have been transformed from an instrument of better government into a clever political trap'.[203] Sunset clauses are thus said to be easily employed as 'a convenient political excuse for shortcutting initial parliamentary debate about controversial legislation' and delaying essential discussions to the sunset moment.[204] According to Rebecca Kysar, in the field of tax law, sunset clauses were employed during the Bush administration 'as apparatuses [to] underestimate the revenue costs of legislation or fit the legislation within predetermined budget constraints (…) and function as rent-extracting mechanisms'.[205] By enacting sunset clauses that involve tax cuts instead of permanent laws, lawmakers could reduce the estimation of the revenue costs of these laws, since the calculation would only take the sunset period into account. However, in practice, the original plan was to renew these tax cuts later and circumvent budgetary constraints under the 'cover' of a temporary provision.[206]

Thirdly, the bad reputation of sunset clauses can be explained by its non-selective use in the 1970s and 1980s. The 'sunset boom' at the state level was motivated by the desire to limit the growing power of agencies rather than by the 1970s economic crisis. An excessive number of sunset clauses resulted, for example, in deficient evaluations and incorrect evaluation periods. According to a study performed in 1990 by Kearney, most sunset clauses were characterized by incorrect sunset review periods.[207] Excessively short periods burdened sunset commissions with constant reviews, which meant that several automatic reauthorizations took place. The retrospective evaluation of sunset clauses became in many cases a mere formality that did not impede agencies from continuing ineffective and unnecessary programs. These pathologies affect the reputation of sunset clauses and diminish our hope for a brighter future for sunset clauses in the context of de-jurification.

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[203] Chris Mooney, *A Short History of Sunsets*, LEGAL AFFAIRS 67 (2004).

[204] Nicola McGarrity, Rishi Gulati, George Williams, *Sunset clauses in Australian Anti-terror laws* 33 ADELAIDE L. REV. 307, 308 (2012).

[205] Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code* 40 GA. L. REV. 335, 339 (2006).

[206] Manoj Viswanathan, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future* 82 New York University L. Rev. 656 (2011).

[207] See Richard C. Kearney, *Sunset: A Survey and Analysis of the State Experience*. PUB. ADMIN. REV., 49, 51 (1990).

B. Normative framework

As we mentioned earlier, juridification is an ugly word.[208] It is hideous because it represents a reality where jus is the predominant element of the society. However, history has shown that the reality of limitless de-juridification at times of crisis can be even uglier. Sunset clauses have walked side by side de-juridification in turbulent times to guarantee that the temporary limitation of human rights and guarantee enhanced legislative oversight. However, these legislative instruments have not always been able to fulfill their mission. Temporary de-juridification needs a normative framework that sets the boundaries of the spaces susceptible of being juridified.

Firstly, an important step would be to clearly define the situations that can and should be de-jurified on a temporary basis. In the case of crisis, a strict definition of the concept of 'emergency' and the reasons that justify the temporary suspension of human rights must be provided. This would avoid that emergency powers remain valid after the emergency has ceased to exist. A statement of reasons would invite the legislature to reflect upon both the need for emergency de-juridification and its duration.[209]

In addition, before deciding to de-jurify and sacrifice human rights, the legislature should investigate whether a certain situation is the result of serious dangers or merely risks. Here, we refer to Luhman's distinction between risk and danger: *risk* "refers to the potential future loss as a consequence of a decision (…) and we can speak of risk only if we can identify a decision without which the loss could not have occurred", whereas danger refers to "the potential loss resulting from something external to the one affected".[210] Terrorism and natural disasters can be qualified as dangers because they were unexpected, whereas some economic policies (*e.g.*, decision to invest or engage into financial speculation) will easily fall into the category of risks. This distinction is nonetheless fluid and what is a risk for one person might be a danger for others: Christian Borch explains that 'heavily geared investment in the financial markets [a typical risk] might trigger a financial collapse which has negative effects on people who did not speculate [danger]'.[211] In this case, de-jurification might be justified to tackle the results of a danger which was unexpected to most citizens.

In the case of mere 'risks', legislators might decide to adopt sunset clauses in order to gather more information as to a certain phenomenon, experimenting with a new act. Rebecca Kysar—despite her critical position toward temporary legislation—acknowledges that sunset clauses have been used in the United States as an instrument to assess the risks and effects of a new policy as well as to obtain more information about it during the interim

[208] Teubner, supra note 30, at 3.

[209] *See* Bryan L. Page, *State of Emergency: Washington's Use of Emergency Clauses and the People's Right to Referendum*, 44 GONZAGA L. REV. 219 (2008).

[210] *See* Max Boholm, *The Semantic Distinction between 'Risk' and 'Danger': A Linguistic Analysis* 32 RISK ANALYSIS 281 (2012).

[211] CHRISTIAN BORCH, NIKLAS LUHMANN 100 (2011).

period between the enactment and the sunset.[212]In such cases, sunset clauses which be employed to experiment with a new act, rather than to de-juridify.

An important question to be asked is whether there are sectors which should never be de-jurified, not even on a temporary basis. As mentioned above, that is the case of the Prohibition of torture which can be under no circumstances constrained. In addition, a number of core legal institutions and concepts which are essential for the functioning of any state and society cannot be easily de-jurified.[213] This argument is supported, for example, by the German Constitutional Court case law on the requirements of transitory law. In 1976, this Court affirmed that 'laws that are indispensable for the legal capacity and [normal] functioning of a state'[214] and the laws that are required for the concretization of fundamental rights guarantees (*e.g.* media and broadcasting laws) are not compatible with a temporary or transitory nature.

After having decided whether or not a social space can and should be de-jurified, law and policymakers should reflect upon the duration period of the sunset clause. This period should coincide with the emergency, *i.e.*, it should be long enough to allow lawmakers to solve effectively a certain social problem and gather information as to its nature, but it should not be disproportionate considering the crisis in question. Depending on the scope of the de-juridification, this period should be as limited as possible to avoid unjustified violations of human rights and the principle of separation of powers. Another important element of temporary de-juridification is retrospective evaluation (or ex post evaluation).

As above mentioned, the adoption of sunset provision increases the probability that political opponents will support new laws due to the 'promise' of future evaluation or revision.[215] Evaluations should therefore be an essential element of de-juridification. The necessity of extraordinary measures or de-juridification should be reassessed after a certain period, preferably by an independent evaluation commission, and the transparency of this evaluation should be guaranteed, when possible, by the publication of its results. In some cases, the publication of information may be however contrary to the safeguard of national security. According to the Mandelkern Group on Better Regulation, reconsidering the necessity of a certain regulation in a serious way can ensure that the executive takes new information into account, reassesses the underlying regulatory problem and evaluates the effects of the rules at stake.[216]

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[212] Rebecca M. Kysar, *Lasting Legislation* 159 U. PA. L. REV. 101, 135 (2011).

[213] V. Bouffier, *Normprüfung: Modifizierung des hessischen Befristungskonzepts* Zeitschrift für Rechtspolitik 55 (2012).

[214] See 1 BvR 79/70 of 09.11.1976.

[215] *See* Forrest Maltzman, Charles R. Shipan, *Change, Continuity, and the Evolution of the Law* 52 AM. J. OF POL. SCI. 252, 255 (2008).

[216] Mandelkern Group on Better Regulation, Final Report, 13 November 2001, p.18, available at http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf

The evaluation moment should be used to assess the effects of the sunset disposition and verify whether the objective for which it was enacted has been achieved. Depending on the evaluation report, it should be decided whether to let the provision sunset or renew it on the grounds of the arguments provided. The secret to the successful adoption of sunset clauses and the consequent de-juridification at times of crisis, seems to be highly dependent on the commitment of the executive to conduct serious sunset reviews and provide legislators with accurate information.[217] This implies that legislators must also ensure that the evaluation techniques and criteria are adequate to the rules and programs that need to be terminated.[218]

CONCLUSION

Juridification has a negative connotation. It symbolizes the excessive role of *jus* in the societal relationships. *Jus* has invaded every facet of our life, imposing norms and regulating processes. On the contrary, crises demand fast and effective decisions and laws instead of heavy juridification. In this Article, we argue that de-juridification is necessary at critical times and can be executed through a broader use of sunset clauses. Emergencies require less bureaucracy and fast decisions, transfer of decision making power from the legislature to bodies with expertise, and broad consensus in the decision making. Sunset clauses may be a useful mechanism to achieve these goals. However, sunset clauses are just one of many instruments of de-juridification. Hence the analysis on why sunset clauses fail to expire is a subsection of the broader discussion on why de-juridification is preferable to juridification.

History has repeatedly shown that the rhetoric of emergency and de-juridification at times of crises can be dangerous. As we all know, many dictatorships initially started with the establishment of emergency powers that became normalized.[219] This Article analyzed the historical use of temporary legislation to suspend the writ of habeas corpus, to facilitate the adoption of controversial measures such as the indefinite detention in the context of terrorism and the use of sunset clauses in counter-terrorism acts which are still in the statute books such as the USA Patriot Act. The analysis was not confined in a single legal order, although it was focused on common law jurisdictions. We looked into temporary suspensions of human rights guarantees that rapidly became excessive, and emergency legislation that lived beyond the emergency they meant to tackle.

De-juridification is however not (only) a source of evil. The aim of this Article was rather to explain why we need it, and how history has taught us to use weapons of de-juridification such as sunset clauses very wisely.

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[217] S M. Vidas, *The Sun also Sets: A Model for Sunset Implementation*, 26 AM. U. L. REV.1170, 1193-1194 (1976).

[218] Id at 1193-1194.

[219] Sanford Levinson, Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and its Design* 94 MINN. L. REV. 1789, 1809 (2010).

Sunset clauses promise to 'erase' legislative provisions that might be unnecessary or inconvenient in times of crisis, and, 'rewind' legislation to the original status quo after the end of this critical period. However, since not much in life is reversible, this may be a dangerous promise that often comes at a price for human rights and the principle of separation of powers. It is nonetheless possible to bring the best out of temporary de-juridification by enacting sunset clauses within a normative framework that distinguishes between risks and dangers, 'sunsettable' and 'non-sunsettable' institutions and rights, adequate and excessive sunset periods, placing the emphasis on evaluation duties.

Although the de-juridification of social spheres and rights might seem at first sight an attractive alternative to excessive legalization and regulation of lawmaking procedures, *fewer* rules might also result in the reduction of the protection of human rights and checks and balances. *Less* is not always *more*, unless it is not meant to last.

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