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Article

Snoozing Democracy:

Sunset Clauses, De-Juridification, and Emergencies*

Antonios Kouroutakis**

Sofia Ranchordás**

"[There is] no cure for law but more law."

-Karl Llewellyn¹

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1. In the context of teaching first-year law students, Karl Llewellyn wrote:

Details, unnumbered, shifting, sharp, disordered, unchartable, jagged. And all of 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 of plunging deeper.

KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1930), reprinted in CHRIS GOODRICH, *ANARCHY AND ELEGANCE: CONFESSIONS OF A JOURNALIST AT YALE LAW SCHOOL* 9, 9 (2002).

I. INTRODUCTION

At times of crisis, *fewer* rules are often regarded as *more*.² Fewer rules may mean more expeditious decisions,³ more effective reactions to threats to national security,⁴ financial support for economic sectors in need,⁵ and less bureaucracy. At

2. Philip Hamburger, *More is Less*, 90 VA. L. REV. 835, 838 (2004) (discussing Mies van der Rohe's adoption of the phrase as a slogan for modernism in architecture that reputedly provoked Frank Lloyd Wright to respond that "less is only more where more is no good"); *id.* (citing JOHN SMITH, THE MYSTERIE OF RHETORIQUE UNVAIL'D 56 (1657) and Robert Browning, *Andrea Del Sarto*, in MEN AND WOMEN for the arguments that the phrase "less is more" may have derived from attempts to define the trope known as "meiosis."). For an analysis in the specific context of crisis, see OREN GROSS & FIONNUALA NI AOLAIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 17 (2006) ("[W]hen a nation is faced with emergencies its legal, and even constitutional, structure must be somewhat relaxed . . .").

3. In a number of countries, administrative decision-making procedures are relaxed at times of economic crisis in order to avoid regulatory delay. For example, this was the position taken in the Netherlands with the *Crisis en Herstelwet* (Crisis and Recovery Act) that aimed to foster sustainable development and innovation in the construction and energy sectors after the global financial crisis in 2008. Legislators realized that long waiting periods imposed by the existing administrative system delayed the acquisition of required licenses and permits. This Act authorized the enactment of experimental regulations that derogated from existing rules in order to facilitate the operationalization of construction projects. This was the case of the expansion of the Amsterdam Schiphol Airport. The Act entered into effect in March 2010 originally in a 'record' period of seven months, and was converted into a permanent statute in March 2013. 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 accelerated process of the legislation and the difficulties in gathering political consensus for enacting the Crisis and Recovery Act).

4. See President George W. Bush, Address on the Patriot Act & the National Security Agency (Dec. 17, 2005) (transcript available in Martin Medhurst & Paul Stob, *George W. Bush on the Patriot Act and the National Security Agency*, PRESIDENTIAL RHETORIC, <http://www.presidentialrhetoric.com/speeches/12.17.05.html> (last visited Jan. 3, 2016) ("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 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.").

5. Financial intervention at times of crisis must, however, be limited in time—this has not always been clear. In 2014, the Organization for Economic Co-operation and Development (OECD) analyzed the Netherlands' intervention in the housing market and suggested the introduction of sunset clauses in

times of crisis we observe a phenomenon called *temporary de-juridification*, which is the strategic disappearance or suspension of law.⁶ Temporary de-juridification in the context of emergencies can mean that special and extraordinary measures are enacted to respond to a certain crisis, in derogation of 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 single market.⁷ However, during the 2008–09 economic crisis,

measures designed to support financial institutions and the housing market in order to limit risks. See Heleen M.J. Hofmans & Clement P. Van de Coevering, *How to Deal with Contingent Liabilities—Lessons from the Dutch Experience*, 1 OECD J. BUDGETING 35, 37–43 (2014) (“In response to the financial crisis, the Dutch government has provided substantial support to financial institutions, sovereigns and the housing market.”). In the United States, the efforts to overcome the crisis were visible in the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, which aimed to promote employment and assist a number of economic sectors by including measures to increase unemployment benefits, stimulate investments in the energy industry, healthcare, and construction, and improve new facilities.

6. The term de-juridification 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 considered as hurdles to effective decision-making and executive action. Temporary de-juridification has, however, remained highly overlooked in the context of emergencies. We find more references to de-juridification, for example, in the field of labor law, to refer to the exemption of labor law standards, such as decent work standards. See Siobhan Mullally, *Introduction: Decent Work, Domestic Work: Gendered Borders and Immigration*, in CARE, MIGRATION AND HUMAN RIGHTS: LAW AND PRACTICE 1, 10 (Siobhan Mullally ed., 2015). See also Marcelo Neves, *Between Under-Integration and Over-Integration: Not Taking Citizenship Seriously*, in IMAGINING BRAZIL 61, 69–70 (Jesse Souza & Valter Sinder eds., 2007) (discussing de-juridification processes that enact exemptions and limitations to work standards impacting integration). De-juridification has also been employed in family law. See ALISON DIDUCK, *LAW’S FAMILIES* 183–84 (2003) (“[A]nother goal of this legislation may have been to relieve expenditure and costs related to the litigation of child support disputes [B]ut unlike other de-juridification measures which provided incentives to encourage families to order their own affairs . . . , this was a shift *towards* interventionism.”) (emphasis added).

7. State aid is regulated by a number of treaty provisions and regulations. See Consolidated Version of the Treaty on the Functioning of the European Union art. 107–09, Oct. 26, 2012, 2012 O.J. (C326) 1 [hereinafter TFEU]; Council Regulation 659/1999 of Mar. 22, 1999, 1999 O.J. (L 83) 1–9 (prescribing detailed rules for the application of Article 93 of the TFEU); *Communication*

the European Commission allowed for more flexibility at this level, authorizing the adoption of temporary measures to ensure that European companies would continue investing in research and development in spite of financial strain.⁸

Another form of temporary de-juridification occurs through the temporary suspension of legal dispositions regarding the exercise of individual rights. For example, this is the case with suspension of the writ of habeas corpus, which has been at stake in times of crisis for centuries (see Part III *infra*). This form of de-juridification has more recently regained a place in the legal literature in case of suspicion of future involvement in acts of terrorism.⁹

Temporary de-juridification also means the executive may be allowed to derogate from a number of constitutional principles, and even use armed forces to quash insurrections during a state of emergency.¹⁰ Past states of emergencies, the most notable occurring in Weimar Germany, have shown that at times of crisis, the executive may be allowed to act as necessary,

from the Commission on the Application, from 1 January 2012, of State Aid Rules to Support Measures in Favour of Banks in the Context of the Financial Crisis, 2011 O.J. (C 356) 7.

8. Although there was 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 on the Application of State Aid Rules to Measures Taken in Relation to Financial Institutions in the Context of the Current Global Financial Crisis*, 2008 O.J. (C 270) 8; *Communication from the European Commission on Temporary Community Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis*, 2009 O.J. (C 16) 1; *Communication from the Commission on a European Economic Recovery Plan*, COM (2008) 800 final (Nov. 26, 2008). Specific and temporary ad hoc arrangements have been put in place in order to deal with these cases in a timely manner. By introducing a common temporary framework, the Commission allows temporary and exceptionally well-targeted state aid, unblock lending to companies and stimulate investment in research and development. The adoption of these temporary measures evidences a more flexible approach to state aid rules or even a derogation of the existing framework.

9. See Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009) (analyzing suspension of the writ of habeas corpus and exploring the relationship between suspension, executive power, and individual rights in American history).

10. See Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to Use the Military in Domestic Emergencies*, 91 MARQ. L. REV. 1027, 1029 (2008) (“[T]he question posed is not whether to use armed force in certain situations but what limitations there should be on that use . . . [the] federal government may need to resort to armed force to quash insurrections or execute federal laws.”).

even if this implies circumventing statutes, treaties, and the constitution.¹¹ Although we acknowledge the existence of emergency powers, we often forget to discuss its real meaning and limits. Does the need to make 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? Furthermore, 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 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.¹² Instead, it has been concretized for centuries through so-called sunset clauses.¹³ Sunset clauses are legislative dispositions that provide that a specific piece of legislation shall expire automatically on a specific date.¹⁴ Sunset law has been defined as a “statute under which a governmental agency or program automatically terminates at the end of a fixed

11. See Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT'L SECURITY L. & POL'Y 507, 508 (2012) (“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.”).

12. See Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012) (remarking that recent debates on the implementation of the suspension clause during wartime have not taken into account historical evidence and demonstrating that the temporary suspension of laws 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 September 11, 2001).

13. See Mark D. Young, *A Test of Federal Sunset: Congressional Reauthorization of the Commodity Futures Trading Commission*, 27 EMORY L.J. 853, 854 (1978) (“Sunset’ is the popular term for a statutory method of forcing a legislature 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: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT'L L. 442 (2010).

14. For a thorough analysis of sunset clauses, including a historical overview of this instrument, see SOFIA RANCHORDÁS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION (2014).

period unless it is formally renewed.”¹⁵ The idea underlying the use of these dispositions is to terminate a number of dispositions when they are no longer necessary.¹⁶

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 rigorous legislative oversight.¹⁷ By conferring a temporary character to a law, sunset clauses manage legislative inertia since the continued validity of a law will be contingent upon a new legislative decision.¹⁸ These dispositions limit the duration of extraordinary powers and guarantee a more frequent dialogue between the executive and parliament.¹⁹ Sunset clauses were therefore originally employed to improve political accountability and transparency, by ensuring that unnecessary regulations and agencies would be terminated.²⁰

While ideally the ‘sun’ should not set on legislation before an evaluation takes place, sunset clauses seem to have acquired somewhat of a bad reputation. The literature has pointed out that the practice of states with sunset clauses seems to reveal that these temporary legislative measures have often been

15. *Sunset Law*, BLACK’S LAW DICTIONARY (8th ed. 2004).

16. Sunset clauses were widely used in the twentieth century in the United States as instruments to combat legislative inertia, the growing power of the executive, and the existence of unnecessary laws, programs, and agencies. See Mark B. Blickle, *The National Sunset Movement*, 9 SETON HALL LEGIS. J. 209, 210–12 (1985) (explaining that sunset provisions emerged as a reaction to the general discontent with the uncontrolled governmental growth, excessive bureaucracy, and public spending). For a more recent analysis of the use of sunset clauses, see Symposium, *Showcase Panel IV: A Federal Sunset Law*, 16 TEX. REV. L. & POL. 339, 342 (2012).

17. See Richard C. Kearney, *Sunset: A Survey and Analysis of the State Experience*, 50 PUB. ADMIN. REV. 49, 55 (1990).

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

19. See Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401 (1978) (discussing the first examples of sunset clauses in Colorado and subsequent enactments in other states). See also KATHERINE R. WILLIAMSON, REVISITING AND EVALUATING THE CONGRESSIONAL REVIEW ACT (2009). This rationale for using sunset clauses has also been argued in Germany. See JAN FUNKE, BU ROKRATIEABBAUE MIT HILFE ZEITLICH BEFRISTETER GESETZE 43 (2011) [Reduction of Bureaucracy with the Help of Temporary Legislation: The Effects of Sunset Legislation].

20. See Lewis A. Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393 (1981).

reauthorized without a meaningful evaluation²¹ or have served primarily to ‘sweeten’ legislative opponents 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,’ and instead of reacting to the obsolescence of legislation, the adoption of sunset 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 Consequently, does this mean that sunset clauses are a dangerous legislative instrument that should be banned altogether since they may be misused?

Our answer to this question is clearly no—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

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) (“[T]he first hypothesis relating to a decrease of the quantity and quality of evaluation used in emergency policy making is clearly supported by evidence [T]he 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. 1007, 1041 (2011) (providing a critical overview of the use of sunset clauses in the case of tax cuts). For more information regarding sunset clauses 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) (criticizing dispositions for being apparatuses that “underestimate the revenue costs of legislation or fit legislation within predetermined budget constraints”). Kysar additionally argues that 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. See *id.* 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.

23. See David A. Fahrenthold, *In Congress, Sunset Clauses are Commonly Passed but Rarely Followed Through*, WASH. POST (Dec. 15, 2012), 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).

Article are first to demonstrate that the tendency to de-juridify as a response to changes in circumstances might be necessary, but 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, and instead started in traditional common law, and 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-juridification must be conditioned upon the protection of fundamental 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, 2001 terrorist attacks, when the use of sunset clauses to tackle the phenomenon of international terrorism took place on a record scale, from the United States and Canada,²⁵ to the United Kingdom, Germany,²⁶ and Australia.²⁷ The aim of

25. For literature regarding Canada, see Tobi Cohen, *Controversial Anti-Terror Bill Passes, Allowing Preventative Arrests, Secret Hearings*, NAT'L POST (Apr. 25, 2013), <http://news.nationalpost.com/2013/04/25/controversial-anti-terror-bill-passes-allowing-preventative-arrests-secret-hearings/> (referring to Bill S-7, which passed in the wake of the Boston terrorist attacks and introduced stricter anti-terrorism rules). Cohen discusses rules introduced in Canada which included preventative arrest provisions which would allow an individual suspected of engaging in terrorist activity to be preventively imprisoned, be secretly arraigned, or be prevented from departing Canada to engage in terrorist activities. *Id.* ("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.")

26. In Germany, this was the case of the *Terrorismusbekämpfungsgesetz* [Anti-Terrorism Act], which, in 2002, introduced several temporary limitations to fundamental rights on the grounds of the need to safeguard national security. See Gesetz zur Bekämpfung des Internationalen Terrorismus [Act for Combatting International Terrorism] Jan. 9, 2002, BGBl I at 361, no. 3 (Ger.). Article 22 imposed significant limitations on fundamental rights such as data privacy, grant of entry visas, and identity control through January 11, 2007. For a comparative study of the counterterrorism responses of different countries including the United Kingdom, Germany, France, and Canada, see THE CONSEQUENCES OF COUNTERTERRORISM (Martha Crenshaw ed., 2010). In the wake of the Charlie Hebdo attacks in France, and the growing number of European Islamic State of Iraq and Syria ("ISIS") fighters in Syria, stricter legislative responses can be expected. See Daniel Tost, *Germany Set to Pass 'One of the Harshest' Anti-Terror Laws in Europe*, EURACTIV (Feb. 5, 2015), <http://www.euractiv.com/sections/justice-home-affairs/germany-set-pass-one-harshest-anti-terror-laws-europe-311851>.

27. For literature regarding Australia, see Nicola McGarrity et al., *Sunset*

this Article is not to evaluate the efficiency or explore the value of such clauses, or to argue in favor or against their use.²⁸ 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 borders and paradigms, which are located in a variety of legal orders, sufficing to mention here the United States, Germany, Australia, and the United Kingdom.

This Article focuses on the relationship between law and rupture in turbulent periods, i.e., in times of crisis, circumstances may justify the temporary suspension of legal guarantees and institutions, derogation of numerous rules, and the allocation to the executive of an enhanced role in 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 of a multitude of agencies at various levels, emerged to manage the credit crisis.²⁹ Moreover, crises confer a fluid character to rigid laws until the critical situation comes to an end.³⁰ 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.³¹ As we mentioned earlier, this is, for example, the case of the European Commission’s Temporary Union Framework for State Aid Measures³² or the Dutch *Crisis en Herstelwet*. The first

Clauses in Australian Anti-Terror Laws, 33 ADELAIDE L. REV. 307 (2012).

28. Professor Ackerman endorses the use of sunset clauses during emergencies. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004). Other scholars, including Gross, consider sunset clauses ineffective tools. See Gross, *supra* note 24. A more recent evaluation of sunset clauses is recorded in literature. See, e.g., Finn, *supra* note 13; Ip, *supra* note 18.

29. For more information on this occurring in the United Kingdom, see Julia Black, *The Credit Crisis and the Constitution*, in THE REGULATORY STATE: CONSTITUTIONAL IMPLICATIONS 92, 112–13 (Dawn Oliver et al. eds., 2010).

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

31. See Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1800 (2010).

32. Communication from the Commission of Jan. 22, 2009, Temporary Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis, 2009 OJ (C 16) at 1.

document allowed European Union (EU) Member States to grant, on a temporary and exceptional basis, well-targeted state aid in order to unfreeze lending to companies and stimulate investment. The latter was a law adopted to accelerate the administrative decision-making procedure as to complex projects and was itself an example of a temporary and complex law enacted in less than seven months.³³

This Article proceeds 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 a 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 their use during emergencies. In Part III, we analyze how such clauses can be a formula for de-juridification and 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. We aim in Part IV to draw conclusions for future reference and pose suggestions for a meaningful framework for temporary de-juridification.

II. JURIDIFICATION AND DE-JURIDIFICATION

The concept of de-juridification is often mentioned in literature,³⁴ 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 transmogrify into a deeper understanding of the interaction between different branches of government.³⁵

33. See *supra* text accompanying note 3.

34. See, e.g., Guy Neave, *On the Cultivation of Quality, Efficiency and Enterprise: An Overview of Recent Trends in Higher Education in Western Europe, 1986–1988*, 23 *EURO. J. EDUC.* 7, 13 (1988) (contrasting the “juridification of British higher education” with that in other European countries like the Netherlands, France, Sweden, and Finland, which introduced “a new flexibility to systems of control and evaluation precisely by lessening the weight of formal legal control”).

35. See GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* 4 (2009) (“Juridification is not the

Therefore, to get an understanding of temporary de-juridification, a core concept in this Article, one must first study its companion, juridification, that has captivated the attention of literature for a longer interval.³⁶

In this Article, we argue that both juridification and de-juridification are transnational problems since they are found in most Western countries.³⁷ Today, we live in a world of national and supranational rules, rights, and institutions that aim to predict and regulate every single step we take. Juridification underscores legal attempts to “colonize society” and conquer new frontiers.³⁸ This metaphor refers to the tendency to over-regulate society, seeking any aspect which might be relevant from a regulatory point of view. This international trend to juridify³⁹ has been translated not only into an increase in the amount of rules and individual rights, but also into a “reallocation of power to autonomous institutions such as the courts.”⁴⁰

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 a more democratic alternative for

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.”) (emphasis original).

36. See, e.g., JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW (Gunther Teubner ed., 1987). For a more recent analysis, see Graf-Peter Calliess & Moritz Renner, *From Soft Law to Hard Code: The Juridification of Global Governance*, 22 *RATIO JURIS* 1 (2009) (exploring the legal and non-legal governance mechanisms that compete in terms of dispute resolution and behavioral controls, and the function of law in stabilizing normative expectations).

37. See Jon Clark & Lord Wedderburn, *Juridification—A Universal Trend? The British Experience in Labor Law*, in JURIDIFICATION OF SOCIAL SPHERES 163 (Gunther Teubner ed., 1987).

38. JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1987).

39. See Lars Chr. Blichner & Anders Molander, *Mapping Juridification*, 14 *EUR. L.J.* 36 (2008) (analyzing the concept of juridification in the European context).

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

citizens. Resembling the opposite of juridification, de-juridification can be both a guarantee of effective solutions and an instrument which can enable deprivation of fundamental guarantees.⁴¹ In Part I, we examine the concept of de-juridification first by explaining where it comes from. Society was first juridified due to an expansion of law to more areas of society,⁴² and only then, the tendency to de-jurify emerged to combat bureaucracy and obstacles to rapid decision-making during emergencies. Second, we analyze the concept of de-juridification and explain why the tendency to make laws disappear plays an important role in times of crisis.

A. JURIDIFICATION

In the beginning, there was no law, only communicative rules developed within the intimacy of the family. With the growing need to interact with strangers, some form of sovereign was established to oversee these relations, giving rise in the early modern period to the initiation of a process of juridification.⁴³

The term juridification refers thus primarily to the relationship between state and society and more specifically, the modern proliferation of laws.⁴⁴ This expansion of the role of law to different fields of society that remained for a number of years unregulated, e.g., 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

41. See Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in *JURIDIFICATION OF SOCIAL SPHERES* 3, 9 (Gunther Teubner ed., 1987).

42. See Ken Foster, *The Juridification of Sport*, in *READINGS IN LAW AND POPULAR CULTURE* 155 (Steve Greenfield & Guy Osborn eds., 2011) (“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 have appeared immune from law.”).

43. See ANDREW EDGAR, *THE PHILOSOPHY OF HABERMAS* 245 (2005) (“[A]s 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.”).

44. *Id.* (reflecting on Habermas’ concept of juridification and defining the beginning of the juridification process 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”).

thinking and acting in a legal way without the imposition of case law.”⁴⁵ In other words, the juridification of society has been translated in both 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.⁴⁶ However, as Cicero predicted in Ancient Rome, “more laws” often mean “less justice.”⁴⁷

The term juridification does not only refer to the growing number of rules—sometimes badly drafted—in our society,⁴⁸ but also to the effects of the expanding dominion of law as such. Individuals perceive these effects differently, with Robert A. Kagan explaining:

[T]o some, law is primarily a mode of repression . . . that in actuality protects and legitimates existing political and social hierarchies. To others, in contrast, law is an instrument of liberation and social progress, a realm in which courageous litigants and judges can subject the preferences and prejudices of the powerful (or of selfish political majorities) to the constraints of reason and justice . . . And to still others, the ever-expanding ‘juridification’ of everyday social and commercial life imposes a stultifying formalization on human activity, burying us under piles of paperwork, efficiency-depleting

45. 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. JURID. SCI. 85, 87–88 (2011) (“[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.”) (emphasis added).

46. On the legitimacy of law understood as the acceptance of the process of juridification, see ANDREW EDGAR, *THE PHILOSOPHY OF HABERMAS* 250–51 (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.”).

47. CICERO, *DE OFFICIIS* 35 (44 B.C.) (“More law, less justice.”).

48. This is far from being a recent problem. See Ulrich Karpen, *On the State of Legislation Studies in Europe*, 7 EUR. J.L. REFORM 59, 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.”).

regulations, and initiative-stoppers⁴⁹

As explained *infra*, these differences in 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[es] by which the state intervenes in areas of social life (e.g., industrial relations, education, family, social welfare, commerce) in ways that *limit the autonomy of individuals* or groups to determine their own affairs.”⁵⁰ 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 increasingly determines 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.”⁵¹ In the words of Teubner, “juridification is an ugly word—as ugly as the reality which it describes.”⁵² 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.”⁵³

Thus, juridification refers to more than the weight of over-regulation, bureaucracy, and red tape.⁵⁴ 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 is to expand the scope of law, which is often “referred to when the formal legislature and/or the judge become competent in situations where they previously

49. See Robert A. Kagan, *Introduction* to PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION* vii–viii (2d ed. 2009) (explaining the different roles of law in a society in transition).

50. See Jon Clark & Lord 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, 165 (Gunther Teubner ed., 1987) (emphasis added).

51. EMILIOS A. CHRISTODOULIDIS, *LAW AND REFLEXIVE POLITICS* 97 (2001).

52. Teubner, *supra* note 41, at 3.

53. Teubner, *supra* note 41, at 4.

54. See CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 634 (2d ed. 1997) (“Every move to juridification tends therefore to create complaints of bureaucracy and red tape, provoking a whiplash effect.”).

were not.”⁵⁵ This growth is far from accepted, particularly when policymakers seem to have the tendency to add a large number of increasingly proscriptive rules to the over-regulated society we live in.⁵⁶ Instead, as Paul Kahn remarks, “our political culture suffers from a dangerous disposition toward juridification that undermines the exercise of political responsibility by leadership alike.”⁵⁷ 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.”⁵⁸

Juridification may therefore be an ugly word, but it is frequently 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.⁵⁹ As mentioned *supra*, law can also be an “instrument of liberation,”⁶⁰ and it is a weapon to fight the misappropriation of political power and corruption. Thus, juridification is not always associated with heavy bureaucracy, but may also represent positive efforts “to solve policy problems by judicial means, as well as efforts to formalize, proceduralize, and to automate the political process itself.”⁶¹ As Gordon Silverstein analogizes from the example of the United States, “juridification is not the product of an imperial judiciary

55. 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 375, 401 (Gunther Teubner ed., 1987).

56. For a criticism of regulation, 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 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.”).

57. 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).

58. *Id.*

59. See Bruno Debaenst, *A Study on Juridification: The Case of Industrial Accidents in Nineteenth Century Belgium*, 81 LEGAL HIST. REV. 247, 248 (2013).

60. See Kagan, *supra* note 49, at vii.

61. See *supra* SILVERSTEIN, note 35, at 3 (2009) (analyzing the juridification of American politics and the movement toward law, “[F]ear 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’”).

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.”⁶²

However, does this mean that the solution for this distrust should reside in widespread de-juridification, diminishing the empire of law? Understanding why juridification may be seen as an ugly result, it is now time to turn to de-juridification and explore whether some beauty might be found.

B. DE-JURIDIFICATION

The juridification of emergency powers is important to prevent the executive from abusing these temporary measures and exercising abusive discretion in turbulent times. However, in times of crisis we might just want to temporarily forget the role of juridification and instead dismantle numerous legal obstacles that might stand in the way of a solution in the midst of an economic or political crisis. Emergencies that call for decisive action by the executive often include the very prospect of whether a certain situation can be qualified as a “state of exception.”⁶³

Although juridification is often regarded as the “enemy of discretion” in practice, excessive bureaucracy might actually hamper policy measures designed to solve crises.⁶⁴ Heavy juridification does not guarantee that better decisions will be taken within a set deadline, but more frequently results in “blind” or automatic decisions.⁶⁵ In this section, we explain first the concept of de-juridification, then delve into the often necessary de-juridification at times of crisis.

62. *See id.* at 4.

63. 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.”).

64. *See* Levinson & Balkin, *supra* note 31, at 1856 (referring to the ‘legalization’ of the use of emergency powers and ‘its discontents’).

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

1. Definition

De-juridification is defined as the erosion of law or the legal dimension of our relationship with society, leaving certain social actors outside official compulsion. De-juridification should not be confused with de-regulation, which typically refers to the removal of government regulatory controls from an industry and in some cases, has resulted in the re-regulation of multiple sectors.⁶⁶ De-juridification goes much further and refers to the politicization and the adoption of a non-legal approach to societal conflicts that aims to comply with a necessity. This is encapsulated in the Latin proverb *necessitas non habet legem*, and was further analyzed by Machiavelli.⁶⁷ 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 into fewer procedures and rules, but not necessarily the non-involvement of the state.⁶⁸ As a result, a broader role for the executive and a greater empowerment of private actors *vis-à-vis* public actors, namely the legislature may emerge.

The concept of de-juridification conveys the idea of a less 'legalistic' approach to society which governments in different countries have tried to concretize via enacting fewer rules and less clearly defined norms for conduct. This has been realized through framework legislation,⁶⁹ moving from public law to

66. See, e.g., GIANDOMENICO MAJONE, DEREGULATION OR REREGULATION? REGULATORY REFORM IN EUROPE AND IN THE UNITED STATES (1990).

67. "Necessity has no law." See NICOLO MACHIAVELLI, THE PRINCE, ch. 12 (Peter E. Bondanella ed., Oxford Univ. Press 2005) (1515).

68. See ALFIO MASTROPAOLO, IS DEMOCRACY A LOST CAUSE? PARADOXES OF AN IMPERFECT INVENTION 109 (Clare Tame trans., 2011) ("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.").

69. See WIM DUBBINK, ASSISTING THE INVISIBLE HAND: CONTESTED RELATIONS BETWEEN MARKET, STATE AND CIVIL SOCIETY 108 (2003) ("A society is becoming more juridified and there are normative objections to this process. At the same time, a process of de-juridification 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 Garrett, *The Purpose of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 718 (2004) ("Framework legislation creates rules that structure

contracts with private entities and the de-judicialization of government benefit programs.⁷⁰ However, de-juridification does not only mean that unnecessary bureaucratic rules will disappear, but also that rights may be suspended and courts may be marginalized during 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.

Regina Kreide asserts that de-juridification is concretized in three aspects: 1) de-formalization of private law (e.g., through the expansion of privatization processes in health, military, and security);⁷¹ 2) missing separation of powers in a multi-level system through greater decentralization of power; and 3) exclusion of a great part of the global population from access to money, knowledge, power, and judicial protection.⁷² In a juridified world, “laws colonize society,” but in a de-juridified world, we face the risk that “power and money” will end up colonizing it.⁷³ This risk is particularly present in times ruled by the dialectics of fear and panic.

2. De-Juridification and States of Emergency

The 2008–09 economic crisis and numerous terrorist attacks

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.”)

70. See HARLOW & RAWLINGS, *supra* note 54, at 634 (“[W]e 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.”).

71. 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. 417 (2013) (on private military companies); See GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Mino eds., 2009).

72. See Regina Kreide, *The Ambivalence of Juridification. On Legitimate Governance in the International Context*, 2 GLOBAL JUST.: THEORY, PRAC., RHETORIC 18, 22 (2009).

73. See HAUKE BRUNKHORST, *SOLIDARITY: FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY* 116 (Jeffrey Flynn trans., 2005).

in Europe and the United States have taught us that excessive juridification cannot shield us from these risks. Instead, emergencies will 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.⁷⁴ Although the literature has distinguished between the maintenance of a core of constitutional rights that should remain untouched by a 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 in times of crisis.⁷⁵ At these times, however, government will often claim that de-juridification is only temporary and will assume that it is possible to rewind to the status quo ante.⁷⁶

A temporary limitation of fundamental rights, suspension of constitutional protections, and the acceleration of legal procedures are sometimes unavoidable consequences of emergency measures adopted to combat terrorism and provide firm reactions to potential national security threats.⁷⁷ Adequate and rapid state actions are necessary in this context since terrorists may feel that their target is not just an anonymous citizen, but instead the state itself.⁷⁸ As Günter Frankenberg

74. See Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DEPAUL L. REV. 539, 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.”).

75. For a distinction between different types of emergencies and allowed derogations from constitutional rights, see *id.* at 559. See also Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003).

76. See Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 534–35 (2008) (arguing that sunset clauses can be used to promote a continuous process of learning and ensure policy reversibility).

77. See Gabriel Malor, *How Not to Fight Terrorism*, NAT’L REV. (Jan. 28, 2015, 4:00 AM), <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). “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.” *Id.*

78. See Todd Sandler, *Terrorism and Counterterrorism: An Overview*, OXFORD ECON. PAPERS 1–2 (2014) (“[T]errorists 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

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.”⁷⁹ 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 normal operations and a state of emergency, states might be requested to de-juridify on the legislative, administrative, and judicial levels.⁸⁰ Such de-juridification, often translated into the temporary limitation of constitutional protections, should, nonetheless, be limited and circumscribed to the duration of situations of “exceptional and imminent danger.”⁸¹ However, history has made it clear 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 rescission and enactment, as well as the limitation of basic rights, in an attempt to reconcile the present with past and future. This challenge is developed in Part III of this article.

III. TIME, EMERGENCIES, AND SUNSETS

In this Part, we shift our conceptual analysis from de-juridification to its temporary character in 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.⁸² In order to guarantee this termination, sunset clauses are used to prevent normalization of the state of exception and to enable legal frameworks to keep up with the

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.” (citations omitted).

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

80. See Alan Greene, *Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights*, 12 GER. L.J. 1764 (2011).

81. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S 222.

82. See Malor, *supra* note 77.

current state of affairs. However, law is usually not keen on remaining current with the evolution of society.⁸³ Rather, both at the domestic and international levels, “delay is [normally] the rule,”⁸⁴ and rules that were supposed to be temporary often remain after the period of crisis.⁸⁵ In fact, this is a problem common to both times of war and peace, since there is a tendency for policies and laws to persist even “[w]hen [their] original rationale is no longer applicable or has been proven invalid.”⁸⁶ In this Part, we start by analyzing why the 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* (a state of normalcy where any effects of temporary measures must be erased). After exploring law’s nostalgia with the past, we delve into the concept and functions of sunset clauses, arguing that such clauses could close the gap between a state of normalcy (juridification) and a 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.⁸⁷ Laws are doomed to face a destiny like the mythological character Kronos⁸⁸: they overthrow existing laws, have a period

83. 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). “[I]t 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.” *Id.*

84. *Id.*

85. See Frank H. Easterbrook et al., *Showcase Panel IV: A Federal Sunset Law, the Federalist Society 2011 National Lawyers Convention*, 16 TEX. REV. L. & POL. 339, 348 (2011) (explaining the reluctance to terminate laws is not surprising since “it’s 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”).

86. See Stephen Coate & Stephen Morris, *Policy Persistence*, 89 AM. ECON. REV. 1327, 1327–28 (1999) (describing the difficulty of terminating policies).

87. *E.g.*, FRANK FAGAN, *LAW AND THE LIMITS OF GOVERNMENT: TEMPORARY VERSUS PERMANENT LEGISLATION* (2013).

88. Kronos was a mythological character, “the Titan god of time and the

to reign, but are destined to be overthrown again by the next generation. Like Kronos, legislators often experience the “nostalgia of eternity,” refusing their mortality as well as that of their rules.⁸⁹ This nostalgia is often translated in the ‘*détemporalisation*’ of law, which has been in the vanguard of totalitarian ideologies, cultural crises, and profound divergences between law and status quo.⁹⁰ Professor Ost’s *détemporalisation* suggests the image of a law that has become detached from any temporal dimension, as if it must inevitably govern our society without end.⁹¹ Instead of enhancing legal certainty,⁹² and increasing the effectiveness and deterrent effect of laws with the course of time,⁹³ longstanding laws easily become obsolete and are converted into both sources of satire⁹⁴ and abuse.⁹⁵

On one hand, the disconnection between time and society can be caused by a refusal to accept evolution or changed circumstances, or on the other hand, by rupture. Law and its institutions are the result of incremental change and profound transitions. If the law is unable to advance at the pace of society, technology, and the economy, the law will gradually lose effect.⁹⁶ The necessary 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 instability, or political

ages, especially time where regarded as destructive and all-devouring.” *Kronos*, THEOI GREEK MYTHOLOGY, <http://www.theoi.com/Titan/TitanKronos.html> (last visited Oct. 4, 2015).

89. See FRANCOIS OST, *LE TEMPS DU DROIT* 14–15 (1999).

90. *Id.* at 15–16.

91. *Id.*

92. See Sofia Ranchordás, *Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?*, 36 *STATUTE L. REV.* 28 (2015) (exploring the different dimensions of the principle of legal certainty and arguing that temporary legislation does not necessarily create legal uncertainty, but can further it because it creates sufficient certainty in the long run).

93. See Anthony D’Amato, *Legal Uncertainty*, 71 *CALIF. L. REV.* 1, 36–38 (1983) (arguing that the legal certainty of laws decreases over time); Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 *IOWA L. REV.* 443, 449–464 (2004) (positing that deterrence may increase if law is less predictable and sanctions are uncertain).

94. See, e.g., *UK Chooses ‘Most Ludicrous Laws’*, BBC NEWS (Nov. 7, 2007), <http://news.bbc.co.uk/2/hi/uk/7081038.stm> (discussing outdated laws on duels).

95. E.g., Melissa J. Mitchell, *Cleaning Out the Closet: Using Sunset Provisions to Clean Up Cluttered Criminal Codes*, 54 *EMORY L.J.* 1671 (2005).

96. See GARY E. MARCHANT ET AL., *THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-ETHICAL OVERSIGHT: THE PACING PROBLEM* 19–30 (Anthony Mark Cutter et al. eds., 2011) (outlining the “pacing problem in the context of regulation of emerging technologies”).

upheaval usually require temporary and exceptional legislative measures.⁹⁷ Rupture of the status quo might be temporary in the latter situations, but it can also become permanent when legislators are confronted with a demand for innovative institutions and instruments that replace the status quo.⁹⁸

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 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.⁹⁹ An example of this inflexion point are the triggering circumstances which might allow the President of the United States to declare a national emergency.

Emergency powers must therefore be constrained in some manner in order to guarantee timely legal checks before further delegation and/or fast-tracked decisions and regulation.¹⁰⁰ This is often concretized by introducing sunset clauses in existing statutes or enacting ad hoc emergency legislation.¹⁰¹

B. EMERGENCY LEGISLATION AND SUNSET CLAUSES

Sunset clauses¹⁰² (or provisions) are dispositions that

97. See Haskell, *infra* note 98.

98. In this context, it is important to distinguish between rupture and revolution. *E.g.*, John D. Haskell, *The Strategies of Rupture in International Law: The Retrenchment of Conservative Politics and the Emancipatory Potential of the Impossible*, 13 GER. L.J. 468, 468 (2012) (“Rupture is not necessarily the same as speaking about revolution, 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.”).

99. See Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 552, 558 (2007).

100. Levinson & Balkin, *supra* note 31, at 1805.

101. See generally ANNA JASIAK, CONSTITUTIONAL CONSTRAINTS ON AD HOC LEGISLATION (2011) (comparing the United States, Germany, and the Netherlands).

102. 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.” MARK FREEMAN, NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE 142 (2009) (“[S]unrise clause . . . is a clause in a law that provides for the coming into force rather than the termination of portions of the law . . . after a specific date in the future and upon the satisfaction of specific conditions.”).

determine the *expiry* of a law or regulation within a *pre-determined period*.¹⁰³ Such provisions are conceived to automatically erase legislation that is no longer necessary because it has fulfilled its function or 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 trigger or a “Henry VIII clause” providing a law will be amended by secondary legislation.¹⁰⁴ Although a sunset clause is designed to terminate a piece of legislation at a certain point in time, the latter may always be reauthorized on exceptional grounds.¹⁰⁵

Sunset clauses allow for regulations to adjust to changing social or technological circumstances and can be included in emerging legislation to ensure that an enactment returns to the pre-emergency situation. Sunset clauses may be motivated by four main rationales: overcoming legislative inaction, generating a temporary placeholder, allowing future decisions to be made with better information, or protecting against legislative panic.¹⁰⁶ This Article focuses on the last rationale, which is usually present in counterterrorism legislation.

Under a state of emergency, more powers are concentrated in the hands of the executive, which often means that public officials are allowed to limit fundamental guarantees, enacting ‘extra-legal measures’ to protect a nation confronted with grave peril. As Oren Gross explains, the adequate enactment of these measures “[m]ay strengthen rather than weaken, and result in more rather than less, long-term constitutional fidelity and

103. See *Sunset Clause*, U.K. PARLIAMENT, <http://www.parliament.uk/site-information/glossary/sunset-clause/> (last visited Oct. 5, 2015) (“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.”).

104. See *Henry VIII Clause*, U.K. PARLIAMENT, <http://www.parliament.uk/site-information/glossary/henry-viii-clauses/> (“The Government sometimes adds this provision to a Bill to enable the Government to repeal or amend it after it has become an Act of Parliament. The provision enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny. Such provisions are known as Henry VIII clauses, so named from the Statute of Proclamations 1539 which gave King Henry VIII power to legislate by proclamation.”). However, these instruments would be incompatible with the U.S. doctrine of non-delegation since they transfer the power to amend primary legislation to the executive. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

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

106. See Ip, *supra* note 18, at 82.

commitment to the rule of law.”¹⁰⁷ Since times of crisis produce a tension of tragic dimensions between democratic values and responses to emergencies, this tension is often solved by introducing a sunset clause in emergency provisions.¹⁰⁸ Ex ante evaluations and evidence-based policy making play a limited role in critical times, meaning that legislation can be hastily adopted without sufficient empirical support.¹⁰⁹ In this context, sunset clauses aim to guarantee that the circumstances that justified a certain piece of extraordinary delegation to the executive are reassessed after a set period.

In the United Kingdom, review and sunset clauses have been favored in order to improve the scrutiny of fast-track¹¹⁰ and emergency legislation, most notably, the law that temporarily suspended the local government in Northern Ireland after the growth of urban terrorism in the area.¹¹¹ 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. The Committee explained:

[W]here fast-track bills are used, there needs to be an additional safeguard . . . [I]n 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.¹¹²

Sunset clauses have been included in different examples of emergency counterterrorism legislation.¹¹³ In the United States,

107. See Gross, *supra* note 24, at 1023.

108. *Id.* at 1028.

109. Van Stolk & Fazekas, *supra* note 21, at 163.

110. Fast-track legislation refers to legislation enacted in deviation of normal legislative procedures and timetables, namely to respond to ‘urgent’ situations. “Bills . . . which the Government of the day represents to Parliament must be enacted swiftly . . . and then [the former] uses its power of legislative initiative and control of Parliamentary time to secure their passage.” SELECT COMMITTEE ON THE CONSTITUTION, FAST-TRACK LEGISLATION: CONSTITUTIONAL IMPLICATIONS AND SAFEGUARDS, HL 116-I 2008-09 (UK), <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/11604.htm>.

111. Northern Ireland (Temporary Provisions) Act 1972, c. 22, sch. 1(5).

112. *E.g.*, SELECT COMMITTEE ON THE CONSTITUTION, *supra* note 110.

113. See Finn, *supra* note 13.

a number of sunset clauses were introduced in the USA PATRIOT Act in the aftermath of the September 11th attacks.¹¹⁴ Sixteen sections of this legislation were originally meant to sunset on December 31, 2005. These provisions were included in order to limit the duration of measures constraining the margins of certain constitutional rights to a four-year period.¹¹⁵ The Act was however reauthorized several times in the following years following very limited evaluation—though many provisions expired in the summer of 2015 and then were resurrected in a new form in the USA FREEDOM Act.¹¹⁶ Although some of its provisions expired this year after a long debate in Congress, a few hours later, they reemerged in the USA Freedom Act.

Other countries followed this trend. In the last decade, the inclusion of these clauses has been discussed in Germany and the Netherlands. In Germany, the Counterterrorism Act introduced several limitations to rights established by the Basic Law on a temporary basis in order to safeguard national security.¹¹⁷ An analogous provision was enacted in the Netherlands (*Wet Bestuurlijke Maatregelen Nationale Veiligheid*).¹¹⁸ Advising on the constitutionality of this legislation, the Dutch Council of State argued that a sunset clause should be introduced so as to limit extraordinary powers and periodically assess the necessity and proportionality factors. Periodic evaluation invited the government to weigh the

114. See generally Neal Katyal, *Sunseting Judicial Opinions* 79 NOTRE DAME L. REV. 1237 (2004) (discussing the application of a sunset rationale to judicial decision-making in the post-9/11 world). USA PATRIOT stands for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.” *Id.*

115. Examples include interception of communications, disclosure of communication, and surveillance orders. Section 224 of the USA Patriot Act contained a sunset clause of five years. However, a number of sections were renewed (e.g., sharing of criminal information and single-jurisdiction search warrants). See USA PATRIOT Act, Pub. L. No. 107-56, § 224, 115 Stat. 272 (2011).

116. USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268 (2015); Van Stolk & Fazekas, *supra* note 21, at 161. The USA Patriot Act was to initially sunset in 2005. Some of its sections were made permanent in that year while others were extended until 2010.

117. *Gesetz zur des Internationalen Terrorismus* [Act for the Combat of International Terrorism], Jan. 9, 2002, BGBl I, at 361, no. 3 (Ger.). A day before these measures expired, a new law extending these limitations was enacted.

118. See generally STATE COUNCIL OF THE NETHERLANDS, ADMINISTRATIVE MEASURES FOR NATIONAL SECURITY, OPINION AND FURTHER REPORT II (2005–06) (describing the rules governing decision-making and the imposition of restrictive measures on persons for the protection of national security).

restriction imposed by a specific emergency policy against the continuing severity of the state of emergency. The opinion of the Council to include a sunset clause was not welcomed by the Dutch Minister of Justice, who refused to introduce it, affirming that “terrorism cannot be regarded as a transitory problem.”¹¹⁹ The good intentions of the Dutch Council of State were clearly misunderstood by the minister. Although terrorism is indeed a lasting problem, it is important to limit the time extraordinary powers are granted to the executive in order to guarantee that these are revisited after a determined period of time.

Compared to unpredictable natural disasters, terrorism carries both certain and uncertain elements—we know it exists, but we are unable to predict when and where it will occur. At times of higher risk, e.g., after the 9/11 attacks, or more recently, when the United States started launching airstrikes on the Islamic State in August 2014¹²⁰—states might need to consider new emergency measures or decide to review the effectiveness and proportionality of existing ones. The use of sunset clauses can therefore be placed in the context of a “lesser evil logic for dealing with emergencies” that implies the suspension of constitutional protections and the transfer of significant extraordinary powers to the executive.¹²¹ Sunset clauses serve several functions: limiting unnecessary temporal de-juridification, guaranteeing enhanced legislative oversight of emergency powers, ensuring that extraordinary measures are not normalized, and building consensus around potentially controversial measures.

Consequently, sunset clauses renew legislative oversight, wake legislators out of their natural inertia,¹²² and activate the army of special interests that surrounds a law upon

119. *Id.* at 12–13 (arguing 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).

120. See, e.g., 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 (Aug. 29, 2014), <http://www.dailymail.co.uk/news/article-2737724/Terror-attack-UK-highly-likely-warns-Home-Secretary-Theresa-May-threat-level-raised-severe.html> (describing Prime Minister Cameron’s Aug. 28, 2014 speech on terrorism).

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

122. See Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1676 (2002) (remarking that some policies may be entrenched partly due to dependence and inertia).

enactment¹²³—attempting to ensure that emergency measures do not live beyond the political, social, or economic crises that justified enactment. “Legislative oversight of administration is a nexus of administrative-political relation [T]he 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.”¹²⁴ However, this operationalization can in some cases undermine, or even destroy, original legislative intent. This feeling was prevalent in the 1970s.¹²⁵ As a result, a new instrument of legislative oversight was added to the representatives’ toolbox, i.e., sunset clauses. As explained *infra*, 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.

Gathering consensus for controversial pieces of legislation that involves the limitation of constitutional protections can also be far from a simple task. Divided government and significant political opposition are often visible in legislative fragmentation and a lack of provisions ensuring the continuity of legal regimes or imposing future reconsideration.¹²⁶ Sunset clauses create more room for political bargaining and swiftly achieve the social and political consensus that would have otherwise been absent among legislators. 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.¹²⁷ This occurs 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 and rewind can be particularly relevant in the context of economic and

123. See Forrest Maltzman & Charles R. Shipan, *Change, Continuity and the Evolution of the Law*, 52 AM. J. POL. SCI. 252, 254 (2008).

124. See Mordecai Lee, *Political-Administrative Relations in State Government: A Legislative Perspective*, 29 INT’L. J. PUB. ADMIN. 1021, 1023 (2006).

125. See Mark B. Bickle, *The National Sunset Movement*, 9 SETON HALL LEGIS. J. 209 (1985).

126. Maltzman & Shipan, *supra* note 123, at 255 (arguing 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 and explaining how sunset provisions are substantial vehicles for encouraging the building of coalitions and encouraging a law to be revisited).

127. Tom Ginsburg et al., *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291, 337 (2014).

political crises.¹²⁸

IV. DE-JURIDIFICATION IN TIME

This Part focuses on de-juridification of the legal order in times of crisis pertaining to rights jurisprudence. Throughout history, policymakers on both the national and international levels have equally relied on the politicization rather than juridification during emergencies.¹²⁹ A careful examination of the reaction of lawmakers in these turbulent times will show that the trend of politicization is exemplified by the temporary sunset of basic guarantees and the subsequent deactivation of the courts, in combination or separately with temporary delegation to the executive.

The practice of de-juridification through the adoption of sunset clauses or similar temporary provisions is not a modern phenomenon, nor is it confined to a single legal tradition. Although these emergency measures were adopted on a temporary basis, the principle of separation of powers was placed in peril as a matter of course. Emergency laws have an explicit impact on rights that may be openly asserted, while separation of powers effects are equally significant, but generally indirect since the system of divided roles is perceived as a guarantee of liberties.¹³⁰

The first subsection that follows explores the early use of temporary suspensions of the writ of habeas corpus in United States. The following subsection discusses the frequent use of sunset clauses to de-juridify in the United Kingdom during the First and Second World Wars. A third subsection focuses on the reasons and causes of de-juridification during emergencies and discusses its impact on fundamental rights. The final subsection

128. Maltzman & Shipan, *supra* note 123, at 255.

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

130. The allocation of powers among different institutions does not encompass only functional considerations to increase efficiencies. 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 first expressed by Montesquieu and later by Madison. See MONTESQUIEU: THE SPIRIT OF THE LAWS 162 (Anne Cohler et al. eds., 1989); THE FEDERALIST NO. 47 (James Madison).

analyzes the impact of temporary legislation on separation of powers, with a particular focus on judicial functions.

A. THE SEEDS OF DE-JURIDIFICATION IN THE SUSPENSION OF HABEAS CORPUS

The procedural development of law has been a general concern of scholars with various approaches, ranging from conventional styles like Savigny that blur legal and societal evolution,¹³¹ to those such as Watson that advocate more nuanced and controversial approaches based on imitation and legal transplantation.¹³² The rule of law has gradually been enhanced, the spectrum of law has expanded to cover every eventuality and *jus* became the predominant element of society. This naturally led to a juridification of the social aspects of life. Likewise, the development of human rights jurisprudence had an equivalent progress.¹³³ The legal framework of the protection of rights therefore progressively became more impermeable, covering wider ranges of law.

The writ of habeas corpus has played a significant role in this process. This writ has served multiple functions since its thirteenth century origins;¹³⁴ however, its crystallization only took place in the seventeenth century with the Habeas Corpus Act of 1679.¹³⁵ The enactment of this Act—the emergence of the ‘great writ’—has been called one of the most efficient guarantees of liberty.¹³⁶ Fundamentally, this instrument challenges unlawful arrest and detention.¹³⁷ Habeas corpus is also technically a procedural remedy and not a right,¹³⁸ but as Dicey

131. See 1 FRIEDRICH KARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW (William Holloway trans., Madras, J. Higginbotham, 1867).

132. See ALAN 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).

133. See TOM BINGHAM, THE RULE OF LAW 10 (2010) (marking the development of the most important historical events in the rule of law, including the writ habeas corpus and the abolition of torture). 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).

134. See PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010).

135. Habeas Corpus Act, 1679, 31 Car. 2, c. 2.

136. See HALLIDAY, *supra* note 134.

137. See BINGHAM, *supra* note 133, at 13.

138. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE

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.”¹³⁹ Though important, history has shown that this writ has been the target of temporary de-juridification.

Interestingly, the first temporary suspension occurred less than a decade later in 1688.¹⁴⁰ The temporary suspension of habeas corpus then became a common practice during the eighteenth century when various plots against the Crown emerged or threats of invasion surfaced.¹⁴¹ During the transition to the new Hanoverian regime, another habeas corpus suspension act was recorded;¹⁴² the end of the century saw not only a series of successive habeas corpus suspension acts,¹⁴³ but also legislation with a three year sunset clause, which forbade meetings of more than fifty people without prior permission from a magistrate.¹⁴⁴

On one hand, suspension of habeas corpus removed a sensitive area of action from judicial control. The decision to maintain imprisonment or not thus became an inherently political decision. This practice is rooted in Roman jurisprudence, with Cicero famously declaring that *inter arma enim silent leges* (“in time of war, the law falls silent”).¹⁴⁵ Several centuries on, Rousseau 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.”¹⁴⁶

On the other hand, repercussions from the suspension of

CONSTITUTION 120 (1982).

139. *Id.* at 118.

140. Habeas Corpus Suspension Act, 1688, 1 W. & M., c. 2. *See also* MARK A. THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND: 1642 TO 1801 at 286 (1938) (“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.”).

141. MARK KNIGHTS, HANOVERIAN BRITAIN 5 (2011).

142. Habeas Corpus Suspension Act, 1722, 9 Geo. 1, c. 1.

143. *See* Habeas Corpus Suspension Act, 1714, 1 Geo. 1, c. 8 (“[T]o empower his Majesty to secure and detain such Persons as his Majesty shall suspect are conspiring against his Person and Government”). *See also* Habeas Corpus Suspension Act, 1798, 38 Geo. 3, c. 36.

144. Seditious Meetings Act, 1795, 36 Geo. 3, c. 8.

145. MARCI TULLII CICERONIS, PRO TITO ANNO MILONE, 4 (52 B.C.), <https://archive.org/details/oratioprotitoann00ciceuoft>.

146. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 138 (Victor Gourevitch ed., 1997) (1762).

habeas corpus are equally relevant to separation of powers through deactivation of the courts.¹⁴⁷ Across the Atlantic, suspension of habeas corpus was expressly incorporated into the text of the U.S. Constitution.¹⁴⁸ In particular, President Lincoln suspended the writ in 1861 during the Civil War and a case challenging this decision was brought before the federal courts. In *Ex parte Merryman*, Chief Justice Roger Brooke Taney delivered an opinion¹⁴⁹ questioning whether the President had the authority to use suspension powers without Congressional authorization.¹⁵⁰ President Lincoln disregarded this ruling and made a choice he considered pragmatically necessary. In fact, during an address to a Joint Session of Congress on July 4, 1861, President Lincoln responded to the Court with a memorable quote that underscored de-juridification: “are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?”¹⁵¹ Lincoln stressed that the Constitution is silent on which branch of government has the power to suspend the privilege of the writ of habeas corpus.

The conflict between President Lincoln and Chief Justice Taney illustrates the early tension amongst the separation of powers and represents early de-juridification by the executive branch, albeit over the unequivocal disapproval of the Supreme Court. President Lincoln made a correct decision—or perhaps, a realistic one—given the peril the nation faced. Though the question of which branch of the government had the power to suspend the writ of habeas corpus is still officially unanswered,¹⁵² Chief Justice Taney is frequently credited with

147. Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer From the Arguments Surrounding Ex Parte Merryman*, 34 BALT. L. REV. 11 (2005) (“[T]he 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.”).

148. U.S. CONST. art. I, § 9, cl. 2 (stating that “[t]he 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”).

149. At that time, Supreme Court justices had circuit duties and sat as trial judges on lower federal courts. This practice was repealed by the Judiciary Act of 1891. See 26 Stat. 826, § 14 (1891). See Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003).

150. *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

151. 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. SUP. CT. HIST. 262, 272 (2006).

152. See Jackson, *supra* note 147.

the correct legal conclusion.¹⁵³ The *Merryman* episode established a precedent though that the existence of a state of armed conflict is a political question that counsels judicial deference.¹⁵⁴ Nonetheless, it is questionable whether this doctrine encompasses all cases of emergency or whether it is confined to armed conflict.¹⁵⁵

B. DE-JURIDIFICATION IN THE UNITED KINGDOM DURING THE TWENTIETH CENTURY

A century later, emergency laws of temporary nature,¹⁵⁶ also called wartime acts, clogged the statute book based on two world wars that monopolized Parliament's agenda.¹⁵⁷ Thorough examination of those laws shows extensive de-juridification, not just confined to fundamental rights areas, but also marked by constant centralization of powers, since power was delegated temporarily from Parliament to His Majesty's government.

In particular, during the First World War, the government introduced emergency legislation with temporary duration "until to the end of the War,"¹⁵⁸ or for a certain period—for instance six months thereafter.¹⁵⁹ In substance, most of these acts limited rights and freedoms. Examples of this were temporary suspension of freedom of assembly,¹⁶⁰ prohibitions on

153. See CLINTON LAWRENCE ROSSITER, *THE SUPREME COURT AND THE COMMANDER-IN-CHIEF* 25–26 (1951).

154. See *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

155. This caveat is relevant to the phenomenon of terrorism due to its peculiar dichotomy between war and crime. Unlike war, terrorism is not organized and an armed conflict between states or other entities. Rather, terrorism involves selective attacks against civilian and governmental targets. See Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1032–37 (2004).

156. However, not all emergency laws were temporary. See, e.g., Termination of the Present War (Definition Act), 1918, 8 & 9 *Geo. 5*, c. 59 (empowering the King-in-Council to define the termination of the war—without a sunset clause).

157. 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 also Ehrlich, *supra* note 129.

158. See, e.g., British Ships (Transfer Restriction) Act, 1915, 5 *Geo. 5*, c. 21; National Registration Act, 1915, 5 & 6 *Geo. 5*, c. 60.

159. See, e.g., Special Acts (Extension of Time) Act, 1915, 5 & 6 *Geo. 5*, c. 72; Price of Coal (Limitation) Act, 1915, 5 & 6 *Geo. 5*, c. 75.

160. Societies (Suspension of Meetings) Act, 1917, 7 *Geo. 5* c. 16.

trading with the enemy,¹⁶¹ suspension of the grand jury,¹⁶² and a ban on strikes in industries relevant to war munitions.¹⁶³ These enactments empowered the executive, particularly the Chancellor of the Exchequer in issues pertaining to war finance¹⁶⁴ and public undertakings,¹⁶⁵ the Home Secretary,¹⁶⁶ and the Prime Minister through the King-in-Council.¹⁶⁷ Most importantly, emergency acts with sunset clauses also affected political rights, such as temporarily postponing elections¹⁶⁸ and suspending re-election for ministers.¹⁶⁹

Likewise, in the wake of the Second World War, another series of emergency acts were brought forward. The most notable one was a temporary act to control the export of goods to particular countries, hence limiting freedom of contract.¹⁷⁰ This Act delegated power to the Chamberlain government to regulate exportation and imposed criminal penalties. 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 to an end, and shall then expire except as respects things previously done or omitted to

161. See Trading With the Enemy Act, 1914, 4 & 5 Geo. 5 c. 87; Trading With the Enemy Amendment Act, 1915, 5 & 6 Geo. 5 c. 79; Trading With the Enemy (Amendment) Act, 1918, 8 & 9 Geo. 5 c. 31.

162. See Grand Juries (Suspension) Act, 1917, 7 Geo. 5 c. 4.

163. See Munitions of War Act, 1915, 5 & 6 Geo. 5 c. 54.

164. See, e.g., Finance (No. 2) Act, 1915, 5 & 6 Geo. 5 c. 89; War Loan Act, 1917, 7 & 8 Geo. 5 c. 41; Government War Obligations Act, 1918, 8 & 9 Geo. 5 c. 28.

165. See, e.g., Statutory Companies (Redeemable Stock) Act, 1915, 5 & 6 Geo. 5 c. 44; Statutory Undertakings (Temporary Increase of Charges) Act, 1918, 8 & 9 Geo. 5 c. 44.

166. E.g., Police, Factories &c. (Miscellaneous Provisions) Act, 1916, 6 & 7 Geo. 5 c. 31.

167. See, e.g., Postponement of Payments Act, 1914, 4 & 5 Geo. 5 c. 11.

168. See, e.g., Elections and Registration Act, 1915, 5 & 6 Geo. 5 c. 11; Parliament and Local Elections Act, 1917, 7 Geo. 5 c. 13; Parliament and Local Elections (No. 2) Act, 1917, 7 & 8 Geo. 5 c. 50; Parliament and Local Elections Act, 1918, 8 & 9 Geo. 5 c. 22.

169. See, e.g., Re-Election of Ministers Act, 1915, 5 & 6 Geo. 5 c. 50; Re-Election of Ministers Act 1916, 6 & 7 Geo. 5 c. 22; Re-Election of Ministers (No. 2) Act, 1916, 6 & 7 Geo. 5 c. 67.

170. See Import, Export, and Customs Powers (Defence) Act, 1939, 2 & 3 Geo. 6 c. 69.

be done.¹⁷¹

Nevertheless, no order was ever made causing the Act to expire. Over forty years later, the Thatcher Government issued the Export of Goods (Control) Order 1987¹⁷² and the Export of Goods (Control) Order 1989,¹⁷³ which prohibited the exportation of particular items to several countries, including Iraq.

A case was brought before the Court of Appeal in 1995 concerning these orders. In essence, the appellants argued that “[h]owever broad or loose a construction is to be given to ‘the emergency,’ it cannot rationally be said to have continued up to 1987.”¹⁷⁴ Therefore, the 1987 and 1989 orders were an abuse of power based on the 1939 Act.¹⁷⁵ The Court acknowledged that the legislative intent behind the Act was the imminence of the Second World War, but did not allow the appeal since Parliament had the opportunity to repeal the Act during the intervening period but presumably chose not to.¹⁷⁶

This case illustrates the potential extent of emergency de-juridification and the absurd results that sometimes follow. The rationale behind this choice seems to be that expediency ranks higher than legality. However, this can become dangerous when what was initially perceived as temporary becomes the new status quo with a permanent character.

C. RIGHTS IN PAUSE

Crisis management is always a daunting task.¹⁷⁷ Diachronically, the dilemma is reflected by the thoughts of Abraham Lincoln, who wondered, “is there, in all republics, this inherent and fatal weakness? Must a government, of necessity,

171. *Id.* at § 9(3).

172. Export of Goods (Control) Order, 1987, SI 1987/2070.

173. Export of Goods (Control) Order 1989, SI 1987/2376.

174. *R v. Blackledge* [1995] 1 EWCA (Crim) 326.

175. *See id.*

176. *Id.* at 5. In reality, the court showed deference to the legislative branch on this issue by stating, “[A] court order compelling a minister to bring into effect primary legislation would bring the courts right into the very heart of the legislative process. But the legislative process is for the legislature not the judiciary.”

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

be too strong for the liberties of its own people, or too weak to maintain its own existence?"¹⁷⁸ In times of crisis, the conflict between liberty and safety *de facto* is resolved in favor of the latter.¹⁷⁹ Therefore, as it is commonly said, the ends usually justify the means.¹⁸⁰ The priority of the policymakers is to tackle the threats for society as a whole while the protection of civil liberties is temporarily diminished. At the international level, this practice is commonly referred to as derogation.¹⁸¹

The scope of rights suspended depends on the impending emergency. 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 to life, to the prohibition of torture and slavery, and no punishment shall be imposed without law.¹⁸² Additionally, as a general principle, limits to de-juridification may exist where "[t]he infringement is not reversible, or the damage is uncountable."¹⁸³

A recent case of de-juridification recorded in the United Kingdom is indefinite detention of terrorism suspects.¹⁸⁴ A bill

178. CHESTERFIELD SOCIETY, *THE SPEECHES OF ABRAHAM LINCOLN* 325 (1908) (internal quotation marks omitted).

179. See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("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 *Conway v. Rimmer* [1968] AC 910 [982] (HL) (stating that "the flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed building").

180. See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 4 (2007) ("Civil liberties are compromised because civil liberties interfere with effective response to the threat . . .").

181. See, e.g., European Convention on Human Rights art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR]. See Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1976). See also Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 4 (1981).

182. *Id.* at art. 15(2).

183. Antonios E. Kouroutakis, *Separation of Powers and the War on Terror: An Analysis of the Role of its Institution*, 42 BRACON L.J. 27, 43 (2010).

184. Two cases of de-juridification arising from the temporary suspension of habeas corpus remedies are recorded in the same year in the United States. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that an executive order did not have the power to detain Hamdi indefinitely and deprive him of due process); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (dismissing the claim on procedural grounds because the court lacked jurisdiction). Yet, these cases are not appropriate for a comparison because the relevant Act of Congress did not have temporal limits. Both petitioners were detained under the Executive Order

was presented to the House of Commons on November 12, 2001 allowing the indefinite detention of foreign nationals implicated in international terrorism.¹⁸⁵ The initial proposal incorporated a fifteen-month sunset clause.¹⁸⁶ The Anti-Terrorism, Crime, and Security Act later passed after the sunset period was extended to five years on the suggestion of several Members of Parliament¹⁸⁷ and the Home Affairs Committee.¹⁸⁸ Consequently, Sections 21–23 were to “cease to have effect at the end of 10th November 2006.”¹⁸⁹ This measure was challenged before the Appellate Committee of the House of Lords in *A v. Secretary of State for the Home Department*.¹⁹⁰ The Law Lords’ decision held that the indefinite detention of foreign suspects of terrorism without trial under the Act was incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms, but remained in effect since British judges do not possess judicial review power.¹⁹¹

In practice, de-juridification means more discretion for the political branches of government since law no longer establishes standards of protection. Hence, legal protections depend on the policy-making choices of the legislator, their discretion in balancing competing alternatives, and the protection of fundamental rights.

entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” which was issued in accordance with an Act of Congress. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001). See Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2011).

185. See Anti-Terrorism, Crime, and Security Bill 2001-2, H.L. Bill 49.

186. *Id.* at §§ 28(1)–(2)(c) (“(1) 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. (2) 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.”).

187. 375 Parl. Deb. H.C. (6th ser.) (2001) col. 396.

188. Anti-Terrorism, Crime, and Security Bill 2001-2, H.C. Bill 351 c. 43.

189. Anti-Terrorism, Crime, and Security Act, 2001, c. 24, § 29(7).

190. *A v. Sec’y of State for the Home Dep’t* (2004) UKHL 56.

191. 669 Parl. Deb. H.L. (5th ser.) (2005) col. 161 (“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 . . .”).

It is noteworthy that the Anti-Terrorism, Crime, and Security Act was reviewed twice based on statutory language¹⁹² following the Secretary of State's order.¹⁹³ Lord Lloyd of Berwick clearly articulated this conclusion when 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 December¹⁹⁴

The duration of de-juridification is another important element in this equation. *A priori*, the duration of each crisis cannot be measured. Policymakers commonly adopt a sunset clause and before its expiration, they might renew the legislation if the crisis has not fully concluded. However, the promulgation of sunset clauses with indefinite duration is incompatible with the rationale of emergency legislation and has unintended consequences. As mentioned *supra*,¹⁹⁵ the 1995 Court of Appeal decision on the Import, Export and Customs Powers (Defence) Act of 1939, signals the ease by which emergency legislation can become a routine power used by government.

A member of the House of Commons' Select Committee on Home Affairs has emphasized:

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

192. Anti-Terrorism, Crime, and Security Act 2001, c. 24, § 28.

193. Anti-Terrorism, Crime, and Security Act 2001 (Continuance in Force of Sections 21–23) Order 2003, SI 2003/691; Anti-Terrorism, Crime, and Security Act 2001 (Continuance in Force of Sections 21–23) Order 2004, SI 2004/751.

194. 670 Parl. Deb. H.L. (5th ser.) (2005) col. 161.

195. An example of one of these extensions would be in 1995 when the Court of Appeals analyzed the validity of emergency legislation, the Import, Export and Customs Powers (Defense) Act of 1939, which was passed during the Second World War. Import, Export and Customs Powers (Defense) Act, 1939, 2 & 3 Geo. 6 c. 69, § 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 . . .”).

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.¹⁹⁶

That said, in times of crisis, it seems sunset laws mean that human rights protections depend primarily on the policymaking choices of the executive and on its discretion in balancing between specific policies and the protection of rights. The ends justify the means and rule of law is consequently replaced by the rule of discretion.¹⁹⁷ De-juridification removes the legal constraints in the exercise of power and policymakers have broader room for maneuver and a relatively free hand. Such de-juridification, however, is not unlimited since a number of human rights guarantees, such as the rights enlisted in the European Convention on Human Rights, are not subject to modification.

Even in spite of *Ex parte Merryman*, de-juridification should be subject to judicial review. Courts must have a significant role in the protection of rights, even though their role is mainly *ex post facto* and exercised with deference in wartime. In some cases though, the judiciary can be a victim of de-juridification.

D. JUDICIAL DEACTIVATION

The question of which branch of the United States government has the power to suspend habeas corpus still remains unanswered. What is agreed, though, is that temporary suspension of the writ of habeas corpus deactivates the courts.¹⁹⁸ The sunseting of particular rights and freedoms has an equivalent impact. Courts are the frontrunners in the

196. 375 Parl. Deb. H.C. (6th ser.) (2001) col. 62–63.

197. Dicey has said that, “the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint.” See DICEY, *supra* note 138, at 110.

198. However, the permanent restriction on alien detainees’ use of habeas corpus to access federal courts has been ruled unconstitutional. See *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). Congress adopted the Military Commissions Act in 2006, prohibiting alien detainees or suspected enemy combatants from using the writ of habeas corpus to petition federal courts. In *Boumediene*, the Court held the prohibition unconstitutional.

juridification of our society—they implement the law, define its meaning, determine gaps, fill vacuums, and conduct constitutional review.¹⁹⁹ Curtailing certain rights under sunseting deactivates courts in the same manner as suspension of habeas corpus.

One of the most famous examples of judicial deactivation was when Japanese and Japanese-Americans on the west coast were moved to internment camps during the Second World War. In an attempt to explain the relatively powerless role of the courts, Justice Jackson's *Korematsu* dissent underlined this issue:

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 delusiveThe 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.²⁰⁰

Judicial deactivation has a profound impact on the protection of basic guarantees. Since *Marbury v. Madison*²⁰¹ in 1803, many legal orders with separated powers have entrusted courts with the task of constitutional review and the protection of enumerated rights²⁰²—a trend also apparent today in Commonwealth nations.²⁰³

199. See THE FEDERALIST NO. 78 (Alexander Hamilton). See also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Josephine Ann Bickel ed., 2d ed. 1986).

200. *Korematsu v. United States*, 323 U.S. 214, 248 (1944).

201. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

202. Since World War II, the dominant paradigm of constitutionalism is the enhanced role of the courts in constitutional review, especially regarding the Bill of Rights. See John E. Ferejohn, *Constitutional Review in the Global Context*, 6 LEGIS. & PUB. POL'Y 49 (2002). A proponent of this model is Ronald Dworkin. See, e.g., RONALD DWORIN, TAKING RIGHTS SERIOUSLY (1978). However, this model has been criticized by numerous academics. See RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2007); Michael Mandel, *A Brief History of the New Constitutionalism, or "How We Changed Everything So That Everything Would Remain the Same,"* 32 ISR. L. REV. 250 (1998).

203. Stephen Gardbaum, *The New Commonwealth Model of*

This phenomenon was also echoed in a series of U.S. Supreme Court cases decided in the aftermath of World War I. Congress passed legislation that limited freedom of contract for a period of two years, and in certain circumstances allowed a tenant to remain in their rental beyond their lease term if they continued to pay rent.²⁰⁴ Restriction of a landlord's eviction power was necessitated by the emergencies of war. Justice Holmes echoed the passive wartime role of courts in this case, stating, "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 world-wide fact."²⁰⁵

Past experience has shown that courts tend not to intervene during emergencies, and in reality defer to the political branches of the government for guidance. This is a dangerous proposition since the standards of protection in these periods are lower due to sunset legislation. In this scenario, it is even more important that judicial discretion to intervene is maintained. When fundamental protections are sunsetted, the judge therefore becomes an *ultimum refugium*.

V. DE-JURIDIFICATION AND SUNSET CLAUSES AT TIMES OF CRISIS

In this Part, we ask what the real problem of de-juridification in the midst of crisis is: is it the fact that rights are suspended or that 'temporary' rules are enacted to confer more powers to the executive branch. Until now, we have argued that de-juridification is not *per se* unsatisfactory; in fact, it can be necessary to guarantee the adoption of timely decisions.

In the first segment, we unveil 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 after emergency circumstances are resolved. In Section A, we delve into the past misuse of sunset clauses and explain why de-juridification and sunset clauses, as its instrument, have acquired a bad reputation. Section B, suggests a normative framework for a more effective use of sunset clauses during times of crisis (and beyond).

Constitutionalism, 49 AM. J. COMP. L. 707 (2001).

204. Food Control and District of Columbia Rents Act, Pub. L. No. 66-63, § 101, 41 Stat. 297 (1919).

205. Block v. Hirsh, 256 U.S. 135, 154 (1921).

A. THE RECENT PAST OF SUNSET CLAUSES AND DE-JURIDIFICATION

As mentioned *supra*, the USA PATRIOT Act was one example of many anti-terrorism enactments that utilized sunset clauses.²⁰⁶ Sunset provisions contained in the Act were included in order to *limit the duration* of measures constraining certain freedoms to a five year period.²⁰⁷ At this time, there was thought to be a higher level of terrorist threat. This Act was, however, reauthorized in the following years and some of its provisions have likely become permanent.²⁰⁸

Although existing constitutional and criminal law structures might be ill-equipped to respond to terrorism,²⁰⁹ sunset clauses might be an important tool to avoid the normalization of emergency powers.²¹⁰ As demonstrated in our historical overview, the suspension of laws, human rights, and the deactivation of courts in turbulent times “eats away the foundations of republican government.”²¹¹ This is particularly apropos if emergency powers live beyond the initial tragedy that gave rise to the state of emergency. Discretion, efficient decision-making, and expediency are fundamental elements of de-juridification since law is not omnipresent. As a result, de-juridification seems to be the appropriate medicine to combat

206. In Canada, Parliament passed the Anti-Terrorism Act which was incorporated into the Criminal Code under ‘Part II.1—Terrorism.’ Anti-Terrorism Act, S.C. 2001, c. 41. A sunset clause was included in the bill (Section 83.32), sunsetting sections 83.28, 83.29 and 83.3 concerning preventative arrests and investigative hearing powers, after a five-year period. In Britain, the Anti-Terrorism, Crime and Security Act, which amended the Terrorism Act 2000, introduced the indefinite detention of foreign suspects of terrorism without trial and was subject to a 5-year sunset clause. *See* Anti-Terrorism, Crime, and Security Act 2001, c. 24, § 23.

207. Examples of the de-juridification include the interception and disclosure of communications and surveillance orders. Although section 224 of the USA PATRIOT Act contained a four-year sunset clause, a number of its sections were later renewed, including the sections regarding sharing of criminal information and single-jurisdiction search warrants. USA PATRIOT ACT, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 (2001).

208. The USA PATRIOT Act was to terminate in 2005, but was reauthorized. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).

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

210. For a more detailed analysis of the use of sunset clauses to address temporary problems including terrorism, see RANCHORDÁS, *supra* note 14, at 62–64.

211. Levinson & Balkin, *supra* note 31, at 1801.

emergencies. In that respect, sunset clauses have proven to be an adequate formula for de-juridification. Sunset clauses are an integral element 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 that once normality is restored, juridification and its positive effects fail to reemerge.

Although used for centuries, sunset clauses do not have a good reputation in the legal literature.²¹² They are thought to be ineffective, costly, and unable to impede the “normalization of the extraordinary.”²¹³ The repeated extensions of counterterrorism legislation, à la the USA PATRIOT Act, is a classic example of sunset clauses’ inability to terminate emergency legislation. Adopting sunset clauses was an important tool in gathering consensus for this bill.²¹⁴ Sunset provisions were supposed to guarantee that limitations on civil liberties would not become entrenched, but would rather be reevaluated after a determined period. This instrument was supposed to allow Congress to revisit this Act and based on new information, correct possible policymaking errors by revising or repealing unnecessary rules.²¹⁵ Conversely, these sunset clauses produced the opposite effect, facilitating the long-term entrenchment that they were originally designed to prevent.

In this way, sunset clauses have been abused to gather consensus regarding controversial, and often emergency, laws that would have not been adopted otherwise. The consensus-gathering virtue attributed to sunset clauses frequently evolves into a vice and “sunset clauses have been transformed from an instrument of better government into a clever political trap.”²¹⁶ 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 on the sunset moment.²¹⁷

212. For a thorough account of the reasons why sunset clauses have developed this ‘bad reputation,’ see RANCHORDÁS, *supra* note 14.

213. *Ip*, *supra* note 18, at 87.

214. 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, 225–26 (2006).

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

216. Chris Mooney, *A Short History of Sunsets*, LEGAL AFF., Feb. 2004, at 67.

217. Nicola McGarrity et al., *Sunset Clauses in Australian Anti-Terror Laws*, 33 ADELAIDE L. REV. 307, 308 (2012).

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.”²¹⁸ This is often described as a result of so-called ‘legislative inertia’ created by the interaction of legislators and interest groups. Maintenance of policies, regardless of their effectiveness, can be an important way of ensuring the survival of stakeholder organizations such as regulatory agencies.²¹⁹

This bad reputation is not exclusive to emergency legislation, but has also been the result of the deficient implementation of sunset clauses in other fields. 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.”²²⁰ By enacting sunset clauses instead of permanent tax provisions, 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.²²¹

Finally, the non-selective use of sunset clauses in the 1970s and 80s can explain their bad reputation. The ‘sunset boom’ at the state level was motivated by the desire to limit the growing power of executive agencies, rather than by the economic crisis in the 1970s. An excessive number of sunset clauses resulted, for example, in deficient evaluations and incorrect evaluation periods. According to Kearney’s 1990 study, most sunset clauses were typified by incorrect sunset review periods.²²² 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

218. Stephen Coate & Stephen Morris, *Policy Persistence*, 89 AM. ECON. REV. 1327, 1328 (1999).

219. See STELLA Z. THEODOULOU & CHRIS KOFINIS, *THE ART OF THE GAME: UNDERSTANDING AMERICAN PUBLIC POLICY MAKING* 206 (2004).

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

221. See Manoj Viswanathan, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. REV. 656 (2011).

222. See Richard C. Kearney, *Sunset: A Survey and Analysis of the State Experience*, 50 PUB. ADMIN. REV. 49, 51 (1990).

agencies from continuing ineffective and unnecessary programs. These pathologies continue to affect the reputation of sunset clauses today and diminish hope for a brighter future for de-juridification.

B. NORMATIVE FRAMEWORK

Juridification can also be stigmatized because it represents a reality where *jus* is the predominant element of society.²²³ However, history has shown that the reality of limitless de-juridification at times of crisis can be uglier. Sunset clauses have walked side-by-side with de-juridification to guarantee the temporary limitation of fundamental rights and enhanced legislative oversight. However, these legislative instruments have not always fulfilled their mission. Temporary de-juridification requires a normative framework that can set boundaries for the spaces susceptible of juridification.

Firstly, an important step would be to clearly define the situations that can and should be de-juridified on a temporary basis. An inflexible definition of a state of emergency and the reasons that justify the temporary measures must be provided. This would minimize the possibility 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.²²⁴

In addition, before emergency de-juridification, legislatures should investigate whether a certain situation is the result of serious dangers or merely risks. Luhman's distinction between risk and danger exemplifies this issue: *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."²²⁵ Terrorism and natural disasters can be qualified as dangers because they are unexpected, whereas some economic policies (e.g., investment in risky securities or financial speculation) will easily fall into the category of risks. This distinction is nonetheless fluid and a risk for one person could

223. Teubner, *supra* note 41, at 3.

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

225. Max Boholm, *The Semantic Distinction between 'Risk' and 'Danger': A Linguistic Analysis*, 32 RISK ANALYSIS 281, 282 (2012).

be a danger for others; Christian Borch explains, “heavily geared investment in the financial markets [risk] might trigger a financial collapse which has negative effects on people who did not speculate [danger].”²²⁶ In such a scenario, de-juridification might be justified to tackle the results of a danger which was unexpected to most citizens.

In the case of risks, legislators might decide to adopt sunset clauses in order to gather more information related to a certain phenomenon. 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 period between enactment and sunset.²²⁷ In such cases, sunset clauses may be employed to experiment with a new act, rather than to de-juridify.

A natural question is whether there are sectors that should never be de-juridified, even on a temporary basis. As mentioned *supra*, this may be so in prohibiting torture or in relation to a number of core legal institutions like legislative non-delegation, which are essential for the functioning of any state and society.²²⁸ This is exemplified by the German ‘eternity clause’ and unamendable provisions of its Basic Law,²²⁹ as interpreted by the Federal Constitutional Court. In 1976, this court affirmed that “laws that are indispensable for the legal capacity and [normal] functioning of a state”²³⁰ 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 a social space can be de-juridified, policymakers should reflect upon the duration of the sunset clause. This period should coincide with the emergency, lasting long enough to allow the executive to effectively manage an issue and gather information as to its nature, but should not be disproportionate. Another important element of temporary

226. CHRISTIAN BORCH, NIKLAS LUHMANN 100 (2011).

227. See Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1042 (2011).

228. Volker Bouffier, *Normprüfung: Modifizierung des Hessischen Befristungskonzepts*, 2 ZEITSCHRIFT FÜR RECHTSPOLITIK 55 (2012) (Ger.).

229. See Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1037 (2014).

230. See Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Feb. 8, 1977, 1 BVR 79, 278, 282/70 (Ger.).

de-juridification is retrospective evaluation by the legislature, and courts if necessary (or *ex post* evaluation).

As mentioned before, the adoption of a sunset provision increases the probability that political opponents will support new laws due to the promise of future revision.²³¹ Evaluations should therefore be an essential element of de-juridification. The necessity of extraordinary measures 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. In some cases though, the publication of information may be contrary to national security interests. Nevertheless, reconsidering the necessity of a certain regulation can ensure that the executive takes new information into account, reassesses the underlying regulatory problem, and evaluates the effects of the rules at stake.²³²

Any evaluation should be used to assess the effects of the sunset disposition and verify whether objectives have been achieved. Depending on the evaluation report, an informed decision can then be made as to whether to let the provision sunset or renew. 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 branch to conduct meaningful sunset reviews and provide legislators with accurate and complete information.²³³ This implies that legislators must also ensure that the evaluation techniques and criteria provided in legislation are adequate to the programs that will later be evaluated.²³⁴

V. CONCLUSION

Juridification has a negative connotation. It symbolizes the excessive role of *jus* in societal relationships, invading every facet of our life, imposing norms, and regulating processes. Conversely, crises demand fast and effective decisions instead of

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

232. EUR. COMM'N, MANDELKERN GROUP ON BETTER REGULATION FINAL REPORT 19 (2001), http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf.

233. See Sandra M. Vidas, *The Sun Also Sets: A Model for Sunset Implementation*, 26 AM. U. L. REV. 1169, 1193–94 (1976).

234. See *id.*

burdensome procedures. In this Article, we argued that de-juridification is necessary at critical times and can be executed through a broader use of sunset clauses. Emergencies require less bureaucracy transfer of decision-making power from the legislature to bodies with expertise, and broad consensus in 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. This is the basis for the key question of why sunset clauses often fail to have meaningful effect and why de-juridification may be preferable to juridification.

The annals of history have repeatedly shown that the rhetoric of emergency and de-juridification at times of crises can be dangerous. For example, many oppressive regimes found their genesis with the establishment of emergency powers that became normalized.²³⁵ As a result, this Article analyzed the historical use of temporary legislation to suspend the writ of habeas corpus and facilitate the adoption of controversial measures such as indefinite detention in the context of terrorism and the USA PATRIOT Act. Too frequently, temporary suspensions of constitutional rights became excessive, and emergency legislation lived beyond the emergency it was meant to tackle.

De-juridification is, however, not solely a source of challenges. The aim of this Article was rather to explain why de-juridification can sometimes be desirable, and how history has taught us to use the weapons of de-juridification, such as sunset clauses, in a nuanced manner. Sunset clauses promise to erase legislative provisions that might be unnecessary after times of crisis, and 'rewind' legislation to the original status quo after the end of this critical period. This may be a dangerous promise, however, that comes at the price of basic guarantees 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 cogently distinguishes between risks and dangers, 'sunsettable' and 'non-sunsettable' subject areas, and adequate sunset periods, placing a strong emphasis on evaluation.

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

235. Levinson & Balkin, *supra* note 31, at 1809.

might also result in the reduction of key civil liberties and our system of checks and balances. *Less* is not always *more*, unless it is not meant to last.