



UNIVERSITY OF OXFORD
Faculty of Law

**Sunset Clauses:
A Historical, Positive and Normative Analysis**

**Thesis submitted for the Degree
Doctor of Philosophy in Law**

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February 2014**

ABSTRACT

Sunset clauses are a commonly used statutory provision related to the temporary duration of various laws. Such clauses are scattered throughout the statute books. This thesis aims to shed light on the constitutional value of such clauses, in order to value them from the perspective of the separation of powers and the rule of law.

We have an extant amount of literature on sunset clauses, especially regarding their utility in the United States. In the United Kingdom, we have a limited analysis with respect to specific fields, including emergency legislation. However, we lack a comprehensive analysis with regard to their constitutional value.

This thesis's analysis is conducted in three parts, separated into the historical, the positive, and the normative. All three parts of this thesis are interdependent, and the analysis of each subsequent part builds on the conclusion of its antecedent. The first part investigates the historical development of sunset clauses since the first Parliament in England. The positive analysis examines the contemporary utility of sunset clauses. Finally, the normative evaluation examines their interaction with several models of separation of powers as it values their impact on the rule of law.

Depending on the separation of power model, such clauses play a role in the system of checks and balances. On the one hand, they impact the institutional relationship between the executive and legislative branches. On the other hand, they influence the interaction between the legislature and the courts. Although I acknowledge that their legislative use in limiting human rights diminishes the rule of law, they might have the exact opposite effect: on several occasions in the past, they were used to advance the rule of law, including the adoption of innovative legislation and the annulment of the death penalty. Indeed, this thesis attests to the constitutional value of sunset clauses.

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LIST OF ABBREVIATIONS

AC, QB, Ch, Fam, P	Law Reports
Admin	Administrative
All ER	All England Law Reports
art	article
Bl Comm	Blackstone, Commentaries on the Law of England
BISD	Basic Instruments and Selected Documents
c	chapter (of statutes)
CE	Court of Exchequer Chamber
Ch/Chrs	Chapter/Chapters
CJ	Chief Justice
cl	clause
Co	Company
Co Ints	Coke, Institutes of the Laws of England
col/cols	column/columns
Cr App R	Criminal Appeal Reports
CUP	Cambridge University Press
Dept	Department
Dir	Directive
DPP	Director of Public Prosecutions
EC	European Communities
ECHR	European Convention on Human Rights
ed/eds	editor/editors
edn	edition
Edw	Edward
eg	for example
Eliz	Elizabeth
ER	English Reports
EWHC	High Court, Chancery Division
ff	And following
fn	footnote - (external to the work)
Geo	George
Hale PC	Hale, The History of the Pleas of the Crown
HC	House of Commons
Hen	Henry
HL	House of Lords
HM	Her Majesty's
HRA	Human Rights Act
HMSO	Her (or His) Majesty's Stationery Office

KB	Kings Bench
LQR	Law Quarterly Review
MP/MPs	Member of Parliament/ Members of Parliament
MS/MSS	manuscript/manuscripts
n/nn	footnote/footnotes (internal to the work)
no	number
OUP	Oxford University Press
para/paras	paragraph/paragraphs
PL	Public Law
PRO	Public Records Office
R	The Queen (or King)
Raym	Sir Thomas Raymond's King's Bench and Common Pleas Reports
Ric	Richard
s/ss	section/sections
SC	Supreme Court
SI	Statutory Instruments
SP	State Papers
SS	Publication of the Selden Society
St	Statute (UK Statute)
Stat	Statute (US Statute)
tr	translator
TNA	The National Archives
UK	United Kingdom
UKHL	House of Lords
UKSC	Supreme Court
UN	United Nation
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
US	United States
Vol/vols	volume/volumes
Vict	Victoria
YB	Yearbook

FOREWORD

Yesterday's law is not binding to-day; but silence is taken for tacit consent, and the Sovereign is held to confirm incessantly the laws it does not abrogate as it might

Jean- Jacques Rousseau, On the Social Contract, Book 3 XI

A. Panorama of Sunset Clauses

The duration of laws and their perpetual binding force has always been a central concern of philosophers and academics. The laws of past generations are the most prominent feature in the statute book and mark the life of present and future generations. Laws are regarded as being in force until amended or repealed, whilst through the inclusion of a sunset clause, the duration of the law is defined and thus the law is commonly addressed as temporary.

As the name of sunset clauses suggests, the duration of laws expires, just as the sun sets every day. The origin of the term 'sunset clause', and the question of how long it was part of UK parliamentary legislation, is a mystery. Surprisingly, the coining of the term was a 20th century development,¹ even though such clauses were present in parliamentary legislation since the reign of Edward III, and even, periodically, in ancient legislation.²

Legislation without a sunset clause has the presumption of permanence;³ on the contrary, legislation with a sunset clause is taken to be temporary. Thus, it is widely accepted as axiomatic that the inclusion of a sunset clause in legislation aims to regulate

¹ For more information concerning the origin and the definition of the term see Ch I.

² See Ch II.

³ See Daniel Greenburg (ed), *Craies on Legislation* (8th edn, Sweet & Maxwell 2004) 381.

transitory and temporary issues, and its utility is generally restricted to this purpose. Furthermore, the emergency legislation adopted in the aftermath of the terrorist attacks in New York and London highlighted the use of sunset clauses in legislation concerning (indeed restricting) human rights.

There are not many sources of reference on sunset clauses in academic literature; however, some articles have been published in American journals.⁴ In addition, over the last decade sunset clauses have attracted wider academic debate than in the past, in part because of their use in emergency legislation, with the consequential impact on human rights,⁵ and in part because of their use in taxation.⁶

In the 1980s the analysis was focused on how sunset clauses could hold the administration to account, an idea originally expressed by Lowi.⁷ Adams first argued that such clauses are a tool to restore the balance of power between the legislature and the executive,⁸ while Price supports the view that the sunset clause movement in the US is relevant to the growth of bureaucracy and argues that its success depends upon its proper implementation.⁹ Further, Davis elaborates on how sunset clauses would meet the objective of reinstating the legislature as co-partner with the executive in government, and of combating bureaucracy.¹⁰ Finally, Muskie contends that such clauses are the best

⁴ See text to nn 8 – 14 in Ch I.

⁵ See text to nn 15, 16 in Ch I.

⁶ See text to nn 17, 18 in Ch I.

⁷ See Theodore J Lowi, *The End of Liberalism, the Second Republic of the United States* (2nd edn, WW Norton & Company 1979).

⁸ Bruce Adams, 'Sunset: A Proposal for Accountable Government' (1976) 28 *Administrative Law Review* 511.

⁹ Dan R Price, 'Sunset Legislation in the United States' (1978) 30 *Baylor Law Review* 401.

¹⁰ Lewis Anthony Davis, 'Review Procedure and Public Accountability in Sunset Legislation: an analysis and Proposal for Reform' (1981) 33 *Administrative Law Review* 393.

vehicle to ensure the proper evaluation of federal agencies.¹¹ Other authors argue that such clauses do not meet their aim to decrease the amount of regulations,¹² or that they are an inefficient mechanism for oversight.¹³

After a decade of implementation, a thorough evaluation was published by Kearney according to which 12 out of 36 States had implemented sunset clauses, repealed or suspended them, for a variety of reasons. The author concluded that legislators would rather repeal such clauses, rather than make them more workable.¹⁴ In 2001 the *Mandelkern* report for better regulation endorsed sunset clauses in specific areas of regulation.¹⁵

There has been much discussion of their recent use in the context of emergencies and taxation. Thus their use in relation to emergencies was supported by Ackerman,¹⁶ but criticized by Finn, Gross and Ip as an ineffective tool.¹⁷ Similarly, in relation to taxation

¹¹ Edmund S Muskie, 'Sunset Legislation, Restoring Public Confidence in Government' (1977) 4 *Journal of Legislation* 11.

¹² Vern McKinley, 'Sunrises without Sunsets. Can Sunset Laws Reduce Regulation?' (1995) 18 *Regulation* 57.

¹³ Bert A Rockman, 'Legislative-Executive Relations and Legislative Oversight', (1984) 9 *Legislative Studies Quarterly* 387; Guido Calabresi, *A Common Law for the Age of Statutes* (Lawbook Exchange 1999) 62.

¹⁴ Richard C Kearney, 'A Survey and Analysis of the State Experience' (1990) 50 *Public Administration Review* 49.

¹⁵ Mandelkern Group on Better Regulation, *Final Report* (13 November 2001) 18.

¹⁶ Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029.

¹⁷ Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional' (2003) 112 *Yale Law Journal* 1011, 1090; John E Finn, 'Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation' (2010) 48 *Columbia Journal of Transitional Law* 442; John Ip, 'Sunset Clauses and Counterterrorism Legislation' [2013] *PL* 74.

there has been some support for their use,¹⁸ but there has also been criticism on the ground that they were used as a tool to bypass a procedural budgetary rule.¹⁹

Finally, although the research and scholarship on sunset clauses during the last decade was mainly focused on specific fields, there has been recent research concerning temporary legislation as a whole, but not specifically concerning sunset clauses. Jensen examines temporary legislation and endorses its use, and he argues that in specific fields such legislation should be the rule and not the exception.²⁰

B. Research Inquiry

Despite the fact that there is some debate on sunset clauses, there has been no attempt to provide a comprehensive, coherent and analytical account of the constitutional value of sunset clauses. The relatively minimal discussion of sunset clauses in the UK, as well as the neglect of certain normative aspects of such clauses, makes this a fertile field for doctoral research.

This thesis therefore provides an in-depth examination of sunset clauses from a historical, positive and normative perspective. It must be stressed that these three analytical perspectives are not isolated, but rather must be seen as interdependent. The historic and the present accounts help to elucidate the normative implications of sunset

¹⁸ Martin A Sullivan, 'False Alarms and Real Problems with Budget Gimmicks' (2003) 99 Tax Notes 1129; George K Yin, 'Temporary - Effect Legislation, Political Accountability, and Fiscal Restraint' (2009) 84 New York University Law Review 174.

¹⁹ William G Gale, Peter R Orszag, 'Sunsets in the Tax Code' (2003) 99 Tax Notes 1553, 1557; Elizabeth Garrett, 'Accounting for the Federal Budget and Its Reform' (2004) 41 Harvard Journal on Legislation 187, 196; Rebecca M Kysar, 'The Sun Also Rises: the Political Economy of Sunset Provisions in the Tax Code' (2006) 40 Georgia Law Review, 335, 339; Manoj Viswanathan, 'Sunset Provisions in the Tax Code: a Critical Evaluation and Prescriptions for the Future' (2007) 82 New York University Law Review 656, 658.

²⁰ Jacob E Gersen, 'Temporary Legislation' (2007) 74 Chicago Law Review 247.

clauses and vice versa, while the normative implications are often to be attributed to the use of sunset clauses throughout different historical occasions.

Our knowledge of the use of such clauses in UK parliamentary history is at a rudimentary level. There is moreover no analysis as to why legislators included such clauses, in which types of legislation they were included, to what extent the separation of powers influenced their use and vice versa, and the normative implications of their current use for the rule of law.

The present thesis seeks to address these issues. First, it elucidates the use of sunset clauses throughout different historical periods, with the aim of showing that such clauses were a constant feature in the statute book since the first parliaments in the UK, and that they influenced the balance of powers. The analysis then turns to the contemporary use of sunset clauses. In this part the aim is to show that their current function is intimately related to the separation of powers and that their utility goes beyond emergency and tax legislation. Finally and most importantly, their inclusion does not only diminish the rule of law, as it is commonly claimed, but may also enhance it.

In doing this, the thesis comprises three parts: first, the historic development of sunset clauses; second, their contemporary utility from the perspective of positive law; and third, the normative evaluation of such clauses in legislation from the perspective of the separation of powers and the rule of law.

C. Methodology

The primary focus of this thesis is on the use of sunset clauses in the UK, but the analysis considers selectively the use made of such clauses in other countries such as Canada, France and USA. The extent to which this is done depends in part upon constraints of space. The object of the research is not only the drafting of sunset clauses and the relevant

amendment process, but also the parameters that influence their incorporation into legislation. Arguments and conclusions are drawn from historical and current uses and I discuss how and why legislators draft legislation with sunset clauses.

The approach is interdisciplinary insofar as it elaborates on the historical use and development of such clauses. The extensive use of sunset clauses in UK parliamentary history, which has not hitherto been systematically examined, means that two chapters have been devoted to this aspect of the thesis.²¹ The sources of the first historical period, from the House of Plantagenet until the end of the House of Tudor, are limited but the sources progressively multiply. The findings, and the analysis of them, are based mainly on the rolls of the parliament (*rotuli parliamentorum*), on the statutes themselves, on unsuccessful bills, on the daily debates from *Hansard*, on *Cobbett's Parliamentary History*, on several private diaries and on several reports from the Committee upon Temporary Laws.

Although the first part is partly descriptive, its significance should not be underestimated given that it is the first time that a complete and comprehensive account of the evolution of sunset clauses has been systematically undertaken and presented. Furthermore, the objective of the historical parts is to demonstrate why legislation during the first parliaments incorporated such clauses and to discuss if the use of sunset clause was largely related to the balance of powers between the King, the Commons and the Lords. Finally, the historical analysis seeks to demonstrate the role played by sunset clauses in relation to important constitutional developments.

In the part of the thesis dealing with positive law, the contemporary legislative practice with regard to sunset clauses is examined with the aim of revealing and testing the soundness of the policy and the purpose of the legal rule. The analysis is threefold and is

²¹ Concerning the value of legal history, Justice Holmes stated 'at present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition'. See OW Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 469.

based on the meaning, typology and pragmatic use of such clauses. The principal aim of the positive part is to facilitate a greater understanding of the overall rationale for the use of such clauses, to find and test the soundness of the policy underlying such clauses and to highlight the fact that sunset clauses are not confined to a specific type of legislation such as emergency laws.

The normative part is twofold and seeks to elucidate the constitutional implications of the use of sunset clauses and to evaluate in detail their impact upon the separation of powers and the rule of law. The focus is on the interaction between such clauses and the separation of powers. The analysis considers current conceptions and models of the separation of powers and discusses the role of such clauses in the institutions and their competing sovereignty claims. The normative part concludes with by considering the impact of such clauses on the rule of law. The discussion considers divergent theories of the rule of law, analyses the value of such clauses from these perspectives, and includes consideration of the cost-benefit analysis of the use of sunset clauses in emergencies.

D. Thesis Chapters

Chapter I: Definition and Taxonomy of Sunset Clauses

In the first chapter, the meaning and typology of sunset clauses is examined (while the pragmatic application of such clauses is explored in the Chapter IV). The first part of the chapter considers the meaning of such clauses and their legal effects. The second part, concerning typology, examines the different varieties of sunset legislation, such as the ‘entire’ sunset clause as compared with the ‘sectional’; the ‘direct’ sunset clause as compared with the ‘indirect’; the ‘conditional’ sunset clause as compared with the ‘unconditional’. The aim of this first chapter is to set the scope of the thesis and define the

term ‘sunset clause’ and its legal effect, before proceeding with the historical evaluation, the analysis of the current uses and the normative implications for the separation of powers and the rule of law.

Chapter II: Historical Overview of Sunset Clauses; The Balance of Power Between King, Lords and Commons

This chapter examines the early involvement of Parliament in legislation until just before the outbreak of the constitutional crisis of the Stuart reign and the civil war. The findings, especially in the medieval period, are both surprising and illuminating. In the late medieval period, there was a royal prerogative to amend legislation by adding sunset clauses. It will be seen that from the reign of Edward III until the end of the Tudor period, the use of sunset clauses increasingly became an expression of legislative power as the legislative process evolved and matured. Thus, by the end of the Tudor era, the sunset clause came to be a useful bargaining tool for the House of Commons and the House of Lords respectively, throughout their negotiations. Finally this chapter explores the way in which sunset clauses were used by the first two Stuarts, during the period when the balance of powers was trembling.

Chapter III: Historical Overview of Sunset Clauses; The Increasing Power of the Commons

This chapter explores the way in which sunset clauses were used since the Restoration until the emergence of the political parties and the constitutional stability of the 19th century. Parliament progressively began to understand its governance function and legislation became a tool used to implement desired policies as it was used to abolish censorship, to introduce the first land tax, while the first act suspending habeas corpus was

also passed. It will be apparent that the use of such clauses evolved as the legislative role of Parliament evolved.

At the same time the ordinary use of sunset clauses in specific types of legislation, such as ‘money bills’ and emergency acts, forms a pattern. Furthermore, as the legislative process in the UK is crystallised and the parties become the mechanism for the enactment of legislation, the use of sunset clauses is limited as the opposition’s role in influencing the adoption of bills is diminished. Finally, the historical analysis is concluded with the discussion about the utility of such clauses in early emergency legislation.

Chapter IV: Types of Legislation Containing Sunset Clauses

This chapter concludes the positive analysis and focuses on the pragmatic dimension of sunset clauses. It examines how sunset clauses are applied, in which types of legislation, and the surrounding legal environment. It first explores the constitutional use of such clauses and then addresses the use of sunset clauses in contemporary legislation and selectively considers the use made of such clauses in other countries such as Canada and USA. It discusses the use of sunset clause in different legal fields and especially in emergency legislation, in legislation related to finance, such as taxation and financial regulations, in constitutional documents, and in legislation related to the administration.

Chapter V: Sunset Clauses and their Institutional Effect

This chapter concentrates on three distinct, albeit related, subjects. The first is how the use of sunset clauses affects the separation of powers, primarily the relationship between the legislature and the executive, and conversely, how the separation of powers influences the use of sunset clauses. The second issues concerns the impact of such clauses on successive parliaments and the relationship between present and future parliaments. This reveals the

impact of such clauses on the inter-temporal dimension of the separation of powers doctrine. By examining how the separation of powers interacts with sunset clauses, it also reveals the possibilities and limitations of such clauses. The final topic in this chapter is how recent constitutional developments, especially the adoption of the Human Rights Act 1998, affect the separation of powers. It investigates the role of sunset clauses in the relationship between Parliament and the courts.

Chapter VI: Rule of Law and Sunset Clauses

The last chapter evaluates the utility and constitutional legitimacy of sunset clauses, with regard to both formal and substantive conceptions of the rule of law. The analysis is twofold. The first part of this chapter examines the impact of sunset clauses on the formal dimension, and the second part on the substantive. The implications on the formal conception of the rule of law vary according to the clause's construction. Thus the first part evaluates several common legal constructions and proposes some guidance for legislative drafters in order to remedy constructions that could potentially infringe the rule of law. The second part focuses on the impact of temporary legislation on human rights, specifically how this effect can be evaluated and limited.

CHAPTER I: DEFINITION AND TAXONOMY OF SUNSET CLAUSES

Perpetua lex est, nullam legem humanum ac positivam perpetuam esse; et clausula quae abrogationem excludit initio non valet. (It is a perpetual law that no human or positive law can be perpetual; and a clause in a law which precludes the power of abrogation is void ab initio)

Bacon's Max in Reg 19

Introduction

The positive analysis of sunset clauses is explored in two chapters. The methodology used constitutes a legal interpretation of temporary legislation in order to reveal the meaning, typology and pragmatic application of such clauses. In particular, this chapter will first consider the meaning and then the typology of sunset clauses, while the pragmatic dimension is explored in the 4th chapter. The discussion of the meaning of such clauses will include their legal effect, while analysis of typology will also include examination of their construction and subsequent taxonomy derived from current usage.

The aim of this chapter is to enhance the legal clarity of the term ‘sunset clause’ before proceeding with the historical evaluation and analysis of current uses. It builds the positive framework of such clauses by drawing categories and divisions from the UK legislation and exploring their functioning. In fact, although the definition of the term is unambiguous, legislators and scholars, as will be seen in the following chapters, use the term indiscriminately in order to describe the whole spectrum of clauses containing restraints of time.¹ The analysis in this chapter is, therefore, important in the development of the thesis, and is not confined simply to definitional issues.

¹ Finn also observes the same consideration. See John E Finn, ‘Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation’ (2010) 48 Columbia Journal of Transnational Law 442, 445.

Thus this chapter considers what a sunset clause is, its legal effect and its common structures, and thereby delimits the scope of the thesis. By examining its legal effect, the purpose and the policy of the clause is revealed, while by addressing the exceptions, the soundness of the policy is tested. Finally, by examining the typology of such clauses, it is possible for there to be a more finely tuned appreciation of the way in which they function.

This chapter will proceed as follows. In the first part the term sunset clause is defined. In the process, the origin of the term sunset clause and related terms – such as duration clause and temporary legislation – will be discussed. It will be seen that there are boundaries to the definition of sunset clauses that can be discerned by considering their legal effect. In addition, it will be shown that the expiration of an act is not identical to repeal of an act, and that the maxim *expressio unius est exclusio alterius* does not always apply. The second part of this chapter analyses the construction of sunset clauses and develops their taxonomy. On the one hand, sunset clauses are categorised based on the scope of their application as ‘entire’ or ‘sectional’, and ‘direct’ or ‘indirect’. On the other hand, they are categorised based on the expiration date as either ‘conditional’ or ‘unconditional’.

A. The Meaning of Sunset Clauses and their Legal Effect

I. Definition

In *The Concept of Law*, Hart discusses the persistence of law and observes that the Witchcraft Act 1735 was a legislative expression of some centuries ago, but was still in use until the middle of the 20th century.² Indeed, while ordinary legislation endures in

² HLA Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, OUP 2012) 64.

force until amended or repealed, the inclusion of a sunset clause defines the duration of a law. Therefore such a law is commonly viewed as temporary. For instance, Parliament passed the Terrorist Asset-Freezing Act 2010, which was limited in duration through a sunset clause in section 1, ending on 31 December 2010,³ and thus in the title the label ‘Temporary Provisions’ was added in parenthesis.⁴

Sunset clauses are statutory provisions providing that a particular law will expire automatically on a particular date unless it is re-authorised by the legislature.⁵ As will be shown in Chapter II, such clauses have been used for a very long time. Despite this, the term ‘sunset clause’ is a relatively recent term in legal scholarship, established in the United States after the Watergate scandal. The term was first proposed by the ‘Common Cause’, which is a non-party organisation founded in 1970 with the aim of promoting accountability in the political system.

At that time the use of a sunset clause was expected to create an incentive for the periodic and comprehensive executive and legislative evaluation of agencies.⁶ It is noteworthy that the term ‘sunset’ was used, as opposed to the term ‘sunshine’ law.⁷ According to the latter, the regulatory authorities are required to make available to the public material pertaining to meetings, decisions and records.⁸ Further, in contrast with the

³ Terrorist Asset-Freezing (Temporary Provisions) Act 2010, s 1.

⁴ Ibid s 3.

⁵ Black’s Law Dictionary defines a sunset law as follows: ‘A statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed’. *Black’s Law Dictionary* (Bryan A Garner ed, 8th edn, Thomson West 2004) [sunset law].

⁶ Bruce Adams, ‘Sunset: A Proposal for Accountable Government’ (1976) 28 *Administrative Law Review* 511, 514.

⁷ Ibid.

⁸ Black’s Law Dictionary defines ‘sunshine law’ as follows: ‘a statute requiring a governmental department or agency to open its meetings or its records to public access - also termed open meetings law, public meeting law, open door law’. *Black’s Law Dictionary* (Bryan A Garner ed, 8th edn, Thomson West 2004) [sunshine law].

contemporary definition of the term ‘sunset clause’, during the 19th century the term ‘sunset clause’ was used in debtor poor law and referred to the provision authorising obedience after the expiration of the writ commanding arrest.⁹

Nowadays, the term sunset clause connotes a clause limiting the duration of an act. Within the literature such a clause is also described as a time-limitation clause¹⁰ or duration clause,¹¹ or a temporary provision.¹² However, these terms are not synonymous with the term sunset clause; whilst there is some overlap between them, they are not identical or coterminous.¹³ In relation to a duration clause, it suffices to mention that not all such clauses prescribe an automatic termination date. For instance, the Constitution of Clarendon included a duration clause which prescribed that

‘There are, moreover, many other and great customs and dignities of the holy mother church, and of the lord king, and of the barons of the kingdom, which are not contained in this writ. And may they be preserved to the holy church, and to the lord king, and to his heirs, and to the barons of the kingdom, and may they be inviolably observed for ever’.¹⁴

Similarly, there is an overlap between temporary provisions and sunset clauses. In principle, the inclusion of a sunset clause in an Act signals its temporal character. Consequently, the correlation between temporary legislation and sunset clauses is not accurate, as temporary legislation does not always contain a sunset clause. This is exemplified by the Indemnity Acts, which are undoubtedly a subset of temporary legislation, but have a retrospective character.

⁹ See Charles E Grinnell, *Poor Debtor Law of Massachusetts* (Little Brown and Company 1883) 207.

¹⁰ David Dean, *Law – Making and Society in Late Elizabethan England* (CUP 1996) 259.

¹¹ Sir Courtenay Ilbert, *Legislative Methods and Forms* (Clarendon Press 1901) 279.

¹² For instance, see Prevention of Terrorism (Temporary Provisions) Act 1989.

¹³ Further ambiguity is caused by the combination of sunset clauses with other types of clauses such as review clauses and Henry VIII clauses. The analysis of this ambiguity is part of Chrs IV and VI.

¹⁴ Constitutions of Clarendon in Ernest F Henderson (ed), *Select Historical Documents of the Middle Ages* (University Press of the Pacific 2004) 16.

The most significant example of the use of Indemnity Acts indemnified dissenters who were holding offices, violating the Test¹⁵ and Corporation Acts.¹⁶ According to the Test and Corporation Acts all civil, military and corporation officers were supposed to take the Sacrament of the Church of England, and due to that requirement, dissenters were excluded from offices. Thus in 1728 Sir Robert Walpole introduced the policy of the Annual Indemnity Acts,¹⁷ which were renewed for more than a century, until 1828 when finally the Test and Corporation Acts were repealed. An Indemnity Act provided that ‘Members of Corporations who have neglected to take the Oath of Office, qualifying themselves by January 1731, indemnified’.¹⁸

II. Legal Effect

In the previous part the definition of the term sunset clause was set out. In this part, the legal purpose and policy of such clauses, and the exceptions thereto, are addressed. It will be seen that sunset clauses have two major legal effects. First, unless re-authorised by the legislature, a sunset clause brings about the expiration of a law on a prescribed date. Expiration, as brought about by a sunset clause, is different from repeal. Secondly, if a clause prescribes that a statute should expire from a certain date, then it is reasonable to assume that it is not valid unless re-enacted. Nevertheless, it will be shown that in practice there are exceptions in each instance.

¹⁵ 25 Car II c 2.

¹⁶ 13 Car II st 2 c 1.

¹⁷ Indemnity Act 1727 (1 Geo II c 23).

¹⁸ Indemnity Act 1730 (4 Geo II c 6).

To begin with, note that the expiration, or ‘sunset’, of an act has the same consequences as if it were repealed.¹⁹ However, as Broom remarks, there is a difference between statutes which expire and statutes which are repealed since ‘although the latter become as if they had never existed (except so far as they relate to transactions already completed under them), yet, with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction’.²⁰

To illustrate Broom’s remark, it is worth mentioning an early case reported by Sir Thomas Raymond.²¹ In 1661, the Deputy Governor of Jamaica enacted laws to tax liquor. In 1663, with the appointment of the new Deputy Governor, the King granted him the power to enact laws for a period of two years. Accordingly, the new Deputy Governor passed laws taxing liquor for a two-year period. Upon the expiration of this law, the question arose as to whether the former law of 1661 was to be revived. The Privy Council held that the expiration of an act revives the previous regulation, while repeal does not.²²

Turning to the second major legal effect, as set out above, the latin maxim on legal interpretation, *expressio unius est exclusio alterius* (expression of one is the exclusion of the other), applies to sunset clauses. This canon of construction, which is also expressed as *expressum facit cessare tacitum*, means broadly that mentioning one thing may exclude another thing.²³ Hence, the determination that on a certain date the law will expire means that from that date onwards, the law is not valid unless it is re-enacted. However, as will be shown below, this is not always the case.

¹⁹ Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (4th edn, Sweet & Maxwell 1905) 623.

²⁰ Herbert Broom, *Legal Maxims* (T & JW Johnson Law Booksellers 1845) 38.

²¹ 83 ER 207 (1660) Raym 397.

²² As if ‘an Act of repeal is repealed, the first Act repealed is revived’. See 83 ER 207 (1660) Raym 397.

²³ See FAR Bennion, *Bennion on Statutory Interpretation* (5th edn, Lexis Nexis 2008) 1250.

The application of this maxim is not undisputed. Indeed it has received robust criticism from several scholars. For example, Posner states that this canon makes sense under the hypothesis of a ‘legislative omniscience’, implying that all omissions are deliberate.²⁴ Radin, on the other hand, reverses the principle, stating that ‘the question will accordingly be in every case, not whether on the expression of one thing excludes everything else, but whether we are to deny or affirm this rule in this particular case’.²⁵ In similar vein, Sunstein suggests that the maxim should not be used mechanically.²⁶

Furthermore, the application of the maxim by the courts is not always coherent. A series of cases, although recognising the canon of interpretation, reject its application.²⁷ The House of Lords in an early case ruled that ‘there is certainly an axiom of law (...). But that is not of universal application. It depends upon the intention of the parties’.²⁸ In another case the High Court, citing Maxwell on the *Interpretation of Statutes*, found reasonable, proper and applicable in the particular case the statement that:

‘Provisions sometimes found in statutes enacting imperfectly or for particular cases only that (...) have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim, “expressio unius est exclusio alterius.” But that maxim is inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (...) is that the Legislature was either ignorant or unmindful of the real state of the law or that it acted under the influence of excessive caution’.²⁹

²⁴ Richard A Posner, ‘Statutory Interpretation - in the Classroom and in the Courtroom’ (1983) 50 University of Chicago Law Review 800, 813.

²⁵ Max Radin, ‘Statutory Interpretation’ (1929-1930) 43 Harvard Law Review 863, 874.

²⁶ Cass R Sunstein, ‘Interpreting Statutes in the Regulatory State’ (1989) 103 Harvard Law Review 405, 455.

²⁷ *Canadian National Rylys v Canadian SS Lines Ltd* [1945] AC 204 (PC); *Wiseman and another Appellants and Borneman and others Respondents* [1971] AC 297 (HL).

²⁸ *Saunders v Evans* (1861) 8 HLC 719, 729 (HL).

²⁹ *The State (at the Prosecution of The Minister for Lands and Fisheries) v His Honor Judge Sealy* [1939] 1 IR 21, 32 (HC).

Moreover, in *United States v Vonn* the US Supreme Court held that ‘the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives’.³⁰

Beyond this general critique of the maxim, its application in relation to sunset clauses is not always coherent. A characteristic case, from which useful conclusions regarding the construction of sunset clauses can be reached, is *Barnhart, Commissioner of Social Security v Peabody Coal Co.*,³¹ which questions the consequences of the expiration of a time limitation.

Under the Coal Industry Retiree Health Benefit Act 1992, the Commissioner of Social Security ‘shall, before October 1, 1993,’ assign each coal industry retiree eligible for benefits to an extant operating company responsible for funding the beneficiary’s benefits. After 1 October 1993, despite the expiration of the sunset clause, the Commissioner assigned beneficiaries to various operating companies. The operating companies challenged the assignments made to them after the 1 October 1993. The question for the Court was whether the statutory date sets a time limit on the Commissioner's power to assign such beneficiaries to various operating companies and therefore whether a beneficiary not assigned on 1 October 1993 must be left unassigned.

Surprisingly, the Court held that the Commissioner's initial assignments made after 1 October 1993 were valid despite not being made in time. The majority reasoned that a statute directing official action needed more than a mandatory ‘shall’ before the grant of power would be read to expire when the job was supposed to be completed, as the sunset

³⁰ (2002) 535 US 55, 65 (US SC).

³¹ *Barnhart, Commissioner of Social Security v Peabody Coal co. et al* (2003) 537 US 149 (US SC).

clause meant ‘to spur the Secretary to action, not to limit the scope of his authority’.³² Moreover, Justice Souter, giving judgment as part of the majority, stated that ‘if Congress had meant to set a counterintuitive limit on authority to act, it would have said more than it did’.³³

However, Justice Scalia, in his dissenting opinion, characterised the majority’s decision as a disposition upon the Commissioner of Social Security of ‘an unexpiring power to assign retired coal miners to signatory operators’.³⁴ Commenting on the construction given to the sunset clause, Justice Scalia stated that ‘this makes no sense. When a power is conferred for a limited time, the automatic consequence of the expiration of that is the expiration of the power’.³⁵

Justice Souter circumvented the criticism of Justice Scalia and denied the application of the maxim, holding that ‘no one could disagree with Justice Scalia that ‘when a power is conferred for a limited time, the automatic consequence of the expiration of that time is the expiration of the power (...) but his assumption that the Commissioner’s power to assign retirees was “conferred for a limited time” assumes away the very question to be decided’.³⁶

Having presented the facts and the dicta of this case, it is apparent that the maxim was not applied. *Expressio unius est exclusio alterius* is a linguistic canon, meaning that

³² Ibid, 158.

³³ Ibid 163.

³⁴ Ibid 172.

³⁵ Ibid 174.

³⁶ Ibid 159 (fn 6).

provisions shall be interpreted in accordance with the rules of grammar.³⁷ However, the linguistic canons of constructions are not the exclusive interpretive devices to define the meaning of statutes. Judges use various tools and methods, such as legislative history, legislative intent or several constitutional principles.³⁸

In principle, therefore, if a clause states that a statute should expire from a certain date, it is reasonable to assume that it is not valid unless it is re-enacted. However, this is not a rule without exceptions. In practice, various factors such as the wording of the provision and its vagueness or the legislative intent can influence and ultimately determine the construction of a sunset clause and the expiration of an act.

In the preceding analysis the origin and definition of the term sunset clause were set out. It was seen that sunset clauses are neither synonymous nor coterminous with duration clauses and temporary provisions. It was also seen that the expiration of an act due to a sunset clause is automatic and instantaneous, without the need for further action, and that expiration of the law is not equivalent to repeal. The expiration of a law, moreover, does not depend exclusively on its wording; rather, other interpretive devices, such as legislative intent, are also taken into account.

B. Typology of Sunset Clauses

Identification of the major classifications of sunset clauses is a precondition for understanding their role and the variety of options such clauses provide to the legislature.

³⁷ Gross defines linguistic canons as the ‘rules for interpreting statutory text that are akin to rules of grammar’, as opposed to the term substantive canons, which are rules that ‘create presumptions about the substantive meaning of statutes’: see Frank B Gross, *The Theory and Practice of Statutory Interpretation* (Stanford University Press 2009) 85.

³⁸ *Ibid.*

Whilst the sunset clause occasionally took on standardised form for short periods, or was part of a specific type of legislation, as will be seen in the historical sections,³⁹ the reality is nonetheless that throughout legislative history, sunset clauses have not had a settled form or a certain place assigned to the operative words and they were used in several types of legislation.⁴⁰ Formally speaking, the construction of sunset clauses varies as there is no specific pattern.

However, systematic research on sunset clauses allows us to identify a variety of sunset clauses, such as: the ‘entire’ sunset clause compared to the ‘sectional’; the ‘conditional’ compared to the ‘unconditional’; the ‘direct’ compared to the ‘indirect’. This typology depends on the construction of the clauses, which produces different results.⁴¹

I. Entire and Sectional Sunset Clause

Until recently, the drafting of a sunset clause was Parliament’s concern. With a series of Standing Orders regulating the way Members of Parliament conduct public business, Parliament prescribed that ‘the precise duration of every temporary law or enactment shall be expressed in a distinct clause or subsection of the bill’.⁴² Hence, the first categorisation of sunset clause, between entire and sectional, is evident from this standing order, which makes a distinction between law and enactment. Entire classifies the sunset clause by reference to the act as a whole, providing the expiration of all sections at the same time;⁴³

³⁹ See Chrs II, III .

⁴⁰ Committee upon Temporary Laws, Expired or Expiring, *Report* (HC 13 May 1796) 322.

⁴¹ Finn remarks that there are several kinds of sunset clauses but his analysis is limited to some examples. See John E Finn, ‘Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation’ (2010) 48 *Columbia Journal of Transnational Law* 442, 445.

⁴² Standing Orders of the House of Commons, *Public Business* (2012 HC 614).

⁴³ See for instance The Accommodation Agencies Act 1953, s (2)(4) ‘This Act shall cease to have effect on the thirty-first day of December, nineteen hundred and fifty-seven’.

by way of contrast, sectional classifies those sunset clauses which prescribe the expiration of one or some sections only.⁴⁴

As a result this typology is related to the construction of the clause, especially concerning its scope. A sunset clause may have a more complex construction prescribing different expiration dates for different sections, such as section 15 of the Road Traffic Act which provides that ‘subject to subsections (2), (3) and (5) below, an order under section 14 of this Act shall not continue in force — (a) if it is in respect of a footpath, bridleway, cycle track or byway open to all traffic, for more than six months; and (b) in any other case, for more than eighteen months, from the date on which it comes into force’.⁴⁵

II. Direct and Indirect

The second classification of the sunset clause is likewise based on the scope of the provision. A sunset clause is direct when it prescribes the termination of the whole or part of the act which is embodied, while an indirect sunset clause refers to a different act. By way of illustration, a direct sunset clause would provide that ‘the duration of the act is three years’. Conversely, an indirect sunset clause is one which provides, for example, that ‘If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act—(a)in the case of the derogation referred to in section 14(1)(a), at the end of the period of five years beginning with the date on which section 1(2) came into force;(b)in the case of any other derogation, at the end of the period of five years beginning with the date on which the order designating it was made’.⁴⁶

⁴⁴ Police (Northern Ireland) Act 2000, s 47 (2).

⁴⁵ Road Traffic (Temporary Restrictions) Act 1991, s (15) (1). During the reign of George I, a statute containing two sunset clauses sunsetting two different parts of the legislation in different times was recorded for the first time. See 1 Geo I st 2 c 10.

⁴⁶ Human Rights Act 1998, s 16 (1).

Indirect sunset clauses are not commonly used in the UK and the aforementioned example was enacted in 1997. Another paradigm indirect sunset clause is recorded during the Interregnum. The Act stated that ‘no Bill of Tonnage and Poundage shall hereafter pass in Parliament, but such as shall relate and be in Force to compel all Merchants to pay for all Goods and Merchandizes exported or imported from the said First Day of July, 1642, on which Day the former Bill of Tonnage and Poundage expired’.⁴⁷

While a plethora of direct sunset clauses are recorded in the statute books, indirect sunset clauses are mainly recorded in constitutional documents. Therefore, the common utility of indirect sunset clauses is recorded in constitutional orders with codified constitutions and a hierarchy of norms.⁴⁸

III. Conditional and Unconditional

The final classification of sunset clauses is related to the expiration date, which might be based upon a condition. A sunset clause is unconditional when the expiration date is certain, and does not depend upon any condition. For instance, the expiration date in the sunset clause is unconditional in section 27 of the Prevention of Terrorism Act 1989, which provides that ‘the provisions of Parts I to V of this Act and of subsection (6)(c) below shall remain in force until 22nd March 1990 and shall then expire’.⁴⁹ Thus, the expiration date is definite when it is unconditional and, as a result, known in advance.

On the other hand, a sunset clause is conditional when the automatic expiration of the law depends upon a condition such as the end of a war or emergency. For instance, section 2 of the Local Government Act 1916 provides that ‘this Act, except the provisions

⁴⁷ See CH Firth, RS Rait (eds) *Acts and Ordinances of the Interregnum 1642-1660* (HMSO 1911) 16 [August 1642: The Ordinance of Parliament, concerning the Subsidy of Tonnage and Poundage].

⁴⁸ For further examples of indirect sunset clauses in constitutional documents see Ch IV.

⁴⁹ Prevention of Terrorism Act (Temporary Provisions) Act 1989.

of sections two, three, sixteen, seventeen, eighteen and paragraph (4) of section twenty three thereof, shall have effect only during the continuance, of the present war (...)' .⁵⁰ This form can have more complicated structures, as exemplified by the Increase of Rent and Mortgage Interest Act 1915, section 5(2), which provides that 'this Act shall continue in force during the continuance of the present War and for a period of six months thereafter and no longer (...)' .⁵¹ Thus, the expiration date is indefinite when it is based upon a condition.

The distinction between unconditional and conditional sunset clauses becomes more complicated where commencement of an act containing a sunset clause depends upon a condition and is therefore uncertain. As a result, the legislator chooses to define the expiration date implicitly in combination with the commencement of the Act. For instance, section 8 of the Imprisonment (Temporary Provisions) Act 1980 provides that 'the provisions of Part I of this Act shall remain in force until the expiry of the period of one month beginning with the date on which this Act is passed (...)' .⁵² Thus the expiration date is not fixed explicitly, but is instead dependent upon the activation date.

The reason why the legislation might contain either a conditional or an unconditional expiration date depends on the nature of the regulation and its surrounding circumstances. As we shall see in the historical chapters,⁵³ the early application of sunset clauses was marked by expiration dates that were mainly conditional, such as 'to endure until next parliament', but it will be shown that, with the growth of the rule of law, over time expiration dates have become more definite, and unconditional.⁵⁴ This development

⁵⁰ Local Government (Emergency Provisions) Act 1916, s (24) (2).

⁵¹ Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, s (5) (2).

⁵² Imprisonment (Temporary Provisions) Act 1980, s (8) (1).

⁵³ See Chrs II, III.

⁵⁴ See Ch VI.

may have been motivated by practical concerns, but was also in accordance with the principle of legal certainty and the growth of the rule of law, since those affected could be sure as to the expiration date of the act.⁵⁵

It is readily apparent that a conditional sunset clause in an act engenders concerns regarding its interpretation. Thus when vague expressions such as the end of the war or the end of a particular emergency were used, the identification of the exact expiry date could be difficult. In addition, it was critical to specify the role of the judge in relation to issues of fact, and this had implications from a separation of powers perspective.⁵⁶ Conditional sunset clauses are not very common at the present time, but cases concerning the expiration of emergency situations nonetheless provide useful insights.

For example, a case regarding the expiration of an emergency was brought before the Privy Council acting as the Highest Court in Malaysia.⁵⁷ On May 15, 1969, when Parliament was not sitting, the Yang di-Pertuan Agong (hereinafter ‘the ruler’) proclaimed a state of emergency according to Article 150(2) of the Constitution.⁵⁸ At the same time and according to his constitutional emergency powers, the ruler issued the Emergency Ordinance, according to which he had the power to issue a series of security regulations.⁵⁹ Subsequently, in 1975, even though the Parliament had been summoned four years earlier

⁵⁵ Ibid.

⁵⁶ See Ch V.

⁵⁷ According to the Constitution of Malaysia (1957) art 131.

⁵⁸ Constitution of Malaysia (1957) art 150(2): ‘if a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required’.

⁵⁹ Emergency (Essential Powers) Ordinance 1969, (Malaysia).

on 20 February 1971, the ruler issued the Essential Regulations, according to section (2) of which security offences were to be tried without a jury.⁶⁰

The question before the Privy Council was whether the Essential Regulations 1975 were valid.⁶¹ The Appellant argued that the emergency had lapsed by 1975, thus the ruler did not have the power to issue the Essential Security Regulations and explicitly pointed out that ‘the test for lapse is whether the circumstances prevailing at the time the emergency was proclaimed were still subsisting at the time the regulations were made: that can be ascertained by comparing the factual situation with the facts set out in the recital to the proclamation’.⁶²

The Privy Council held that even if Emergency Ordinance, section (2), delegated to the ruler wide powers to make any laws in the future without an express expiry date, the Essential Regulations 1975 were ultra vires, as his power lapsed on 1971 when the Parliament sat.⁶³ The ruling of the Privy Council was therefore mainly based on procedural grounds.

A series of US Supreme Court cases decided in the aftermath of World War I are especially significant. In October 1919 Congress passed the Rent Law,⁶⁴ regulating rent control in the District of Columbia and having a limited duration of two years. The constitutionality of this statute was challenged on due process grounds and the US Supreme Court upheld the statute. Justice Holmes, who delivered the ruling of the court, explicitly held that

⁶⁰ Essential (Security cases) (Amendment) Regulations 1975, (Malaysia).

⁶¹ *Teh Cheng Poh v Public Prosecutor* [1980] AC 458, 464 G (PC).

⁶² *Ibid* A.

⁶³ *Ibid* D.

⁶⁴ 41 Stat 80.

‘No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect. In this instance, Congress stated a publicly, notorious and almost worldwide fact’.⁶⁵

In 1921, Congress renewed the preceding Act before its expiration with a one-year sunset clause⁶⁶ and this Act was continued with a subsequent Act until 22 May 1924.⁶⁷ It thus appears that this Act, originally purported to expire in 1921, had been extended by successive Acts until the middle of 1924, a period of more than four years. Another case was brought before the US Supreme Court, and the legal action was based on several grounds, the most important being that the emergency justifying interference with private rights had come to an end in 1922.⁶⁸

Once again, Justice Holmes delivered the opinion. This time, however, the Court’s approach was different. Justice Holmes settled the jurisdiction of the court, stating that ‘a Court is not at liberty to shut its eyes to an obvious mistake when the validity of the law depends upon the truth of what is declared’, and in addition that ‘a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed’.⁶⁹ As a consequence the US Supreme Court on 21 April 1924 remanded the case to the lower court as ‘obviously the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here’,⁷⁰ and thus the door to invalidate the Act was left ajar.

⁶⁵ *Block v Hirsh* (1921) 256 US 135, 154 (US SC).

⁶⁶ 42 stat 200.

⁶⁷ 42 stat 543.

⁶⁸ *Chastleton Corp v Sinclair* (1924) 264 US 543 (US SC).

⁶⁹ *Ibid* 547.

⁷⁰ *Ibid* 549.

Regardless of the fact that on 17 May 1924 Congress pointed to the continuance of the Rent Law until 22 May 1925,⁷¹ on 3 November 1924 the Court of Appeal invalidated the Act, holding that ‘It of course is unnecessary for us to attempt to add to the reasoning of the Supreme Court, but we may say with propriety that, if the emergency in question is not at an end, then this legislation may be extended indefinitely, and that which was ‘intended to meet a temporary emergency’ may become permanent law’.⁷²

Thus in 1924 the US Supreme Court laid down a more precise framework concerning the nature of the emergency expiry date and the degree of the courts’ intervention. The US Supreme Court treated the expiry date and the state of emergency as questions of fact, and as soon as the case was brought before its jurisdiction it questioned whether ‘the conditions that justified the measures are, in fact, present’.⁷³ Considering Justice Holmes’s dicta, Vermeule characterised the invalidation of legislation with sunset clauses before the expiry date as ‘ex post sunseting’, in contrast to the ‘ex ante sunseting’ of legislation, which occurs when legislation sunsets due to the lapse of time.⁷⁴

The UK Supreme Court had, until recently, addressed the expiration of an act only in relation to a Henry VIII clause.⁷⁵ However, in the recent case of *A v Secretary of State*

⁷¹ 43 stat 120.

⁷² *Peck v Fink* (1924) 2 F.2d 912, 913 (DC Cir).

⁷³ Adrian Vermeule, ‘Holmes on Emergencies’ (2008) 61 *Stanford Law Review* 163, 192.

⁷⁴ *Ibid* 189.

⁷⁵ A case was brought before the Court of Appeal in 1995 concerning emergency legislation passed at the wake of the Second World War, namely the Import, Export and Customs Powers (Defence) Act 1939 s (9) (3). This delegated the power to the government to issue regulations making it a criminal offence to export particular goods to particular countries. It provided that ‘this Act shall continue in force until such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end, and shall then expire except as respects things previously done or omitted to be done’ Nevertheless, no Order in Council was ever made in regard to this Act declaring its expiration and subsequently the government issued the Export of Goods (Control) Order 1987 and the Export of Goods (Control) Order 1989 prohibiting the export of several goods with several countries including among others Iraq. In essence, the argument for the appellants was that, however broad or loose a construction is to be given to ‘the emergency’, it cannot rationally be said to have continued up to 1987, and therefore, they claimed, the purported making of the aforementioned orders was an abuse of the powers given by the Act of 1939. The Court dismissed the arguments of the appellants even though it was common

for the Home Department,⁷⁶ the Act concerning the indefinite detention without trial of foreign persons suspected of terrorism offences contained a sunset clause. The appellants claimed that there was no ‘public emergency threatening the life of the nation’ which excused the adoption of the emergency measures.⁷⁷ Lord Bingham, while addressing that claim, stated the position as follows:

‘Assuming, as one must, that there is a public emergency threatening the life of the nation, measures which derogate from article 5 are permissible only to the extent strictly required by the exigencies of the situation, and it is for the derogating state to prove that that is so. The reasons given by SIAC do not warrant its conclusion (...). The European Court does not approach questions of proportionality as questions of pure fact: see, for example, *Smith and Grady v United Kingdom*, above. Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review. So would excessive deference, in a field involving indefinite detention without charge or trial, to ministerial decision. In my opinion, SIAC erred in law and the Court of Appeal erred in failing to correct its error’.⁷⁸

Hence the majority decision took into consideration the extent of the emergency and the proportionality test was applied. Its approach to the issue was, however, predicated on the issue being a question of law, not merely a question of fact.

Conclusions

This first chapter has addressed the meaning and typology of sunset clauses. It is interesting that although the term sunset clause is dominant in contemporary literature, research reveals that the term was coined only in the late 20th century. Furthermore,

ground that the emergency which was the occasion of the enactment was the imminence of the Second World War, with the main counterargument being that Parliament had the opportunity to repeal that Act during all those years but instead chose not to do so: see *R v Blackledge & others* (1996) 1 Cr App R 326.

⁷⁶ See *A v Secretary of State for the Home Department* [2004] UKHL 56.

⁷⁷ *Ibid* [16].

⁷⁸ *Ibid* [44].

although a variety of terms are used in order to describe the automatic expiration of laws, not all of them are synonymous or coterminous. Indeed it has been shown that the terms temporary provision and duration clause are not identical to the term sunset clause, as they have broader application.

The discussion and analysis of the definition of the term sunset clause concluded with an examination of the legal effects of expiration of the relevant period. It is noteworthy that the effect of expiration is not absolutely identical to the repeal of an act. These marginal differences make the sunset clause a distinctive tool in the legislative drafting process. Furthermore, it was shown that although the reasonable expectation is that an act will sunset after a certain period, in practice the construction of a clause, and therefore the expiration of an act, depends on various factors which influence its interpretation.

Finally, the variety of sunset clauses and their uses allows us to consider their theoretical framework. Three principal categorisations can be derived from the preceding analysis of sunset clauses. The typology, which is based on the construction of the clause, is the 'entire' sunset clause compared to the 'sectional', the 'direct' sunset clause and the 'indirect', and the 'conditional' sunset clause compared to the 'unconditional'.

The two major variables are the scope of the clause and the expiration date. Although the above categories are clearly defined, they are not mutually exclusive. For instance, a sectional sunset clause can be conditional or indirect at the same time and similarly a direct sunset clause can be entire or unconditional. This is so notwithstanding that the latter variable, and especially the expiration date upon a condition, raise several interpretive issues. The typology of sunset clauses highlights that they are a flexible legislative mechanism that can fulfil a variety of legislative purposes.

Having considered the meaning and the typology of sunset clauses, the discussion now shifts to the historic evaluation of sunset clauses. The principal focus of the historical

chapters is how sunset clauses were shaped. However, the first historical chapter considers who was initially responsible for the addition of such clauses to legislation and how this developed thereafter.

CHAPTER II: HISTORICAL OVERVIEW OF SUNSET CLAUSES; THE BALANCE OF POWER BETWEEN KING, LORDS AND COMMONS

By the virtue of the [legislature] the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted

Montesquieu, The Spirit of Laws, Book 11, 6

Introduction

In the previous chapter the legal effects and typology of sunset clauses were explored. The historical use of such clauses will now be evaluated, this being necessary to understand the implications of such clauses for the separation of powers and the rule of law. Legal history provides numerous paradigms of sunset clauses.

This chapter is the first of the historical chapters and it tracks the initial use of sunset clauses during parliamentary proceedings, with the objective of determining why such clauses were used in public legislation.

The main argument of this chapter is that the sunset clause was indicative of legislative power. Without a clear understanding of who gains and who loses from the use of sunset clauses, it is difficult to fully understand the balance of powers. It will be seen that in the late medieval period, there was a royal prerogative to amend legislation through the addition of sunset clauses. From the reign of Edward III till the outbreak of the Civil War, it will be seen that as the legislative process evolved and matured, the use of sunset clauses became increasingly an expression of legislative power. Thus by the end of the Tudor era the sunset clause came to be a useful bargaining tool for the House of Commons and the House of Lords respectively, during their negotiations while during the reign of the first two Stuarts, which was a period fraught with tension between the Crown and

Commons, it will be seen that sunset clauses influenced the balance of powers between the King, the House of Commons and the House of Lords.

Although the sources of the late medieval period are limited, based mainly on the *rotuli parliamentorum* (rolls of the parliament),¹ on the statutes themselves, on several calendars such as the Patent Rolls, and on several reports such as the Report from the Committee upon Temporary Laws, the findings in relation to sunset clauses are, nonetheless, both surprising and illuminating. The use of sunset clauses has proven to be a long-standing practice in English legislative history. In the Law Report concerning Public General Acts, numerous acts entitled ‘expiring laws continuance acts’ are recorded. In fact, the first Expiring Laws Continuance Act, which was a new method of monitoring expiring laws, dates from 1536,² and in 1796 a report on expired and expiring temporary laws was drafted, providing us with a full record of temporary legislation.³

The chapter proceeds as follows. Part A briefly explores the origin of sunset clauses during Classical Antiquity and particularly in Roman jurisprudence. The central focus is however on the utility and the establishment of sunset clauses during the parliamentary sessions of the late medieval period, with discussion also of their utility under the Royal prerogative. Part B reviews the further development of sunset clauses in legislation and shows their potential constitutional value as a mechanism to reach consensus. It identifies the first sunset clause proposed by the Commons and analyses how such clauses were used equally by the King, Lords and Commons. Part C finally focuses

¹ The rolls of the parliament, known as statute rolls, were kept from the reign of Edward I, and they were summary accounts of the legislative process, drawn up by the clerk. See Howard L Gray, *The Influence of the Commons on Early Legislation* (Harvard University Press 1932) 15. Nonetheless, the rolls on the mid-fifteenth century did not contain a full account of parliamentary business; rather the account was selective. See PR Cavill, ‘Debate and Dissent in Henry VII’s Parliaments’ (2006) 25 *Parliamentary History* 160, 161.

² GR Elton, *Reform and Renewal, Thomas Cromwell and the Common Weal* (CUP 1973) 163.

³ Committee upon Temporary Laws, Expired or Expiring, *Report* (HC 13 May 1796).

on the early Stuart period during which the use of sunset clauses exacerbated the tension between the King and the Commons.

A. Early Use of Sunset Clauses

I. Founding Era

Most discussions of sunset legislation treat this legal concept as a relatively rare and modern innovation in lawmaking, and academics from the United States focus on federalist papers and the founding of the US Constitution.⁴ Plutarch, the Greek historian and biographer, in his *Bioi Parallèloi* (Parallel Lives), describes the life of the Athenian lawmaker Solon and he states that ‘all his laws were to have force for a hundred years and they were written on axones or wooden tablets, which revolved with the oblong frames containing them’.⁵ According to Plutarch’s description, when Solon drafted the Constitution of Athens he urged the Athenians to preserve it for a certain period of time. This description implies the existence of a sunset clause providing that the ‘Solonian Constitution’ would expire after a hundred years.

Taking into consideration the fact that Athens suffered from political instability, it is more plausible that Solon’s intent was not to set a time limit, but to urge the Athenians to preserve the new set of laws for an eternity. Alongside with this historical remark, in practice it is argued that a sunset clause with relatively long force period might not be differentiated from a permanent law as their effects are similar.⁶

⁴ Jacob E Gersen, ‘Temporary Legislation’ (2007) 74 Chicago Law Review 247, 249.

⁵ Bernadotte Perrin (trs), *Plutarch’s Lives I* (Harvard University Press 1967) 473.

⁶ Jacob E Gersen, ‘Temporary Legislation’ (2007) 74 Chicago Law Review 247, 263 (fn 68).

The Roman Period marks the genesis of sunset clauses.⁷ In general, the temporary character of laws was a legal concept already known from the Hellenistic period of Roman jurisprudence. Schulz, citing Cicero, mentions that the most characteristic product of the jurisprudence of that period was the ‘edict’, which was a *lex annua*.⁸ The temporal character of ‘edict’ was compatible with the tendency of the jurist to prevent the law from being petrified and stabilised.⁹ Furthermore, the magistrates, who were annually elected officials exercising executive power,¹⁰ published the *edicta magistratuum* on wooden boards which were destroyed at the end of their term of office.¹¹

During the Classical period, the Roman Empire was governed on the basis of a decentralised administrative model, consisting of individual enactments applicable to each locality.¹² The ‘mandata’, which was one of the main sources of law of that period, were imperial instructions addressed to provincial governors regulating administrative and judicial matters and their main characteristic was that they were limited in time and extent for as long as the emperor or their recipient remained in office.¹³ Although they had temporal force originally, later on it became common practice that the next emperor would renew them.¹⁴

⁷ For the emergency regime in the Roman period, see Clinton Rossiter, *Constitutional Dictatorship, Crisis Government in the Modern Democracies* (Princeton University Press) 15.

⁸ Fritz Schulz, *History of Roman Legal Science* (Clarendon Press 1953) 61.

⁹ Ibid 286.

¹⁰ G Mousourakis, *The Historical and Institutional Context of Roman Law* (Ashgate Publishing 2003) 286.

¹¹ Fritz Schulz, *History of Roman Legal Science* (Clarendon Press 1953) 88.

¹² Ibid 139.

¹³ G Mousourakis, *The Historical and Institutional Context of Roman Law* (Ashgate Publishing 2003) 286.

¹⁴ Ibid 286.

Moreover, the roots of sunset clause are also evident in Roman emergency legislation. As Rousseau points out in his fourth book on ‘Social Contract’, entitled ‘On the Dictatorship’, when the Roman Empire was under a state of emergency and the laws were insufficient to guard the order against it, one of the two Consuls was appointed as Dictator for a short term of six months.¹⁵ However, it is not clear whether there was a fixed term of six months. Lintott, citing Livy and Cicero, stresses that the dictatorship was conceived in principle as a brief term in office. Dictators abdicated as soon as they could, although Lintott notes that there was some evidence of the six month term.¹⁶

Furthermore, after the 3rd century BC and when the dictatorship fell into disuse, in times of emergency, the Senate had the power to issue a decree, the *Senatus consultum ultimum*, (*Final decree of the Senate*), to restore the order.¹⁷ According to this decree, the state of emergency was declared (*tumultus* in latin or *ταραχή* in greek), the consuls were urged to defend the polity and finally several institutions, such as the senate and the judiciary (*iustitium* in latin or in greek *αργία*), were suspended temporarily.¹⁸ In light of the *iustitium*, Cicero has famously observed that *Silent enim leges inter arma* (in times of war, the law falls silent);¹⁹ nevertheless, it is debatable whether the *iustitium* had any set time limit.²⁰

¹⁵ Rousseau, *The Social Contract and other Later Political Writings* (Victor Gourevitch, CUP 1997) 140.

¹⁶ Andrew Lintott, *The Constitution of the Roman Republic* (Clarendon Press 1999) 110.

¹⁷ C Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate* (CUP 1960) 55.

¹⁸ Gregory Kung Golden, *Emergency Measures: Crisis and Response in the Roman Republic* (ProQuest 2011) 89; cf Kevin Attell (tr) Giorgio Agamben, *State of Exception* (University of Chicago Press 2005) 41.

¹⁹ Cicero Pro Tito Annio Milone 4.11.

²⁰ Paul Lachlan MacKendrick, Emmett Leslie Bennett, *The speeches of Cicero: Context, Law, Rhetoric* (Duckworth 1995) 183.

II. Sunset Clauses under the Royal Prerogative

Late Medieval legislation holds a unique position in legal scholarship. Indeed, during this period the first parliamentary enactments are recorded. These limited sources provoked scholarship which endeavoured to explain the relevant enactment processes.

By contextualising the debate between Coke, Pluncknett and McIlwain on ordinances and statutes, it is apparent that the temporary nature of the laws has already been a concern of scholarship. In particular, divergent opinions were expressed in relation to the distinction between ordinances and statutes, and these opinions were based on the alleged temporary nature of the former.

Coke expressed the view that although every statute is an ordinance, every ordinance is not a statute because they lack the assent of the Commons or the Lords.²¹ On the other hand, McIlwain has explained the difference between ordinances and statutes based on the temporary nature of the former. He explicitly argued that

‘Statutes are enactments “perpetuelment a durer”. It is their permanence that makes them “statutes,” and necessitates somewhat greater formality in their promulgation than is necessary in acts of a character less permanent and therefore less important. Ordinances, on the other hand, are temporary provisions, which are not considered to affect the permanent law unless they are re-enacted “in form of a statute,” as they often were’.²²

However, Pluncknett disagrees with the distinction grown by McIlwain and supports the view that during the first century of parliamentary activity, the term ‘ordinance’ is used interchangeably with the term ‘statute’, as there is no distinction between them and both indicate parliamentary enactments.²³

²¹ Sir Edward Coke, *The First Part of the Institutes of the Laws of England Vol I* (19th edn, J&WT Clarke 1832) 234.

²² Charles Howard McIlwain, ‘Magna Carta and Common Law’ in Henry Elliot Malden (ed), *Magna Carta Commemoration Essays* (Lawbook Exchange 2005) 122, 145.

²³ See Theodore Pluncknett, *Statutes and their interpretation in the First Half of the Fourteenth Century* (Lawbook Exchange 2005) 33. ‘[N]either of these words was as yet a technical term, and neither had any special meaning’.

It will be seen from the analysis which follows that as soon as Commons and Lords obtained their role in legislation, the king favoured the use of sunset clause in order to limit the effect of the laws on his sovereign power; as a result, the temporary character of the laws was not related to the distinction between ordinances and statutes. However, this analysis does not apply to king's revenue, as it is argued that sunset clauses were used with the purpose of controlling the amount of the grant. Finally, in the last part of the analysis, it is shown that as soon as Commons and Lords advanced their role in the legislative process, sunset clauses became a useful bargaining tool in order to create consensus over legislation.

Until recently, the orthodoxy among scholars was that the origin of Parliament can be traced back to the mid of 13th century. Nonetheless there is still some disagreement on the reasons that transformed the court of the King into the Parliament. Pollard²⁴ and Richardson²⁵ focus on the mixture of legal and political tasks, Harriss highlights the frequency of the sessions,²⁶ Pasquet emphasizes on the King's desire for financial support²⁷ and, furthermore, Maitland stresses the role of consent between the King and the

²⁴ Pollard argues that 'so long as parliament had mainly to deal with individual petitions, it remained predominantly a court of law; as soon as common petitions supersede individual petitions, parliament becomes a legislative body'. See AF Pollard, *The Evolution of Parliament* (2nd edn, Longmans Green 1926) 118. Pollard reciting a quotation by Fleta, a pseudonymous author, which states that 'habet enim rex curiam suam in consilio suo in parliamentis suis' (The King has his Court counselling him in his Parliament) argues that in the Medieval parliament the judiciary, the executive and the legislature were exercised by the King in Parliament. Ibid 24.

²⁵ HG Richardson, 'The Origin of Parliament' (1928) 11 *Transaction of the Royal Historical Society* 137, 154ff

²⁶ Harriss argues that it occurred at the 13th century due to the frequency of its sessions, as in a forty-year period there were forty four assemblies. See GL Harriss, *King, Parliament and Public Finance in Medieval England to 1369* (Clarendon Press 1975) 75.

²⁷ D Parquet, *An Essay on the Origins of the House of Commons* (CUP 1925) 177.

body.²⁸ Moreover Maddicott linked the genesis of this institution back to the Germanic assemblies in the 10th century.²⁹

The Lords and Commons however came to have a more active role in legislation through the petition process, even if the extent of the House of Commons' influence in legislation is debated amongst academics.³⁰ As will be seen, the early use of sunset clauses was associated with amendments made at the King's behest, which reveals the King's unwillingness to allow his royal prerogative to be undermined by permanent legislation. The first use of sunset clauses is dated from the period of Edward III.

The first sunset clause is recorded in 1368.³¹ A petition made in the name of the 'mayor, aldermen and commons of the city of London and all other cities and boroughs of England' was suggested in the Parliament and the King accepted the petition, at least for a certain period of time, stating that:

'It is agreed that those of London and no other shall sell victuals (and nothing else) at retail only, and this of the king's special grace, until the next parliament, on condition that it shall be properly regulated and governed in the meantime to the common profit; and it is not the king's intention that any prejudice should be incurred by aliens who have franchises by royal charters'.³²

²⁸ FW Maitland, *The Constitutional History of England: A Course of Lectures* (HAL Fisher ed, CUP 1908) 74.

²⁹ JR Maddicott, *The Origins of the English Parliament, 924-1327* (OUP 2010) 5.

³⁰ Howard L Gray, *The Influence of the Commons on Early Legislation* (Harvard University Press 1932); SB Chrimes, *English Constitutional Ideas in the Fifteenth Century* (CUP 1936) 236.

³¹ In January 1327, during the first parliament after the coronation of Edward III a temporary statute entitled 'Indemnity for those who took part with the King and his Mother' was adopted to last 'till the Day of the Coronation of the same King'. See 1 Edw III st I c I. This indemnity act, which was related to the opposition of Thomas late Earl of Leicester and Lancaster to Edward III father, Edward II has a retrospective character and thus the provision specifying the temporary duration is not classified as a sunset clause. Furthermore, another temporary law was enacted ten years later, in 1337, during the eleventh year of Edward III reign entitled 'exportation of Wools prohibited' and provided that 'That no Merchant, foreign or denizen, (...) shall [bring or cause to be brought] by himself nor by other, privily nor apertly from henceforth any Wools out of the Realm, till by the King and his Council it be thereof otherwise provided': see 11 Edw III c 1. This clause is probably the origin of a Henry VIII clause and not a sunset clause, as it does not prescribe the automatic expiration of the act and delegates power to the king and the council to terminate the relevant regulation.

³² Rot Parl C 65/25 II 296. Accordingly it was enacted the 42 Edw III c 7 statute entitled 'Londoners privileged to sell at retail victuals only' and providing that 'it is accorder, that they of London and none other shall sell at retail Victuals only, and that of the King's special grace, till the next parliament, upon

Secondary sources provide us with useful information regarding the surrounding environment. In particular the aforementioned petition aimed to amend the Statute of York of 1335,³³ which was confirmed by the Statute of York in 1351,³⁴ conferring the freedom to trade throughout England upon all merchants both English and alien. The Londoners had repeatedly sought release from its terms³⁵ and, surprisingly, this time their request was approved, although only for a short period of time.

The reason why the King decided to add the sunset clause is unknown. However, looking at the facts, it may be reasonable to infer that the sunset clause was added to the proposed petition by Edward III in order to accept amendment to the Statute of York. In this way, all sides were satisfied. Thus Parliament's request was satisfied, though for a limited time, and the King did not allow the amendment to be final and thus binding on him forever.

Moreover, during the seventh year of Richard II, a petition was presented in Parliament regarding the procedural issue of the writ of debt, and the King's response was:

'It is agreed that in this particular case and in all others where mainprise is involved and a writ of supersedeas is grantable, if the persons bailed do not appear at all before the justices on the day specified in the said mainprise, and thus the plaintiff is delayed; then let the said mainperners be answerable to the plaintiff for a certain sum, to be determined at the discretion and advice of the justices; giving just consideration to the sum of the damage and loss suffered by the plaintiff, and the nature of the thing demanded. And this ordinance shall remain on trial only until the next parliament'.³⁶

condition, that it be well ruled and governed in the mean Time to the common Profit: And it is the King's Mind, that no Prejudice be done to Aliens, which have Franchises by the King's Charters'.

³³ 9 Edw III st 1 c 1.

³⁴ 25 Edw III st 3 c 2.

³⁵ Rot Parl C 65/25 II 294.

³⁶ Rot Parl C 65/41 III 161. Accordingly, the statute 4 Ric II c 17 was enacted entitled 'When mainperners shall be liable on damages by delay' including the following clause 'and this ordinance shall endure in Assay till the next parliament only'.

During the reign of Henry IV and especially during the third Parliament on September 1402, which was summoned because the King needed to secure grants of taxation³⁷ on the common petition regarding Shoemakers and Cordwainers, which was an amendment to a statute made in the parliament in the thirteenth year of the reign of King Richard II and dated from 1390, the King's answer was 'the king wishes for the assay to be fixed until the next parliament'.³⁸ According to Patent Rolls, in 1386, Parliament submitted another petition concerning the Shoemakers and Cordwainers of London, which Richard II approved, adding a sunset clause to endure until the next parliament.³⁹ This common petition, which was a renewal of previous legislation, is noticeable due to the wording of this primary source, because this legislation is characterised as 'grant, until the next Parliament, to the shoemakers and cordwainers (allutarios) of London'.

Similarly, the King approved a petition with reference to customs and the export of bullion from the realm, adding the condition that it shall last until the next parliament.⁴⁰ In addition, another common petition was presented regarding alien merchants and the King's answer was, 'let this be committed to the council, and let the same council have the power by authority of parliament to ordain a remedy for it by their discretion, by whatever means seem to them most profitable for the king and the realm, between now and the next parliament.'⁴¹ Finally, during the 5th parliament on October 1404, on the common petition

³⁷ Rot Parl C 65/65 III 485.

³⁸ Ibid 496. Accordingly it was enacted in the statute 4 Hen IV c 35 providing that 'this Statute be put in Assay, and hold Place till the next Parliaments'.

³⁹ This petition is not recorded in the Parliament Rolls. See Calendar of Patent Rolls, *Rich II Vol I* (HMSO 1895-909) 132.

⁴⁰ Rot Parl C 65/65 III 509; and the statute 4 Hen IV c 16 entitled 'The statutes forbidding exporting of gold and silver' was enacted.

⁴¹ Rot Parl C 65/65 III 511.

regarding the Merchants at Ipswich and Yarmouth,⁴² the King's answer was 'let the passage of wool, hides and woolfells, with the tonnage of the wool, be at Ipswich as well as at Yarmouth, for a trial period until the next parliament'.

Later on, in 1406 a temporary bill was recorded in the parliamentary rolls during the long parliament of Henry IV. On November 18 the speaker for the Commons, Sir John Tiptoft, submitted a Bill containing 31 articles and requested their registration in the roll of Parliament.⁴³ The articles regulated the status of the Council prescribing among other things in article 1 the confirmation of the members of the Council from the Commons,⁴⁴ in article 2 a series of restrictions upon the exercise of their authority,⁴⁵ and in article 6 the advisory role of the council upon grants and appointments.⁴⁶

The ultimate provision, Article 31, which signals the temporary character of the act, provides that: 'Also, it was ordained and agreed that all the aforesaid articles and the contents of the same, in the style and manner in which they were pronounced, should come into force and effect from the beginning of this present parliament only until the end of the next parliament'.⁴⁷

The Act proved to be a fertile source of controversy among scholars. Addressing the enactment, Stubbs argues that 'These articles comprise a scheme of reform in government, and enunciate a view of the constitution far more thoroughly matured than

⁴² Rot Parl C 65/67 III 556.

⁴³ Rot Parl C 65/68 III 585.

⁴⁴ Ibid.

⁴⁵ Ibid 586.

⁴⁶ Ibid.

⁴⁷ Ibid 589.

could be expected (...)',⁴⁸ while he describes the whole bill as a constitutional experiment and argues for a 'Lancastrian Constitutionalism'.⁴⁹

Likewise, Pollard argues that 'a consensus was reached in Parliament, by mutual consent of Crown and the body of the realm, for limitation to be placed on the freedom of monarch'.⁵⁰ In like manner, McFarlane states that 'in fact Lancastrian constitutionalism was not the fruit of a happy partnership between King and Commons but of the concessions made by a would-be autocrat hampered by financial weakness'.⁵¹

Contrariwise, Brown waters down the theory of 'Lancastrian Constitutionalism', arguing that the reform was dictated by the circumstances and the King's convenience,⁵² while Baldwin remarks that 'most of these articles were, indeed, only repetitions of former enactments, which by this time had become familiar'.⁵³

Although both sides have sound arguments, the presence of the sunset clause in the bill highlights the significance of the bill. If the bill was just the administrative convenience of the King, what was the reason to make it temporary? While there is no clear evidence that the sunset clause was added by the King, it is more likely that he introduced it for two key reasons.

First, since the law restricted the King's privilege to appoint Council members, the King had a real interest in limiting its duration, and therefore in adding a sunset clause. In

⁴⁸ William Stubbs, *The Constitutional History of England in its Origin and Development Vol. III* (first published 1878, CUP 2011) 55.

⁴⁹ Ibid 5.

⁵⁰ AJ Pollard 'Lancastrian Constitution Experiment Revised: Henry IV, Sir John Tiptoft, and the Parliament of 1406' (1995) 14 *Parliamentary History* 103, 117

⁵¹ KB McFarlane, *Lancastrian Kings and Lollard Knights* (Clarendon Press 1972) 99.

⁵² AL Brown, 'The Commons and the Council in the Reign of Henry IV' (1964) 79 *English Historical Review* 1, 2.

⁵³ James Fosdick Baldwin, *The Kings' Council in England during the Middle Ages* (Clarendon Press 1913) 158.

fact, the aforementioned bill was an innovation because thus far, the King had absolute and unlimited authority to appoint the Council members, while the confirmation of his council by the Commons created a procedure limiting his power.

Second, the examination of the drafting process concludes that the sunset clause was an amendment proposed by the King. In particular, according to the parliamentary rolls, the bill was negotiated by the King and the Lords,⁵⁴ but a bargain must have taken place during the legislation drafting. According to *Cobbett's Parliamentary History*, this enactment shows 'that whatever indirect steps Henry took to acquire the diadem, he was resolved to keep it; and is a strong instance, that the best laws for the subject have been often gained under the weakest titles of our kinds'.⁵⁵

Furthermore, a similar bill concerning the Council was proposed by the King in May 1406,⁵⁶ but it did not satisfy the Commons⁵⁷ and was therefore rejected. In addition, the construction of the clause which provided that the duration would be 'only until the end of the next parliament' demonstrates that the King approved this legislation for the first and last time. Finally, the King, while confirming the bill of November 1406, was concerned with his prerogative, as is shown in the parliament rolls.⁵⁸

The inclusion of the sunset clause in the Act thus denoted its impact on the constitutional order and its effect on the balance of powers between the King and Parliament. The sunset clause was a safeguard to the King's prerogative and also signalled

⁵⁴ Rot Parl C 65/68 III 585.

⁵⁵ *Cobbett's Parliamentary History of England Vol I* (Hansard 1806) 305.

⁵⁶ Rot Parl C 65/68 III 572.

⁵⁷ See Chris Given - Wilson (ed), *The Parliamentary Rolls of Medieval England 1275- 1504 Vol VIII* (Boydell Press 2005) 321.

⁵⁸ Rot Parl C 65/68 III 585.

the temporary character of the King's need. When the Act expired, the previous constitutional *status quo* was re-established.

The following conclusions can be drawn from the early statutes containing a sunset clause. In relation to the academic debate between Coke, Pluncknett and McIlwain on the distinction between ordinances and statutes, it can be seen that the temporariness of laws was not relevant to that distinction. Therefore, McIlwain's argument that the difference between ordinances and statutes was based on the temporary nature of the former is not convincing. Rather, the temporariness of the laws was more relevant to the balance of powers between King and Parliament.

Firstly, the sunset clause was proposed by the King as a condition in order to approve the proposed petition and consequently in order to enact the relevant law or to amend existing legislation. Secondly, it is significant that the relevant petitions have financial implications and their aim is to support a specific target group and in particular the merchants. At that time the merchants and traders were not part of feudal society, but their wealth and their role in the economy and the revenues of the King was significant.⁵⁹

Thirdly, it is noteworthy that the King provided the reason for use of the sunset clause, which was mainly the 'trial period'. However, it is questionable whether it was an excuse or a real reason. From the parliamentary rolls of every following year, there is no evidence whether the law was renewed or whether its effectiveness was discussed.⁶⁰ Finally, the parliamentary rolls do not give any insight into Parliament's reaction to the

⁵⁹ For more analysis about the role of the Merchants see Douglass C North, *Understanding the Process of Economic Change* (Princeton University Press 2005).

⁶⁰ On several occasions, though, petitions are recorded to renew temporary legislation. For instance: 'This was another petition concerning pleading. The commons of the counties of Hereford, Gloucester and Shropshire which adjoin the marches of Wales, and the commons of the counties of Somerset, Bristol and Cheshire humbly beseech: that whereas at the parliament held at Westminster in the twentieth year of the blessed reign of our present sovereign lord the king it was ordained by the authority of the said parliament that (...) and the King's response was that 'The king wills that the ordinance made in the parliament held at Westminster in the twentieth year of his noble reign [1442] for such distrains taken, to be enforced for seven years, shall take effect and be enforced until the next parliament, and then it shall expire'. See Rot Parl C 65/99 V 151.

amendment limiting the duration of the proposed statute. Nonetheless, it is probable that the MPs were satisfied with the approval of their petition in spite of its temporary basis, since the adopted temporary legislation still accorded with their interests and ultimately marked a victory for them.

III. The Establishment of Sunset Clauses in Legislation

The previous part discussed the early constitutional importance of sunset clauses. This part will consider the utility of these clauses, in particular how their use evolved through time in the legislative process, until Commons and Lords play a more active role in the legislative process.

During the first parliament of Henry V in 1413, no sunset clauses are recorded in the enacted laws. However, at the beginning of the second parliament in April 1414, an unusual petition was submitted by the Commons. The petition provided that

‘[O]ur sovereign lord, (...) just as it has always been their liberty and prerogative that no statute of law should be made without their consent (...) that from henceforth, as a result of a complaint of the commons concerning any wrongdoing for which they are asking for a remedy through the common speaker, or else by written petition, that no law should ever be made thereon and engrossed as statute and law which changes the sense or meaning of what is requested by the common speaker or of the aforesaid petitions proffered in writing, either through additions or omissions, or by any kind of term or terms, without the assent of the aforesaid commons. Considering, our sovereign lord, that it is only the intention of your commons, if they ask you two or three things, or as many as they wish, verbally or in writing, that it should always be the prerogative of your high regality to grant those that you desire and to refuse the rest’.⁶¹

The background and context to this petition was that during the Parliament of 1413 the King approved several petitions submitted by the Commons, but the final wording of the relevant statutes enacted was divergent. Gray presents the divergence that occurred

⁶¹ Rot Parl C 65/74 IV 22.

between the submitted petitions and the relevant enacted statutes.⁶² This petition led to a discussion in academia regarding its significance and its contribution to the constitutional history of medieval England. Gray, examining the amendments to the petitions submitted to the following parliaments, concludes that it was a turning point in the Commons struggle to influence legislation, as the Commons claimed the right to confirm or reject amendments which changed their intent and, at least for a period, their claim was admitted.⁶³

However, Gray adds two reservations limiting the effect of this conclusion. First, he explicitly states that the Crown admitted the Commons' claim to confirm or reject amendments at least for a period of time.⁶⁴ Second, he argues that the amendments henceforth took the form of limiting the duration of the statutes.⁶⁵ Furthermore, he argues that these amendments limiting the duration of statutes were 'minor amendments' and were considered 'as within the king's prerogative, just as the right to reject a commons petition'.⁶⁶

From another point of view, Chrimes focused on the King's reply, which stated that 'the king of his special grace grants that from henceforth nothing shall be enacted relating to the petitions of his commons which is contrary to what they have requested, whereby they shall be bound without their consent. Saving always to our liege lord his royal prerogative to grant and deny whichever of the aforesaid petitions and requests he

⁶² Howard L Gray, *The Influence of the Commons on Early Legislation* (Harvard University Press 1932) 265.

⁶³ *Ibid* 169.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* 282.

⁶⁶ *Ibid*.

desires'.⁶⁷ He characterised the King's response as 'even nugatory', because the King not only totally ignored the petitioned claims, but also repeated that nothing should be enacted to the commons' petition which was contrary to his will.⁶⁸ Moreover, Chrimes criticised Gray's argument that the amendments sunsetting statutes were insignificant, in order to strengthen his thesis that the royal promise of 1414 was not a landmark in the constitutional history of medieval England.⁶⁹

The common ground in both approaches is the fact that the king has the right to amend legislation initiated by common petitions, limiting their duration by using a sunset clause. Indeed during the following parliaments, Henry V exercised his power to amend legislation proposed by common petitions, limiting its duration according to his will. A paradigm of the sunset clause's use took place during the absence of the Henry V in France in 1421. In six common petitions submitted, time limits were imposed to endure 'till the Parliament which shall be first holden after the King's Return into England from beyond the Sea'.⁷⁰

Gray's work reveals considerable information regarding the use of sunset clauses following the reign of Henry VI. During the parliaments of 1422-1451, twenty-nine amendments were made limiting the duration of statutes.⁷¹ Even in the first parliament of Henry VI, in November 1422, which lasted less than six weeks in the aftermath of Henry V's death,⁷² a sunset clause was recorded. Six common petitions were submitted in total:

⁶⁷ Rot Parl C 65/74 IV 22.

⁶⁸ SB Chrimes, *English Constitutional Ideas in the Fifteenth Century* (CUP 1936) 162.

⁶⁹ Ibid 163.

⁷⁰ 9 Hen V st 1 c 2; 9 Hen V st 1 c 3; 9 Hen V st 1 c 4; 9 Hen V st 2 c 8; 9 Hen V st 2 c 9; 9 Hen V st 2 c 10.

⁷¹ Howard L Gray, *The Influence of the Commons on Early Legislation* (Harvard University Press 1932) 314

⁷² See Chris Given - Wilson (ed), *The Parliamentary Rolls of Medieval England 1275- 1504 Vol X* (Boydell Press, 2005) 2.

the first concerned the proper practice to be pursued in chancery suits;⁷³ the second abuses in purveyance;⁷⁴ the third bad behaviour of wild Irishmen who were studying at the University of Oxford;⁷⁵ the fourth the terms and conditions of office of sheriffs;⁷⁶ the fifth the operation of merchant law in the staples;⁷⁷ and the sixth appointments to offices.⁷⁸

The sunset clause was added to the fifth common petition related to the ‘easement and profit of the Merchants’.⁷⁹ It is remarkable that King’s response did not explicitly mention the time limitation of the statute. The King replied that

‘As regards having confirmations according to the desire of this petition, let them have such confirmations without clause de licet as they have duly had in the past. And as regards the rest of the said petition, let it be done as it has been permitted to be done and used previously in similar cases’.⁸⁰

The findings on sunset clauses during the reign of Henry V and Henry VI lead to the following conclusions. First, the frequency of sunset clauses increased. However, this might be related to the fact that the number of statutes enacted by common petition increased while this legislative process was developing. Gray shows that during the reign of Henry VI, of the 185 statutes enacted, 162 arose from common petitions.⁸¹ Moreover, it became clear that the sunset clause was an amendment proposed by the King limiting the duration of the statute. As mentioned above, the King’s right to accept or reject a petition

⁷³ Rot Parl C 65/84 IV [item 41].

⁷⁴ Ibid item 42.

⁷⁵ Ibid item 43.

⁷⁶ Rot. Parl C65/84, IV, [item 44].

⁷⁷ Ibid [item 45].

⁷⁸ Ibid [item 46].

⁷⁹ 1 Hen VI c 6, ‘St 14 Ric II c 2 recited’.

⁸⁰ Rot Parl C 65/84 IV 191.

⁸¹ Howard L Gray, *The Influence of the Commons on Early Legislation* (Harvard University Press 1932) 334.

was absolute, and thus the limitation of an act for a certain period of time is in effect a less negative reaction than rejection, and there was always the hope that such legislation might be renewed.

From the legal positivism perspective, the common petitions aimed either to limit the royal prerogative or to promote a framework favouring a specific group, especially the Merchants. But the Crown, as the one holding the sovereign power, was not willing to limit royal rights indefinitely. The King was willing to bind himself in legislation providing financial benefits for certain groups like merchants. It comes as no surprise then that the vast majority of sunset legislation was related to trade and commerce. Indeed Maitland accurately observed that

‘[L]egislation begins with Magna Carta and goes on through the Middle Ages; one sees in such legislation at once the admitted claim of parliament to set limits to royal rights, and on the other hand the extreme difficulty that there is in getting the king to observe any laws which [are made] against his pecuniary interests’.⁸²

Furthermore, there is no evidence in the parliamentary rolls of any amendment proposed by the Commons or the Lords which limits the duration of a statute proposed by the King or a petition submitted by the Lords.⁸³ The first Commons’ amendment is recorded in 1429 and it referred to misuse of judicial records and was incorporated in the relevant statute.⁸⁴ It was attached as a schedule providing that ‘les communes sount assertuz a la bille a cest cedula annexe parissint qe les forsprises en cest cedula comprisez soient affermez come parcelle bille’ (the Commons asserted in the bill of this schedule which is provided in the annex that the exceptions which are included would be affirmed like this

⁸² FW Maitland, *The Constitutional History of England* (CUP 1919) 183.

⁸³ A fortiori, Chrimes argues that during that period Commons did not even have the right to assent to the amendments made by the King to their petitions: see SB Chrimes, *English Constitutional Ideas in the Fifteenth Century* (CUP 1936) 164 (fn 1).

⁸⁴ 8 Hen VI c 12.

bill).⁸⁵ Nonetheless, Gray argues that there is a possibility of an earlier amendment dated from 1406, but no evidence survives.⁸⁶

In conclusion, from the above analysis it is evident that the early use of sunset clauses was an amendment proposed by the King. The King had the royal prerogative to deny a petition and to veto legislation. As Stubbs stresses, ‘it is in the treatment of petitions that the king shows the most strength of will’.⁸⁷ The limitation of a statute’s duration is undoubtedly a substantial restriction, but it is not a complete rejection. As long as the King had the absolute power to reject a petition *a maiore ad minus*, he had the power to limit its duration. As regards the duration of the sunset clause, the King had absolute power to define it and there is no evidence of any parliamentary reaction to this power.

⁸⁵ TNA PRO C 49/19/16.

⁸⁶ Howard L Gray, *The Influence of the Commons on Early Legislation* (Harvard University Press 1932) 195.

⁸⁷ William Stubbs, *The Constitutional History of England in its Origin and Development Vol III* (first published 1878, CUP 2011) 23.

B. The Development of Sunset Clauses

The preceding analysis demonstrates that sunset clauses were initially a tool which the King used to safeguard his sovereignty. The discussion thus far has shown that while the legislative role of Commons and Lords was expanded to submit petitions, the King had the absolute power to approve such petitions and could impose a limit on duration. This part will examine the development of sunset clauses in an era where such clauses were not the monopoly of the King. It will be shown that such development enshrined the balance of powers in the legislative process according to which a synergy existed between the King, Lords and Commons.

I. The First Sunset Clause Proposed by the Commons

The use of the clause in *ad hominem* legislation reveals the first sunset clause proposed by the Commons. In particular, this part demonstrates how the Commons used a sunset clause for the first time to regulate a specific occasion and at the same time to reassure other constitutional players that the legislation would not have further implications in the future.

The Treason Act of 1351,⁸⁸ parts of which are still in force, was a significant legislation that codified the crime of treason. This Act for the first time contained the definition of the crime of treason, and distinguished between high and petty treason,⁸⁹ while the basic and relevant principles of the common law were largely codified in its

⁸⁸ 25 Edw III st 5 c 2

⁸⁹ For further analysis on the Act, see JG Bellamy, *The Law of Treason in England in the Later Middle Ages* (CUP 2004) 59ff.

provisions.⁹⁰ In 1424 a petition is recorded which amended this legislation on treason. The petition provided that

‘[T]he commons pray: whereas in the time of the noble King Edward the third since the conquest, in the twenty-fifth year of his reign at his parliament held at Westminster [1351-2], it was declared by statute in the said parliament what matters should be called treason, among which if a man was indicted, appealed, or arrested on suspicion of high treason, and was committed and detained in the king's prison for this reason, and then escaped from such a king's prison, it was not declared in the past whether the escape should be adjudged treason or not; that it shall be ordained and declared by the authority of this present parliament, by statute, that if any person is indicted, appealed or arrested on suspicion of high treason, as is said above, and is committed and detained in the king's prison for any reason, and escapes voluntarily from the said prison, that such an escape shall be adjudged and declared treason, if such a person is duly convicted of this according to the law of this land. And let the lords of the fee in such a case have the escheats and forfeitures of the lands and tenements of those held of such persons thus convicted, as they do of those who are convicted of petty treason. And this statute shall take place and effect from 20 October last until the next parliament’.⁹¹

This petition altered the scope of the statutes of treason and broadened the definition of the term. Specifically, it included within the definition of treason the case of a detainee who, while he is suspected of treason, escapes. In addition, this petition requires close attention, as it is the first petition with a sunset clause and this raises a number of important questions. More specifically, the main question is why the petition is time-limited through a sunset clause and indeed why the Commons added the time limitation.

The petition, which was approved by the King,⁹² has attracted the interest of scholars due to the possible connection and the obvious application of this regulation to the curious case of Sir John Mortimer, which was discussed at an earlier stage of the same parliamentary session. In short Sir John Mortimer, who was regarded as a threat to the King according to His Council,⁹³ was arrested in 1421 by order of Henry V on suspicion

⁹⁰ Samuel Rezneck, ‘The Early History of the Parliamentary Declaration of Treason’ (1927) 42 *English Historical Review* 497.

⁹¹ Rot Parl C 65/85 IV 260.

⁹² 2 Hen VI c 21.

⁹³ Charles Lethbridge Kingsford (ed) *Chronicles of London* (Clarendon Press 1905) 342.

of treason. In 1422 he escaped but he was subsequently recaptured.⁹⁴ In February of that year Sir John Mortimer escaped once again, and as soon as he was recaptured, he was brought before parliament, operating as a court, and he was condemned to death for treason.⁹⁵

The complexities of the case are accurately presented by Williams.⁹⁶ The controversy surrounds the issue of whether the statute was adopted in relation to the case of Sir John Mortimer and, if so, whether the enactment took place before the escape or after. According to *Chronicles of London*, the aforementioned petition was adopted before the escape of Sir John Mortimer.⁹⁷ However, according to *Cobbett's Parliamentary History*, the aforementioned petition was proposed *ex post facto*.⁹⁸

Coke, referring to this particular case, does not mention the statute at all, and he claims that Sir John Mortimer 'was indicted of high treason for certain words'.⁹⁹ Hale regarded this petition as independent to the case of Sir John Mortimer but relevant to its precedent. He argues that Sir John Mortimer was condemned according to the power of the Parliament to interpret the Statute of Treason with a Parliamentary Declaration which was 'a particular judgement of parliament in that particular case, to which it was particularly applied'.¹⁰⁰

⁹⁴ Ibid 281 - 3, 342.

⁹⁵ Ibid; Rot Parl C 65/85 IV 202.

⁹⁶ See CH Williams (ed), *YB 1 Hen VI vol 50* (SS 1933) 27.

⁹⁷ See Charles Lethbridge Kingsford (ed), *Chronicles of London* (Clarendon Press 1905) 283.

⁹⁸ See *Cobbett's Parliamentary History of England Vol I* (Hansard 1806) 350.

⁹⁹ See Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of the Courts* (1797) 37.

¹⁰⁰ Hale, PC vol I 269. For more analysis on the Parliamentary Declaration on Treason see Samuel Rezneck, 'The Early History of the Parliamentary Declaration of Treason' (1927) 42 *English Historical Review* 497.

On the other hand, Powell correlates the aforementioned petition with the case and argues that ‘although prepared to make a special case for Mortimer, the Parliament of 1423-24 was obviously reluctant to allow a permanent statutory extension of the scope of treason’.¹⁰¹

In general, the sources concerning the drafting of the petition are limited and firm conclusions cannot be drawn. But the comprehensive analysis of data and the evaluation of the reports, in conjunction with the wording of the clause, shed light on the case. The aforementioned petition is recorded as the last petition of the same parliamentary session while its force is retrospective from the 20th of October. That day was the first day on which parliament was summoned.¹⁰²

The retrospective character of the law denotes the motivation to include a sunset clause. It is more probable that the Commons wanted to treat the particular case of Sir John Mortimer as exceptional and to limit its impact on the precedent. Therefore, Hale is correct when he remarked that the judgment itself in Mortimer’s case was not at all binding in other cases ‘because it is checked and control[ed] as to any such effect by the general act of parliament of 2 H[en] 6 which was to continue only to the next parliament’.¹⁰³

The petition expanding the definition of treason sought to create a special legal regime through *ad hominem* legislation. The Commons’ reaction was to restrict the duration of the legislation.

Therefore the precedent of the Mortimer case could not apply to future cases and the legal framework of treason was not distorted permanently. This sunset clause is

¹⁰¹ Edward Powell, ‘The strange death of Sir John Mortimer: Politics and the Law of Treason in Lancastrian England’ in Rowena E. Archer and Simon Walker (eds), *Rulers and Ruled in the Late Medieval England* (Hambledon Press 1995) 92.

¹⁰² Hale, PC Vol I 269.

¹⁰³ Ibid.

therefore of great importance, because it is the first sunset clause proposed by the Commons, and because its purpose is to limit the impact of the Mortimer case.

II. The Use of Sunset Clause in the *Interna Corporis* of Parliament

In this part, the utility of sunset clauses is considered in the context of the interaction between the Commons and the Lords in the legislative process. The focus of this part will be the Tudor dynasty, during which the legislative process evolved and matured.

By the middle of the 15th century the legislative procedure became more definite, as the consent of King, Lords and Commons was necessary for the passage of a bill.¹⁰⁴ Henry VII defeated Richard III in the War of the Roses and established the House of Tudors.¹⁰⁵ This part will show that towards the end of the Tudor era, the enactment of legislation became an ever more collective process while different actors expressed different interests and the reaching of a consensus involved mutual compromise and a conciliatory spirit.

Even if at the beginning of the 15th century the term House of Commons was not used in the modern institutional sense, there is no doubt among the scholars that the existence of two distinct houses in Parliament was clearly understood.¹⁰⁶ The precise time when the split between the two houses, Lords and Commons, occurred is a point of controversy. However, there is evidence that the division existed from the middle of the 14th century.¹⁰⁷ At the same time Parliament itself established its status as a part of the

¹⁰⁴ AR Myers, 'Parliament 1422 -1509', in RG Davies and JH Denton (eds), *The English Parliament in the Middle Ages* (Manchester University Press 1981) 148.

¹⁰⁵ For further information see AJ Pollard (ed), *The Wars of the Roses* (Macmillan 1995).

¹⁰⁶ SB Chrimes, 'House of Lords' and House of Commons' in the Fifteenth Century' (1934) 49 *English Historical Review* 494.

¹⁰⁷ FW Maitland, *The Constitutional History of England* (CUP 1919) 175.

government, and formed procedures.¹⁰⁸ Thus, Myers acknowledges that ‘the whole trend of fifteenth century was for the necessary participation of king, lords and commons in parliamentary acts’.¹⁰⁹

During the reign of Henry VII and his first parliament, the Commons presented a petition containing a sunset clause. The petition was entitled ‘An act against importing Gascon wine, except in English, Irish or Welsh men's ships’, and the sunset clause provided that ‘this act and ordinance to last from now until the beginning of the next parliament, saving always to the king all his prerogative’.¹¹⁰ However, at the same session, another petition aimed to renew an act and expand its duration.¹¹¹

During this period numerous petitions were submitted with a sunset clause. This means that the draft of the petitions was debated before its submission. Suffice to mention the Parliament of 1495, where five petitions were presented with a sunset clause, namely: ‘An act against riots and unlawful assemblies’; ‘An act for pulling down weirs and structures’; ‘An act for writs of attain to be brought against jurors for untrue verdicts’;

¹⁰⁸ AR Myers, ‘Parliament 1422 -1509’, in RG Davies and JH Denton (eds) *The English Parliament in the Middle Ages* (Manchester University Press 1981) 145.

¹⁰⁹ Ibid 149.

¹¹⁰ Rot Parl C 65/123 VI 335.

¹¹¹ The petition was entitled ‘An act against foreign merchants bringing girdles, ribbons, lace, etc. into this realm’ and the sunset clause provided that ‘Afterwards, in the parliament held by Richard III, late in deed and not by right king of England, the same was granted and ordained to be and remain good, valid and effectual until the end of the said four years then next ensuing. The said four years contained in the said first act will end and expire at the feast of Easter 1487. May it please your said wisdoms to pray our sovereign lord the king to ordain, by authority of this present parliament, that the said act and ordinance and all of it that touches or concerns the foregoing, be and remain good, valid and effectual until the end of the said four years, and from the end of the same four years until the end and term of the following twenty years’: see Rot Parl C 65/123 VI 335. Another example is recorded in 1495, although this time the aim was to make the law perpetual. ‘And because the said act of parliament was ordained to remain in effect only until the first day of this present parliament, may it therefore please your most noble grace, by the advice and assent of the lords spiritual and temporal assembled in this present parliament, and by authority of the same, in consideration of the things stated, to ordain, decree and enact that the said act and ordinance, made and ordained in the said last parliament, may always stand, continue and endure in its full strength and effect’: See Rot Parl C 65/127 VI 442.

‘An act against perjury, unlawful maintenance and corruption in officers’; and ‘An act that sheriffs shall return adequate jurors’.¹¹²

While discussing some measures concerning law enforcement during the same period (the reign of Henry VII), which were limited due to a sunset clause, Chrimes states that ‘why it was deemed appropriate to enact important measures of this kind temporarily only, is a mystery, but it hardly testifies to the firm intentions of the government’.¹¹³ In fact, from the numerous petitions on the same subject (riotous assembly) which have been proposed in the following years during different sessions,¹¹⁴ it is plausible that the sunset clause was related to the fact that there was not a single point of view in Commons and Lords.¹¹⁵

There are some indications that sunset clauses were the product of debate before such petitions were filed. Indeed, whilst a detailed account of the Houses, namely the Commons and Lords, did not exist, there are sources that can enlighten us in relation to the preparation and drafting of petitions. An illustration is the case of ‘liveries’.

A petition presented in 1504 concerning unlawful retaining, which was also known as liveries or maintenance (of army from nobles), requires distinctive focus. The petition was presented with a time limitation clause to endure during the life of Henry VII. The sunset clause provided that ‘the same act shall continue and endure during the life of our said sovereign lord the present king, and no longer’.¹¹⁶

¹¹² Rot Parl C 65/128 VI 458.

¹¹³ SB Chrimes, *Henry VII* (University of California Press 1972) 187.

¹¹⁴ In 1504, thirteen petitions were submitted treating the issue of riotous assembly from a different point of view: see Rot Parl C 65/130 VI 542.

¹¹⁵ Cavill argues that the most probable explanation is that the MPs had reservations as to the substance of these laws. See PR Cavill ‘Debate and Dissent in Henry VII’s Parliaments’ (2006) 25 *Parliamentary History* 160, 171.

¹¹⁶ Rot Parl C 65/130 VI 542.

From the wording of the petition, it is evident that it derived from a King's initiative:

'The king our sovereign lord calls to mind that where previously various statutes for the punishment of such persons who give or receive liveries, or retain any person or persons, or are retained with any person or persons [...] and moreover, our said sovereign lord the king ordains, decrees and enacts by the said authority that no person, of whatever estate or degree or condition, either personally, or anyone else on his behalf by his command or agreement or assent, shall secretly or openly give any livery or sign, or retain any person'.¹¹⁷

The matter of retaining nobles was of great concern for the kings of that period.¹¹⁸ As Stubbs points out, the custom of livery was an important element among the conflicts of the previous years.¹¹⁹ Several statutes were passed regulating the issue.¹²⁰ Nonetheless their enforcement was unsuccessful, mainly because the kings occasionally used the liveries as a standing army, and thus they were not inclined to adopt legislation to abolish it.¹²¹

According to this petition, the retaining was prohibited unless it was licensed by Henry VII.¹²² Cavill claims that a reason for the adoption of the act was the misbehaviour of Lord Bergen's retinue in Kent and Sussex.¹²³ Elton describes this statute as the 'chief instrument in the Tudor campaign against baronial independence',¹²⁴ and Cameron

¹¹⁷ Ibid.

¹¹⁸ The first statute regulating the liveries is adopted by Richard II in 1377 during the first year of his reign. See 1 Ric II c 7.

¹¹⁹ William Stubbs, *The Constitutional History of England in its Origin and Development Vol III* (first published 1878, CUP 2011) 535.

¹²⁰ Regarding the precedent legal regime see A Cameron, 'The giving of livery and retaining in Henry VII' (1974) 18 *Renaissance and Modern Studies*, 17, 22.

¹²¹ John A Wagner, *Encyclopedia of the Wars of the Roses* (ABC-CLIO 2001) 20

¹²² For further detail regarding the new regulation and the innovation it introduced, see A Cameron 'The giving of livery and retaining in Henry VII' (1974) 18 *Renaissance and Modern Studies* 17, 25.

¹²³ PR Cavill, *The English Parliaments of Henry VII 1485 - 1504* (OUP 2009) 77.

¹²⁴ GR Elton, *The Parliament of England: 1559 - 1581* (CUP 1986) 137.

observes that ‘The statute of 1504 was the first occasion on which the right of noblemen to retain was called into question. It must therefore be seen as a direct attack upon feudal privilege (...).’¹²⁵ Henry VII apparently preserved his own standing army, and thus he was in favour of a mere regulation. Contrariwise, the Lords would have been against that regulation.

The petition was approved,¹²⁶ and although there is no evidence in relation to the drafting of the sunset clause, it is more probable that Parliament, and especially the Lords, argued in favour and succeeded to impose the first sunset clause on the King’s legislation. It is worth mentioning the conclusion of Cameron, who states that ‘The relief felt by these nobles when Henry VII’s death left them with the problem of coping with an eighteen year old boy can only be imagined. It took Henry VIII and Wolsey just six years to reach a situation in which they also felt it necessary to curb the power of these same nobles’.¹²⁷

However, with the establishment of a detailed account of the work of the two houses, the indication that the petitions were debated prior to the submission, and that the sunset clause was a product of the debates, becomes trustworthy.

In 1509 the Lords introduced the ‘Lords’ Journal’, with narrative description of the procedures in the House of Lords, and in 1547 the Commons introduced theirs.¹²⁸ The practice of three readings of the bills in each House appeared in the journals and from the reign of Henry VIII it was regarded as an established rule.¹²⁹ In effect, the most interesting

¹²⁵ A Cameron, ‘The Giving of Livery and Retaining in Henry VII’ (1974) 18 *Renaissance and Modern Studies* 17, 34.

¹²⁶ 19 Hen VII c 14.

¹²⁷ A Cameron, ‘The Giving of Livery and Retaining in Henry VII’ (1974) 18 *Renaissance and Modern Studies* 17, 35.

¹²⁸ Howard L Gray, *The Influence of the Commons on Early Legislation* (Harvard University Press 1932) 15.

¹²⁹ William Stubbs, *The Constitutional History of England in its Origin and Development Vol III* (first published 1878, CUP 2011) 459.

part of this thrice-reading process in each House was the interaction between the two Houses, which constituted a negotiation process.

In 1509, during the first parliament of Henry VIII, the Commons drafted a series of bills either repealing, explaining or limiting statutes by which the previous King ‘took advantage of the people’, as is explicitly stated in *Cobbett's Parliamentary History*.¹³⁰ Specifically, the Commons drafted a bill on time limitation of penal laws according to which the benefit of forfeitures for penal laws was reduced.¹³¹ When the bill was sent to the Lords, during the first reading on February 4, an amendment was added granting a special framework for crimes against the King and sent back to the Commons for approval. It stated that

*Billa de Actionibus et Informationibus Popularibus, lecta secunda vice, missa fuit, ex mandato Dominorum, in Domum Inferiorem reformanda, quia Domini neque justum neque equum judicarunt Regiam Actionem extinguendam uno anno tantum, sed decreverunt Regie Majestati in prosequenda sua Actione quadriennium concedendum, ceteris vero prout in Billa continebatur*¹³²

During the second reading of the bill on February 8, the Lords confirmed it as it is stated in the *Journal of House of Lords*, namely *Billa de Actionibus Popularibus, cui Domini assenserunt* (The Bill concerning the Actions of the People, to whom the Lords assent).¹³³ However, on February 22, the Lords sent back the bill to the Commons containing a sunset clause. The text was as follows: *Billa de Actionibus Popularibus mittitur in Domum Inferiorem, et additur Actui ut duret usque ad proximum Parliamentum* (The Bill

¹³⁰ *Cobbett's Parliamentary History of England Vol I* (Hansard 1806) 477.

¹³¹ *Ibid* 478.

¹³² *Journal of the House of Lords Vol 1 1509-1577* (1802) 6. (The Bill concerning the Actions and the information of the People was sent with the command of the Lords amended into the lower house for a second reading, because Lords, it is neither just nor equity, actions against the King to be punished only within one year, but it is decided that actions against the Royal Majesty should be punished within four years, and against the others (will be punished) as it is prescribed in the bill).

¹³³ *Ibid*.

concerning the Action of the People is sent into the lower House, and that it will last until next Parliament is added to the Act).¹³⁴

The Commons accepted the limitation and the statute entitled an ‘Acte thath Informacons uppon Penall Statute shalbe made within three Yeres’ was enacted.¹³⁵ Interestingly, one of the two prototypes of the bill preserved in the Parliament Office is endorsed with the phrase *Le roy se advysera* (The king will consider this further).¹³⁶ With the King’s reluctant reaction in mind, the following conclusions are reached.

First, the right to amend a bill by limiting its duration was not any longer a monopoly of the king’s prerogative. The power of the Lords to amend legislation submitted by the Commons is an indication of its upgraded status in the parliament. Mackie accurately points out that during the reign of Henry VIII, the King imposed his policy through the Lords, and he would introduce important legislation in the Lords, while the Lords claimed the power to scrutinise bills submitted by the Commons.¹³⁷ As long as the Lords had the power to reject a bill, as they did for instance in 1534 in a bill regulating the sewers *Billa a Domo Communi transmissa, concernens Proclamationem Actus de Sewers nuper editi siendam, semel et denuo est lecta, et per Dominos est rejecta* (the Bill transmitted from the House of Commons concerning the Proclamation of the Sewers’ Actions lately be announced and once agains read, and rejected lately by the Lords),¹³⁸ the power to limit its duration can be seen as a less dramatically negative reaction.

Second, any legislative restriction on the King’s prerogative was likely to be accepted if it had a time limit. This was exemplified with the bill proposed by the

¹³⁴ Ibid 8.

¹³⁵ 1 Hen VIII c 4.

¹³⁶ *The Statutes of the Realm, Vol III* (Tanner Richie Publishing 1817) 2 (fn 3).

¹³⁷ JD Mackie, *The Earlier Tudors 1485 – 1558* (Clarendon Press 1952) 437.

¹³⁸ *Journal of the House of Lords 1509-1577 Vol 1* (1767-1830) 79.

Commons concerning the time limitation of penal acts introducing penal procedures. Their aim through the time limitation of penal laws was to set restrictions on King's discretion to prosecute its subjects. Both amendments (the former to introduce a distinctive framework in favour the King and the latter to limit the duration of the Act) proposed by the Lords reduced the impact of the legislation on the King's discretion. Consequently, the sunset clause imposed by the Lords was in accordance with, and indeed was serving the King's interest. At the expiration of the Act, the limitation would be removed and thus the sovereign would preserve his original power to prosecute without restrictions.

During the reign of Elizabeth I, the legislative process was further developed; in case of disagreement between the Lords and the Commons during the three-stage reading process, the bill was disputed and amended in a Committee, forming a 'committed stage'.¹³⁹ By the end of 16th century the committees were appointed not on a *de facto* basis, but they were standing committees to deal with constantly recurring topics.¹⁴⁰ During the same period the Committee for Continuance of Statutes was established, with the main focus being on the continuance of expiring laws, and by 1601 this committee had merged with the Committee for Repeal of Statutes.¹⁴¹

In addition, another institutional change pertained to the role of the Speaker. The Speaker became the representative and spokesman of the House, while he was regulating the order of business in the House of Commons.¹⁴²

A plethora of statutes contained sunset clauses. It is noteworthy that during the first years of Elizabeth's reign, statutes contained a sunset clause to last for the rest of her

¹³⁹ WS Holdsworth, *A History of English Law Vol IV* (3rd edn, Methuen 1945) 178.

¹⁴⁰ *Ibid* 178.

¹⁴¹ Wallace Notestein, *The House of Commons 1604 - 1610* (Yale University Press 1971) 8.

¹⁴² WS Holdsworth, *A History of English Law Vol IV* (3rd edn, Methuen 1945) 176.

life.¹⁴³ Nonetheless during the last parliaments for sensitive reasons no sunset clause to last for the Queen life was included, as Dean acknowledges.¹⁴⁴ Specifically out of six parliaments thirty-one statutes carried a sunset clause to endure the most ‘till the next parliament’, while seven were to sunset between three and ten years.¹⁴⁵

As long as Parliament as an institution was consolidating and the legislative process was flourishing, the regulatory efficiency of the enacted legislation was of growing concern to legislators. As More stated in a speech in the Commons in 1601 ‘it is good to have Tryall of Lawes, before wee make them perpetuall... it were god to Lymitt the Contynuanse of this Lawe, and that the deffectes therein might been examined’.¹⁴⁶

Interestingly, the correlation between good laws and sunset clauses is apparent from the 16th century. However, there is no evidence to demonstrate that the committees scrutinised the expiring laws, while it seems that the interest for good laws was not the first priority that made legislators include a sunset clause.¹⁴⁷

In line with the above remarks, Elton argues that the reason for the time limitation of the statutes is the fact that repealing earlier statutes was ‘a clumsy and a rather expensive way of modifying the law in order to suit an interest’.¹⁴⁸ Indeed, as will be

¹⁴³ For instance, in order to protect the Queen from any act of treason after the Pope’s call for the ‘reconversion of England’, Parliament enacted a new Treason Act having effect only during Queen’s lifetime. 13 Eliz I c 1. A similar sunset clause was included in 14 Eliz I c 1 and 23 Eliz I c 2.

¹⁴⁴ David Dean, *Law – Making and Society in Late Elizabethan England* (CUP 1996) 259.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid 276

¹⁴⁷ Having said that, it is worth mentioning an Act adopted during the parliament of November 1414, which contained a sunset clause. The wording of the act demonstrates the interest of the Monarch in the efficiency of the specific law. The Act, which pertained to the sweaters, clippers and counterfeiters of the currency, provided that ‘this ordinance and provision will retain their force and effect, by the aforesaid authority, until the next parliament; in such a way that, if it seems to the king and to the lords and commons who are to come and gather at that next parliament that the same ordinance and provision are sufficient for the aforesaid purpose, then they should be established in that next parliament as a statute to last perpetually’: see Rot Parl C 65/75 IV 35.

¹⁴⁸ GR Elton, *The Parliament of England: 1559 - 1581* (CUP 1986) 134.

demonstrated below, the innovation during the reign of Elizabeth I was the active involvement of interest groups in the legislative process.¹⁴⁹

In 1584-5, a statute that was enacted entitled ‘Act touching Artificers using the cutting of Leather’.¹⁵⁰ It contained a sunset clause ‘to continue for the space of six yeeres next after this present Session of Parliament and from thence so the ende of the Parliament then next following’. This Act, which repealed an earlier act enacted in 1563,¹⁵¹ imposed penalties on the ‘Curriers’, who treated leather with oil and tallow. According to Dean,¹⁵² the Act of 1563, which did not recognise the ‘Curriers’ as leather-using craftsmen, provoked competition between two companies, the ‘Curriers’ and the ‘Cordwainers’. Both of them, expressing their own interests, promoted bills during the Parliament of 1584-5 in order to amend the act of 1563. The final bill was against the Curriers’ interest, but they managed to add a sunset clause limiting the negative development.

The involvement of lobbyists in the legislative process is recorded even from the reign of Henry VI. During the second parliament in October 1423, in a statute concerning trade and commerce,¹⁵³ the parliamentary rolls reveal the first element of the legislative process involving interaction between the Commons, the Lords and the lobbyists.¹⁵⁴ Their co-operation, however, was aimed at the submission of a common petition. The merchant

¹⁴⁹ For instance, it is recorded that ‘Englishmen vied for the limited parliamentary time, available to obtain legislation dealing with economic and social matters’: see David Dean, *Law – Making and Society in Late Elizabethan England* (CUP 1996)133.

¹⁵⁰ 27 Eliz I c 16.

¹⁵¹ 5 Eliz I c 8.

¹⁵² David Dean, *Law – Making and Society in Late Elizabethan England* (CUP 1996) 143.

¹⁵³ 2 Hen VI c 4; ‘Recital of an Ordinance of 36 Edw III respecting Merchandises of the Staple’.

¹⁵⁴ Rot Parl C 65/85 IV 251: ‘another petition, containing five articles, was delivered to the said lords in the same parliament by the merchants of the staple; which petition was then handed over to the said commons by the same lords in order to have their advice on it: which commons redelivered the same petition, with their common petitions, with two parchment schedules attached to it’.

delivered it to the Lords and the latter handed it to the Commons in order to have their advice.

Besides the involvement of interest groups in legislation and the use of sunset clauses as a mechanism to deal with and cater for conflicting interests, Elton argues that such clauses were used extensively in order to enhance the status of the Parliament, adding that ‘in any case, Parliament possessed a more acceptable means to provide against possible mistakes: instead of making permanent laws which might justifiably be repealed, it could and did make laws valid for a trial period and the subject to scrutiny before continuance’.¹⁵⁵

Useful information regarding temporary legislation and the use of sunset clauses can be gleaned from the enactment of the expiring laws continuance acts. As Dean states:

‘[T]he expiring laws continuance act not only reopened old wounds, but they provided the opportunity for further adjustment or amendment. As we have seen in several cases, sometimes the opponents of a measure were forced to secure a time limitation clause as a last resort; to fight the next battle in the committee for the continuance bill was cheaper than promoting an entire bill of repeal’.¹⁵⁶

The multifaceted role of sunset clauses is shown in an anonymous manuscript dating back to the early Stuart period and attributed to a member of the Commons, which provides us with useful information. The passage, which belongs to the Stowe manuscripts collection, was entitled ‘Policies in Parliaments’, and states that:

‘In all penall bills tis held good policye to make them indure but for a tyme, for if it want that clause and be found ill for the state of the comons, it cannot notwithstanding be repealed exept both the Lords and the king consent, whereas otherwise if it stand upon continuance, it is altogather in the hands of the Commons for the dissolving of it, for they may chuse, whether the[y] will continue it, or not’.¹⁵⁷

Commenting on this manuscript, Dean asserts that ‘since the continuance act still needed approval from the Lords and the royal assent, presumably, the author means that it came

¹⁵⁵ GR Elton, *The Parliament of England: 1559 - 1581* (CUP 1986) 134.

¹⁵⁶ David Dean, *Law – Making and Society in Late Elizabethan England* (CUP 1996) 276.

¹⁵⁷ Stowe MSS, 354 f 30.

under less scrutiny than a single, and new bill of repeal'.¹⁵⁸ Nonetheless the procedure according to which temporary bills were renewed had an impact on the role of the lords and on the extent of their intervention. Although Dean is correct in saying that the continuance bill shall be approved from the three estates as a whole, the Commons did however have a privilege from the drafting of the continuance bill and thus they exercised the power to choose which acts will or will not be renewed. Indeed, Lambert admits that 'during the first part of Elizabeth's reign the expiring laws bill began in the Lords but in 1584 and regularly from 1597 it began in a Commons committee'.¹⁵⁹

Thus sunset clauses were a useful bargaining tool in the hands of legislators throughout the negotiation process. The use of the sunset clause was no longer a royal privilege, but rather an effective negotiation tool. In addition, the Commons had a slight procedural advantage following the inclusion of a sunset clause, as the drafting of the expiring laws bill was their task. This advantage, though, was not decisive, as the Lords could amend the expiring laws bill.

C. Sunset Clauses in a period of Tension

As shown in the previous part, when Parliament, the House of Commons and the House of Lords became an active part of the legislative process, with the discretion to petition for legislation, the Sovereign's reaction was to use the royal prerogative to amend legislation by adding a sunset clause limiting its effect, especially in matters pertaining to trade and merchants. However, the Crown did not hold a monopoly on limiting the duration of

¹⁵⁸ David Dean, 'Pressure Groups and Lobbies in the Elizabethan and Early Jacobean Parliaments' (1991) 11 *Parliaments, Estates and Representation*, 139, 143 (fn 14).

¹⁵⁹ Sheila Lambert, 'Procedure in the House of Commons in the Early Stuart Period' (1980) 95 *English Historical Review* 753, 780.

legislation. This is evidenced through Common's use of sunset clauses in relation to the Mortimer case.

Furthermore, when legislative procedure evolved and legislative power became shared between different actors, namely the Crown, the House of Lords and the House of Commons, the power to amend legislation by adding a sunset clause was no longer the exclusive royal prerogative. As a consequence, the use of sunset clauses was transformed into a bargaining tool in order to forge common ground and reach consensus.

This part focuses on the first half of the 17th century. It considers the utility of sunset clauses in a period of time during which the balance of power was fragile, while the need for certainty in legislation became more apparent.

In the discussion that follows, two principal issues will be considered: first, how the expiration of legislation containing such clauses increased legal uncertainty, because of the conflict between the first two Stuarts and their parliaments. This conflict led to the expiration of several laws without renewal, thereby causing uncertainty, and necessitated the passage of an interpretation act. Second, the way in which such clauses were initially used in legislation about King's revenue and how a Commons' amendment of a one year sunset clause in the bill of Tonnage and Poundage affected the balance of powers.

I. Continuity of Temporary Legislation and the Increase in Uncertainty

By the dawn of the 17th century, Parliament had confirmed its role in the legislative process and its constitutional position as an indispensable element of the State. Two major approaches have been recorded among scholars as to the conceptualization of parliament's role in legislation in the era of the Stuarts. On the one hand Sir John Neale and Wallace Notestein identify a contentious relationship between Parliament and the Crown, whilst on

the other hand Sir Geoffrey Elton and Michael Graves emphasize the consensual role of parliament.¹⁶⁰

Tanner recognizes the institutional development of Parliament and attributes its consolidation to the Tudor period, describing it as one of the great achievements on the constitutional side of things.¹⁶¹ Judson remarks that ‘The Stuarts inherited governmental machinery geared to legal forms and constitutional ideas premised upon the supremacy of law and not of power in human affairs’.¹⁶² The crucial constitutional development of the Stuart period, though, was the rise of a definite opposition to the monarch.¹⁶³ According to Zagorin, two conditions allowed the opposition movement to take shape: ‘one was the further growth of parliament under the Tudors, the other the change circumstances prevailing after the accession of James I’.¹⁶⁴

More precisely, when King James came to England, he found a set of conditions largely corresponding with his beliefs on governance, but the institutional role of Parliament and its share of powers were discordant with these beliefs.¹⁶⁵ As a consequence, a political discussion developed concerning the nature and location of the

¹⁶⁰ For further discussion on the two approaches see David Dean ‘Pressure Groups and Lobbies in the Elizabethan and Early Jacobean Parliaments’ (1991) 11 *Parliaments, Estates and Representation* 139, 143.

¹⁶¹ JR Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603 -1689* (CUP 1928) 5.

¹⁶² Margaret Atwood Judson, *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England 1603-1645* (Rutgers University Press 1988) 47.

¹⁶³ Williams M Mitchell, *The Rise of the Revolutionary Party in the English House of Commons 1603 -1629* (Columbia University Press 1957) 27.

¹⁶⁴ Perez Zagorin *The Court and the Country* (Routledge & Kegan 1969) 75. Zagorin mentions that during the reign of Elizabeth there was opposition groups, but they were a small number and they were loyal to Elizabeth. *Ibid* at 77. Russell, though, denies the existence of a divided parliament into supporters of government and opposition. Conrad Russell, ‘Parliamentary History in Perspective: 1604 - 1629’ (1976) 61 *History* 1, 3.

¹⁶⁵ WS Holdsworth, *A History of English Law Vol VI* (Methuen 1924) 13.

highest powers of government.¹⁶⁶ This debate included the relationship of the Crown and the Commons, and the relationship of both with the State.¹⁶⁷

The parliamentary workload, however, was concentrated on the financial needs of the King and on concerns over the influence of Catholicism. Regarding the former, King James I imposed a new policy levying impositions made without parliamentary assent. This policy was affirmed by the *Bate* case decision of 1606; however, Parliament was not willing to relinquish its privilege to assent to taxation.¹⁶⁸ Regarding the latter, the Gunpowder Plot in 1605 raised the concern of the Commons against Catholics, and as Ruigh reveals, frequent petitions were submitted during the reign of King James seeking more stringent enforcement of the statutes against recusants.¹⁶⁹

An unexpected development during the reign of the first two Stuarts was the reduction of legislation passed by the Parliament and approved by the King.¹⁷⁰ The main reason was that both James I and Charles I dissolved the Parliament when it did not comply with their will, with the hope that the next one would better represent their point of view.¹⁷¹ Four Parliaments took place under the auspices of King James I and five Parliaments under the auspices of King Charles I. Among them the first parliament of

¹⁶⁶ Jeffrey Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Clarendon Press 1999) 78. Goldsworthy argues that there was a consensus on the idea that the governmental powers derive from God, but when, how and to whom these powers were conferred, were all subjects of debate.

¹⁶⁷ Thomas L Moir, *The Addled Parliament of 1614* (Clarendon Press 1958) 7.

¹⁶⁸ Harold Hulme, 'Charles I and the Constitution' in William Appleton Aiken and Basil Duke Henning (eds), *Conflict in Stuart England: essays in honour of Wallace Notestein* (New York University Press 1960) 89, 92

¹⁶⁹ Robert E Ruigh, *The Parliament of 1624 Politics and Foreign Policy* (Harvard University Press 1971) 6.

¹⁷⁰ Judson categorises the prerogatives of the King to summon and dismiss parliament at his pleasure as the "head of the state" being the most controversial. see Margaret Atwood Judson, *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England 1603-1645* (Rutgers University Press, 1988) 24.

¹⁷¹ WS Holdsworth, *A History of English Law Vol VI* (Methuen 1924) 14,15.

James I – that of 1604-1610 – passed 97 public and 130 private acts.¹⁷² Between 1610 and 1640, the parliament of 1614 passed no legislation at all; the parliament of 1621 passed only one act, the 1621 Subsidy Acts; the Parliament of 1624 passed 35 public and 38 private Acts, with no public bills introduced by the House of Lords¹⁷³; and those of 1625 and 1628 passed only eight public acts each.¹⁷⁴

The use of sunset clauses was quite frequent during the reign of James I. According to the Statutes of the Realm, 26 Acts containing a sunset clause were passed,¹⁷⁵ with the most remarkable one to take effect upon a contingency aiming the ‘speedye recoverye of manye thousands acres of Marshe Groundes and other Ground within the Counties of Norffolke and Suffolke, lately surrounded by the Rage of the Sea in divers parts of the said Counties; and for the prevencion of the danger of the like surrounding hereafter’, which was provided to last for seven years.¹⁷⁶

At that time Francis Bacon, who was the Attorney General of England and Wales and afterwards Lord High Chancellor, favoured the temporary character of the laws. He had expressed the maxim *perpetua lex est, nullam legem humanum ac positivam perpetuam esse; et clausula quae abrogationem excludit initio non valet*, meaning it is a perpetual law that no human or positive law can be perpetual; and a clause in a law which

¹⁷² Alan GR Smith, *The Emergence of a Nation State* (Logman 1984) 257.

¹⁷³ Kevin Sharpe, ‘Introduction: Parliamentary History 1603 – 1629: In or out or Perspective?’ in Kevin Sharpe (ed), *Factions and Parliament Essays on Early Stuart History* (Clarendon Press 1978) 41.

¹⁷⁴ Alan GR Smith, *The Emergence of a Nation State*, (Logman 1984) 273. According to Smith the failure to pass legislation was due to a variety of factors; the lack of government legislative programmes; the time consumed by high political matters such as impeachment proceedings, and the early dissolution.

¹⁷⁵ *The Statutes of the Realm Vol IV Part II* (Tanner Ritchie Publishing 2007). Among them, eleven acts referred to penal issues (1 Jac I c 7; 1 Jac I c 9; 1 Jac I c 18; 3 Jac I c 8; 3 Jac I c 10; 7 Jac I c 1; 7 Jac I c 4; 7 Jac I c 5; 7 Jac I c 13; 7 Jac I c 17; 21 Jac I c 17) and ten referred to trade issues and agriculture (3 Jac I c 9; 3 Jac I c 11; 4 Jac I c 2; 4 Jac I c 11; 7 Jac I c 11; 7 Jac I c 18; 21 Jac I c 9; 21 Jac I c 18; 21 Jac I c 20; 21 Jac I c 22).

¹⁷⁶ 7 Jac I c 20.

ab initio.¹⁷⁷ In addition, he undertook an initiative to reform the law digest and especially to review all obsolete statutes; thus he introduced a ‘variety of devices which would allow for legal change without sacrifice of legal certainty’.¹⁷⁸

The tension between James I and Parliament and the reduction in the number of parliamentary acts highlighted a critical dimension of the sunset legislation – mainly, the renewal of legislation containing a sunset clause. In 1610, on the continuance of the statutes, Hakewill, describing how statutes are enacted, mentions that ‘bills for the revivall, repeal or continuance of statutes, are usually drawn by lawyers being members of the house, appointed thereunto by the house upon some motion to that purpose made, which is usual at the beginning of every parliament’.¹⁷⁹

But the so-called ‘Addled’ Parliament of 1614 produced no statutes because James I dissolved it after it had been sitting for just a few weeks.¹⁸⁰ The main reason was that the Commons was not keen to grant him the subsidies he was requesting.¹⁸¹ The dissolution of the Addled Parliament led to different conclusions in academia concerning the 58 temporary acts which were due to expire that session. According to the *Journal of the House of Commons* on April 8th, a committee was appointed in order to consider all expiring acts,¹⁸² and on May 24th Mr Moore produced a report according to which the

¹⁷⁷ Francis Bacon, *The Elements of the Common Laws of England* (London 1826) 63.

¹⁷⁸ See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (CUP 1989) 183.

¹⁷⁹ William Hakewill, *The Manner How Statutes are Enacted in Parliament by Passing of Bills, Collected Many Years Past out of the Journals of the House of Commons* (London 1641) 4.

¹⁸⁰ Samuel R Gardiner, *The First two Stuarts and the Puritan Revolution* (2nd edn, Longmans Green 1877) 21.

¹⁸¹ *Ibid* 20.

¹⁸² *Journal of the House of Commons 1547 – 1629 Vol I* (1802) 456-7, ‘This Parliament not called for Making of Laws; rather for the Execution. - Moveth for Continuance of Statutes which else must die this Session. - That Bill Two Parts; Continuance, and Repeal. - Joined both together. - Many other worthy to be repealed. - A Committee to be well chosen, of Lawyers, and other Gentlemen of Experience; and that this Committee may subdivide itself, and in every, Lawyers, and others, to consider of all Statutes, for Repeal of

statutes were divided into 6 parts, and a request was made for the nomination of 6 subcommittees to evaluate them.¹⁸³

On the one hand, Hinton claims that the acts lapsed and he stresses that they were not even renewed in the parliament of 1621.¹⁸⁴ On the other hand, Moir argues that none of the temporary acts lapsed because the Lord Chancellor declared that ‘according to its terms this assembly was to be no parliament, but it was dissolved and annihilated as though no such thing had ever been’.¹⁸⁵ According to the findings, it was commonly accepted that if the Parliament were assembled without passing legislation, the assembly of the members of the Parliament did not constitute a parliamentary session but a convention, and as a result the expiring laws did not expire but continued until the first next session.¹⁸⁶

The issue of the expiring acts became more complicated after the Parliament of 1621, which ended up with two signed Acts, the ‘Act for the Grant of two entire Subsidies granted by the Temporalty’ and the ‘Act for Confirmation of the Subsidies granted by the Clergy’.¹⁸⁷ On January 6 1622, the King dissolved parliament due to non-cooperation by the Commons in considering a continuance bill, declaring that the assembly of Parliament

obsolete, unprofitable, and pernicious Statutes. - This to extend as well to Branches of Statutes, as to whole Statutes’.

¹⁸³ *Journal of the House of Commons 1547 – 1629 Vol I* (1802) 496, ‘Mr. Moore reporteth the Proceedings of the Committee for Statutes. - That the Heads should be distributed into Six several Parts, and several Sub-Committees to be appointed for every Part’.

¹⁸⁴ RWK Hinton, ‘The Decline of Parliamentary Government under Elizabeth I and the Early Stuarts’ (1957) 13 *Cambridge Historical Journal* 116, 129.

¹⁸⁵ Thomas L Moir, *The Addled Parliament of 1614* (Clarendon Press 1958) 145.

¹⁸⁶ WJ Jones, *Politics and the Bench, The Judges and the Origins of the English Civil War* (George Allen & Unwin 1971) 157.

¹⁸⁷ *The Statutes of the Realm Vol IV Part II* (Tanner Richie Publishing 2007) 1208. However, the text of the statutes is not included.

shall be taken as a convention and not as a session.¹⁸⁸ The dissolution of Parliament resulted in the expiration of seventy acts without renewal.¹⁸⁹ As Jones acknowledges, the immediate result was uncertainty as to whether the expiring acts were to be considered as effective.¹⁹⁰ A case was brought before the Court of the Common Pleas upon the statute of 35 Elizabeth c I for the adjuration of secretaries.¹⁹¹ The Court met twice and on the second occasion it neglected to step in, declaring that ‘all the judges were not in the interim, the grand Secretary and the Attorney General were to inform the King that the statute is obscure, and had not been put in jure, and that we could not agree’.

Finally, the Parliament of 1624 solved the whole issue, passing an Act repeating the expiring acts by prescribing that ‘(...) by virtue of this Act be adjourned ever since the Session of Parliament in the Seventh yeere of his Majestics Raigne of England to have been of such force and effect as the same were the last day of that Session, and from thenceforth until the end of the first Session of the next Parliament.’¹⁹²

The solution to the constitutional crisis regarding the renewal of expiring acts was utilised again during the first parliament of Charles I. An act was passed pertaining to temporary legislation, entitled ‘an Act, that this Session of Parliament shall not determyne by his Majesties Royall assent to this and some other Actes’, which provided that:

‘All Statutes which are to have continuance until the End of the present Session are to remain in force; Proviso if the present Session determine by Dissolution. And that all Billes and matters whatsoever, depending in the same Parliament, not fully determined or enacted before such Adjournement, shall remaine and contynue in the

¹⁸⁸ James F Larkin and Paul Hughes (eds), *Stuart Royal Proclamations Vol 1* (Clarendon Press 1973) 527: ‘A Proclamation Declaring his Majesties pleasure concerning the dissolving of the present Convention of Parliament’.

¹⁸⁹ WJ Jones, *Politics and the Bench, The Judges and the Origins of the English Civil War* (George Allen & Unwin 1971) 80.

¹⁹⁰ *Ibid* 81.

¹⁹¹ *The Reports of that reverend and learned judge Sir Richard Hutton* (2nd edn, Richards and Edward Atkins 1682) 61 [The Vacation after Hil 20 Jac].

¹⁹² 21 Jac I c 28.

same state and plight, as they are, or shalbe the day of the said Adjournment: And that all Statutes and Acts of Parliament, which are to have contynuaunce unto the end of this p[re]sent Session, shall be of full force after the said Adjournment, untill this p[re]sent Session be fully ended and determined. And if this Session shall determine by dissolucion of this p[re]sent Parliament, then all the Acts aforesaid, shalbe contynued untill the end of the first Session of the next Parliament'.¹⁹³

This statute aimed to remove any doubts regarding the continuance of the temporary acts expiring during the Parliament of 1625 in the event of non-renewal due to dissolution. In fact, the session of the parliament of 1625 did end in dissolution without further action having been taken; however, the temporary acts continued until the end of the first session of the next parliament.

The dissolution of the parliaments during that period without having temporary legislation renewed, revealed another critical dimension of sunset legislation with implications for the balance of powers. As Gensen and Posner have pointed out, 'often decisions about the timing of a new law are just as critical as decisions about its content'.¹⁹⁴ Sunset legislation has two temporal considerations: first, adoption of the legislation; and second, termination with the prospect of renewal. The value of sunset legislation with a stipulation for termination is the fact that the decision making process is lengthened through postponement to a desirable moment in the future. Benefits of sunset legislation thus include confirmation of the institutional capacity to renew or not renew a specific regulation. As a result the continuance bill is not a typical procedure, and its importance depends on the constitutional environment.

¹⁹³ 1 Car I c 7.

¹⁹⁴ Jacob E Gensen and Eric A Posner, 'Timing Rules and Legal Institutions' (2007) 121 Harvard Law Review 543.

More specifically, on the one hand the Crown was dependent on Parliament for the renewal of the temporary legislation, and on the other hand Parliament's task of renewing the legislation was made difficult by the King's dissolution. When, during the era of King James, the constitutional balance between the Crown and Parliament were in tension, interdependence between those two institutions was not possible. This constitutional tension resulted in the non-renewal of the temporary legislation.

II. Sunset clauses in the King's Revenue

In this part it will be seen how sunset clauses were used by the Commons in order to limit the amount of money granted to the King. The grant of money, as Judson points out, was a 'voluntary grant - gift of the subjects from his own property to the king' and 'Leaders of the parliamentary opposition naturally found this doctrine a strong bulwark in their stand against the king'.¹⁹⁵ The discussion in this part will also reveal the constitutional utility of such clauses, and how the Commons steadily reinforced its position over king's revenue.

As will be shown, sunset clauses were a dominant component in legislation concerning the king's revenue. In fact it will be argued that, during the emergence of Commons and Lords in the legislative process, such clauses in legislation concerning the king's revenue were a mechanism to limit the amount of the grants, rather than to monitor expenditure or to put pressure on the King to summon the Parliament in the near future.

¹⁹⁵ Margaret Atwood Judson, *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England 1603-1645* (Rutgers University Press, 1988) 39.

As Mitchell points out, the king's revenue in the 12th century was categorized into ordinary and extraordinary, with the latter deriving from unusual sources or being collected as an additional contribution when the king had to govern out of the ordinary times and the former income did not suffice for his needs.¹⁹⁶ An example of an extraordinary levy was the 'tallage'¹⁹⁷ and suffice to cite here a reference from the Calendar of Patent Rolls that shows the connection of sunset clause with the amount of grant

"Grant to the Jews of England, except Isaac de Norwico and Ursel and his brothers, heirs of Hamo de Hereford, that of the 10,000 marks which they owe to the king for the last tallage, they may pay at the Exchequer at Michaelmas next 500, at the following Easter 500, and if they answer well the said 1000 and other arrears which they owe to the king, then they may pay in like manner 1000 in the eighteenth year, and after that 2000 yearly, at the same terms, until the said 10.000 marks."¹⁹⁸

Correspondingly, the same pattern, that of granting levies to the king for a certain period was followed also in parliamentary business. For instance during the second parliament of the 14th year of Edward III a statute passed which was entitled 'a subsidy granted to the King on Wool, Woolfells, and other Merchandise exported for a certain period'.¹⁹⁹ It is remarkable that in 1415²⁰⁰ the Commons and Lords granted the subsidy on wool to the King for the rest of his life without further parliamentary action, instead of for a year or

¹⁹⁶ Sydney Knox Mitchell, *Studies in Taxation Under John and Henry III* (Yale University Press, 1914) 1.

¹⁹⁷ For the list of extraordinary levies see Sydney Knox Mitchell, *Studies in Taxation Under John and Henry III* (Yale University Press 1914) 2.

¹⁹⁸ Calendar of Patent Rolls, *Henry III Vol 3* (HMSO 1901-13) 12.

¹⁹⁹ 14 Edw III st 1 c 21. This act was considered as a defining moment in the history of indirect taxation because after several efforts Parliament managed to bring the taxation on wool subsidy under its auspices. See George Unwin, *Finance and Trade under Edward III* (Frank Cass 1962) 157; GL Harriss, *King, Parliament and Public Finance in Medieval England to 1369* (Clarendon Press 1975) 446. During the following years, the subsidy on wool was granted every time it was asked, though normally for a few years at a time see AL Brown, *The Governance of Late Medieval England 1272-1461* (Stanford University Press 1989) 68.

²⁰⁰ Rot Parl C 65/76 IV 63; [Grant of the subsidy on wool and other merchandise to the king for his lifetime, and a tenth and fifteenth also granted to the king].

so. This practice was followed during the first and last parliament of Richard III in 1484, during the reign of Henry VI in 1453 and during the reign of Edward IV in 1465.²⁰¹

As Harriss accurately points out, in the medieval history of England ‘the granting of taxation was an expression of the political harmony between the King and the subjects’.²⁰² The use of sunset clauses in the king’s revenue was mainly a reaction to practical needs. It is indisputable that the parliamentary grant of levies was traded in return for the King’s affirmative response to the common petitions. The limited duration of the grants implies the existence of this parliamentary interest. Moreover, it was mainly a mechanism to define the amount of the grant rather than to impose a monitoring on expenditure. Finally, even if the lack of resources was a reason for the King to summon parliament,²⁰³ there is no evidence that the use of sunset clauses in the king’s revenue exerted parliamentary pressure to the King to so summon it.

Eventually, by the turn of 17th century, the extensive use of sunset clauses in specific grants formed a custom and a pattern according to which some grants were categorized as perpetual and others as temporary. Coke points out this pattern saying that

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‘Subsidies taken in their generall sense for Parliamentary Aides are divided into perpetuall and temporary: perpetuall into three parts, viz. into Custuma antiqua, sive magna, custuma nova sive parva, and into custome of Broad cloth. Temporary, whereof there are three kindes, viz. 1. of Tonnage and Poundage of ancient time granted for a year or years incertainly, and of latter times for life. 2. A Subsidie after the rate of 4s. in the pound for lands, and 2 s. 8 d. for goods. And 3 for an Aide called a Fifteenth, And of these in order’.

²⁰¹ AR Myers, ‘Parliament 1422 -1509’, in RG Davies, JH Denton (eds), *The English Parliament in the Middle Ages* (Manchester University Press 1981) 147.

²⁰² GL Harriss, *King, Parliament and Public Finance in Medieval England to 1369* (Clarendon Press 1975) 31.

²⁰³ MV Clarke, *Medieval Representation and Consent* (Longmans Green 1936) 267.

²⁰⁴ Sir Edward Coke *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of the Courts* (London 1797) 28.

As shown above, a sunset clause in king's revenue was an instrument to meet practical needs, in particular to quantify the amount of the grant. There is no evidence that the Commons at the time had the power to refuse the king the grant of levies or impose time constraints to force the King to convene future Parliaments. Nevertheless, the use of these clauses meant the *de facto* dependence on parliament of each King, and progressively a tradition was established according to which the Kings, Commons and Lords co-operated in taxation.

The role of sunset clauses in the king's revenue developed later during the 17th century, as will be discussed in the following paragraphs. Such clauses were associated with the Commons' effort to control the king's revenue.

King Charles I succeeded his father in March 1625 and summoned Parliament with the hope of no contentious business²⁰⁵ and with the aim of obtaining a grant of supply.²⁰⁶ At the same time, members of the Parliament did not want a long session since the city of London was suffering from a plague epidemic and they were concerned about whether the session would conclude before the plague became devastating.²⁰⁷

As regards the King's request for a grant of supply, ever since the reign of Henry VI duties on exports and imports, known under the name of 'tonnage and poundage', had been granted by Parliament for the lifetime of each successive sovereign in the first session of his reign.²⁰⁸ However, during the reign of Henry IV, these duties were granted

²⁰⁵ Conrad Russell, *Parliaments and English Politics: 1621 – 1629* (Clarendon Press 1982) 217: 'The king wanted two things from the parliament, a grant of supply commensurate with the enterprise he had undertaken and the life grant of Tonnage and Poundage which had been made to all new kings since the fifteen century'.

²⁰⁶ Roger Lockyer, *Buckingham the Life and Political Career of George Villiers, First Duke of Buckingham* (Longman 1984) 245.

²⁰⁷ Conrad Russell, *Parliaments and English Politics: 1621 – 1629* (Clarendon Press 1982) 203; Maija Jansson, William B Bidwell (eds), *Proceedings in Parliament 1625* (Yale Center for Parliamentary History 1987) 3.

²⁰⁸ Samuel R Gardiner, *History of England from the Accession of James I to the Outbreak of the Civil War 1603 – 1642 Vol V* (Longmans, Green 1883) 364. For instance, 1 Hen VIII c 20; 1 Eliz c 20; 1 Jac I c 33.

only for a limited period.²⁰⁹ In general, the duties on tonnage and poundage were obtainable without the argument of necessity requisite for extraordinary taxation because they were associated with the constant needed for protection in the seas and foreign trade.²¹⁰ However, during that session the Commons were not willing to approve the grant for the lifetime of Charles I.

Sir Walter Earle proposed two motions: first, that ‘the Narrow Seas may be better garded then they have bene; it beings the consideration upon which this graunt was first made, and that for want hereof divers shippes have bene of late taken upon our owne shore’; and second, that ‘it might not nowe passe for the Kinges life, till the pointe of the pretermitted costome be examined, which is fownded upon this graunte and in the meane tyme be limited for a yeare.’²¹¹ Both motions were seconded by Sir Robert Phillipps, who added that

‘[I]t might so be past as not to exclude the question of other impositions. Untill H. the 6ths tyme this graunte had never other then a temporary limitation. Kinges ever received it as a guift of the subject, and were therewith contented without changinge them with any other waye of imposition: for if they had any such power it were altogether unneedfull to pass’.²¹²

Even if the Solicitor General, Sir Robert Heath, opposed the motion – he argued that ‘it had continued so many discents, and might be distastfull to the Kinge, who would be as inclinable to doe matters of grace to us as any of his ancestors’²¹³ – Earle’s motions were approved and the one year sunset clause was included in the Bill. Consequently the

²⁰⁹ Rot Parl C 65/68 III 570.

²¹⁰ Linda S Popofsky, ‘The Crisis over Tonnage and Poundage in Parliament in 1629’ (1990) 126 *Past and Present* 44, 49. The germ of this policy can be allocated in 15th century.

²¹¹ Samuel R Gardiner, *Debates in the House of Commons in 1625* (Camden Society 1873) 43.

²¹² *Ibid.*

²¹³ *Ibid.*

temporal Bill on Tonnage and Poundage was sent to the upper house and the first reading of the Bill took place on July 9th.²¹⁴

Despite its progression, the Bill was rejected by the Lords due to its limited duration, as is shown in *Cobbett's Parliamentary History*.²¹⁵ Russell argues, however, that after the first reading, the Lords simply left the Bill to 'fall asleep'.²¹⁶ Another point of view, propounded by Hulme, is that the cause of the Lords' decision not to pass the Bill is unknown.²¹⁷ The *Journal of the House of Lords* does not provide sufficient information for accurate conclusions to be drawn, although it is explicitly noted that the Bill was read three times before its rejection.²¹⁸

The reason why the House of Commons confirmed the one-year sunset clause is not clear. Lockyer argues that the attitude of the Commons during the Parliament of 1625 was not particularly co-operative and might have been different if only they had been given more specific information about the King's policies.²¹⁹

More precisely, Gardiner argues that Sir W. Earle was concerned about the fact that through the name of pretermitted customs the Crown Lawyers included in the parliamentary grant of tonnage and poundage new impositions expanding the amount of

²¹⁴ *Journal of the House of Lords 1620-1628 Vol III* (1767) 462.

²¹⁵ *Cobbett's Parliamentary History of England Vol II* (Hansard 1807) 6.

²¹⁶ Conrad Russell, *Parliaments and English Politics: 1621 – 1629* (Clarendon Press 1982) 229. According to Russell, 'it is very hard to be certain which bills were halted by opposition in the Lords, since the Lords rarely formally rejected a bill they did not like: they allowed it to fall asleep'. Ibid 42.

²¹⁷ Harold Hulme, 'Charles 1 and the Constitution' in William Appleton Aiken and Basil Duke Henning (eds), *Conflict in Stuart England: Essays in Honour of Wallace Notestein* (New York University Press 1960) 89, 101.

²¹⁸ *Journal of the House of Lords 1620-1628 Vol III* (1767) 490.

²¹⁹ Roger Lockyer, *Buckingham the Life and Political Career of George Villiers, First Duke of Buckingham* (Longman 1984) 245.

the grant.²²⁰ The pretermitted customs were founded on an interpretation of the tonnage and poundage grant and they differed from the new impositions, which were collected without any pretence of parliamentary authority.²²¹ Hence, Earle proposed the one-year sunset clause in order to give time for the examination of the scope of pretermitted customs.²²² The statement by Phillipps, who included the question of other impositions when he seconded Earle's motion, accords with that interpretation.

Moreover, Harrison remarks that the Commons would have required the early approval of the one-year Bill on tonnage and poundage as the necessary precondition towards a more comprehensive financial settlement.²²³ Although Russell admits that the common interpretation of the sunset clause in the Tonnage and Poundage Bill was to diminish the King's revenue, he expresses a different point of view. He argues that the Commons approved Earle's motion with the purpose of supporting the King's revenue with the pretermitted custom and impositions. The Bill's complexity and the fact that there was no available time at the session due to the plague threat were the crucial elements prompting the inclusion of the one-year sunset clause.²²⁴

Reviewing primary sources, such as anonymous diaries and state papers, allows us to delve deeper into the intention of the Commons in adding the one year sunset clause to the Tonnage and Poundage Bill and thereby departing from well-grounded tradition.

²²⁰ Samuel R Gardiner, *History of England from the Accession of James I to the Outbreak of the Civil War 1603 – 1642 Vol V* (Longmans Green 1883) 364.

²²¹ Samuel R Gardiner, *Debates in the House of Commons in 1625* (Camden Society 1873) 43 (fn b). For instance, through the grant of tonnage and poundage, Edmund Nicholson, projector of the pretermitted customs granted in 1618, had argued that the collection of customs on cloth made of wool as well as on wool itself was allowed. See Maija Jansson and William B Bidwell (eds), *Proceedings in Parliament 1625*, (Yale Center for Parliamentary History 1987) 313 fn 8.

²²² Samuel R Gardiner, *History of England from the Accession of James I to the Outbreak of the Civil War 1603 – 1642 Vol V* (Longmans Green 1883) 364.

²²³ GA Harrison, 'Innovation and Precedent: a procedural reappraisal of the 1625 Parliament' (1987) 102 *English Historical Review* 51.

²²⁴ Conrad Russell, *Parliaments and English Politics: 1621 – 1629* (Clarendon Press 1982) 227.

According to an anonymous diary describing the process in the Parliament of 1625, ‘the reasons that moved the house not to grant it for life, as it was in King James his tyme, was for that the kinges Councill in the Parliament of 18 Jacobi [recte 1624] did picke out reasons out of that Act for the ptennitted customs and other impositions wch lay and were imposed on the subts. very grievous unto them, and they had not tyme to examine and redress them’²²⁵, we may conclude that one reason was that it was the intention of the Commons to re-examine the scope of the goods upon which the tax of tonnage and poundage was applied, because there was no available time at the original session.

The State Papers reveal further useful information regarding the reasons for the inclusion of the sunset clause. Before and during the Parliament of 1625, numerous reports were sent from state officials describing incidents of pirates cruising unchecked off the coast of Cornwall.²²⁶ Sir W Earle, who was a representative of the West Country towns, was deeply concerned about that fact.²²⁷ Moreover, a belated report of August 2nd, sent by Sir James Bagg to Buckingham, reveals that West Country towns had complained to their Members of Parliament about the unguarded sea and the presence of Turkish pirates.²²⁸ As the management of the specific grant which aimed to safeguard the seas proved inefficient due to the inclusion of a one-year sunset clause in the Bill on Tonnage and Poundage, it is assumed that the time limitation was related to matters of tax accountability as well.

²²⁵ MS 449 257.

²²⁶ TNA PRO SP 16/1/68, TNA PRO SP 16/1/94; TNA PRO SP 16/2/33, TNA PRO SP 16/2/36; TNA PRO SP 16/3/76; TNA PRO SP 16/4/35; TNA PRO SP 16/5/8, TNA PRO SP 16/5/23, TNA PRO SP 16/5/24, TNA PRO SP 16/5/32, TNA PRO SP 16/5/49, TNA PRO SP 16/5/55, TNA PRO SP 16/5/81, TNA PRO SP 16/5/90.

²²⁷ Maija Jansson and William B Bidwell (eds), *Proceedings in Parliament 1625* (Yale Center for Parliamentary History 1987) 313. Sir W Earle states at the debates of Commons on July 5th that ‘the Turkish pirates come into our seas and take our ships at our doors’.

²²⁸ TNA PRO SP 16/5/6.

Even without reference to the original and primary aim of the Commons in amending the Bill on Tonnage and Poundage by limiting its duration, the inclusion of the one-year sunset clause was clearly a significant amendment with important implications in respect of the allocation of authority to approve or refuse taxation. Gardiner accurately states that ‘the question of tonnage and poundage was the question of the sovereignty of England. Charles could not govern the country without this money, and if the claim of the Commons was admitted they might demand anything they liked as the price of their grant’.²²⁹

The way in which the Commons treated the issue of the tonnage and poundage in the years that followed confirms the fact that the Commons was struggling to control the grant of taxation and to safeguard their subsequent authority.

Once the temporary Bill on Tonnage and Poundage failed to pass in the House of Lords, the King issued a proclamation to collect the grant on tonnage and poundage without parliamentary consent.²³⁰ In response, in May 1628, Parliament passed the Petition of Rights, which (among other things) confirmed the principle that taxation can be imposed only by Parliament, while the Commons refused once again to grant Tonnage and Poundage.

In addition, the Commons submitted a ‘remonstrance’ using the Petition of Rights as a basis against the practice of the Crown collecting the tonnage and poundage, and stated explicitly that ‘the receiving of Tonnage and Poundage, and other impositions not granted by Parliament, is a breach of the fundamental liberties of this kingdom, and contrary to your Majesty's royal answer to the said Petition of Right.’²³¹ The issue of

²²⁹ Samuel R Gardiner, *The First two Stuarts and the Puritan Revolution* (2nd edn, Longmans Green 1877) 62.

²³⁰ Samuel R Gardiner, *The Constitutional Documents of the Puritan Revolution 1625 – 1660* (Clarendon Press 1906) 49 [‘Commission for raising Tonnage and Poundage with Impositions’].

²³¹ *Ibid* 70 [‘The Remonstrance against Tonnage and Poundage’].

tonnage and poundage was also a matter of discussion until the Long Parliament, because of the case of John Rolle, a Member of Parliament whose goods were seized when he refused to pay tonnage and poundage.²³²

Eventually, in 1640, Parliament passed a series of legislation granting the tonnage and poundage. It is noteworthy that the first piece of legislation contained a 20-day sunset clause, the second a 25-day sunset clause, the third a 110-day sunset clause, the fourth a two-month sunset clause, the fifth a 55-day sunset clause, the sixth a 38-day sunset clause and the last a two-month sunset clause.²³³ These sunset clauses both confirm the increasing role of the Commons to grant the tonnage and poundage and also exemplify the Commons' effort to monitor the King's expenditure.

The previous discussion revealed the conceptual value of sunset clauses and demonstrated how a one-year sunset clause in the Tonnage and Poundage Bill was a key part of the tension between the King and the Commons.

Conclusions

The historical analysis of sunset clauses began in this chapter with the first parliaments of the late medieval period. Unfortunately, the information available regarding that period is limited, and the parliamentary rolls do not provide us with sufficient information regarding parliamentary proceedings. Due to the lack of evidence, irrefutable conclusions cannot be reached. However, secondary sources provide us with useful information regarding the origin of the statutes, allowing some firm conclusions to be drawn.

²³² Linda S Popofsky, 'The Crisis over Tonnage and Poundage in Parliament in 1629' (1990) 126 *Past and Present* 44, 49-62.

²³³ 16 Car I c 8; 16 Car I c 12; 16 Car I c 22; 16 Car I c 25; 16 Car I c 29; 16 Car I c 31; 16 Car I c 36.

The above analysis, which was based on original sources, was designed to show the constitutional value of such clauses during their early use. The absence of the concept of the rule of law precludes the study of the effect then of sunset clauses upon it as such. However, as regards the balance of power between the King, Commons and Lords, it was shown that the use of this clause accords with the legislative power of each actor.

During the late medieval history of England, when Parliament became an active part of the legislative process, the royal prerogative to amend legislation by adding a sunset clause provided the necessary flexibility and elasticity to the Sovereign, especially in matters pertaining to trade and merchants. The Crown, in limiting the duration of the legislation, complied with the request of the subjects on the one hand, and on the other hand preserved its right to repeal such legislation so as to administer the dominium according to its interest.

However, the Crown did not hold a monopoly on limiting the duration of legislation. By the end of the reign of Tudors, the system of government which emerged was that of a mixed government, although not completely articulated.²³⁴ The legislative procedure evolved and became a more multi-party process. The legislative power was shared between different actors, the Crown, the House of Lords and the House of Commons. The power to amend legislation by adding a sunset clause was no longer exclusive, and as a result the use of sunset clauses was transformed so that it became a bargaining tool in the formation a common ground in order to reach consensus.

In the Stuart era, sunset clauses were used extensively, and this had interesting implications as regards first the co-operation between the King and the Commons and Lords. During the First Stuart reign, the continuity of temporary legislation became a central political issue as the accidental expiration of the laws increased uncertainty, and

²³⁴ MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 43.

during the reign of Charles I, the sunset clause in the Bill on Tonnage and Poundage was a key part of the tension between the King and the Commons and was transformed as a tool in negotiating the conflicting relationship between Commons and the Crown.

CHAPTER III: HISTORICAL OVERVIEW OF SUNSET CLAUSES; THE INCREASING POWER OF THE COMMONS

[Parliament] hath sovereign and controllable authority in the making, confirming, enlarging restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military maritime, or criminal

W Blackstone, Commentaries, Book 1, 17

Introduction

The previous historical chapter outlined the significance of sunset clauses in the relationship between King and the House of Commons and the House of Lords. This chapter commences with the last Jacobean era when the balance of powers between Parliament and the King was restored, albeit with increasing influence from the Commons. It considers the utility of sunset clauses in a period of transition during which the doctrine of parliamentary sovereignty was beginning to emerge.

Furthermore, this chapter analyses the constitutional value of sunset clauses during an era of parliamentary sovereignty. It will be argued that sunset clauses were exclusively used by the Commons, and that the driving force was not controversy between the parties, but the effort to build majorities. It will be seen, moreover, that Parliament used these clauses to control the growth of the administration, and face emergencies as exemplified by use of such clauses in numerous Habeas Corpus Suspension Acts. Finally It will highlight the way in which their extensive use burdened the legislature's task.

Many primary sources provide us with information regarding the use of sunset clauses in legislation, such as the statute book, the *Journal of the House of Lords*, the *Journal of the House of Commons*, the *Cobbett's Parliamentary History Reports*, and the

Hansard Reports. Nevertheless, the vast majority of temporary acts from 1714 until 1760 are excised. Sir Charles Robertson explains the lack of the whole text of these acts, as they do not affect the principles, structure and machinery of government.¹

This chapter proceeds as follows. Part A examines the use of sunset clause in an era of balance of powers between the King, Lords and Commons. Part B discusses the use of sunset clauses during the era of parliamentary sovereignty. It shows the utility of such clauses during controversies between the executive and the legislature and how Parliament used them in order to control the administration. Finally Part C first explores the utility of sunset clauses in emergencies, it focuses on the Habeas Corpus Suspension Acts and assesses them from the perspective of the earlier remedial understanding of law, and secondly analyses the difficulties caused by extensive use of such clauses.

A. Sunset Clauses in the Era of Balance of Powers

The sudden death of Oliver Cromwell in September 1658 and the subsequent collapse of the republican government under Richard Cromwell led to the restoration of the constitutional order as it was before the Civil War.² The first part of this chapter will discuss the further evolution of sunset clauses at a time when the Commons consolidated its position in the legislative process.

It will be shown that the Commons used sunset clauses in order to safeguard its position – for instance, in order to impose more frequent parliamentary sessions. Conversely, it will be shown that the Crown made use of such clauses in order to maintain its prerogatives. Furthermore, this part of this chapter will also demonstrate how sunset

¹ Sir Charles Grant Robertson, *Select Statutes, Cases and Documents to Illustrate English Constitutional History* (4th edn, Methuen 1923) 194.

² The Statute Book is a blank from the close of the 16th year of Charles I (1640–1) to the year of the Restoration, the so-called 12th year of Charles II (1660).

clauses were used to facilitate the adoption of innovative legislation, such as the new land tax, the first bankruptcy law and the abolition of censorship.

I. Sunset Clauses for the Revival of the Suspending Powers of the Crown

As Craig accurately remarks, ‘the restoration of the monarchy in the person of Charles II did not restore the previous constitutional status quo’,³ and as Holdsworth further points out, Parliament possessed a more central role in the government ‘with an initiative of its own, and an acknowledged right to survey the whole field of political action’.⁴ As a result, government after the restoration was more parliamentary.⁵ The new balance of powers which emerged was based on the theory of a balanced constitution.⁶

As regards the position of the King, and in particular the relation between royal prerogative and the law Vile asserts that ‘The battle between King and Parliament had resulted in two fundamentally important modifications of this doctrine. First, the King, although he still had powerful and important prerogatives, must acknowledge the supremacy of the law, and, therefore, of the legislature’.⁷

One of the main constitutional issues emerging during the reign of Charles II and James II was the extent of the suspending powers of the King according to his prerogatives. The origin of suspending power of the monarch derived from the middle

³ Paul Craig, ‘Public Law, Political Theory and Legal Theory’ [2000] PL 211, 215.

⁴ WS Holdsworth, *A History of English Law Vol VI* (Methuen 1924) 162.

⁵ GR Elton, *Studies in Tudor and Stuart Politics and Government Vol II* (CUP 1974) 158.

⁶ Regarding the concept of ‘balanced government’ and the process according to which it emerged see MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 58.

⁷ *Ibid.*

ages and was a reserve power permitting the King to correct the deficiencies of the ordinary law.⁸ However, as Holdsworth states, the ‘Tudors and the earlier Stuarts do not seem to have made any great use of that power, and no discussion arose concerning it during that period’.⁹

A bill introduced into the House of Lords in 1662-1663, giving the monarch wide suspending power, had failed to pass.¹⁰ Another effort took place in 1672 and, remarkably, the bill again failed to pass. On the latter occasion the bill introduced into the House of Lords was more specific than previously: the suspending power was limited to certain named statutes and it contained a five-year sunset clause limiting its duration.¹¹ It appears that the sunset clause in the bill was used in an effort to create a common ground of consensus so that the proposed bill would be passed by Parliament.

Despite the failure of the bill, Charles II and James II exercised their prerogatives which were in substance a repeal of the suspended law. The 1672 Declaration of Indulgence issued by Charles II and the 1687 Declaration of Indulgence, together with the amendment issued by James II, suspended all penal laws against Catholic and Protestant nonconformists. However, it is significant that while the reaction of the Commons in 1673¹² forced Charles II to withdraw the Declaration of Indulgence,¹³ the reaction of the Commons in 1788 was more co-operative. Indeed the Commons declared that ‘the king,

⁸ Ibid 218.

⁹ Ibid 220.

¹⁰ *7th Report of Historical Manuscripts Commission* 167 - 8.

¹¹ *9th Report of Historical Manuscripts Commission Part II* 25.

¹² *Journal of the House of Lords 1666-1675 Vol XII* (1767) 539-40.

¹³ Ibid 551.

with the assent of the lords, might make such sufferance touching the Statute of Provisors lately passed, as should seem to him reasonable until the next parliament'.¹⁴

II. Sunset Clauses for more frequent Parliaments

The well-established practice during the last period of Charles I regarding the short-term sunseting of the Tonnage and Poundage legislation was kept under the rule of Charles II.¹⁵ Notably, with regard to the relationship between the House of Commons and the House of Lords, the former advanced its role in taxation. Porritt accurately argues that in the field of taxation the Commons had established a privileged role.¹⁶ In fact, the Lords exercised only a limited power upon money bills, as they could not amend bills on taxation, and, moreover, they could not amend the duration of a sunset clause.

Consequently, the Commons claimed the aforementioned principle of the privileged role of the House of Commons concerning money bills in order to block the Lords' initiatives upon the levy of money.¹⁷ A Commons report to the Lords on March 20, 1671, concerning an amendment to the Bill for Impositions on Merchandize, was emblematic. It stated:

¹⁴ FW Maitland, *The Constitutional History of England: A Course of Lectures* (HAL Fisher ed, CUP 1908) 306.

¹⁵ Similarly, the practice of involving sunset clauses in the delegation of powers was continued as well. Nonetheless, there was no parliamentary intervention on the matter, as the colonial policy was under the royal prerogative. It is worth mentioning the commission given to the newly appointed Governor of Jamaica, Sir Thomas Modyford Bart. The new Governor was instructed, among others, to limit the duration of all laws with a two-year sunset clause. The commission explicitly granted the power to the Governor to 'call Assemblies, and with their consent to make laws, reserving to himself a negative voice ; also to levy monies : said laws to agree with those of England, and to be in force for two years only, except they be confirmed by the King'. W Noel Sainsbury (ed), *Calendar of State Papers Colonial, America and West Indies Vol 5* (Digital version at British History Online 1884) [656].

¹⁶ Edward Porritt, *The Unreformed House of Commons, Parliamentary Representation before 1832 Vol I* (CUP 1909) 545.

¹⁷ Contrariwise the Lords developed the principle of not incorporating irrelevant bill in money bills, as the Commons were keen to incorporate irrelevant bills to money bills in order to prevent amendment in the House of Lords. See *Cobbett's Parliamentary History of England Vol VI* (Hansard 1810) 360.

‘[T]hat the Power exercised by the House of Peers, in making the Amendments and Abatements in the Bill, intituled, An Act for an additional Imposition on several foreign Commodities, and for Encouragement of several Commodities and Manufactures of this Kingdom, both as to the Matter, Measure, and Time, concerning the Rates and Impositions on Merchandize, is a fundamental, inherent, and undoubted Right of the House of Peers; from which they cannot depart’.¹⁸

The short time limitation in taxation is acknowledged by Holdsworth, who recognises that ‘in the first place, the revenue granted to the king in perpetuity decreased, and that granted annually for a limited term increased’, and points out that ‘in the second place, the rule of strict appropriation universally applied to the annual or limited grants, resulted in securing for the House of Commons permanent control over the amount and kind of expenditure which the crown could incur’.¹⁹ In addition, it is claimed that the short term sunseting of tax legislation was a mechanism to guarantee that frequent parliaments would occur.²⁰

The reign of the first two Stuarts after the Restoration proved to be one of the most erratic periods in British history, starting with a revolution and concluding in another. The successful co-operation of Whigs and Tories against James II led to the succession of the throne by William of Orange and Mary II.²¹ A Parliamentary Convention was summoned in order to offer the throne and draft the major constitutional documents of the settlement. Among them, the Bill of Rights²² was passed. It contained a clause prohibiting the suspension of laws without parliamentary consent. From the reign of William III onwards,

¹⁸ *Journal of the House of Commons 1667-1687 Vol IX* (1802) 239.

¹⁹ WS Holdsworth, *A History of English Law Vol VI* (Methuen 1924) 252.

²⁰ G Burnet and others, *Bishop Burnet’s History of his own time Vol II* (Thomas Ward 1724-34) 43.

²¹ WS Holdsworth, *A History of English Law Vol VI* (Methuen 1924) 163.

²² 1 Gul&Mar c 5 [An Act declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne.

the new mechanism for the promotion of governmental policies was the political parties, Whigs and Tories.²³

During the first Parliament of William III and Mary II, many temporary Acts were passed and, according to Holdsworth, 'were made necessary by the exigencies of the situation.'²⁴ The first Mutiny Act was passed according to the Bill of Rights clause which prohibited the raising of a standing army without parliamentary consent. The Mutiny Act contained a one-year sunset clause,²⁵ and its renewal became regular practice for around two centuries.²⁶ The importance of this sunset clause is highlighted by Holdsworth, who claims that the annual renewal of the standing army 'has proved to be one of the strongest sanctions for parliamentary annual session'.²⁷

Other writers,²⁸ though, have stressed that the annual calling of parliaments is explicable on the basis of the King's need to secure further subsidies. Focusing either on the annual Mutiny Act or on several annual subsidies, each author admits that the use of sunset clauses in legislation was a useful mechanism which imposed the need for frequent parliamentary sessions. Consequently, another use of the sunset clause emerged, having ramifications for the institutional co-operation of the government and its interdependence.

²³ GR Elton, *Studies in Tudor and Stuart Politics and Government Vol II* (CUP 1974) 158. According to Hayton, the clear lines between the two parties were formed during the Exclusion Crisis see David Hayton, 'Contested Kingdoms. 1688-1756,' in Paul Langford (ed), *The Eighteenth Century* (OUP 2002) 47.

²⁴ WS Holdsworth, *A History of English Law Vol VI* (Methuen 1924) 194.

²⁵ 1 Gul&Mar c 5 [An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service].

²⁶ FW Maitland, *The Constitutional History of England: A Course of Lectures* (HAL Fisher ed, CUP 1908) 329. In fact it was renewed during the second session of the first parliament of William III. However, it was not renewed during the third session as, according to Ogg, the Commons did not approve the necessity of a standing army at that moment; see David Ogg, *England in the Reigns of James II and William III* (Clarendon Press 1955) 441.

²⁷ WS Holdsworth, *A History of English Law Vol VI* (Methuen 1924) 241.

²⁸ David Hayton, 'Contested Kingdoms. 1688-1756,' in Paul Langford (ed), *The Eighteenth Century* (OUP 2002) 40; HT Dickinson 'The British Constitution' in HT Dickinson (ed), *A companion to Eighteenth-Century Britain* (Blackwell 2002) 13.

The lack of a specific framework regulating the summons of Parliament²⁹ was in practice replaced with the use of sunset clauses in important legislation, which made the monarchs' ruling without parliaments ineffective.

III. Sunset Clauses and Innovative Legislation

Several sunset clauses are recorded in a plethora of legislation,³⁰ with the most notable being the act suspending the habeas corpus,³¹ which drew significant attention at the debates in the House of Commons and House of Lords.³² In fact, it was the first time that a sunset clause was used for the suspension of the habeas corpus remedy, and it is noteworthy that the sunset clause is set out twice in the text of the statute.³³ On the one hand, in the body of the act it is stated that 'every Person or Persons ... may be detain'd in safe Custodie till the Seventeenth Day of Aprill in the Yeare of Our Lord One thousand six hundred eighty and nine, without Baile or Mainprize...'; while on the other hand there is a sunset provision entitled 'continuance of Act', which is continuance sunsetting the Act as a whole on April 17th.

²⁹ In 1664 the Triennial Parliaments Act '16 Car II c 1' passed; however, due to the lack of a mechanism to enforce the calling of parliaments, Charles II was able to complete the last four years of his reign without Parliament.

³⁰ i.e 1 Gul&Mar c 3; [An Act for preventing all Doubts and Questions concerning the Collecting the Publique Revenue]; 1 Gul&Mar c 13 [An Act for Reviveing two former Acts for Exporting of Leather].

³¹ 1 Gul&Mar c 2; [An Act for Impowering His Majestie to Apprehend and Detaine such Persons as He shall finde just Cause to Suspect are Conspireing against the Government].

³² *Journal of the House of Lords 1685-1691 Vol XIV (1767-1830)* 222. According to Thomson 'The passing of the Act desired by the Commons implied that henceforth extraordinary powers could only be conferred upon the executive by Parliament and for such time and in such manner as Parliament pleased.' Mark A Thomson, *A Constitutional History of England 1642 to 1801* (Methuen 1938) 286.

³³ For more discussion about the Habeas Corpus Suspension Act see text to n 150 in Ch III

The latter was an amendment proposed in the House of Commons,³⁴ and this pleonasm expresses the significance of the sunset clause in the habeas corpus. Indeed, another amendment proposed during the same session, which failed to pass, reaffirms the consternation which members of the House felt concerning the suspension of habeas corpus. However, during the same session, two acts renewing the suspension of the habeas corpus were passed, the first until May 5th and the second until October 23rd.³⁵

During the reign of William III it is significant that, the Licensing Press Act of 1662³⁶ expired. It was revived for seven years in 1685³⁷ and the last time it was renewed was in 1692, for one year.³⁸ However, during the Parliament of 1695, the House of Lords aimed to include the Licensing and Press Act in a general Act with the title ‘an Act for continuing, and making perpetual, several Laws therein mentioned’, so as to make it perpetual. However, the Commons declined to renew the Act.³⁹

According to the *House of Lords Journal*, at the joint conference the Commons presented 18 reasons why the Act should not be renewed.⁴⁰ Indeed it was the first time that a detailed account of a temporary legislation was considered whilst the termination or the

³⁴ The Convention Parliament (William): The convention becomes a Parliament - begins 20/2/1689', *The History and Proceedings of the House of Commons 1680-1695 Vol 2* (1742) 280.

³⁵ 1 Gul&Mar c 5 [An Act for Impowering His Majestie to Apprehend and Detaine such Persons as He shall finde just Cause to Suspect are Conspireing against the Government] 1 Gul&Mar. c 19 [An Act for Impowering His Majestie to Commit without Baile such Persons as He shall finde just Cause to Suspect are Conspireing against the Government].

³⁶ 14 Car II c 33 [An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Bookes and Pamphlets and for regulating of Printing and Printing Presses].

³⁷ 1 Jac II c 17 [An Act for Reviveing and Continuance of severall Acts of Parlyament therein mentioned].

³⁸ 4&5 Gul&Mar c 24 s 14 [An Act for reviving continuing and explaining several Laws therein mentioned [that] are expired and neare expiring].

³⁹ *Journal of the House of Commons Vol XI* (1803) 305. Based on this development Ihalainen claims that “Britain had a comparatively free press after 1695, which supported the emergence, mobilisation and expression of the views of the people” see Pasi Ihalainen, *Agents of the People: Democracy ad Popular Sovereignty in British and Swedish Parliamentary and Public Debates, 1734-1800* (Brill, 2010) 62.

⁴⁰ *House of Lords Journal 1691-1696 Vol XV* (1767-1830) 544.

renewal of legislation was evaluated. As Thomson remarks, the Commons pointed out that the Licensing Act was ‘absurd’ and ‘inequitable’ even though there is no reference to the freedom of the press.⁴¹

At the turn of the century, normality was restored and parliamentary business contributed a significant amount of work to legislative action. During the reign of Anne, and especially from the first year, a new policy was initiated in the field of taxation. An Act was passed imposing a land tax,⁴² which contained one-year sunset clause, and which continued for approximately a century, until 1798, when it became perpetual.⁴³ Furthermore, due to the hostilities against France and the outbreak of the War of the Spanish Succession, Parliament adopted an act ‘for Prohibiting all Trade and Commerce with France’,⁴⁴ which was intended to last for the duration of the war.

In addition, another innovation is recorded in 1705, this time concerning bankruptcy law, as an act was adopted introducing the discharge of a bankrupt’s exiting liabilities.⁴⁵ The act was temporary, due to a three-year sunset clause,⁴⁶ and signalled a shift from creditor assistance to debtor assistance.⁴⁷ Interestingly, the motivation behind this enactment is recorded in *ex parte Burton*.⁴⁸ In that case Lord Hardwicke mentions

⁴¹ Mark A Thomson, *A Constitutional History of England 1642 to 1801* (Methuen 1938) 298.

⁴² Land Tax, Forfeited Estates, etc. Act 1702 (1 Anne c 6).

⁴³ Land Tax Perpetuation Act 1798 (38 Geo III c 60).

⁴⁴ Trade with France Act 1704 (3&4 Anne c 12).

⁴⁵ See Jay Cohen, ‘The History of Imprisonment for Debt and its Relation to Development of Discharge in Bankruptcy’ (1982) 3 *Journal of Legal History*, 153, 156; John C McCoid, ‘Discharge: The most important development in Bankruptcy history’ (1996) 70 *American Bankruptcy Law Journal* 163, 164; Vanessa Finch, *Insolvency Law, Perspectives and Principles* (CUP 2002) 9.

⁴⁶ Bankrupts Act 1705 (4&5 Anne c 4), s 17.

⁴⁷ Emily Kadens, ‘The Pitkin Affair: A Study of Fraud in Early English Bankruptcy’ (2010) 84 *American Bankruptcy Law Journal* 483, 485.

⁴⁸ *Ex parte Burton* 26 ER 163.

that ‘the statute of the 4 and 5 Ann. which was temporary at first, and never intended to be a perpetual law (...) was made in consideration of two long wars which had been very detrimental to traders, and rendered them incapable of paying their creditors’.⁴⁹

McCoid, who focuses on the further development of the law, recognises that this temporary legislation might have related to the War of the Spanish Succession. However, he argues that ‘While that is certainly a possibility, Parliament’s not-much-later readiness to enlarge both the time frame and the coverage, as well as to alter its terms, seems to correspond more to experimentation than to any perception of a particular short-term need. Moreover, the idea of an experiment fits comfortably in the pattern formed by the sporadic efforts to deal with the problem of insolvency made previously by the Privy Council, Chancery, Interregnum Council, and Parliament’.⁵⁰

Although the principal focus of the Act was to prescribe the appropriate behaviour of bankrupts, this new framework was, as McCoid argues,⁵¹ abused. Suffice to mention the story of Thomas Pitkin and Thomas Brerewood. As Kaderns notes, ‘the two conspirators had managed to make off with over 50,000 pounds, around 150.000.000 US Dollars in modern money’.⁵² This case motivated Parliament to amend the existing act, and the following year, in 1706, the Act was amended by another temporary act ‘to explain and amend an Act of the last session of Parliament for Preventing Frauds frequently committed by Bankrupts’.⁵³

⁴⁹ Ibid.

⁵⁰ John C McCoid, ‘Discharge: The most important development in Bankruptcy history’ (1996) 70 American Bankruptcy Law Journal 163, 182.

⁵¹ Ibid 168.

⁵² Emily Kadens, ‘The Pitkin Affair: A Study of Fraud in Early English Bankruptcy’ (2010) 84 American Bankruptcy Law Journal 483, 484.

⁵³ Bankrupts Act 1706 (6 Anne c 22).

During the years of last two Stuarts, the sunset clause was developed into a useful mechanism entertaining mainly practical needs. In taxation, the use of sunset clause was principally a mechanism to secure accountability on spending, and it is remarkable that the vague expression ‘until the next parliament’ or ‘until the next session of the parliament’ was omitted from the temporary legislation.⁵⁴

Sunset clauses played a significant role in the transition period after the Interregnum, when the balance of powers was in a state of flux. Thus we have seen that the King used sunset clauses, albeit unsuccessfully, in an attempt to revive the royal prerogative to suspend laws. At the same time, the Commons applied short term sunset clauses to taxation and mutinies because of the fact that frequent Parliaments were likely to occur, while they opposed the Lords' authority to amend the wording of such clauses pertaining to taxation.

This period also witnessed the first law suspending habeas corpus and the double sunset clause in the act is an indication of the profound concern that was raised. Finally, the utility of such clauses was demonstrated in the field of legislative experimentation, as a series of new laws with sunset clauses were adopted, namely the the new land tax and the first bankruptcy law while such clauses facilitated the abolition of censorship.

⁵⁴ And when it is recorded, it is accompanied cumulatively by a specific number of years; for instance, Preventing Theft and Rapine upon the Northern Borders of England (12&13 Gul III c 6) ‘(...) thereby given and continue and are hereby continues in full force from and after the Expiration of the last mentioned Act for and during the Space and Term of Eleven Years and from thence to the End of the First Session of the next Parliament and no longer’.

B. Sunset Clause and Parliamentary Sovereignty

I. The Era of Parties

Queen Anne reigned for twelve years until her death in 1714. She was the last Monarch to exercise the power of not giving assent to a bill. She was succeeded by George I according to the Act of Settlement and he was the first Monarch whose role in legislation was formal only.⁵⁵ During the same period, a new system of parliamentary government was established by legislation enacted in the years between 1689 and 1716,⁵⁶ which featured a system of cabinet government and, progressively, the development of party government.⁵⁷ As Kemp accurately remarks, ‘if the years from 1689 to 1716 are the formative years for the relation between Kings and Commons, the years from 1716 to 1783 are the years of balance between them, and in the years from 1784 to 1832 this balance was slowly undermined’.⁵⁸

In this part, I argue that stability in the constitutional order and the establishment of the doctrine of parliamentary sovereignty in the 18th century crystallised the use of the sunset clause in the internal matters of Parliament.⁵⁹ Despite the formation of political parties, it will be shown that the use of sunset clauses was more relevant to the ministerial - anti ministerial controversy.⁶⁰

⁵⁵ See WI Jennings, *The Law of the Constitution* (5th edn, University of London Press 1959) 143.

⁵⁶ Betty Kemp, *King and Commons 1660 - 1832* (MacMillan 1957) 32.

⁵⁷ WS Holdsworth, *A History of English Law Vol X* (Methuen 1938) 55; Mark A Thomson, *A Constitutional History of England 1642 to 1801* (Methuen 1938) 305.

⁵⁸ Betty Kemp, *King and Commons 1660 - 1832* (MacMillan 1957) 5.

⁵⁹ The term of art ‘sovereignty’ was first recorded in 1776. see Pasi Ihalainen, *Agents of the People: Democracy ad Popular Sovereignty in British and Swedish Parliamentary and Public Debates, 1734-1800* (Brill, 2010) 254. For more analysis on the Parliamentary Sovereignty, see Ch V.

⁶⁰ Whereas the statute book has numerous temporary acts, not all of them contain a sunset clause. An illustrative example is the series of indemnity acts which were initiated in 1728 (1 Geo II c 23) and lasted for more than a century, until 1828. These acts were relieving the Protestant Dissenters – office-holders from all

To a large extent the mechanism for the promotion of bills was mainly the ministers through which the Crown was expressing its will.⁶¹ The House of Lords had the power to amend or even block a bill at least until 1911, when the Parliament Act was passed limiting the legislative authority of the Lords.⁶² With the exception of acts forming the Constitution, the controversy surrounding the legislative process did not have an institutional dimension, ie between the two Houses. The controversy during the 18th century was more on the ministerial and anti-ministerial front,⁶³ and less often at the front of party lines. With the institutionalisation of the political parties, conflict in the legislative process became located between the majority and the minority.

The Hanoverian succession hastened the transition from a Tory government to Whig dominance.⁶⁴ The Whig supremacy, though, ceased to provide a clash along party lines, and disputes were raised between groups of Whigs for the share of ministerial seats.⁶⁵ The most famous Whigs opposed to Walpole during his leadership were the ‘Cobham’s cubs’—among them, Grenville, Pitt and Lyttleton.⁶⁶ With reference to this balance of powers, in 1741 the ministry introduces a bill ‘for the encouragement and

penalties and consequences to which the Dissenters were liable according to the Test (25 Char II c 2) and Corporation (13 Char II Stat 2 c 1) Acts. What was commonly referred to as the ‘Annual Indemnity Acts’ were temporary and were renewed more or less annually; however, their temporal effect was retrospective, as Dicey remarks. See AV Dicey, *Introduction to the Study of the Law of the Constitution Vol I* (JWF Allison ed, OUP 2013) 135.

⁶¹ D Hume, *Essays, Moral, Political and Literary* (1862) 25.

⁶² The Parliament Act 1911 (1&2 Geo V c 13). With the exception of money bills, where Lords did not have the right to amend. See above text to n 18 in Ch III.

⁶³ Sir David Lindsay Keir, *The Constitutional History of Modern Britain 1485 - 1937* (3rd edn, Adam and Chales Black, 1946) 317.

⁶⁴ Brian Hill, ‘Parliament, Parties and Elections 1688 - 1760’ in HT Dickinson (ed), *A companion to Eighteenth -Century Britain* (Blackwell Publishing 2002) 63.

⁶⁵ HT Dickinson, *Liberty and Property: political ideology in eighteenth-century Britain* (Weidenfeld and Nicolson, 1977) 121.

⁶⁶ John Beckett, *The rise and fall of Grenvilles* (Manchester University Press 1994) 26.

increase of seamen, and for the better and speedier manning his majesty's fleet'.⁶⁷ This bill, which was rejected during the previous session of the parliament, was a motion to revive and make perpetual a temporary act⁶⁸ adopted during the 4th year of the reign of Queen Anne.⁶⁹ The bill was hotly debated and was opposed strongly by many Whig members of the parliament including Pitt, Lyttelton, Barnard, Sandys, Pulteney.⁷⁰ Eventually, the opposition managed to amend the bill, and among other amendments, a three-month sunset clause limiting its duration was passed.⁷¹

Furthermore, in 1756 William Pitt the Elder, from the opposition, advocated in favour of a 'militia bill' reconstituting the militia in order to meet imperial necessities.⁷² The militia bill was quite popular, and as Yorke indicates, 'the zeal and eagerness shown in pressing on the measure was to embarrass the government by forcing ministers into opposition to a popular measure'.⁷³ Despite the approval of the bill at the House of Commons,⁷⁴ strong opposition was expected in the House of Lords, as the Earl of Temple⁷⁵ and William Lyttelton⁷⁶ confess. According to *Cobbett's Parliamentary History*, a fruitful debate took place in the House of Lords on the militia bill and Lord Chancellor

⁶⁷ *Cobbett's Parliamentary History of England Vol XII* (Hansard 1811) 27.

⁶⁸ *Cobbett's Parliamentary History of England Vol XI* (Hansard 1810) 114.

⁶⁹ Exportation Act 1705 (4&5 Anne c 19).

⁷⁰ *Cobbett's Parliamentary History of England Vol XII* (Hansard 1811) 27.

⁷¹ *Ibid* 53.

⁷² Sir Charles Grant Robertson, *Select Statutes, Cases and Documents to illustrate English Constitutional History* (4th edn, Methuen 1923) 194.

⁷³ Yorke Philip, *The Life and Correspondence of Philip Yorke, Earl of Hardwicke, Lord High Chancellor of Great Britain Vol II* (CUP 1913) 262.

⁷⁴ *Cobbett's Parliamentary History of England Vol XV* (Hansard 1813) 704.

⁷⁵ *Ibid* 759.

⁷⁶ Robert Phillimore, *Memoirs and Correspondence of Lord Lyttelton Vol II* (James Ridgway 1845) 510.

Hardwicke of the Newcastle administration opposed it and managed its rejection.⁷⁷ It is remarkable, though, that the Lords in favour of Pitt's bill were willing to compromise and put it in probation in order to have it approved by the government.⁷⁸

Newcastle's administration was dismissed at the end of 1756 and on November 15, King George offered the Ministry to Pitt.⁷⁹ The militia bill was announced in the King's speech at the opening of the session of the Parliament,⁸⁰ which was, according to Leadam,⁸¹ a precondition of Pitt's acceptance of office. The Militia bill was introduced once again in Parliament, and in the Committee of the whole House the bill was amended according to Hardwicke's objections.⁸² Accordingly, a sunset clause was included and the duration of the act was restricted for five years,⁸³ for a trial period.⁸⁴

Likewise, in 1770, during North's administration, Grenville introduced a bill to regulate the procedure of controverted elections.⁸⁵ Until that time, controverted elections were solved by an *ad hoc* committee which was not impartial and as a consequence was

⁷⁷ *Cobbett's Parliamentary History of England Vol XV* (Hansard 1813) 725.

⁷⁸ Lord Tablot stated, during the debate: 'now my lords, supposing that the law should upon trial be found not to answer all the good ends intended by it, we should from that trial be able to judge wherein it was deficient, and by what means those deficiencies might be supplied': see *Cobbett's Parliamentary History of England Vol XV* (Hansard 1813) 750.

⁷⁹ Basil Williams, *The Whig Supremacy: 1714 - 1760* (Clarendon Press 1962) 354.

⁸⁰ *Cobbett's Parliamentary History of England Vol XV* (Hansard 1813) 772.

⁸¹ IS Leadam, *History of England* (Longmans Green 1909) 1757.

⁸² Navy Act 1740 (14 Geo II c 38); *Cobbett's Parliamentary History of England Vol XV* (Hansard 1813) 739; Yorke Philip, *The Life and Correspondence of Philip Yorke, Earl of Hardwicke, Lord High Chancellor of Great Britain Vol II* (CUP 1913) 266.

⁸³ See *Journal of the House of Lords 1756-1760 Vol XXIX* (1767-1830).

⁸⁴ Yorke Philip, *The Life and Correspondence of Philip Yorke, Earl of Hardwicke, Lord High Chancellor of Great Britain Vol II* (CUP 1913) 266.

⁸⁵ The political life of Britain at that time was influenced by the Wilkes case. For more discussion on this case see Pasi Ihalainen, *Agents of the People: Democracy and Popular Sovereignty in British and Swedish Parliamentary and Public Debates, 1734-1800* (Brill, 2010) 136ff.

used by the ministerial party to increase its majority in the Commons.⁸⁶ The bill met ministerial opposition, which was expressed by Richard Rigby.⁸⁷ Several objections were raised but subsequently dropped during the debate in the Commons.⁸⁸ Finally the act was adopted, though temporarily, and a seven-year sunset clause was added,⁸⁹ which was suggested to make the bill temporary by way of experiment.⁹⁰

More revealing in so far as sunset clauses are concerned, in 1774 a bill was introduced to make the Grenville Act perpetual. Sir William Molesworth, who seconded the motion, said that ‘administration had been opposers of this bill’,⁹¹ and Aubrey added that ‘the fact is and I can appeal to some gentlemen now in the House to bear me witness in the assertion that Mr Grenville originally intended to make this a perpetual bill; but in compliance with the opinions and solicitations even of his friends, who feared, that, by attempting too much at once, as the subject was as new as it was important, they might lose the whole; and that there might be no complaint of its being hastily obtruded upon the house, he modestly recommended it only upon trial’.⁹²

From the examples mentioned above, it can be concluded that when a legislative initiative does not have widespread approval, a sunset clause is used in order to build a majority. Similarly, when the opposition opposed a bill, the motion for the inclusion of a duration clause was quite frequent. In *Hansard* there are several motions, opposing a bill

⁸⁶ Philip Lawson, ‘Grenville’s Election Act: 1770’ [1980] *Historical Research* 218.

⁸⁷ *Cobbett’s Parliamentary History of England Vol XVI* (Hansard 1813) 907.

⁸⁸ *Ibid* 916.

⁸⁹ Parliamentary Elections Act 1770 (10 Geo III c 16).

⁹⁰ *Cobbett’s Parliamentary History of England Vol XVI* (Hansard 1813) 916.

⁹¹ *Cobbett’s Parliamentary History of England Vol XVII* (Hansard 1813) 1063.

⁹² *Ibid* 1067. Nonetheless, Lord North argues the exact opposite, that Grenville did not intend to make this act perpetual, saying that ‘he only meant it as a temporary and experimental act’ cf *Cobbett’s Parliamentary History of England Vol XVII* (Hansard 1813) 1063.

that failed, to limit the duration of a proposed bill, for instance in the Technical Instruction Bill,⁹³ the Vexatious Actions Bill,⁹⁴ the Foreign Prison Made Goods Bill,⁹⁵ and the Evidence in Criminal Cases Bill.⁹⁶ In particular, at the debate of the Licensing Bill in 1904, Lloyd George proposes the amendment of a sunset clause by arguing that ‘If this Government had not the time, resource, or political courage to deal with a question of that magnitude in the way it should be treated, they ought not to stand in the way of future Governments dealing with it’.⁹⁷

The use of sunset clause, though, was not a unique mechanism to block legislation. The minority or the opposition quite often used procedural tactics such as the lack of quorum in order to block a voting procedure,⁹⁸ or the Lords would delay a bill until it had fallen asleep. The latter practice, which was abolished by the Parliament Acts of 1911 and 1949, was recorded when ministers and lords were in harmony and when the government did not want to openly oppose a legislative initiative.⁹⁹

The practice of opposing a bill with a sunset clause amendment continued until recent years. The debates on the abolition of the death penalty illustrate this utility more clearly. In 1965, a bill abolishing the death penalty was introduced. It began as a Private Member's Bill but was entirely endorsed by the Government.¹⁰⁰ It was a controversial

⁹³ HC Deb 27 August 1889 vol 340 col 718.

⁹⁴ HC Deb 10 August 1896 vol 44 col 456.

⁹⁵ HC Deb 13 July 1897 vol 51 col 81.

⁹⁶ HC Deb 30 June 1898 vol 60 col 748.

⁹⁷ HC Deb 26 July 1904 vol 138 col 1234.

⁹⁸ Peter David Gamer Thomas, *The House of Commons in the Eighteenth Century* (Clarendon Press 1971) 167.

⁹⁹ E Neville Williams, *The Eighteenth Century Constitution 1688 - 1815* (CUP 1960) 136.

¹⁰⁰ HC Deb 13 July 1965 vol 716 col 358.

issue at the time, and thus the opposition managed to limit its duration with a five-year sunset clause.¹⁰¹ A consensus was formed regarding the experimental character of the bill, and Brooke, who introduced the sunset clause, stated ‘it seems to me that if the Bill becomes law, in five years' time we shall all know a great deal more than we do today, and we shall have had the benefit of the Report of the Royal Commission on the Penal System, which may help us with the terribly difficult problem of sentencing, on which we have spent so much time’.¹⁰² Finally the Bill passed¹⁰³ and in 1969 it became permanent, in spite of the opposition who aimed at least to keep the act temporary.¹⁰⁴

As long as the legislative process was concentrated in the House of Commons, the sunset clause lost its role as an interaction among the King, Lords and Commons. However, it kept its role between the executive and the legislative branches in expressing opposition to a bill. Maltzman and Shipan accurately remark that ‘opponents of new policies can also advocate inclusion of sunset provisions, temporally limited reauthorisations, or other provisions that are likely to encourage public and organised interests to lobby against successful implementation’.¹⁰⁵ Furthermore, the motive of the opposition in adding a sunset clause to an act is empirically linked to the expectation that temporary laws are more likely to be amended than perpetual laws.¹⁰⁶

¹⁰¹ HC Deb 13 July 1965 vol 716 col 408.

¹⁰² HC Deb 13 July 1965 vol 716 col 444.

¹⁰³ Murder (Abolition of Death Penalty) Act 1965.

¹⁰⁴ HL Deb 17 December 1969 vol 306 col 1138.

¹⁰⁵ Forrest Maltzman, Charles R Shipan, ‘Change, Continuity and the Evolution of the Law’ (2008) 52 *American Journal of Political Science* 252, 254

¹⁰⁶ *Ibid* 263.

Whereas the absence of strict party division in the House and the popular control over members of parliament was the main aspect of the 18th century,¹⁰⁷ increasingly in the following centuries, the power was transferred from parliament to the people.¹⁰⁸ According to Hayton, the active participation of the people in political life is explained on one hand through the rise in the importance of parliament and on the other hand through the expansion of state bureaucracy.¹⁰⁹ Thus, this evolution in the political system gives another role to the sunset clause – a link between representatives and constituents – especially when the expiration of the sunset clause occurs after an election. The prospect of a temporary law sunsetting, and the need for renewal, might be ground for debate between candidates opposing the renewal and those candidates in favour of renewal.

Indeed this development is recorded in the debates. As Mr Lewis argued in favour of the inclusion of a sunset clause in the House of Commons Members' Fund Bill, he stated that 'our constituents have not been consulted, nobody can say there is any popular mandate for this Bill, and I think many Members have very vague ideas as to how it will work in practice I submit it is reasonable to ask that within a period of years the matter should be bound to come up for Parliamentary attention by the expiry of the Act'.¹¹⁰

¹⁰⁷ Sir William R Anson, *The Law and Custom of the Constitution Vol I* (5th edn Clarendon Press 1935) 369.

¹⁰⁸ AF Pollard, *The Evolution of Parliament* (2nd edn, Longmans Green 1926) 340.

¹⁰⁹ Paul Langford (ed), *Contested Kingdoms, 1688 - 1756: The Eighteenth Century 1688 - 1815* (OUP 2002) 43.

¹¹⁰ HC Deb 19 July 1939 vol 350 col 670.

II. The Growth of the Administration

The previous part revealed the way in which sunset clauses were of utility as a mechanism to build majorities in Parliament, and their role in the controversy between the executive and the legislature was explored. This part will outline the utility of such clauses in the delegation of powers, and it will be argued that such clauses were useful for Parliament in allowing it to monitor and control the growing administration.

The practice of delegating law-making power is recorded from the 16th century.¹¹¹ Nonetheless, the foundation of local organisations under the auspices of the Parliament was one of the significant changes in public law and in the system of local government which took place in the 18th century and made the practice of delegated law-making power more common. From the Tudor period until the Restoration, local government was strictly controlled by the executive branch, while from the later Stuart Kings, Parliament progressively gained its management.¹¹² One remarkable example of delegation is the Mutiny Act of 1717, according to which Parliament delegated the power to Crown to constitute and govern the army.¹¹³ Indeed as Vile remarks:

‘[T]he demand for the establishment of "harmony" between legislature and government, which characterized the theory of parliamentary government in Britain and France, and the Progressive movement in the United States, was accompanied by a new "separation of powers" - that between the "political" branches of government and the bureaucracy. The distinction between "Regterung" and "Verwaltung," or between "politics" and "administration" was, paradoxically, to open a new chapter in the establishment of semi-autonomous branches of government in an age which stressed unity and cohesion’.¹¹⁴

¹¹¹ Regarding the history of delegated legislation see Paul Craig, *Administrative Law* (7th edn, Sweet and Maxwell 2008) [15-002].

¹¹² WS Holdsworth, *A History of English Law Vol X* (Methuen 1938) 133.

¹¹³ As is shown in text to n 26 in Ch III, the first Mutiny Act passed in 1689 but the practice of delegating power to the Crown started only in 1717, See Mutiny Act 1716 (3 Geo I c 2). See also Committee on Ministers' Powers, *Report* (Cmd 4060 1932) [1].

¹¹⁴ MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 6.

Thus, numerous statutes are recorded in the statute books regulating local issues. In 1711, we find the first temporary act introducing an *ad hoc* fiduciary body, the Turnpike Trustees. Initially the Turnpike Trustees was enacted through a private act entitled ‘An act for repairing the Highway between Highgate Gatehouse in the Country of Middlesex and Barnet Blockhouse, in the Country of Hertford’,¹¹⁵ with a temporary duration of twenty one years. Nonetheless, at the expiration of this act, the delegated authority of this body was renewed with successive public acts having a similar sunset clause.¹¹⁶

The use of sunset clauses in laws regulating local organisations pertains to the parliamentary control of local bodies. As Anderson points out, the inclusion of a sunset clause concerning the Turnpike Trustees is explained as the need for periodic renewal, thereby entrenching the local government’s accountability to Parliament.¹¹⁷ From another point of view, while examining the local organisations during 18th century. Holdsworth suggests that the Turnpike Trustees were far from being temporary, as they were always renewed, and his explanation for the sunset clause is that it prevented the growth of local opposition.¹¹⁸

Nevertheless, there is consensus on the fact that due to the profound social changes at the turn of the new century, difficult tasks were placed upon the central government and the need of expertise and local focus with autonomy was inevitable and indeed necessary.¹¹⁹ Thus, Parliament conferred upon these new institutions the power to legislate and regulate local and minor issues, with the aim of confronting the challenges of the new

¹¹⁵ Militia, etc. Act 1711 (10 Anne c 33).

¹¹⁶ Highgate and Chipping Barnet Road Act 1720 (7 Geo I st 1 c 18); Northern Roads, London Act 1735 (9 Geo II c 39).

¹¹⁷ Stuart Anderson, ‘Public Law’ in *The Oxford History of the Laws of England Vol XI* (OUP 2010) 347.

¹¹⁸ WS Holdsworth, *A History of English Law Vol X* (Methuen 1938) 78.

¹¹⁹ Committee on Ministers’ Powers, *Report* (Cmd 4060 1932) 51; Paul Craig, *Administrative Law* (7th edn, Sweet and Maxwell 2008) [15-003].

era. In total, Webbs estimates that during the 18th century parliament enacted legislation introducing 1100 turnpike trusts, 125 guardians of the poor, and 300 improvement commissioners.¹²⁰ However, the control over the executive law-making powers and the accountability of all these local and ad hoc bodies was achieved through a variety of mechanisms, such as consultation, publication, legislative scrutiny and judicial review.¹²¹

During the 19th century, Parliament introduced new local institutions such as the Poor Law Commission¹²² and the Tithe Commission,¹²³ amending relevant ad hoc bodies. Even if parliament aimed to introduce with these institutions a perpetual system of local administration seeking maximum independence from political influence,¹²⁴ its control over them was through the annual appropriation acts¹²⁵ that examined and approved their budget, and through the periodical appointment of commissioners.

In addition, Parliament sought control of bodies long holding a privileged position in relation to the government. The East India Company was an early joint stock company holding trade monopolies¹²⁶ with sovereign powers.¹²⁷ The struggles between different members of the company to gain control and the criticism that the state would share in profits led the government to seek its control.¹²⁸ Thus a petition was submitted at the

¹²⁰ See Sidney Webb, *The Manor and the Borough* (Longmans Green 1963)

¹²¹ Moreover, for a complete account of methods of central control to the local government see WI Jennings, *Principles of Local Government Law* (University of London Press 1931) 160.

¹²² Poor Law Amendment Act 1834.

¹²³ Tithe Communication Act 1836.

¹²⁴ Stuart Anderson, 'Public Law' in *The Oxford History of the Laws of England Vol XI* (OUP 2010) 348.

¹²⁵ Appropriation Act 1849 (3&4 Vict c 112).

¹²⁶ Bruce P Lenman, 'Britain and India' in HT Dickinson (ed), *A companion to Eighteenth -Century Britain* (Blackwell Publishing 2002) 460.

¹²⁷ Lucy S Sutherland, *The East India Company in Eighteenth Century Politics* (Clarendon Press 1952) 4.

¹²⁸ WS Holdsworth, *A History of English Law Vol XI* (Methuen 1938) 342.

Commons, and according to the original proposal the Company was required to pay annually a sum of four hundred thousand pounds for three years in exchange for the territorial acquisitions and revenues lately obtained.¹²⁹ However, the proposal met opposition and the time limit was reduced for two years,¹³⁰ but in 1769 the statute was prolonged for five years.¹³¹

Moreover, another bill was introduced, the so-called ‘dividend’ bill, which prevented the company from raising a dividend larger than ten per cent.¹³² This latter bill aroused more opposition. The Company unsuccessfully submitted a petition to limit the duration of the restriction to at least the duration of the agreement and to raise the dividend up to twelve and a half per cent.¹³³ However, when the bill was sent up to the Lords, the anti-ministerial party was united and blocked the bill at the third reading.¹³⁴ Eventually during the following session of parliament the bill passed with a one-year sunset clause,¹³⁵ which was renewed for another year.¹³⁶

In the case of the East India Company, Parliament used alternative and more complicated methods to control it through temporary legislation, which temporarily regulated the financial status of the Company. Moreover, when in 1772 the company could not comply with its financial obligations, a secret committee of enquiry was appointed. The committee proposed to suspend the power of the company and to appoint

¹²⁹ *Cobbett’s Parliamentary History of England Vol XVI* (Hansard 1813) 342.

¹³⁰ East India Company Act 1767 (7 Geo III c 57).

¹³¹ East India Company Act 1769 (9 Geo III c 24).

¹³² *Cobbett’s Parliamentary History of England Vol XVI* (Hansard 1813) 343.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ East India Company Act 1767 (7 Geo III c 49).

¹³⁶ East India Company Act 1768 (8 Geo III c 11).

commissioners in order to regulate its affairs in its presidencies.¹³⁷ These proposals were passed as an act.¹³⁸ As regards this act, it is noteworthy that the appointed supervisors of East India Company were critical of the government's policy to use temporary enactments, speaking of 'a misfortune which we are sorry to find greatly growing upon us by those temporary occasional and partial acts of parliament, which, without consideration of their conformity to the general principles of our law and constitution, are adopted rashly and hastily on every occasion.'¹³⁹

Progressively, it became customary for parliament to confer minor legislative authority to subordinate institutions and this practice is recorded in numerous acts. Suffice to mention here the Land Drainage Act of 1914, section 4 of which provided that 'The powers of making Provisional Orders under this Act shall not be exercised after the expiration of two years from the passing of this Act, except for the purpose of amending an existing Provisional Order made under this Act; but nothing in this subsection shall prejudice or affect any powers or provisions contained in any Provisional Order made before the expiration of that period'.¹⁴⁰

The autonomy of these institutions became a major concern of the United Kingdom Parliament and in 20th century a committee was tasked with investigating the issue and exploring solutions on implementing safeguards against the abuse of the delegated powers.¹⁴¹ From the Donoughmore Report, and especially from the section on delegated legislation to administrative authorities and corporate organisations, it is

¹³⁷ *Cobbett's Parliamentary History of England Vol XVII* (Hansard 1813) 559.

¹³⁸ East India Company Act 1772 (13 Geo III c 9).

¹³⁹ *Cobbett's Parliamentary History of England Vol XVII* (Hansard 1813) 662.

¹⁴⁰ Land Drainage Act 1914, s 4 (2). The same construction was used in the Fishery Harbours Act 1915, s 4 (2).

¹⁴¹ Committee on Ministers' Powers, *Report* (Cmd 4060 1932) [4].

possible to draw useful conclusions in relation to the use of sunset clause in delegated legislation.¹⁴²

The great concern of the Committee was the autonomy of institutions exercising conferred lawmaking power. Thus, one of the general principles laid down by this Committee was that ‘the so called Henry VIII Clause, by which a dispensing power is given to a minister to modify the provisions of a statute, should never be employed except for the sole purpose of bringing an Act into operation, and should be subject to a time limit of one year for the period of its operation’.¹⁴³

The short sunset clause of one year that is proposed in the Donoughmore report is related to the autonomy of the institution. The shorter the sunset clause, the more limited the autonomy vested in administrative authorities. As Tushnet observes,¹⁴⁴ and as Colonel Sibthorp had argued in favour of a shorter sunset clause, he ‘would prefer the limitation to one year, to show that the House had no confidence (...)’.¹⁴⁵

Nowadays, the use of time limits in delegated legislation to administrative authorities is a worldwide practice. Looking at the use of sunset clauses in legislation conferring legislative power to subordinate bodies and local organisations as a whole, it would be true to say that the sunset clause permits parliament to monitor to an extent the subordinated bodies and reaffirm their actions.¹⁴⁶ On the one hand, the parliamentary authority to review from time to time the delegated power to subordinate bodies is an

¹⁴² For more information regarding sunset clauses and delegation of power see Ch V.

¹⁴³ Committee on Ministers’ Powers, *Report* (Cmd 4060 1932) [15].

¹⁴⁴ Mark V Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 *Yale Law Journal* 1225, 1258.

¹⁴⁵ HC Deb 17 June 1847 vol 93 col 696.

¹⁴⁶ See Ch V.

expression of the doctrine of the parliamentary sovereignty.¹⁴⁷ On the other hand, the parliamentary review of delegated powers to the government is an expression of the doctrine of separation of powers.¹⁴⁸ Parliament limits the scope of the delegated authority, puts it in probation and gives more specific direction to the courts in case they review their actions.

C. Emerging Elements of the Rule of Law and Sunset Clauses

A fortiori, it would be regarded as anachronistic to evaluate such clauses from the perspective of the modern conception of the rule of law. Having said that, it is also the case that elements of the rule of law were apparent at the turn of the 17th century.¹⁴⁹ Numerous sunset clauses are recorded in emergency legislation, thus, the final part of the historical chapters aims to elucidate the early interaction of such clauses with the concern of the MPs to face emergencies. In addition, this part aims to highlight the difficulties in the legislative process that emerged due to the extensive use of such clauses at the turn of the 18th century. The subsequent analysis has three dimensions. First it will be shown how Parliament used sunset clauses in the habeas corpus suspension acts so as to impose institutional restraints on the executive, then the use of such clauses in the early

¹⁴⁷ Regarding the nature of Parliamentary Sovereignty see AV Dicey, *Introduction to the Study of the Law of the Constitution Vol I* (JWF Allison ed, OUP 2013) 27.

¹⁴⁸ See Ch V.

¹⁴⁹ Dicey comparing UK with other nations states that “An Englishman naturally imagines that rule of law (in the sense in which we are now using the term) is a trait common to all civilised societies. But this trait is erroneous. Most European nations had indeed, by the end of the eighteenth century, passed through that stage of development (from which England emerged before the end of the sixteenth century) when nobles, priest, and others could defy the law” see AV Dicey, *Introduction to the Study of the Law of the Constitution Vol I* (JWF Allison ed, OUP 2013) 101; Bingham marks the most important historical events in the development of the rule of law, such as Habeas Corpus, the abolition of torture see Tom Bingham, *The Rule of Law* (Allen Lane 2010) 10ff. Also Shklar identifies two models [archetypes] of rule of law; the former associated with Aristotle and the rule of reason, and the latter with Montesquieu and the rule of the institutional restraint. see Judith Shklar, ‘Political Theory and the Rule of Law’ in Allan C Hutchinson and Patrick Monahan, *The Rule of Law; Ideal and Ideology* (Carswell, 1987) 1ff. 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* (CUP 2004).

emergency framework will be discussed and finally the difficulties raised by the workload to renew such clauses will be considered.

I. Habeas Corpus Suspension Acts

The transition to the new Hanoverian regime was turbulent and led to the suspension of habeas corpus. Following the establishment of George I in 1714, Tory Jacobites in England conspired against the new regime. The reaction of Parliament was to suspend habeas corpus for six months,¹⁵⁰ which was then extended for another six-month term during the same session of Parliament.¹⁵¹ However, when in 1722 an annual habeas corpus suspension act was introduced in the House of Lords and was finally passed,¹⁵² the Commons protested, raising concerns about the length of suspension. Revealing information is contained in Cobbett's reports regarding the Commons' protest about the length of the sunset clause. The main concern was that the sunset clause limiting the duration of the habeas corpus suspension acts was never above the term of six months, while the current act included a one-year sunset clause, which it was feared might set a precedent for the suspending habeas corpus on another occasion for a longer term.¹⁵³

A series of successive habeas corpus suspension acts were passed, including at the turn of the 18th century under George III. The decade just before the 19th century was a period inspired by the French Revolution, and a radical movement against the

¹⁵⁰ Habeas Corpus Suspension, etc. Act 1714 (1 Geo I st 2 c 8) 'to empower his Majesty to secure and detain such persons as his Majesty shall suspect are conspiring against his person and government'.

¹⁵¹ Habeas Corpus Suspension, etc. Act 1714 (1 Geo I st 2 c 30) 'to empower his Majesty to secure and detain such persons as his Majesty shall suspect are conspiring against his person and government'.

¹⁵² Habeas Corpus Suspension Act 1722 (9 Geo I c 1).

¹⁵³ *Cobbett's Parliamentary History of England Vol VIII* (Hansard 1813) 38.

constitutional order emerged, calling for constitutional reform.¹⁵⁴ The response of Pitt's government's was the suspension of habeas corpus¹⁵⁵ on May 1794 until February 1795, which was further renewed until July 1795.¹⁵⁶ In 1795 the Seditious Permitting Act,¹⁵⁷ which forbade meetings of more than 50 people without prior permission from a magistrate, was introduced and had a three-year sunset clause. The Treasonable Practices Act¹⁵⁸ was set to expire upon the death of King George III, but it became perpetual in 1817.¹⁵⁹ Moreover, in 1798 another series of successive habeas corpus suspension acts were passed,¹⁶⁰ suspending habeas corpus until February 1799, which was then renewed until May 1799¹⁶¹ and which was further renewed until March 1800.¹⁶²

The inclusion of sunset clauses in Habeas Corpus Suspension Acts was a parliamentary effort to impose an institutional restraint on the executive. In nature the writ of Habeas Corpus is a remedy, a procedural act which secures the effectiveness of a right.¹⁶³ In his chapter on the rule of law comparing the suspension of habeas corpus with the repeal of habeas corpus, Dicey states that the former is more effective than the latter, since the government can confront the emergency while the people are not deprived of

¹⁵⁴ J Steven Watson, *The Reign of George III 1760 - 1815* (Clarendon Press 1960) 360.

¹⁵⁵ Suspension of Habeas Corpus Act 1794 (34 Geo III c 54).

¹⁵⁶ Habeas Corpus Suspension Act 1795 (35 Geo III c 3).

¹⁵⁷ The Treasonable Practices Act 1796 (36 Geo III c 8).

¹⁵⁸ *Ibid.*

¹⁵⁹ Treason Act 1817 (57 Geo III c 6).

¹⁶⁰ Habeas Corpus Suspension Act 1798 (38 Geo III c 36).

¹⁶¹ Habeas Corpus Suspension Act 1799 (39 Geo III c 15).

¹⁶² Habeas Corpus Suspension Act 1799 (39 Geo III c 44).

¹⁶³ AV Dicey, *Introduction to the Study of the Law of the Constitution Vol I* (JWF Allison ed, OUP 2013) 129. For further analysis on Dicey's view about the nature of Habeas Corpus see JWF Allison, *English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 160.

their freedoms.¹⁶⁴ The reference by Dicey to the Habeas Corpus Suspension Acts contributes to the existing analysis and useful conclusions can be drawn therefrom. The suspension of habeas corpus was ‘the exclusive prerogative of Parliament’¹⁶⁵ as the legislature confers powers to the executive for a limited period, but retains control at the expiration of the sunset clause.¹⁶⁶ That said, this transfer of authority to the executive might lead to arbitrary powers in case a Habeas Corpus Suspension Acts is coupled with an Act of Indemnity.¹⁶⁷ As the Act of Indemnity, might ex post facto remove all liabilities of the executive, this empowers the executive with arbitrary powers and denies any relief to the people deprived from writ of habeas corpus.¹⁶⁸ Nonetheless, this development depends on the spectrum of the indemnity act, whether it is construed widely or narrowly.¹⁶⁹

II. The Establishment of Sunset Clauses in Emergencies

Temporary legislation was established at the turn of the 18th century as a legislative means to deal with emergencies and contingencies. Blackstone, when commenting on emergencies and the suspension of habeas corpus, affirms that ‘this experiment ought only

¹⁶⁴ AV Dicey, *Introduction to the Study of the Law of the Constitution Vol I* (JWF Allison ed, OUP 2013) 133.

¹⁶⁵ David L. Shapiro, ‘Habeas Corpus, Suspension, and Detention: Another View’ (2006) 82 *Notre Dame Law Review* 59, 71

¹⁶⁶ For further analysis on the institutional impact of sunset clauses on the relationship between legislature and executive see Ch V.

¹⁶⁷ AV Dicey, *Introduction to the Study of the Law of the Constitution Vol I* (JWF Allison ed, OUP 2013) 135. For more analysis on Acts of Indemnity see Ch I, text to n 36.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid*

to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever'.¹⁷⁰ Indeed, although the concept of the rule of law at that time was not as sophisticated as it is today,¹⁷¹ the subsequent discussion reveals criticism of the use of such clauses in emergencies. It will be shown how such clauses were used in a variety of emergency legislation, and the concerns raised thereby for the protection of civil liberties.

In the late 18th century, a series of emergency legislation was enacted concerning the status of America. Although Parliament had the power to legislate for the internal affairs of the colonies, it was mainly concerned with colonial trade and its organisation until at least 1765.¹⁷² However, due to the inability of the executive branch to carry out its measures, Parliament was called to express its determination to tighten the economic and political control over the colonies.¹⁷³ It adopted a number of acts, including the Revenue Act,¹⁷⁴ the Currency Act,¹⁷⁵ the Stamp Act,¹⁷⁶ and the Quartering Act.¹⁷⁷ These became a source of tension between the colonies and the British government and were actively

¹⁷⁰ BI Comm, Book 1:136.

¹⁷¹ Galligan states that "History gives little guidance, since it is only relatively recently that standards, such as the rule of law or due process, have been invoked to define the parameters of law's formal qualities". DJ Galligan, *Law in Modern Society* (OUP 2007) 258.

¹⁷² *Cobbett's Parliamentary History of England Vol XVI* (Hansard 1813) 69; WS Holdsworth, *A History of English Law Vol XI* (Methuen 1938) 159; cf WA Speck 'Britain and the Atlantic World' in HT Dickinson (ed), *A companion to Eighteenth -Century Britain* (Blackwell Publishing 2002) 451. Speck sets the landmark at the Parliament's focus on commerce with America until the end of Sir Walpole ministry in 1742.

¹⁷³ *Cobbett's Parliamentary History of England Vol XVI* (Hansard 1813) 107, 1004; WS Holdsworth, *A History of English Law Vol XI* (Methuen 1938) 159; Merrill Jensen (ed), *English Historical Documents* (Eyre & Spottiswoode 1955) 659.

¹⁷⁴ 4 Geo III c 15.

¹⁷⁵ Paper Bills of Credit Act 1763 (4 Geo III c 34).

¹⁷⁶ Duties in American Colonies Act 1765 (5 Geo III c 12).

¹⁷⁷ Mutiny, America Act 1765 (5 Geo III c 33).

opposed by Colonial legislatures.¹⁷⁸ Among the aforementioned acts, only the Quartering Act, which aimed to ensure that the British soldiers would have housing and supplies in America, was due to expire in March 1767. The sunset clause in this act was in accordance with the annually renewed Mutiny Act, to which it was an amendment.

When the New York legislature refused to comply with the Quartering Act,¹⁷⁹ the Parliament responded with an ‘Act for restraining and prohibiting the Governor, Council and House of Representatives of the Province of New York until provision shall have been made for furnishing the King’s Troops with all Necessaries required by Law from passing or assenting to any Act of Assembly’.¹⁸⁰ This Act included a sunset clause, with an imprecise sunset time; however, as soon as the Assembly complied with the Quartering Act, the Act would automatically sunset. In fact, it was the first time as sunset clause was used in order to suspend a local body of a province.

In 1774, however, the same practice is recorded as soon as Parliament passed an ‘Act to Discontinue in such manner and for such time as are therein mentioned the Landing and Discharging, Lading or Shipping of Goods Wares and Merchandise at the Town and within the Harbour of Boston’,¹⁸¹ when the mob demonstrating against the Tea Act¹⁸² dumped tea from Britain into the harbour.¹⁸³ This time the sunset clause was used in order to block a function of the city of Boston. In addition, Parliament passed a series of acts in order to reassert its authority in Massachusetts, changing its constitution with the

¹⁷⁸ Merrill Jensen (ed), *English Historical Documents* (Eyre & Spottiswoode 1955) 659.

¹⁷⁹ *Cobbett’s Parliamentary History of England Vol XVI* (Hansard 1813) 331.

¹⁸⁰ Rebellion in America Act 1767 (7 Geo III c 59).

¹⁸¹ Trade Act (14 Geo III c 19).

¹⁸² Customs Act 1772 (13 Geo III c 44).

¹⁸³ Merrill Jensen (ed), *English Historical Documents* (Eyre & Spottiswoode 1955) 778.

Massachusetts Governments Act,¹⁸⁴ assuring the execution of the law with the Administration of Justice Act,¹⁸⁵ having a three year sunset clause, and re-enacting the Quartering Act,¹⁸⁶ which was due to expire on March 1776.

Eventually, at the outbreak American War of Independence, Parliament passed an act prohibiting trade with the Colonies lasting for the period that the ‘said colonies respectively shall remain in a state of rebellion’.¹⁸⁷ It was the first time that Parliament used an act with an uncertain expiration date. Thus the Committee upon Expired and Expiring Laws of 1796 had to clarify that the termination of temporary law occurs by the extinction of the subject matter of their operation.¹⁸⁸ In 1808 the same committee stated that temporary laws which depend on the duration of a war or other contingency are distinguished as laws of an uncertain duration.¹⁸⁹

Likewise, during the Napoleonic Wars, Parliament passed a series of temporary legislation with similarly constructed sunset clauses with an uncertain duration.¹⁹⁰ For example, an act preventing correspondence with the French was enacted, lasting as long as the war was continuing.¹⁹¹ Furthermore, an act regarding the manning of the navy was

¹⁸⁴ Massachusetts Governments Act 1774 (14 Geo III c 45).

¹⁸⁵ Administration of Justice Act 1774 (14 Geo III c 39).

¹⁸⁶ Quartering Act 1774 (14 Geo III c 54).

¹⁸⁷ American Prohibitory Act 1776 (16 Geo III c 5).

¹⁸⁸ Committee upon Temporary Laws, Expired or Expiring, *Report* (HC 13 May 1796) 831.

¹⁸⁹ Committee upon Expired and Expiring Laws, *Report* (HC 25 January 1808).

¹⁹⁰ However, temporary acts were enacted with define sunset clause such as the John Wilkinson's Estate Act 1794 (34 Geo III c 67) with seven year sunset clause and the Negotiations of Notes and Bills Act 1797 (37 Geo III c 32) with a one year sunset clause.

¹⁹¹ Correspondence with Enemies Act 1793 (33 Geo III c 27).

enacted, providing that ‘this act shall continue in full force, until such matters and every thing dependent thereupon, shall be finally adjudged and determined’.¹⁹²

In addition, another act was enacted which permitted French royalists to serve in the British Army, providing that ‘this act shall be in force and have Continuance during the said War, and from the End thereof to the End of the then next session of Parliament’.¹⁹³ However, in 1804, during the Napoleonic Wars, it was explicitly renewed.¹⁹⁴ Finally, an act of 1798, concerning the communication with people living in hostile territories, included in its title and in the preamble a sunset clause with a similar construction, namely as long as the war was continuing.¹⁹⁵ As Holdsworth points out, these acts were of acts ‘temporary importance which were demanded by the exigencies of the war’.¹⁹⁶

Interestingly, during the same period, in 1799, William Pitt introduced new duties as temporary measures because of the financial needs arising from the Napoleonic Wars. The innovation was that the new duties were imposed upon the assessed income. The Act was entitled ‘An Act for granting to His Majesty an Aid and Contribution for the Prosecution of the War’¹⁹⁷ and incorporated a sunset clause conditional upon the end of the war in its title. These duties, which are also known as the ‘Triple Assessment’,¹⁹⁸ are, in essence, the origin of the income tax.

¹⁹² Manning of the Navy Act 1794 (34 Geo III c 66).

¹⁹³ Enlistment Act 1794 (34 Geo III c 43).

¹⁹⁴ Enlistment of Foreigners Act 1804 (44 Geo III c 75); Enlistment of Foreigners Act 1806 (46 Geo III c 23).

¹⁹⁵ Residence in France During the War Act 1798 (38 Geo III c 79).

¹⁹⁶ WS Holdsworth, *A History of English Law Vol XIII* (Methuen 1952) 175

¹⁹⁷ Aid and Contribution for the Prosecution of the War 1798 (38 Geo III c 16).

¹⁹⁸ Bertram Cox, ‘Origin and Growth of Income Tax’ (1919) 1 *Journal Comparative Legislation and International Law* 42.

The same year, in 1799, the act was repealed and replaced with an act imposing a ten per cent tax on income, which was also limited to the duration of the war.¹⁹⁹ Irrespective of the existence of the sunset clause, the act was repealed following the Peace of Amiens in 1802.²⁰⁰ However, as peace discussions with the French had failed,²⁰¹ the Act was revived by Pitt's successor Addington in 1803,²⁰² and it was amended in 1806.²⁰³ The latter version, which was the foundation of the income tax as we know it in the modern era,²⁰⁴ was to expire, according to the title, on 'the sixth day of April next after the ratification of a definitive treaty of peace',²⁰⁵ even though the original proposal on the duration of the clause was six months after the restoration of peace.²⁰⁶ Eventually, in 1816, the victory in Waterloo signalled the expiration of the act.²⁰⁷ Nonetheless, in 1842, due to a £5million deficit,²⁰⁸ the defunct income tax was revived. According to the title, the initial duration was to last 'until the sixth day of April 1845'.²⁰⁹

The preceding paradigms show how sunset clauses in emergency legislation increasingly conformed to a 'pattern', although this raised concerns about the protection

¹⁹⁹ Duties on Income Act 1799 (39 Geo III c 13).

²⁰⁰ Income Tax Repeal, etc. Act 1808 (42 Geo III c 42).

²⁰¹ *Cobbett's Parliamentary History of England Vol XXXVI* (Hansard 1820) 1258.

²⁰² Income Tax Act 1803 (43 Geo III c 122).

²⁰³ Income Tax Act 1806 (46 Geo III c 65).

²⁰⁴ See Albert Farnsworth, *Addington: Author of the Modern Income Tax* (Stevens & Sons 1951).

²⁰⁵ Income Tax Act 1806 (46 Geo III c 65).

²⁰⁶ *Cobbett's Parliamentary History of England Vol XXXVI* (Hansard 1820) 1596.

²⁰⁷ Stanley N. Katz (ed), *The Oxford International Encyclopaedia of Legal History Vol 5* (OUP 2009) 428.

²⁰⁸ *Ibid.*

²⁰⁹ Income Tax Act 1842 (5&6 Vict c 35).

of civil liberties.²¹⁰ Suffice it to mention the reaction of the members of the parliament enacting the Seditious Permitting Act and the Treasonable Practices Act who expressed their concern from a human rights perspective. Alderman Lushington in particular recognised that the former act was a ‘temporary sacrifice for the general good’ and he proposed an annual restriction at most.²¹¹ In the Duke of Bedford’s speech, the first roots of the proportionality principle are identifiable, with the Duke stating that ‘even allowing that some bill was necessary for the greater protection of his majesty, there was nothing in this bill that could tend to that purpose’.²¹²

III. Difficulty from Extensive Use

The first historical chapter discussed the inconvenience caused by the expiration of several acts during the period of the first two Stuarts. At that time the reason for this problem was the lack of co-operation between the King and his Parliament. Correspondingly this final part examines the difficulty caused due to the extensive use of sunset clauses, which will also advance the understanding of the interaction between such clauses and the rule of law.

At the turn of the 19th century, the expiration date of the sunset clause was even more precise. For instance, the Molasses Act²¹³ prescribed that ‘the same shall continue and be in force for the space of five years, to be computed from the twenty - fourth day of June one thousand seven hundred and thirty three, and to end of the then next session of

²¹⁰ For further discussion see Ch VI.

²¹¹ *Cobbett’s Parliamentary History of England Vol XXXII* (Hansard 1818) 303.

²¹² *Ibid* 250.

²¹³ Trade of Sugar Colonies Act 1732 (6 Geo II c 13).

parliament', while another expression was used regarding the punishment of mutiny, which prescribed that the 'act further continue until the expiration of six weeks after the commencement of the next session of parliament'.²¹⁴

Both the precise expiration date of the temporary legislation and the extensive workload of the parliament led to the expiration of several temporary acts without being renewed.²¹⁵ One example is the case of an important constitutional law, 16 Geo III c 107, which empowered the King to summon the Parliament in the case of a contingency but which was allowed to expire by mistake.²¹⁶ In fact, the Committee upon Temporary laws, Expired and Expiring, remarked in 1796 that the volume of the statutes had at least doubled as compared with the previous six centuries.²¹⁷

The responsibility over this omission was discussed in Parliament, as the responsibility was charged between Ministers and MPs. The Chancellor of the Exchequer clarified that 'the right hon. gent. seemed to think that it was the duty of ministers to attend to the acts that were likely to expire, but did not seem to be aware that a committee was appointed at the commencement of every session to inquire what bills were likely to expire, and if any neglect took place, it was the act of the house.'²¹⁸

Thus Parliament passed an act in 1808 prescribing that

'Where any bill may have been or shall be introduced into this present or any future session of Parliament for the continuance of any Act which would expire in such sessions, and such Act shall have expired before the bill for continuing the same shall have received the royal assent, such continuing Act shall be deemed and taken to have effect from the date of the expiration of the Act intended to be continued as fully and effectually, to all intents and purposes, as if such continuing Act had actually passed

²¹⁴ Army and Navy Act 1798 (39 Geo III c 4).

²¹⁵ A committee, annually appointed, was required to investigate the expiring laws, but its limited authority decreased its efficiency. See Committee upon Temporary Laws, Expired or Expiring, *Report* (HC 13 May 1796) 830.

²¹⁶ *Ibid* 832.

²¹⁷ *Ibid* 35.

²¹⁸ HC Deb 16 June 1808 vol 11 col 912.

before the expiration of such Act, except it shall be otherwise especially provided in such continuing Act'.²¹⁹

During 19th and 20th century, Parliament appointed several special committees with the task of improving the process of continuing the duration of temporary acts which provide us with useful information. Until 1863, the duration of temporary laws was renewed by a separate act²²⁰ but since 1863 the temporary laws have been continued annually with the expiring continuance act, and since 1874 they more or less had one common expiration date.²²¹ However, the concern in 1922 was that until then, there was no systematic scrutiny upon the continuity as long as the continuance bills were introduced at a very late period of the parliamentary session, resulting in the renewal without adequate debate, infringing at the same time the rights of the members of the Parliament.²²²

In all respects, the committee's recommendation was that the expiring law continuity bill should be introduced at a much earlier stage of the session, while a triennial review of all temporary acts should be desirable in order to prevent the congestion.²²³ Moreover, the argument that an act is controversial shall not be a reason for temporary regulation, while experimental legislation should after a reasonable period of trial either be made permanent or dropped.²²⁴ Consequently, temporary laws were continued with the expiring continuance act. In fact, the expiring laws continuance bills were a permanent mechanism of renewing the duration of the temporary acts from 1928 to 1970,²²⁵ and once

²¹⁹ Acts of Parliament (Expiration) Act 1808 (48 Geo III c 106).

²²⁰ Select Committee on the Expiring Laws Continuance Act, *Report* (HC 21 July 1922) [3].

²²¹ *Ibid* [4].

²²² *Ibid* [6].

²²³ *Ibid* [8 - 11].

²²⁴ Select Committee on the Expiring Laws Continuance Act, *Report* (HC 26 May 1925) [3].

²²⁵ Daniel Greenburg (ed), *Craies on Legislation* (8th edn, Sweet and Maxwell 2004) 385 (fn 9).

an act was included in the list there was danger that it might become part of the permanent system of law.²²⁶

In the late 19th century, an act was passed for the further revision of the statute law repealing enactments that have ceased to be in force or have been unnecessary.²²⁷ In the note attached to the proposed bill it was prescribed that ‘for the purposes of the schedule six different classes of enactments are considered as having ceased to be in force although not expressly and specifically repealed; namely such enactments as are -expired- that is enactments which, having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance or which have merely had for their object the continuance of previous temporary enactments for periods now gone effluxion of time (...)’.²²⁸ With this act, it is the first time that the basic principle of sunset clauses, *expressio unius, est exclusio alterius*, is adopted explicitly.

Hence according to the above act, a sunset clause was introduced in 1939 prescribing that ‘the act shall continue in force for a period of two years from the date of the passing thereof and no longer, so, however, that the provisions of the Interpretation Act 1889 relating to the effect of repealing enactments shall apply upon the expiry of this Act in like manner as if this act had been repealed’.²²⁹ Until recently the drafting of a sunset clause was Parliament’s concern, as it issued a series of Standing orders from 1998 until 2012 regulating the way members of the parliament are to conduct public business.²³⁰

²²⁶ Select Committee on the Expiring Laws Continuance Act, *Report* (HC 21 July 1922).

²²⁷ Statute Law Revision Act 1894 (57&58 Vict c 56).

²²⁸ Explanatory Notes to the Statutory Revision Act 1894 [1].

²²⁹ Prevention of Violence (Temporary Provisions) Act 1939. For more analysis on this interpretation rule see Ch I.

²³⁰ For the latest Standing Order see Standing Orders of the House of Commons, *Public Business* (2012 HC 614).

Useful conclusions can be reached from the aforementioned examples which caused disruption to legislative work. The consolidated review of temporary acts proved to be inefficient. The acts were neither renewed on time, nor were proper evaluations taking place. The fact that a law is controversial does not excuse the temporary character of the law, while as soon as the trial period expires, legislation should be evaluated and either be allowed to expire or made perpetual.

Conclusions

In this chapter the balance of power in the legislative process has been considered throughout the historical period in order to understand the constitutional value of sunset clauses.

Parliament steadily came to understand its role in government, with legislation becoming an indispensable tool for the implementation of policy. After the Restoration, Parliament had a decisive role in legislation. Sunset clauses were used as an instrument to shape the balance of powers in the legislative process. In the latter period of the Stuarts, the consensual role of parliament was enshrined in the use of sunset clauses, as they were used to facilitate the adoption of cutting-edge and innovative legislation.

Furthermore, as the legislative process in the United Kingdom crystallised and the parties became the mechanism of legislative work, the use of sunset clauses became more limited as the opposition's role in influencing the adoption of bills diminished. Nevertheless, sunset clauses served to reinforce parliamentary sovereignty, and were used as an expression of authority over subordinate bodies with delegated powers. Parliament can confer legislative functions, though if this delegation is perpetual, the Diceyan doctrine of sovereignty is challenged.

From another perspective, sunset clauses are a mechanism of interaction between previous and subsequent parliaments. Sir Edward Grey accurately observed that by

arguing in favour of a sunset clause amendment, ‘the Solicitor-General had stated that another Parliament would be absolutely free to reverse legislation passed by the present Parliament. That, of course, was perfectly true, since every new Parliament had, in theory, a perfectly clear start, but what had been done in one Parliament might make it more or less difficult for another Parliament to feel itself free in the matter. Much of the Solicitor-General’s speech was, in effect, an exemplification of the manner in which, if the Bill passed without a time limit, it would, year by year, become increasingly difficult for the House to adopt any alternative system of temperance reform’.²³¹

At the same time, the ordinary use of sunset clauses in specific types of legislation, such as the ‘money bills’ and the emergency acts, forms a pattern. Regarding the ‘money bills’, sunset clauses are taken for granted, as they are considered temporary.²³²

In addition, a new aspect of sunset clauses became apparent, with implications for the rule of law, as exemplified by the first emergency acts with sunset clauses. It would be inappropriate to elaborate in detail on the interaction of such clauses with the modern idea of rule of law. Nonetheless, the discussion revealed the interaction between sunset clauses and elements of the rule of law that were present in that period.

The use of a sunset clause in suspending habeas corpus for a certain period during the 18th century might be regarded as an institutional restraint on the executive. Nonetheless, the increasing concern of the MPs about the impact of temporary emergency legislation on civil liberties is worthy of note.

On the other hand, the difficulties caused by the extensive use of sunset clauses in legislation and the bureaucracy required to renew them led Parliament to more temperate usage. The recommendation of the Committee on Expiring Laws of 1922 is noteworthy. It

²³¹ HC Deb 26 July 1904 vol 138 col 1244.

²³² KG Davies (ed), *Calendar of State Papers Colonial, America and West Indies Vol 45* (Digital version at British History Online, 1994) [67].

set out the principle that the regulation of controversial issues cannot be a reason to ‘preclude a recommendation of permanency’.²³³

This chapter concludes the historical analysis of sunset clauses. The focus now shifts to the current uses of sunset clauses, the purposes that they serve and the contemporary challenges posed by their usage.

²³³ Select Committee on the Expiring Laws Continuance Act, *Report* (HC 21 July 1922).

CHAPTER IV: TYPES OF LEGISLATION CONTAINING SUNSET CLAUSES

Such is the natural and inevitable tendency of the best constituted governments. If Sparta and Rome perished, what State can hope to endure for ever?

Jean- Jacques Rousseau, On the Social Contract, Book 3 XI

Introduction

In the first chapter, we examined the meaning and typology of sunset clauses. We considered the definition of a sunset clause, its legal effect and its common structures, and thereby delimited the scope of the thesis. In the historical chapters the constitutional value of such clauses was considered. In this chapter we conclude the positive analysis of sunset clauses and focus on the pragmatic dimension of such clauses. This chapter therefore examines how sunset clauses are applied, in which types of legislation, and considers the surrounding legal environment. The aim of this chapter is to show that sunset clauses are still in operation in the UK, and by analysing the complexities around their use, it will demonstrate the contemporary constitutional value of such clauses. It will argue, furthermore, that rule of law considerations, as well as separation of powers concerns, are the reason for the adoption of sunset clauses.

As demonstrated in the historical chapters, sunset clauses have been used extensively in a broad spectrum of legislation. As far as contemporary legislative practice is concerned, though, sunset clauses are either ignored or it is assumed that they are to be used only rarely; indeed, their use is sporadic. The government responded verbatim to the Report of the Joint Committee on the Draft Civil Contingencies Bill (which argued in favour of the use of a sunset clause) stating that: ‘the inclusion of a provision in an Act

that provides for the expiry of the Act after a certain length of time, commonly referred to as a “sunset clause”, is relatively unusual and requires careful consideration.¹

Moreover, a Member of the Parliament advocating the use of a sunset clause in the Local Government Bill stated as follows:

‘The Minister will ask why the powers should be time-limited, when so many other powers are not. If that is his approach, it will illustrate the very constitutional point that I seek to make and it will show how far we have fallen from grace. The Minister should be asking why we should not limit the powers in time, because Parliament used to do so regularly’.²

To illustrate this point, the dialogue between Sir Philip Holland and Prime Minister Margaret Thatcher provides us with information about a period during which sunset clauses were neglected. In response to the question of Sir Philip Holland regarding the introduction of sunset legislation for all advisory non-departmental bodies, Prime Minister Margaret Thatcher remarked, in 1984, that ‘Current arrangements provide for the continued justification for all advisory non-departmental public bodies to be reviewed on a three-yearly cycle. In the circumstances, I do not consider that to require legislation to provide for a finite life span for all advisory non-departmental public bodies, subject to renewal by Parliament, would provide sufficient additional benefit to justify the use of parliamentary time’.³

Both statements confirm the suspicion that at the dawn of the 21st century, sunset clause and temporary legislation are treated as an exceptional legislative tool to be used only rarely. Indeed in some fields sunset clauses are not used at all. This is exemplified by the response of the Foreign Secretary to a question regarding sunset clauses in Foreign and Commonwealth Affairs on January 21, 2004. The Foreign Secretary replied that ‘whether

¹ Cabinet Office, *Government's Response to the Report of the Joint Committee on the Draft Civil Contingencies Bill* (Cm 6078, 2004) 38.

² HC Deb 23 March 1999 vol 328 col 240.

³ HC Deb 21 March 1985 vol 75 col 568W.

a sunset clause is needed in legislation depends on the circumstance of each Bill. In the case of the Foreign and Commonwealth Office (FCO), much of our legislation is to implement HMG's international obligations, so if those obligations do not have a specific time limit, a limit in our domestic legislation would not be appropriate. No Acts of Parliament since 1997 for which the FCO is responsible contained a sunset clause'.⁴

However, sunset clauses are nonetheless included in a broad spectrum of legislation. For instance, in 2002 the Secretary of State for the Home Department confirmed that his Department had used sunset clauses in five bills introduced by the Home Office,⁵ and a plethora of reports urge their use. In this chapter we will consider the rationale for their use. The argument will be structured as follows. I will adumbrate the main categories of legislation in which a sunset clause was part of the drafting procedure, and I will examine the logic underpinning the decision as to whether or not to use such a clause. I will then compare the reasoning in each category in order to illustrate the common and the distinctive elements of sunset clauses which prevail in the legislative process.

Accordingly, this chapter proceeds as follows. Part A examines the current utility of sunset clauses in emergencies, and by examining the parliamentary debates seeks to ascertain why legislators are keen to include sunset clauses in these types of legislation. Part B highlights the utility of sunset clauses as a mechanism for imposing policies in the economic and international arenas, while part C considers the utility of such clauses in the administration. Finally, part D explores the use of sunset clauses in constitutional

⁴ HC Deb 21 January 2004 vol 416 col 1253W. The same statement was repeated in 2007 regarding the past five years. See HC Deb 26 Jul 2007 vol 463 col 1466W. Similarly, in 2002 the Lord Chancellor explicitly stated that no bills of his department in the last five years contained sunset clauses. see HC Deb 14 May 2002 vol 385 col 589W.

⁵ See HC Deb 23 April 2002 vol 384 col 222W.

documents. The analysis in this part is comparative, as it gives examples from counties with codified constitutions.

A. Sunset Clauses and Emergency Legislation

This part will demonstrate that sunset clauses are still in operation in emergency legislation. Thus it will examine the utility of sunset clauses in emergencies and it will explore why the legislature enacts these clauses and what conditions justify their use. The analysis will concentrate on the parliamentary debates, on the drafting procedure and on the evaluation of such laws, in order to demonstrate the separation of powers and rule of law concerns of the legislature.

In addition, this part will contrast the use of sunset clauses with the use of Henry VIII clauses and will show the degree of difference between the two clauses in regulating emergencies and the conditions under which legislators decide to use the former instead of the latter. As will be seen, legislators have also relied on Henry VIII clauses to regulate emergencies, and therefore the following analysis aims to highlight the potential ambiguity between the two types of clause.⁶ Interestingly, it seems that the degree of parliamentary scrutiny provided by sunset clauses differs from that provided by Henry VIII clauses, as the former afford the opportunity to scrutinise legislation to a greater extent, yet the executive is keener to include Henry VIII clauses in such legislation.

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’.⁷ This remark became more relevant in light of terrorism. The term emergency legislation or emergency laws connotes legislation

⁶ The ambiguity between these two clauses will be part of the rule of law discussion in Ch VI. See text to n 55 in Ch VI.

⁷ Rousseau, *The Social Contract and other Later Political Writings* (Victor Gourevitch, CUP 1997) 138

which regulates emergencies, as set out in section 1 of the Civil Contingencies Act.⁸ The definition of this term, though, was a concern of the Select Committee on the Constitution.⁹ Among several approaches the most notable is the definition proposed by Hansard Society, explaining that emergency legislation:

‘Can be said to broadly fall into two categories: a) special legislation that is needed in order to tackle an emergency of national or international scope and importance in which human welfare, the environment or national security may be threatened (...). b) legislation that is needed to cover a broader range of domestic situations in which the emergency does not meet the threshold of a national public emergency (as defined by the Civil Contingencies Act) but which is deemed by the Government to pose a threat to the good governance of the country (or a region thereof) and its political, legal, administrative or economic condition, or the health of the public, sufficient to justify the fast-tracking of legislative measures outside normal parliamentary procedures’.¹⁰

By its very nature emergency legislation is considered, first, as exceptional.¹¹ This is because legislative decisions are made under conditions of social pressure and substantial uncertainty.¹² Second, emergency legislation is considered transitional,¹³ because the legislation aims to restore normality. Third, it is considered controversial, as the adopted measures have an impact on Human Rights.¹⁴ Thus emergency legislation is, commonly, temporary.

⁸ Civil Contingencies Act 2004, s 1.

⁹ See Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-9, 116-I); Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-9, 116-II). For the elements of the definition, see Clive Walker, *The Anti - Terrorism Legislation* (2nd edn, OUP 2009) 6.

¹⁰ Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-9, 116-II) 5.

¹¹ *Ibid* 5.

¹² John E Finn ‘Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation’ (2010) 48 *Columbia Journal of Transnational Law* 442, 450.

¹³ Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ (2003) 112 *Yale Law Journal* 1014, 1073.

¹⁴ Given the preceding analysis, Lord Goodhart remarked during the debate of anti-terrorism legislation that, ‘We believe, in principle, that emergency legislation—unless it is very simple indeed—should have a sunset clause. That is why, for example, the Football Disorder Bill, which was enacted a couple of years ago, is coming back next week in a new form of primary legislation. We believe that is the right course for that legislation, and even more the right course for this Bill. The more contentious a provision, the sooner the sun

The principal mechanism by which the duration of an Act can be limited is the sunset clause. Indeed a series of UK emergency acts are limited in time by the inclusion of such a clause.¹⁵ In addition to sunset clauses, Parliament has used the Henry VIII clause, including in a series of Acts adopted during the World War II,¹⁶ which gave plenary power to the executive to repeal the act. Subsequently, a new clause was introduced in an act regarding the prevention of terrorism,¹⁷ and this was a combination of sunset clause and a Henry VIII clause.¹⁸

In the Prevention of Terrorism Act (Temporary Provisions) 1976, for instance, there was an expiry date due to a sunset clause, coupled with the inclusion of a Henry VIII clause, and thus the minister could renew it without significant parliamentary intervention. In practice the combination of a sunset clause with a Henry VIII clause resulted in the neutralisation of the sunset clause, as in practice the Acts were renewed without parliamentary interference. The fact that emergency legislation remained in force for many years after the end of the emergency was a cause for parliamentary concern. The

should set on it—and aspects of this Bill are very contentious.’ See HL Deb 10 December 2001 vol 629 col 1201.

¹⁵ Prevention of Violence Act 1939, s 5; Northern Ireland (Temporary Provisions) Act 1972, s 1 (5); Imprisonment (Temporary Provisions) Act 1980, s 8 (1); Prevention of Terrorism (Temporary Provisions) Act 1989, s 27 (5).

¹⁶ Import, Export and Customs Powers (Defence) Act 1939, s 9 (3); Unemployment Insurance (Emergency Powers) Act 1939, s 4 (3); Administration of Justice (Emergency Provisions) Act 1939, s 11 (2); Administration of Justice (Emergency Provisions) (Northern Ireland) Act 1939, s 12 (2); Courts (Emergency Powers) Act 1943, s 14 (3).

¹⁷ Prevention of Terrorism Act (Temporary Provisions) 1974, s 12, and Prevention of Terrorism Act (Temporary Provisions) 1976, s 17. The latter Act contained a twelve month sunset clause, however by the inclusion of the Henry VIII clause, the Secretary of State had the power to renew it and invalidate the sunset clause.

¹⁸ For instance, the Prevention of Terrorism Act of 1974 prescribed that ‘(1) Sections 1 to 8 of this Act shall remain in force until the expiry of the period of six months beginning with the passing of this Act and shall then expire unless continued in force by an order under this section. (2) The Secretary of State may by order provide a. that all or any of the provisions of those sections which are for the time being in force (including any in force by virtue of an order under this section) shall continue in force for a period not exceeding six months from the coming into operation of the order’. See Prevention of Terrorism (Temporary Provisions) Act 1974, s 12.

thoughts of the Marquess of Reading, comparing two emergency acts, the former having a Henry VIII clause, and the latter having a sunset clause, are worthy of note.

‘That Act [National Registration Act 1939] was, as I have said, to be brought to an end by Order-in-Council when the emergency terminated, and one might well have imagined that the carrying out of that statutory suicide pact was inescapable. Nevertheless, simply for administrative convenience the Government continued to relieve the victims. It is worth bearing in mind that there was a National Registration Act in the 1914-18 War and that that Act contained the terse and peremptory clause as to its termination that it should continue in force “during the continuance of the present war and no longer.” With the official termination of that war on August 31, 1921, after the prolonged peace negotiations, that National Registration Act ceased upon the midnight, without pain to itself or grief to anyone else’.¹⁹

The difference between a sunset clause and a Henry VIII clause is the degree of parliamentary scrutiny, as a Henry VIII clause empowers the Minister to renew or repeal the legislation without parliamentary deliberation.²⁰ As a result the inclusion of a sunset clause in emergency legislation is considered to be a safeguard, since, where one is used, parliament has frequent opportunities to debate the continuance of the act and review its merit.²¹ It also enables parliament to reconsider its enactments, which is especially important when it is considered that emergency legislation is adopted – as part of a fast track procedure.²² For example, it is noteworthy that during the debates for the adoption of the – Anti-terrorism, Crime and Security Act 2001, it was stated that ‘given the nature of

¹⁹ HL Deb 26 July 1951 vol 172 col 1339.

²⁰ The Henry VIII clauses is defined by the House of Lords Select Committee on the Scrutiny of Delegated Powers in its report of 2009 as ‘a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny.’ See Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the role and requirements of the Committee* (HL Nov 2009) [16]. These clauses were so named from the Statute of Proclamations 1539, which gave King Henry VIII power to legislate by proclamation. See Committee on Ministers’ Powers, Report (Cmd 4060 1932) 61. For more detailed analysis on these clauses see NW Barber, Alison L Young, ‘The Rise and Prospective Henry VIII Clauses and their Implications for Sovereignty’ [2003] PL 112.

²¹ Joint Committee on Human Rights, *Anti-terrorism, Crime and Security Act Statutory Review and Continuance of Part 4* (2003-4, HL 38, HC 381) 2.

²² Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-9, 116-I) 198.

the Bill, it is impossible to say that it should be passed without a proper review being established'.²³

A few days after 9/11, and just before the adoption of the anti terrorism legislation in the US, Ackerman explicitly supported the idea of a two-year sunset clause in US legislation.²⁴ Finn, however, disagreed in this respect.²⁵ The difference between the two was that Ackerman emphasised the opportunity afforded to the legislature to review legislation, while Finn concentrated on its effectiveness, claiming that it was not a successful mechanism. Gersen has shown that the level of attention paid by the legislature depends on the circumstances, and thus the success of sunset clauses as review mechanism varies.²⁶

In the UK a series of reports urges legislators to use sunset clauses in emergency legislation. The corner stone is a report submitted by Jellicoe reviewing the operation of the Prevention of Terrorism (Temporary Provisions) Act 1976, which, although it contained a sunset clause, also had a Henry VIII clause and thus could be renewed by the Secretary of State without parliamentary deliberation. One of his main recommendations was the 'requirement for periodic full re-enactment by Parliament' with a 'maximum life span of five years without the possibility of further extensions'.²⁷

In addition, several Memorandum submitted before the Select Committee on the Constitution support the use of such a clause. The Hansard Society recommended that

²³ Privy Counsellor Review Committee, *Anti - terrorism, Crime and Security Act 2001 Review* (HC 2003-4, 100) 444.

²⁴ Bruce Ackerman 'Sunset can put a Halt to Twilight of Liberty' September 20, 2001 available at <<http://articles.latimes.com/2001/sep/20/local/me-47757>> accessed February 16, 2014.

²⁵ John E Finn 'Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation' (2010) 48 *Columbia Journal of Transnational Law* 442, 502.

²⁶ Jacob E Gersen, 'Temporary Legislation' (2007) 74 *Chicago Law Review* 247, 277.

²⁷ Home Office, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1979* (Cm 8803, 1983) 14; also known as the Jellicoe Report.

‘wherever possible sunset clauses should be incorporated into emergency legislation, and particularly in relation to legislation that impacts upon civil liberties’,²⁸ and the Better Governance Initiative states that ‘it is characteristic of such legislation in that it has a sunset clause and Parliament therefore has the opportunity to vote on whether the situation still requires its renewal.’²⁹ However, the Memorandum submitted by the Leader of the House of Commons and the Leader of the House of Lords argued that ‘the case for sunset or renewal provisions must be considered on its merits in relation to each bill, having regard to all the relevant circumstances’,³⁰ while the Memorandum submitted by Dickson reasoned that the renewal requirement ‘gave the impression of being effective and transparent but, in the end, was not’,³¹ and was an inadequate safeguard ‘against the perpetuation of bad laws’.³²

Moreover, the report from the Privy Counsellor Review Committee expressed its ‘support for the principle of making emergency legislation subject to periodic review and renewal by Parliament’,³³ and the Joint Committee on the Draft Civil Contingencies Bill proposed the inclusion of a sunset clause in the relevant Bill.³⁴ Recently, in 2006, the Law Commission made clear that ‘emergency legislation should always be subject to post-legislative scrutiny, particularly where it affects civil liberties’.³⁵

²⁸ Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-9, 116-II) 4.

²⁹ *Ibid* 2.

³⁰ *Ibid* 129.

³¹ *Ibid* 87.

³² *Ibid* 84.

³³ Privy Counsellor Review Committee, *Anti - terrorism, Crime and Security Act 2001 Review* (HC 2003-4, 100) 13.

³⁴ Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill* (2002-3, HL 184, HC 1074) [201]

³⁵ Law Commission, *Post-Legislative Scrutiny: A Consultation Paper* (Law Com No 178, 2006) [7.59].

Furthermore, in the international arena, a UN report on the Promotion and Protection of Human Rights while Countering Terrorism supports the use of sunset clause and, citing Walker,³⁶ remarks that ‘to be effective, it is important that independent review mechanisms be based on statutory terms of appointment, linked to the work of relevant parliamentary committees and accompanied by adequate resourcing.’³⁷ It states that

‘[P]eriodic parliamentary review and sunset clauses also enable the Legislature to consider whether the exercise of powers under counter-terrorism laws has been proportionate and thus whether, if they continue, further constraints on the exercise of such powers should be introduced, and/or whether the overall operation of counter-terrorism laws calls for their modification or discontinuance’.³⁸

The recent application of sunset clauses during the financial and banking crisis of 2008 merits further consideration. In order to deal with the problem of the Northern Rock bank and prevent its collapse,³⁹ the government adopted the Banking (Special Provisions) Act.⁴⁰ The Act gave draconian and wide-ranging powers to the executive,⁴¹ including the power to nationalise banks through secondary legislation, but these powers were limited by an annual sunset clause.⁴² On February 21, 2009 the powers conferred on the executive expired, but the Act nonetheless remains in force unless it is repealed by order as prescribed in the Banking Act 2009.⁴³

³⁶ Clive Walker, ‘The United Kingdom’s Anti-terrorism laws: Lessons for Australia’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 189.

³⁷ UNHCR Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (22 December 2010) UN Doc A/HRC/16/51 [19].

³⁸ Ibid [20].

³⁹ HL Deb 21 February 2008 vol 699 col 276.

⁴⁰ Banking (Special Provisions) Act 2008.

⁴¹ Roman Tomasic, ‘The rescue of Northern Rock: nationalisation in the shadow of insolvency’ (2008) 1 Corporate Rescue and Insolvency 109.

⁴² Banking (Special Provisions) Act 2008, s 2 (8).

⁴³ Banking Act 2009, s 262 (1).

The crucial role of sunset clauses in emergencies can be further explored by focusing on anti-terrorism legislation, which is a fundamental subset of emergency legislation.⁴⁴ The emergency legislation enacted in the aftermath of 9/11 and the subsequent terrorist attacks by Al Qaeda in Spain and London attracted the interest of politicians and academics throughout the world.⁴⁵ Few governments now rely on their pre 9/11 emergency legislation and most governments, such as the UK, Canada⁴⁶ and US,⁴⁷ have enacted new anti-terrorism legislation, or at least updated their existing statutes so as to meet the challenges of the 21st century. Significantly, sunset clauses are a common features of this legislation.

The new anti-terrorism legislation in the UK, US and Canada prompted two academic articles⁴⁸ on the subject of sunset clauses. The articles aimed to evaluate the use of sunset clauses as a post-legislative vehicle for scrutiny. Their principal conclusion was that even if sunset clauses may have the potential to be an effective review mechanism, they failed to meet the challenges of anti-terrorism policies.⁴⁹ With regard to the UK legal

⁴⁴ Regarding the definition of terrorism see Home Department, *The Definition of Terrorism* (Cm 7052, 2007).

⁴⁵ See John E Finn 'Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation' 2010 48 *Columbia Journal of Transnational Law* 442; John Ip, 'Sunset Clauses and Counterterrorism Legislation' [2013] PL 74.

⁴⁶ In Canada the Privy Council Office issued a guide to law making according to which legislators should use sunset clauses with caution 'since these provisions may result in a gap of legal authority if the new legislative regime cannot be brought into force in time,' see Privy Council Office, *Guide to Making Federal Acts and Regulations* (2nd edn 2001) 91. In the aftermath of September 11, though, the Parliament passed 'Bill C-36, the Anti-terrorism Act (SC 2001, c 41)' which was incorporated to the Criminal Code as 'Part II.1 - Terrorism'. A sunset clause was included in the Bill (section 83.32) sunsetting sections 83.28, 83.29 and 83.3 concerning preventative arrest and investigative hearing powers after a five year period.

⁴⁷ In the United States a statute enacted in 2001, the 'USA Patriot Act', in response to the September 11, 2001 attacks, contained in Section 224 a sunset clause providing that a series of sections shall cease to have effect on December 31, 2005. For more details see Ch V.

⁴⁸ See John E Finn 'Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation' (2010) 48 *Columbia Journal of Transnational Law* 442; John Ip, 'Sunset Clauses and Counterterrorism Legislation' [2013] PL 74;

⁴⁹ Finn states that: 'Whether sunset clauses work depends instead upon whether they deliver the informational, distributive and deliberative benefits they promise. Our study suggests that in many case

order, despite these articles, relatively little attention has been paid, first, to legislation where the sunset clause amendment failed, and, second, to the inclusion of Henry VIII clauses alongside sunset clauses. Thus, the analysis below will present a full account of anti-terrorism legislation where a sunset clause was debated and will evaluate the critical elements supporting or opposing their use.

Just one year before 9/11, in 2000, the UK enacted the Terrorism Act⁵⁰ with the aim of adopting permanent measures against terrorism.⁵¹ A partial sunset clause was introduced by the Government, but it referred only to Part VII⁵² of the Act, which was related to Northern Ireland. According to the Home Secretary, the government incorporated this in the bill ‘because the Emergency Provisions Act that covers Northern Ireland is due to expire next August. It was felt appropriate to bring these matters together. It is the fervent wish of hon. Members on both sides of the House and of the people of Northern Ireland that the emergency provisions should be withdrawn as soon as possible’.⁵³

The attacks of 9/11 were the catalyst for the Anti-terrorism, Crime and Security Act, which amended the Terrorism Act of 2000⁵⁴ and introduced the indefinite detention

sunsets do offer informational and distributive benefits, but these benefits can, sometimes, lead to merely modest deliberative benefits’ see John E Finn ‘Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation’ (2010) 48 *Columbia Journal of Transnational Law* 442, 501; Ip in addition points out that ‘This article has examined the effectiveness of sunset clauses by looking at specific examples that have been enacted in the counterterrorism legislation of the United States, Canada and the United Kingdom since the September 11 terrorist attacks. The article then evaluated the effectiveness of sunset clauses in both a substantive and procedural sense. The number of occasions of substantive success is few and that there are significant barriers to procedural success as well’ see John Ip, ‘Sunset Clauses and Counterterrorism Legislation’ [2013] PL 74.

⁵⁰ Terrorism Act 2000.

⁵¹ HC Deb 14 December 1999 vol 341 col 154.

⁵² Terrorism Act 2000, s 112.

⁵³ HC Deb 14 December 1999 vol 341 col 153.

⁵⁴ Anti-Terrorism, Crime and Security Act 2001, s 2.

of foreign suspects of terrorism without trial.⁵⁵ When the bill was introduced in the House of Commons on November 12, 2001, the section concerning indefinite detention was subject to a fifteen-month sunset clause, together with a Henry VIII clause.⁵⁶ There was strong opposition in the Commons. In particular, a member of the Select Committee expressed his disagreement with the Henry VIII clause, stating ‘that despite all the semi-sunset clauses that the Home Secretary has included in the Bill to enable us to review aspects of it, I believe that we are moving too fast. If we cannot properly scrutinise legislation, we shall serve neither the House nor the country well’.⁵⁷ Moreover, a Labour MP and member of the Select Committee on Home Affairs stated that

‘As we all know, the history of anti-terrorism legislation is that when it is introduced, it is represented as temporary and as a response to some immediate crisis, but it has a habit of becoming permanent. I have therefore tabled—as have others, probably—a sunset clause which requires the Government to come back to Parliament after five years to go through the entire legislative process to obtain the powers that they seek in part 4. We picked five years—others may choose a shorter or a longer period—because there is a precedent for it’.⁵⁸

The Home Secretary contended that ‘in any case, the derogation has a five-year life and is automatically a sunset clause’,⁵⁹ bearing in mind section 16 HRA.⁶⁰ A five-year sunset

⁵⁵ Anti-Terrorism, Crime and Security Act 2001, s 23.

⁵⁶ Anti-Terrorism, Crime and Security Bill [49] s 28 (1) prescribed that ‘Sections 21 to 23 shall, subject to the following provisions of this section, expire at the end of the period of 15 months beginning with the day on which this Act is passed’ and (2) prescribed that ‘The Secretary of State may by order (a) repeal sections 21 to 23; (b) revive those sections for a period not exceeding one year; (c) provide that those sections shall not expire in accordance with subsection (1) or an order under paragraph (b) or this paragraph, but shall continue in force for a period not exceeding one year’.

⁵⁷ HC Deb 19 November 2001 vol 375 col 77.

⁵⁸ Ibid vol 375 col 62.

⁵⁹ Ibid vol 375 col 28.

⁶⁰ Human Rights Act 1998, s 16. ‘(1)If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act—(a)in the case of the derogation referred to in section 14(1)(a), at the end of the period of five years beginning with the date on which section 1(2) came into force;(b)in the case of any other derogation, at the end of the period of five years beginning with the date on which the order designating it was made.(2)At any time before the period—(a)fixed by subsection (1)(a) or (b), or(b)extended by an order under this subsection, comes to an end, the Secretary of State may by order extend it by a further period of five years’.

clause was supported by several Members of the Parliament,⁶¹ which was proposed by the Home Affairs Select Committee.⁶² Consequently, Sections 21 to 23 were to ‘by virtue of this subsection cease to have effect at the end of 10th November 2006’.⁶³

Furthermore, in 2004 the Government introduced the Civil Contingencies Act, and a political debate took place within Westminster, regarding the issue of sunsetting either a part of the Act or the Act as a whole.⁶⁴ Both sides expressed solid arguments. Eventually, a thirty-day clause was incorporated sunsetting the emergency regulations,⁶⁵ but in the end, the government imposed its will and this political decision led to rejection of a clause sunsetting the Act as a whole.

The following year, in 2005, the UK Government introduced another piece of – anti-terrorism legislation, the Prevention of Terrorism Act 2005, so as to comply with the Supreme Court (at that time House of Lords) decision in *A v Secretary of State for the Home Department*.⁶⁶ The House of Lords held that the indefinite detention of foreign suspects for terrorism without trial under the Anti-Terrorism, Crime and Security Act was incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms.⁶⁷ It is noteworthy that the measure of indefinite detention was reviewed twice

⁶¹ HC Deb 21 November 2001 vol 375 col 397.

⁶² Home Affairs Select Committee, *The Anti-Terrorism, Crime and Security Bill 2001* (HC 2001-2, 351) [41].

⁶³ Anti-Terrorism, Crime and Security Act 2001, s 29 (7).

⁶⁴ See Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill* (2002-3, HL 184, HC 1074); HC Deb 16 November 2004 vol 426 col 1364. Ruth Kelly, the Minister for the Cabinet Office, stated that the Government had reconsidered the issues of sunsetting and reporting on the use of part 2 of the Bill which had been a concern raised, but had denied the sunsetting of the Act itself as not appropriate because the need to be able to respond to the most serious emergencies would not disappear after a given period.

⁶⁵ Civil Contingencies Act 2004, s 26 (1) (a).

⁶⁶ *A v Secretary of State for the Home Department* [2004] UKHL 56.

⁶⁷ HL Deb 22 February 2005 vol 669 col 1102.

by an order of the Secretary of State,⁶⁸ which inevitably raises concerns about the effectiveness of sunset clauses when combined with Henry VIII clauses, since parliamentary control is thereby diminished.⁶⁹ Suffice to mention here a remark by Lord Lloyd of Berwick, who criticised the executive because it ignored the reports in favour the repeal of the indefinite detention measure:

‘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’.⁷⁰

Nevertheless, the new legislation, the Prevention of Terrorism Act, as a response to the House of Lords decision, contained again a hybrid clause comprising a sunset clause and a Henry VIII clause. Sections 1 to 9 were stipulated to expire after a year,⁷¹ while the Secretary of State may renew them with an order for a period less than a year, to be approved by both Houses.⁷²

Initially, the Bill did not contain a sunset clause at all,⁷³ and was subject to severe criticism in the Lords.⁷⁴ As Walker mentions ‘[the Prevention of Terrorism Act 2005] did not get off to a good start. The exceptionally rapid legislative process was the subject of

⁶⁸ The Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2003 SI 2003/ 691; The Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2004 SI 2004/ 751.

⁶⁹ In practice the Home Secretary appointed an independent committee according to section 122 of the Act to review the legislation in April 2002 with the aim of reporting to Parliament by December 2003. Despite the fact that the Independent Committee expressed its objection to indefinite detention, the legislation was renewed. See Privy Counsellor Review Committee, Anti - terrorism, Crime and Security Act 2001 Review (HC 2003-4, 100).

⁷⁰ HL Deb 01 March 2005 vol 670 col 161.

⁷¹ Prevention of Terrorism Act 2005, s 13 (1)

⁷² Ibid s 13 (4)

⁷³ See Prevention of Terrorism HC Bill (2004 - 2005) [61].

⁷⁴ HL Deb 01 March 2005 vol 670 col 132.

highly rancorous debate which was said to have “demeaned” Parliament as well as becoming the catalyst for the most severe bout of disagreement between Houses of Commons and Lords in modern history’.⁷⁵ The Lords proposed the inclusion of an annual sunset clause which would empower Parliament to scrutinise the Bill as a whole.⁷⁶ Eventually, a sunset clause was agreed and the Prime Minister stated that

‘Yes, it is true that we have agreed on a sunset clause. Why? Because it is important. If people have these concerns, and I understand them, let us test it over the year. Let us see if the worries that people have are justified, or not. That is a reasonable thing to put forward. We have an independent review of the system—Lord Carlile will also report on it—but let us send out a signal from the House that, when it comes to defeating terrorism, we are going to give the police the powers that they need and back them’.⁷⁷

The structure of the sunset clause in the Prevention of Terrorism Act 2005 was followed in 2006 in the Terrorism Act adopted as a response to the bombings in London in July 2005,⁷⁸ which extended the length of the previous detention period. However, the Joint Committee on Human Rights criticised the new structure of the sunset clause, comparing the simple sunset clause in the Canadian Anti-Terrorism Act with that in the Prevention of Terrorism Bill 2005, and stated that

‘The contrast between the two types of provision can be seen by comparing the amount of parliamentary scrutiny of the renewal of the Canadian Anti Terrorism Act with that of the UK Prevention of Terrorism Act 2005. In Canada, there have been detailed hearings before Committees of both the House of Commons and the Senate, examining the operation of the legislation and practice and the evidence of the continued need for it. In the UK, by comparison, there was a single debate of one hour in each House before the renewal of that part of the Prevention of Terrorism Act 2005 which authorises the making of control orders’.⁷⁹

⁷⁵ Clive Walker, ‘Keeping Control of Terrorists without Losing Control of Constitutionalism’ (2007) 59 *Stanford Law Review* 1395, 1408.

⁷⁶ HL Deb 01 March 2005 vol 670 col 203.

⁷⁷ HC Deb 9 November 2005 vol 439 col 298.

⁷⁸ Terrorism Act 2006, s 25.

⁷⁹ Joint Committee on Human Rights, *Counter - Terrorism Policy and Human Rights: Prosecution Pre - Charge Detention* (2005-6, HL 240, HC 1576) 166.

The government response to the report was that all future terrorism legislation should have a five-year duration and should require renewal by parliamentary legislation.⁸⁰

As seen in the historical chapters and from the preceding discussion, sunset clauses were used extensively in emergency legislation. This practice is explained by the nature of emergencies. Given that emergency legislation is often adopted under exigencies of time and without appropriate consideration from the legislative branch, the sunset clause enhances legislative oversight. Moreover, where special powers are granted to the executive, the expiration date provides the legislature with an opportunity to reconsider the delegated powers. A sunset clause might also be used as an effective apparatus in order to pass controversial measures, might prevent the normalisation of extreme measures in the legal order and might provide the opportunity to the legislature to evaluate its measures.

Focusing on the use of sunset clauses in the UK, it is important to consider legislation where a sunset clause is included and also where it is rejected. The sunset clause to limit the duration of the Terrorism Act 2000 and the Civil Contingencies Act 2004 was, as a whole, denied. The common element between these Acts was that they were not adopted with a fast track procedure and the government aimed to provide a permanent legal framework. Nonetheless both contained a partial sunset clause – the former because it adopted extreme measures the compatibility of which with the rule of law was impugned, and the latter because it gave special emergency powers to the executive which were related to concerns about the possibility of abuse (hence the sunset of executive orders).

The reports reviewing anti-terrorism legislation had a significant impact on the drafting of sunset clauses. The main focus was on the renewal process and the level of

⁸⁰ Home Department, *The government reply to the Twenty-Fourth Report from the Joint Committee on Human Rights, Counter Terrorism Policy and Human Rights* (Cm 6920, 2006) 30.

parliamentary scrutiny. The executive tends to draft sunset clauses with the least possible parliamentary review, and this was criticised by numerous reports. Nonetheless, the impact of the reports concerning whether to extend sunset clauses varies. The report of the Privy Counsellor Review Committee, (the Newton Committee), urged the government to replace Part 4 of the Anti-terrorism, Crime and Security Act,⁸¹ which was due to expire but was renewed twice following orders from the Secretary of State. The Government ignored the recommendation and eventually the House of Lords ruled that that part was incompatible with HRA.

In light of the preceding analysis, it is evidence that sunset clauses seek to increase legislative oversight, bureaucratic responsiveness, and regulatory efficiency,⁸² while also attempting to minimise the impact of draconian measures.⁸³ Last but not least, such clauses aim to address a procedural deficit in the fast track process, which is to make certain that the legislation is properly discussed and debated at a later stage. Due to the nature of contingencies, emergency legislation is passed using a quick procedure through Parliament, so-called ‘fast track’ legislation.⁸⁴ Therefore, the use of sunset clauses, as a form of post-legislative scrutiny, is vital, and offers safeguards in relation to such procedures.⁸⁵

⁸¹ Privy Counsellor Review Committee, *Anti - terrorism, Crime and Security Act 2001 Review* (HC 2003-4, 100) 25.

⁸² Jacob E Gersen, ‘Temporary Legislation’ (2007) 74 *Chicago Law Review* 247, 260. For more analysis, see text to n 49ff in Ch V.

⁸³ See text to no 134 in Ch VI.

⁸⁴ The House of Lords has explicitly considered as fast track legislation governmental bills that received their second and third reading on the same day. See Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-9, 116-I) [18]. According to the report submitted by the Lords on fast track legislation, over 30 bills were recorded in the past 20 years which have been fast tracked through Parliament.

⁸⁵ *Ibid* [208].

Nevertheless, the most common use of sunset clauses in emergency legislation is in conjunction with a Henry VIII clause. The combination of a sunset clause and a Henry VIII clause, even if in principle it prescribes an expiration date, vests in the executive the power to renew the legislation for a specific period of time. Furthermore, it appears that the executive favours the use of sunset clauses coupled with Henry VIII clauses, whilst the legislature endorses the use of sunset clauses.

By using sunset clauses coupled with Henry VIII clauses, parliamentary scrutiny is limited, and such enactments fail to expire. Yet both negatives consequences are caused mainly by the Henry VIII clause. Sunset clauses, by contrast, enhance the role of the legislature, as will be shown in the following chapter,⁸⁶ while their evaluation pertaining to the rule of law depends on a number of combined elements, such as the right at stake and the amount of time restricted.⁸⁷

B. Sunset Clauses and Policy Making

The previous part canvassed the utility of sunset clauses in emergency legislation. However, the use of such clauses is not limited to emergency laws. Indeed sunset clauses have been used as a device to promote a variety of policies in different fields. The aim of this part is to demonstrate the utility of sunset clauses and in particular their potential impact on implementing different aspects of governmental policy.

The use of sunset clauses in order to regulate policies that require flexibility and constant review will be examined, and so too will the convenience caused by the need for frequent recourse to new legislation. The first section will examine the use of such clauses

⁸⁶ See text to n 49 in Ch V.

⁸⁷ See text to no 146 in Ch VI.

in taxation, the second will discuss their utility in economic policies, and the final part will examine the utility of such clauses in international relations.

I. In Taxation

As seen in the historical chapters, sunset clauses are extensively used in public finance, from taxation to economic policies. Taxation in late medieval England and up to the early 18th century was occasional, and thus sunset clauses in taxation were accorded with the temporal character of the occasion. In contrast to the exceptional character of taxation in the early period, taxation is now considered an ordinary part of the statute books in the UK and throughout the world. Consequently the use of sunset clause is quite a rare phenomenon in tax laws.

For instance, a commentator on the Finance Act 2008 urged for inclusion of a sunset clause and stated that ‘the –so-called “sunset clauses” is a technique neglected in this country, yet in a situation such as this it would have afforded both certainty and timetabled opportunity to review progress’.⁸⁸ The reality is nonetheless that parliament has adopted the Finance Act annually since 1894.⁸⁹

The Finance Acts provide the authority to collect taxes until April 5 of the following calendar year.⁹⁰ As the new Finance Bill might not have received the Royal Assent, the Provisional Collection of Taxes Act 1968 gives interim statutory force to resolutions of the House of Commons, which provide the renewal of taxes in force with or

⁸⁸ Andrew Harper, ‘Finance Act notes: annual investment allowance etc - sections 74 -76 and Schedule 24’ [2008] *British Tax Review* 480, 485.

⁸⁹ Finance Act 1894 (57&58 Vict c 30).

⁹⁰ Hilaire Barnett, *Constitutional and Administrative Law* (5th edn, Cavendish Publishing 2004) 411.

without modifications for a further period of four or five months.⁹¹ The practical purpose of a law imposing a short-term sunset clause is that it allows the government to collect taxes at the declaration of the budget, before the Financial Bill receives Royal Assent.⁹²

The aforementioned support for the inclusion of a sunset clause in tax legislation in the UK was inspired by the paradigm shift in the US in recent tax legislation adopted during the Bush administration. In fact, the Bush administration proposed two major tax cuts, in 2001 and 2003, and it was the first time in recent US legal history that a clause was used to sunset tax legislation as a whole.⁹³ More specifically, the Economic Growth and Tax Relief Reconciliation Act 2001 was stated to expire on December 31 2010,⁹⁴ and the Jobs and Growth Tax Relief Reconciliation Act 2003 was set to expire on December 31 2008.⁹⁵

Both acts stimulated academic literature in the US regarding the effectiveness of such a clause in tax cuts and its compatibility with budget rules⁹⁶. Commentators pointed out that the sunset clause failed to represent the true cost of the tax cuts, and was in principle contrary to budget rules.⁹⁷ In addition, such clauses created uncertainty in the

⁹¹ Provisional Collection of Taxes Act 1968, s 1 (3).

⁹² HM Treasury, Overview of Tax Legislation and Rates (March 2011) A153.

⁹³ In practice sunset clause were used in minor tax provisions, and such tax provisions are commonly referred as the 'extenders', since they are constantly renewed with the exception of a single occasion. See Elizabeth Garrett, 'Accounting for the Federal Budget and Its Reform' (2004) 41 *Harvard Journal on Legislation* 187, 194; Rebecca M Kysar, 'The Sun Also Rises: the Political Economy of Sunset Provisions in the Tax Code' (2006) 40 *Georgia Law Review* 335, 359.

⁹⁴ Pub L No 107-16, 115 Stat 38, (2001) 901.

⁹⁵ Pub L No. 108-27, 117 Stat 752 (2003) 303.

⁹⁶ Regarding the Budget Rules in the US see Rudolph G Penner, C Eugene Steeple 'Budget Rules' (2004) 57 *National Tax Journal* 547.

⁹⁷ See William G Gale, Peter R Orszag 'Sunsets in the Tax Code' (2003) 99 *Tax Notes* 1553, 1557; Elizabeth Garrett, 'Accounting for the Federal Budget and Its Reform' (2004) 41 *Harvard Journal on Legislation* 187, 196; Rebecca M Kysar, 'The Sun Also Rises: the Political Economy of Sunset Provisions in the Tax Code' (2006) 40 *Georgia Law Review*, 335, 390; Manoj Viswanathan, 'Sunset Provisions in the Tax Code: a Critical Evaluation and Prescriptions for the Future' (2007) 82 *New York University Law Review* 656, 658.

Tax Code⁹⁸ and highlighted the lack of policy commitment.⁹⁹ Finally, sunset clauses permitted the legislature to gain benefits from the lobbyists at the expiration date.¹⁰⁰

In opposition it was argued that sunset clauses in tax legislation did in fact reveal the cost of the continuation of the legislation and indeed enhanced fiscal restraint.¹⁰¹ Moreover, it is claimed that sunset clauses in tax cuts created an immediate stimulus to invest,¹⁰² and that they raised accountability, since they permitted constituents to track the votes of their legislators when they adopted, renewed or allowed sunset legislation to expire.¹⁰³

Focusing on the budget rules and the true cost of the sunset clause, Altshuler and Dietz argue that sunset clauses ‘complicate and compromise the value of information provided by the tax expenditure reporting’.¹⁰⁴ This conclusion was based on the premise that tax expenditure analysis regards sunset clauses or their expiration as permanent features, without considering the possibility of their renewal and the policy proposals. This outcome is thus premised on an assumption which might be very different from the

⁹⁸ William G Gale, Peter R Orszag ‘Sunsets in the Tax Code’ (2003) 99 Tax Notes 1553, 1557; Rebecca M Kysar, ‘The Sun Also Rises: the Political Economy of Sunset Provisions in the Tax Code’ (2006) 40 Georgia Law Review 335, 393; Elizabeth Garrett, ‘Accounting for the Federal Budget and Its Reform’ (2004) 41 Harvard Journal on Legislation 187, 196;

⁹⁹ Rebecca M Kysar, ‘The Sun Also Rises: the Political Economy of Sunset Provisions in the Tax Code’ (2006) 40 Georgia Law Review 335, 394.

¹⁰⁰ William G Gale, Peter R Orszag ‘Sunsets in the Tax Code’ (2003) 99 Tax Notes 1553, 1558; Rebecca M Kysar, ‘The Sun Also Rises: the Political Economy of Sunset Provisions in the Tax Code’ (2006) 40 Georgia Law Review 335, 393; Manoj Viswanathan, ‘Sunset Provisions in the Tax Code: a Critical Evaluation and Prescriptions for the Future’ (2007) 82 New York University Law Review 656, 658.

¹⁰¹ George K Yin, ‘Temporary - Effect Legislation, Political Accountability, and Fiscal Restraint’, (2009) 84 New York University Law Review 174, 181.

¹⁰² Darrel S Cohen, Dorte-Pernille Hansen, Kevin A Hassett, ‘The Effects of Temporary Partial Expensing on Investment Incentives in the United States’ (2002) 55 National Tax Journal 557, 565

¹⁰³ George K Yin, ‘Temporary - Effect Legislation, Political Accountability, and Fiscal Restraint’, (2009) 84 New York University Law Review 174, 204 (asserting that ‘extension of a temporary law requires legislative action whereas continuation of a permanent one does not’).

¹⁰⁴ Rosanne Altshuler, Robert Dietz, ‘Reconsidering Tax Expenditure Estimation’ (2011) 64 National Tax Journal 459, 462,

realised account.¹⁰⁵ In part, this explains why conflicting opinions were expressed by scholars in relation to the compatibility of sunset clauses with budget rules.

Interestingly, the inclusion of a sunset clause in the Economic Growth and Tax Relief Reconciliation Act 2001 revealed new aspects of temporary legislation. The sunset clause was originally used in order to overrule a budget voting procedure,¹⁰⁶ which raised concerns from a rule of law perspective. In addition, such clause imposed a burden on the Obama administration concerning the renewal or expiration of the tax cuts, which also relates the issue to the separation of powers.

Regarding the former example, as the Economic Growth and Tax Relief Reconciliation Act was considered as a reconciliation act, a fast track procedure applied and a filibuster was not permitted, so in order to pass the Bill had to be voted by a simple majority in the Senate. However, this rule was not without exceptions. According to the Byrd Rule, if the spending increased or the tax cut exceeded the window budget, then it must be voted into law by a super majority of three-fifths.¹⁰⁷ Consequently, as the Republicans held a one-seat majority in the Senate, they decided to use the reconciliation process in order to pass tax cuts. By adding the sunset clause, they managed to pass the tax cut with a simple majority and thereby circumvent the Byrd Rule.¹⁰⁸

Regarding the latter example, upon the expiration of the Economic Growth and Tax Relief Reconciliation Act in 2010, the Obama administration and the Congressional

¹⁰⁵ Rosanne Altshuler, Robert Dietz, 'Reconsidering Tax Expenditure Estimation' (2011) 64 National Tax Journal 459, 478 (concluding that 'As a result of sunsets, the AMT, and other complications of current law, reading a tax expenditure table across time requires fairly sophisticated knowledge of U.S. tax policy and is a bit like reading tea leaves').

¹⁰⁶ Elizabeth Garrett, Elizabeth Graddy, Howell E Jackson, (eds) *Fiscal Challenges: An Interdisciplinary Approach to Budget Policy* (CUP 2008) 65; Rebecca M Kysar, 'The Sun Also Rises: the Political Economy of Sunset Provisions in the Tax Code' (2006) 40 Georgia Law Review 335, 375.

¹⁰⁷ Michael W Evans, 'The Budget Process and the Sunset Provision of the 2001 Tax Law' (2003) 99 Tax Notes 405, 410.

¹⁰⁸ *Ibid* 414.

Democrats who held the majority in Congress faced the dilemma of whether to let the tax cuts expire or to renew them. The Democrats were against policies favouring tax cuts¹⁰⁹ but the expiration of the Act was seen as an ‘unwise’ action in raising taxes.¹¹⁰ Eventually, the Obama Administration reached a compromise with Republicans and renewed most of the tax cuts for a couple of years.¹¹¹ Thus even if the sunset clause was meant to be a mechanism to bypass the budget rule, it ended up becoming a political burden to the new administration.

By way of contrast, in the UK sunset clauses are not evident in recent tax cut legislation. Nonetheless, taxation seems to be a fertile field for sunset clauses. Indeed, a series of governmental reports refer to them and support their inclusion in a series of tax bills. In June 2010 HM Treasury issued a discussion document to improve its tax policies and restore the system’s reputation, proposing to make more use of sunset clauses for post-implementation evaluation.¹¹² The feedback on the initiative to use sunset clauses in tax legislation was controversial,¹¹³ thus HM Treasury stated that the government ‘in light of the mixed response to the proposed use of sunset clauses, considers that the case has not yet been made for their regular use in relation to tax policy. It will consider the

¹⁰⁹ Jennifer Steinhauer, ‘Some Democrats Count on ‘Millionaires’ Strategy on Tax Cuts’ New York Times (New York, 2 December 2010) <<http://www.nytimes.com/2010/12/03/us/politics/03million.html>> accessed February, 16 May 2014.

¹¹⁰ David M. Herszenhorn, ‘Next Big Battle in Washington: Bush’s Tax Cuts’ New York Times (25 July 2010) <<http://query.nytimes.com/gst/fullpage.html?res=9B01E0D71239F936A15754C0A9669D8B63>> accessed February, 16 2014.

¹¹¹ Tax Relief, Unemployment Insurance Reauthorisation, and Job Creation Act of 2010, Pub L 111-312, 124 Stat 101 (2010) 101.

¹¹² HM Treasury, *Tax policy making: a new approach* (June 2010) [2.20].

¹¹³ HM Treasury, *The new approach to tax policy making: a response to the consultation* (December 2010) [2.75] ‘Some of those who responded were wholly positive; one citing the current economic circumstances as a pretext for temporary policy. Another suggested that sunset clauses would be useful in identifying which tax policies are temporary and which policies are permanent. Many respondents were in favour of the principle of committing to target dates for post-implementation policy reviews and the automatic triggering of policy reviews, though they cited as a concern the uncertainty that sunset clauses would introduce in the tax system’.

appropriateness of a sunset clause, or alternative trigger for formal evaluation, in a case by case basis. This may be something that the Government will explore during consultation on individual tax policies.¹¹⁴ The government intended to add a sunset clause to the Finance Bill 2012 in relation to a series of reliefs, so as to implement its strategy simplify tax codes.¹¹⁵

The preceding analysis indicates the current uses of sunset clauses in taxation and their potential impact on forthcoming legislation. Sunset clauses act as a fulcrum, supporting the implementation of financial policies and providing flexibility while allowing for post-implementation evaluation. Interestingly, alongside the proposal for the inclusion of new sunset clauses, criticism has been raised concerning sunset clauses in Financial Acts. The complexity and length of the Bills, along with the strict process of voting, led to support for the reform of the financial bill regime. It was proposed to extend the sunset clause from an annual to biennial lapse,¹¹⁶ or even to adopt a permanent tax system with a multi-annual review process.¹¹⁷

¹¹⁴ HM Treasury, *The new approach to tax policy making: a response to the consultation* (December 2010) [2.77].

¹¹⁵ HM Treasury, *Consultation on the abolition of 36 tax reliefs* (May 2011) see Table A.15: [Relief 17] and Table A.31: [Relief 33]. Nonetheless the Financial Act 2012, which was adopted accordingly, does not contain any sunset clauses.

¹¹⁶ HC Deb 04 July 2002 vol 388 col 487; Mr Edward Davey has stated that ‘we should move to a system in which a full Finance Bill is introduced every other year’.

¹¹⁷ HC Deb 05 February 2002 vol 379 col 217WH (Mr Edward Davey has furthermore proposed that ‘Lord Howe and others have suggested that we should get rid of the annual Finance Bill. I agree. The right hon. Member for Fylde talked about the need to protect the revenue yield to the Treasury. That is right. Nevertheless, we have an annual Finance Bill only because income tax and corporation tax are not permanent taxes on the statute book. If we reformed the Provisional Collection of Taxes Act 1968 and made income tax permanent, we could think about tax policy in a longer term way’).

II. In Economic Policies

In relation to other economic policies, sunset clauses are a widespread tool in market regulation. Historically, such clauses were a useful tool for the prevailing in the early part of the 18th century economic theory, ‘mercantilism’. According to that theory, the prosperity of the nation is dependent upon the supply of capital, as one of its Founders, Thomas Mun, stated that ‘the ordinary means therefore to encrease our wealth and treasure us by Foreign Trade, wherein wee must ever observe this rule: to sell more to strangers yearly than wee consume of theirs value’.¹¹⁸ Thus the ‘mercantile system’ required a series of acts following the economic conditions and to adjust and readjust the policy.¹¹⁹ Accordingly, trade and commerce were one major concern of the Westminster Parliament which was steadily rising, and as Rule points out, by 1688, 27.7 per cent of the population was engaged in industry and commerce, and by 1759 that figure had increased to 35.8 per cent.¹²⁰

Numerous acts are recorded in the statute book regulating the supply and demand of products, such as the act ‘to discontinue, for a limited time the duties upon wheat and wheat flour imported; and also the bounty payable on the exportation of wheat and wheat flour’¹²¹ and the act ‘to enable his Majesty with the Advice of his Privy Council to prohibit the exportation of wheat, wheatean meal, flour, bread, biscuit and starch, during the next recess of Parliament as such time, and in such manner, as the necessity of the time

¹¹⁸ Thomas Mun, *Englands Treasure by Forraign Trade or the Balance of our Forraign Trade is the Rule of our Treasure* (London 1664) 11.

¹¹⁹ Sir Charles Grant Robertson, *Select Statutes, Cases and Documents to illustrate English Constitutional History* (4th edn, Methuen 1923) 194.

¹²⁰ John Rule, ‘Manufacturing and Commerce’ in HT Dickinson (ed) *A companion to Eighteenth -Century Britain* (Blackwell Publishing, 2002) 127.

¹²¹ Indemnity Act 1763 (4 Geo III c 31).

may require and he in this wisdom shall think convenient and needful'.¹²² Both statutes are in accordance with mercantilism, although the whole piece of the act is excised from the statute book, having just a note stating that it is expired.

In addition, such clauses were used in the colonial policy. The expansion of England overseas through the development of the colonies was one major factor influencing the public law during the 18th century.¹²³ The British Empire was a statehood with a flexible structure and a 'palimpsest' constitution. Broad policies were laid down by Westminster Parliament, if legislation dealt with a matter expressly.¹²⁴ Several navigation acts were introduced during the whole colonial period;¹²⁵ however, only one of them, the so-called Molasses Act in 1733, entitled 'an act for the better securing and encouraging the trade of his Majesty's sugar colonies in America',¹²⁶ was temporary, having a five-year sunset clause. It was renewed with successive acts,¹²⁷ and it became perpetual in 1764 with the introduction of the Sugar Act.¹²⁸

This act, which is considered not to fall within the general principles outlined by the navigations acts, was a direct result of the political pressure of a group favouring the trade from the West Indies as against the mainland colonies.¹²⁹ In practice, the Molasses

¹²² Court of Chancery Act 1763 (4 Geo III c 32).

¹²³ WS Holdsworth, *A History of English Law Vol X* (Methuen 1938) 26.

¹²⁴ William Cornish, 'Empire's Law' in *The Oxford History of the Laws of England Vol XI* (OUP 2010) 240.

¹²⁵ 12 Car II c 18; 15 Car II c 7; 25 Car II c 7; Plantation Trade Act 1695 (7&8 Gul III c 22).

¹²⁶ Trade of Sugar Colonies Act 1732 (6 Geo II c 13).

¹²⁷ Continuance of Acts 1737 (11 Geo II c 18); Growth of Coffee Act 1745 (19 Geo II c 23); Continuance of Acts, etc. 1753 (26 Geo II c 32); Sugar Colonies, etc. Act 1756 (29 Geo II c 26); Continuance of Acts, etc. 1757 (31 Geo II c 35); Colonial Trade Act 1760 (1 Geo III c 9).

¹²⁸ Custom, Duties, etc. Act 1763 (4 Geo III c 15).

¹²⁹ Merrill Jensen (ed), *English Historical Documents* (Eyre & Spottiswoode, 1955) 354.

Act was among the least effective of the navigation acts,¹³⁰ and one main reason it became perpetual was the intuition that if it is perpetual it will be more effective.¹³¹ The structure of the later act of 1764 brings a novelty in the use of the sunset clause, because in section IV the molasses act is further continued until the thirtieth day of September 1764, and in section V it is prescribed that the said act with all the amendments contained at the following sections will be perpetual. Consequently, the sunset clause is used in order to accommodate the need for a transitional period.

Currently, sunset clauses are also used in the EU and at an international level as well. HM Treasury recently issued the Budget Report and in relation to market regulations proposed the inclusion of a seven-year sunset clause to create a more competitive corporate tax system.¹³² Consequently, the government decided to include such a clause as a mandatory component in domestic regulations that impose a net burden on business and the civil society organisations,¹³³ while for other organisations the precise type of sunset clause will depend on their nature.¹³⁴ The benefit of sunseting the regulations is that unnecessary regulations will expire, the overall volume of regulations will be reduced, the quality and design of the existing regulations will improve, and the cost to business and civil society organisations will be reduced.¹³⁵

¹³⁰ As its applications was not successful to the North American Colonies, see Richard B Sheridan, 'The Molasses Act and the Market Strategy of et British Sugar Planters' (1957) 17 *Journal of Economic History* 63, 83; Albert B Southwick, 'The Source of Molasses Act' (1951) 8 *William and Mary Quarterly* 389, 404.

¹³¹ Gersen and Posner confess that 'timing rules can have both desirable and unfortunate effects on new law.' Jacob E Gersen, Eric Posner, 'Timing Rules and Legal Institutions' (2007) 121 *Harvard Law Review* 543, 546

¹³² HM Treasury, *Budget Report* (June 2010) 61 [1.65].

¹³³ HM Government, *Sunseting Regulations: Guidance* (March 2011) [6].

¹³⁴ *Ibid* [8].

¹³⁵ *Ibid* [4].

The combination of a sunset clause with a Henry VIII clause was used in the Debt Relief (Developing Countries) Act 2010.¹³⁶ The limited duration of the Act was a last-minute compromise.¹³⁷ The Act then became permanent, with a Treasury's order,¹³⁸ since the impact of the legislation was evaluated and negative effects were not found.¹³⁹ Nevertheless, the criticism over the practice of combining sunset clauses with Henry VIII clauses was expressed by the Chairman of the Public Accounts Committee, who stressed the contradiction of using a sunset clause with a Henry VIII clause. The MP stated that:

‘At first sight, that (the sunset provision) would appear a perfectly sensible provision, because one presumes it would give time for the House and the Government to consider whether a more permanent Government Act should be placed on the statute book. I think that sunset clauses, as they are described, might often perform a perfectly useful purpose, especially when we are dealing in areas such as this, which have not been tested sufficiently by the Government and by courts in the past. (...) Subsection (1) states: "This Act expires at the end of the period of one year beginning with commencement", which is fair enough. However, subsection (3) states that "The Treasury may by order provide that this Act has permanent effect." That is what I am slightly worried about. If this Act is to have permanent effect-after all, we are talking in terms of the wash-up of Parliament, and this is a private Member's Bill involving the Government in difficult areas - I would prefer to have more protection for Parliament. Why can the Government just decide that the Act should have permanent effect?’¹⁴⁰

Another unique use of a sunset clause is recorded in the Superannuation Act 2010,¹⁴¹ which amended the Superannuation Act 1972 limiting the redundancy payouts of civil servants which are prescribed according to the Civil Service Compensation Scheme ('CSCS'). In practice, the CSCS can be revised either with an agreement between the

¹³⁶ Debt Relief (Developing Countries) Act, 2010, s 9.

¹³⁷ See Michael Waibel, 'Debt relief to poor countries: rules v discretion' [2010] *Butterworths Journal of International Banking and Financial Law* 295, 296.

¹³⁸ The Debt Relief (Developing Countries) Act 2010 (Permanent Effect) Order 2011 SI 2011/1336.

¹³⁹ HC Deb 28 March 2011 vol 526 col 34W.

¹⁴⁰ HC Deb 7 April 2010 vol 508 col 1044.

¹⁴¹ Superannuation Act 2010, s 4 (4).

Government and the civil service unions by virtue of the Superannuation Act of 1972,¹⁴² or with a legislative act amending the existing framework.

The previous government reached an agreement with five out six civil service unions in order to revise the CSCS.¹⁴³ However, the new Scheme was invalidated by a High Court Decision brought by the sixth union.¹⁴⁴ The new Government was committed to reform the CSCS, and thus it passed an amendment to the Superannuation Act 1972, imposing limits to the benefits. However, these limits were under the scope of a one-year sunset clause. The Minister for the Cabinet Office and Paymaster General, explaining the inclusion of the sunset clauses, stated that:

‘We are seeking to negotiate a new scheme, which would effectively make the terms in the Bill redundant. (...) I stress again that we have no desire to see this legislation continue any longer than is absolutely necessary. The inclusion of a sunset provision prevents the legislation from continuing ever onwards. (...) there is also the option to bring forward the termination date. As I have already said, my intention is absolutely to resolve the issue by discussion and negotiation rather than by legislation, and I look forward to making the order that will repeal section 1 (as it then was) of the Act’.¹⁴⁵

Interestingly, after the Act received royal assent, a consensus was reached revising the CSCS and the Minister issued the Superannuation Act 2010 (Repeal of Limits on Compensation) Order¹⁴⁶ repealing the limits before the activation of the sunset clause. Two main conclusions can be drawn from this use of the sunset clause. On the one hand, the clause in the Act was a parliamentary response to a judicial decision invalidating the revised Civil Service Compensation Scheme. On the other hand, it was an interim measure pushing the unions to a consensus.

¹⁴² Superannuation Act 1972, s 2 (3).

¹⁴³ Explanatory Memorandum to the Superannuation Act 2010 (Repeal of Limits on Compensation) Order 2010 SI 2010/ 2996.

¹⁴⁴ Public & Commercial Services Union, R (on the application of) v Minister for the Civil Service, [2010] EWHC 1027 (Admin).

¹⁴⁵ HC Deb 7 September 2010 vol 515 col 218.

¹⁴⁶ The Superannuation Act 2010 (Repeal of Limits on Compensation) Order 2010 SI 2010/ 2996.

Proposals for inclusion of sunset clauses in financial legislation, however, have not always been successful. For example, in the Regulatory Enforcement and Sanctions Bill, the Lords proposed an amendment sunsetting the Bill after five years. Mr Prisk stated:

‘As we have discussed, the scope of the Bill is quite significant—technical, yes, but significant none the less. It creates an entirely new local regulatory system and an entirely new non-departmental public body, albeit there is a company in shadow at present. It provides extensive powers of sanction and enforcement, involving not one single regulator but 27; and not one piece of legislation but over 140 different laws. The Bill permits the Secretary of State to make, by order, important changes to both the current and the proposed system of local regulation. That means, I hope, that in all local authority areas we, as Members of this House, will see the potential for improvement in the regulatory environment. However, those changes will affect all our constituents. In the other place, my noble Friends were able to secure some important concessions, not least that of a three-year review under clause 17 that covers only the LBRO. Given that the LBRO is not, as we have debated, directly accountable to this House, it was right to seek that review. However, clause 17 and the review contained therein does not apply to the whole Bill and that is why it is important to insert the means to debate whether this legislation should persist after a five-year period. New clause 2 offers a number of important advantages to us as a House. It enables us to assess the whole Act and look at how it has worked in practice’.¹⁴⁷

As mentioned above, EU law has a significant role in the regulation of the market.¹⁴⁸ EU policies have revealed new perspectives on the use of sunset clauses. In 2007 the European Parliament and the Council adopted a regulation on roaming charges and mobile networks in Europe.¹⁴⁹ The regulation, according to Article 13, was subject to a sunset clause due to expire on 30 June 2010. Interestingly, the primary aim of the sunset clause was to establish normal market conditions, eliminating the difference between roaming and national prices.¹⁵⁰ Thus the inclusion of the sunset clause regulates the market, but through its expiration the principal aim is revealed, namely to deregulate the market.

¹⁴⁷ Public Bill Committee, ‘Regulatory Enforcement and Sanctions Bill [Lords]’ 4th sitting (19 June 2008) cols 117-8.

¹⁴⁸ Regarding the ‘Single Market’, see Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (5th edn OUP 2011) 605.

¹⁴⁹ Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC OJ L 171/32

¹⁵⁰ European Commission, Digital Agenda for Europe: What would it do for me? (19 May 2010, MEMO/10/199).

However, as the market conditions were not met, the Commission decided on the renewal of the regulation until 2012.¹⁵¹

Moreover, with regard to international trade policies that fall in the EU's commercial policy competence,¹⁵² dumping and anti-dumping duties are regulated at a European level. In general, dumping measures are classified by duration into sporadic, intermittent and continuous categories.¹⁵³ Thus, a Council Regulation was adopted in 2009 prescribing a five-year sunset clause on anti-dumping measures.¹⁵⁴ The regulation is in accordance with the equivalent framework in the World Trade Organisation and the Anti-dumping Agreement of the Uruguay Round.¹⁵⁵

Through the above examples, it is evident that legislators have relied on sunset clauses in order to implement a financial policy. Time limitations permit legislators to implement short-term policies and to reconsider and evaluate them afterwards. Therefore this clause is quite useful, especially in the financial field where flexibility is required but long term planning is not always effective. The use of sunset clauses aims to improve existing regulation and therefore advances the rule of law. As regards the separation of powers, such clauses were used in the US in order to bypass procedures that enhance the

¹⁵¹ European Union Committee, *Mobile Phone Charges in the EU: Follow - up Report* (HL 2008-9, 42) [14]; Regulation (EC) No 544/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services OJ L167/12, art 14.

¹⁵² Regarding the EU's competence on the issue see Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 319.

¹⁵³ Mitsuo Matsushita, Thomas Schoenbaum, Petros Mavroidis, *The World Trade Organisation: Law, Practice and Policy* (2nd edn, OUP 2006) 399. Moreover, sunset clauses are used extensively in safeguard measures under the WTO regime. *Ibid* 457.

¹⁵⁴ Council Regulation (EC) No 1225/2009 of 30 November 2009 on Protection against Dumped Imports from Countries not Members of the European Community OJ L343/51, art 11(2).

¹⁵⁵ Agreement on Implementation of Article VI of the General Agreement on Tariffs And Trade of April 12, 1979, BISD 26 S/171 art 11(3).

check and balances system, and this raises concerns and diminishes their constitutional value.

III. In International Relations

In the past sunset clauses were used effectively in order to implement policies in the international arena. Currently, sunset clauses are used in EU policies. The legal history of sunset clauses provides us with two further examples. The former is the example of the unification of the Kingdom of England with the Kingdom of Scotland, and the other is the Constitution of South Wales.

Remarkably, a sunset clause was used in order to promote the unification between the Kingdom of England with the Kingdom of Scotland. In particular, in 1701 the Parliament of England passed the Act of Settlement,¹⁵⁶ regulating the issue of the Hanoverian succession. In response to this legislation, the Parliament of Scotland passed the Security Act,¹⁵⁷ which provided that the Kingdom of Scotland has the power to choose a Monarch who might not be the same person as the Monarch of the English Throne. As a consequence, the Parliament of England responded with the act ‘for the Effectual Securing the Kingdom of England from the apparent Dangers that may arise from several Acts lately passed in the Parliament of Scotland’ was passed in 1704, which provided that:

‘[F]rom and after the Five and twentieth Day of December One thousand seven hundred and five no Person or Persons being a Native or Natives of the Kingdom of Scotland (except such as are now settled Inhabitants within the Kingdom of England or the Dominions thereunto (Exception) belonging and shall continue Inhabitants thereof and such as are now in Service in Her Majesties Fleet or Army) shall be capable to inherit any Lands Tenements or Hereditaments within this Kingdom of England or the Dominions thereunto belonging or to enjoy any Benefit or Advantage of a Natural born Subject of England but every such Person shall be from thenceforth adjudged and taken as an Alien born out of the Allegiance of the Queen of England until such Time as the Succession to the Crown of Scotland be declared and settled by an Act of Parliament in Scotland in the same Manner the Succession to the Crown of

¹⁵⁶ Act of Settlement 1701 (12&13 Gul III c 2).

¹⁵⁷ Regarding The Security Act see PWJ Riley ‘The Union of 1707 as an Episode in English Politics’ (1969) 84 English Historical Review 498.

England is now settled by Act of Parliament in England in case of Her Majesties Demise without Issue of Her Body'.¹⁵⁸

The aforementioned act thus prescribed a set of economic sanctions against the Scottish, who were regarded as aliens. However, these sanctions would automatically expire if the Parliament of Scotland repealed the Security Act and approved the Union with England.¹⁵⁹ Eventually delegates from both Parliaments negotiated and concluded the Treaty of Union and the aforementioned law expired.

With reference to British colonial policy, a sunset clause introduced in 1823 justified the conclusion that there exists a connection between the use of sunset clauses and the separation of powers. In particular, Parliament adopted the New South Wales Act. Among other things, in section 8 it authorises the King, with the advice of the Privy Council, to introduce trial by jury; section 19 authorises the establishment of Courts of Quarter Sessions with jurisdiction for crimes not punishable by capital punishment; and section 24 authorises the creation of a Legislative Assembly with appointed members'.¹⁶⁰

This Act was of limited duration due to a sunset clause which provided that 'this act shall be and continue in force until the first day of July in the year of our Lord one thousand eight hundred and twenty seven and from thence until the end of the next session of parliament', and it is considered to be the first step towards representative democracy in Australia.¹⁶¹

¹⁵⁸ Union of England and Scotland Act 1704 (3&4 Anne c 6).

¹⁵⁹ The Parliament of Scotland approved the Union, and although the sanctions expired automatically, the Parliament of England explicitly repealed them. Union of England and Scotland Act (4&5 Anne c 15) [An Act to repeal several Clauses in the Statute made in the Third and Fourth Years of Her present Majesty's Reign for securing the Kingdom of England from several Acts lately passed in the Parliament of Scotland].

¹⁶⁰ The New South Wales Act 1823 (4 Geo IV c 96).

¹⁶¹ Alex C Castles, 'The Judiciary and Political Questions: The First Australian Experience, 1824 - 1825' (1975) 5 *Adelaide Law Review*, 294, 298.

In 1828 the Secretary of State for War and the Colonies, William Huskisson, was authorised to bring a bill in order to renew the New South Wales Act, which was about to expire, and to provide ‘for future alterations in the administration of justice’.¹⁶² However, when the bill was presented before the commons, it did not contain a sunset clause. Thus Mr Bright complained that ‘the bill threw too much power into the hands of the Crown and of the privy council, and needlessly limited the other branches of the legislature in their power of interference [...] and would be better pleased that it should be passed for a limited period than be made perpetual’.¹⁶³ Eventually the bill passed with a 8 year sunset clause, due to expire on December 1936.¹⁶⁴

More recently and in relation to the EU, the Financial Services and Markets Act 2000, which among other things sets the framework for market abuse penalties, contains a three year sunset clause for specific clauses.¹⁶⁵ This reveals the interaction between the UK and EU legal orders. The original act did not contain such a clause,¹⁶⁶ but its amendment with the inclusion of a sunset clause was decided while adopting the regulation¹⁶⁷ giving effect to the EC’s Market Abuse Directive.¹⁶⁸ Since the existing UK framework provided a broader scope of market abuse prohibitions than the Market Abuse

¹⁶² HC Deb 01 April 1828 vol 18 col 1430.

¹⁶³ HC Deb 18 April 1828 vol 18 col 1565.

¹⁶⁴ Australian Courts Act 1828 (9 Geo IV c 83).

¹⁶⁵ s 118 (9).

¹⁶⁶ Financial Services and Markets Act 2000.

¹⁶⁷ The Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005 SI 2005/381 Schedule 2 (1).

¹⁶⁸ Council and European Parliament Directive (EC) 2003/6 of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16.

Directive, it was decided to limit the duration of the areas going beyond the scope of the Directive.¹⁶⁹

Nevertheless, such clauses were used selectively in the international arena, in order to safeguard the interest of UK in the broader international environment. As shown above, such clauses were used in order to spur on the unification between the Kingdoms of England and Scotland, in order to preserve the colonial interest of the UK over South Wales and finally in order to preserve the internal markets regime over the European common market policies.

The second part of this chapter considered the utility of such clauses in a broad range of legislation. In general, such clauses were an apparatus with a multitasking function. On several occasions it was observed that such clauses were used in order to meet the special needs of specific policies, such as short-term planning or flexibility, while on other occasions such clauses were used in order to bring forward better regulations by abolishing those which were unnecessary, as well as reviewing, improving and simplifying the existing.

C. Sunset Clauses and Good Governance

The third main category where sunset clauses are used extensively is in legislation pertaining to the administrative functions of the government. As seen in the historical chapters, sunset clauses were used as a mechanism to have agencies controlled by Parliament. An analysis of the contemporary uses of sunset clauses will serve to highlight how the legislature uses them nowadays in order to enhance good governance.

¹⁶⁹ Explanatory Memorandum to the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005 SI 2005/381 [7.6]. The three years sunset clause was renewed accordingly with the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2009 SI 2009/3128.

Indeed use of sunset clauses to monitor delegated powers is still common; a series of acts delegating power to the administration set limits through the inclusion of a sunset clause. For example, in 2002 the government adopted the Education Act, delegating new powers to the Secretary of State for England and National Assembly of Wales to suspend by order several statutory requirements so as to enable innovative pilot projects.¹⁷⁰ However, the powers set out with this delegation were stated to last for a period of four years.¹⁷¹

In 2003 the Government adopted the Fire Services Act, delegating a broad power to the Secretary of State to modify the conditions of service for fire brigade members and to give directions to fire authorities via an order.¹⁷² This power was subject to a two-year sunset clause after the commencement of the Act.¹⁷³ However, the delegated power and its duration were the subject of discussion in the House of Lords. Specifically, the Lords were occupied with the effect of the sunset clause, namely whether the orders made before the expiration shall expire or not. Lord Rooker stated that:

‘It is a general principle in English law that action taken before the repeal of legislation authorising that action is not affected by the repeal of the legislation. If an order were made, it would not fall under the terms of the sunset clause. The point about the sunset clause is that if an order is not made within two years there will be no power to make one as the relevant Act will no longer exist. The Act will be off the statute book’.¹⁷⁴

In 2008 the Government adopted the Children and Young Persons Act according to which the Secretary of State was enabled to establish a reviewing service, if the existing statutory

¹⁷⁰ Education Act 2002, s 2(1)

¹⁷¹ Ibid s 2(7)

¹⁷² Fire Services Act 2003, s 1 (1).

¹⁷³ Ibid s 1 (7).

¹⁷⁴ HL Deb 19 June 2003 vol 649 col 1025.

framework did not prove to be effective.¹⁷⁵ However, if the delegated powers prove to be unnecessary, a seven year sunset clause from the day the Act receives Royal Assent becomes operative.¹⁷⁶ In addition, in 2009 Parliament adopted the Parliamentary Standard Act as a response to the parliamentary expenses scandal. The main innovation of the Act was the creation of the Independent Parliamentary Standards Authority, with the principal task of monitoring the expenses of the Members of the Commons.¹⁷⁷ However, the provisions of the Act regarding the delegated powers dealing with the code of conduct on financial interest and the position of the independent commissioner for investigations were subject to a two-year sunset clause.¹⁷⁸ The sunset clause was an amendment set out in the House of Lords.¹⁷⁹ Eventually, the sunset clause was repealed with the Constitutional Reform and Governance Act, as the relevant provisions have been repealed as well.¹⁸⁰

Furthermore, it is noteworthy that proposals to have secondary legislation subject to sunset clauses have been expressed. Indeed, the Chairman of the Delegated Powers and Regulatory Reform Select Committee, Lord Dahrendorf, said that ‘in many cases, we should give much more serious consideration to the possibility, feasibility and usefulness of sunset clauses, or at any rate, of procedures which move in the direction of sunset clauses; that is, reviews in set periods and at particular times (...). My personal preference would be for every piece of secondary legislation to contain a sunset clause or, at any rate, a severe review clause’.¹⁸¹ Accordingly a report was issued addressing the advantages of

¹⁷⁵ s 11.

¹⁷⁶ Ibid s 14.

¹⁷⁷ Parliamentary Standard Act 2009.

¹⁷⁸ Ibid s 15 (1).

¹⁷⁹ HL Deb 16 July 2009 vol 712 col 1324.

¹⁸⁰ Constitutional Reform and Governance Act 2010, s 37.

¹⁸¹ HL Deb 6 June 2005 vol 672 col 754.

making greater use of sunset clauses in statutory instruments and how it might enhance post-legislative scrutiny.¹⁸² However, the report did not favour the idea of including a sunset clause in secondary legislation, since it was felt to be unrealistic.¹⁸³

Thus not all proposals for the inclusion of sunset clauses are approved. In 2004 the Public Administration Select Committee issued a report concerning the prerogative powers of the Ministers.¹⁸⁴ The main concern of the report was how to make these executive powers accountable and subject to parliamentary scrutiny. Among several approaches, a radical idea was proposed to include a sunset clause to outmoded powers specifying that the non-confirmed powers of the legislation would be abolished by a date specified.¹⁸⁵

The most significant use of sunset clauses in governmental functions is, though, associated with the initiation of constitutional and institutional experiments. In fact, taking as an example the legislative initiatives in the US, Congress adopted the Ethics in Government Act 1978 as a response to the Nixon Scandal. According to the Ethics in Government Act, an independent prosecutor was appointed to investigate abuse of executive power.¹⁸⁶ The Act was subject to a sunset clause.¹⁸⁷ The act was renewed several times for consecutive years until 1999.¹⁸⁸ After the expiration of the sunset clause,

¹⁸² Law Commission, *Post Legislative Scrutiny* (Law Com No 302, 2006) [4.1].

¹⁸³ *Ibid* [4.9].

¹⁸⁴ Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* HC (HC 2003-4, 422) [8]. ‘These executive powers were prerogatives of the Crown delegated to Ministers without parliamentary involvement’.

¹⁸⁵ *Ibid* Appendix 1 [28].

¹⁸⁶ See Alexander I Tachmes, ‘Independent Counsels under the Ethics in Government Act of 1978: A Violation of the Separation of Powers Doctrine or an Essential Check on Executive Power’ (1988) 42 *University of Miami Law Review*, 735.

¹⁸⁷ Pub L No 95–521, 92 Stat 1867 (1978).

¹⁸⁸ Regarding the legislative history of this act and its amendments, see text to n 27 in Ch V.

Congress refused to renew that piece of legislation and thus to reauthorize the authority of the independent prosecutor.¹⁸⁹

Unfortunately, in the UK this aspect of sunset clauses has limited use, and it is deployed mainly in relation to the status of Northern Ireland.¹⁹⁰ Indeed in 1972, the Northern Ireland (Temporary Provisions) Act was adopted, initiating the policy of direct rule from Westminster.¹⁹¹ The Act contained a one year sunset clause in combination with a Henry VIII clause.¹⁹² Nonetheless, the following year, the expiration of the Act was set upon several conditions according to the Northern Ireland Constitution Act.¹⁹³ Eventually, in 1999, the Act imposing direct rule in Northern Ireland was repealed.¹⁹⁴

Finally, an interesting application of sunset clauses is recorded in governmental functions that aim to regulate or deregulate certain legal areas. In fact this policy and its origin might be tracked in the US legal system. More specifically, it is related to the affirmative action policies adopted in the US. As these policies were introduced, they did not contain any sunset clause. Yet the sunset clause was implied by Justice O' Connor, when she mentioned that 'we expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today'.¹⁹⁵

¹⁸⁹ See Bruce Ackerman 'Sunset can put a Halt to Twilight of Liberty' September 20, 2001 available at <http://articles.latimes.com/2001/sep/20/local/me-47757> accessed February 16, 2014.

¹⁹⁰ As a Member of the Parliament, Mark Duncan remarked '[S]unset clauses have been used in various bits of Northern Ireland legislation during the peace process, as institutions were established, different arrangements were put in place, and safeguards were introduced that it was hoped could later be disposed of. Sunset clauses were inserted in the hope that the circumstances and environment would change so the law would not have to remain permanently on the statute book, and there would not have to be a full Act of repeal'. See HC Deb 1 July 2009 Vol 495 col 403.

¹⁹¹ HL Deb 05 December 1972 vol 337 col 145.

¹⁹² Northern Ireland (Temporary Provisions) Act 1972, s 1(5).

¹⁹³ Northern Ireland Constitution Act 1973, s 2 (among the conditions was the formation of the Northern Ireland Executive, and the adoption of several provisions by the Northern Ireland Assembly).

¹⁹⁴ The Northern Ireland Act 1998 (Commencement No 5) Order 1999 SI 1999/3209.

¹⁹⁵ *Grutter v Bollinger et al* (2003) 539 US 306, 343 (US SC).

On the other side of the Atlantic though, in 2002 Parliament adopted the Sex Discrimination (Election Candidates) Act, endorsing affirmative action policies in order to eliminate inequalities in the numbers of male and female candidates standing for election. The Act contained a sunset clause due to expire in 2015,¹⁹⁶ but the expiration date was later extended through to 2030 by the Equality Act 2010.¹⁹⁷ In essence, the sunset clause in affirmative action policies aims to regulate and correct a given deficiency; as soon as the deficiency is eliminated, it is meant to expire.

To summarise, this part examined the utility of sunset clauses in the administration. It was shown that the use of such clauses in public administration aim to increase the legislature's oversight of the executive as well as to test the efficiency of new institutions. In particular, the legislature is more eager to include a sunset clause in Henry VIII powers. However, there are numerous Acts that include a Henry VIII clause without a sunset clause, such as the Human Rights Act 1998 section 10(2) and Legislative and Regulatory Reform Act 2006 section 27(5).

In addition, this part considered how the legislature uses sunset clauses in order to promote institutional experimentation. New institutions are established, while the legislative branch evaluates their actions and monitors their expenditure, before then deciding upon the expiration date of the Act either to further renew the life span of these institutions and remove any deficiencies, or to terminate the experimentation.

D. Sunset Clauses within the Constitution

The previous parts placed sunset clauses in the contemporary legislative frame. The final part of this chapter aims to place such clauses in the constitutional frame. It will be argued

¹⁹⁶ Sex Discrimination (Election Candidates) Act 2002, s. 3.

¹⁹⁷ Equality Act 2010, s 105 (3).

that such clauses have been used by constitutional drafters not only to accommodate transitional periods, but also in order to draft high-quality constitutions and ensure better regulation. To meet this target, two types of sunset clauses are employed: some set a time frame for expiry of the whole constitution, while other constitutional sunset clauses impose conditions on ordinary legislation.¹⁹⁸ It will be argued that rule of law considerations and the separation of powers guide constitutional drafters to include such clauses in constitutional documents.

Predictably, examining the application of sunset clauses beyond the primary scope of this thesis, which is the UK, the use made of such clauses in countries with a written and codified constitution reveals a significant recognition of the use of sunset clauses in constitutional documents. Legislatures around the globe have relied on constitutional provisions containing sunset clause and on constitutional provisions ordering the legislator to include sunset clauses in ordinary legislation. Therefore the aim of this part is to analyse the utility of these clauses in constitutional documents, and to highlight the separation of powers and rule of law concerns which motivate legislators to adopt sunset clauses.

Jackson, discussing constitution making, explores the idea of ‘transitional constitution making’ by adding a sunset clause and points out that ‘they [transitional constitutions] may shed new light on the advantages and disadvantages of constitutional “sunset” –clauses – that is, requirement of reconsideration in plenary form after a set period of years, far enough into the future to allow time for the development of some authoritative institutions of politics and governance’.¹⁹⁹

¹⁹⁸ Regarding the dichotomy between directive and indirective sunset clauses see text to n 46 in Ch 1.

¹⁹⁹ Vicki C Jackson, ‘What’s in a Name? Reflections on Timing, Naming, and Constitution - making’ (2008) 49 *William and Mary Law Review* 1249, 1282.

There are several constitutional documents that are recorded as temporary in nature. These constitutions are often categorised as transitional and are commonly created as a result of a major national crisis.²⁰⁰ Historically, the first temporary or transitional constitutions are recorded in the US after the war of independence, namely the Constitution of South Carolina and the Constitution New Hampshire. Both constitutions were temporary in nature due to the end of the political crisis between the UK and the colonies. The inclusion of the sunset clauses in the preamble was in accordance with the resolution passed by the Continental Congress after the effort of Adams.²⁰¹

The former prescribed in the preamble that, ‘and whereas the judges of courts of law here have refused to exercise their respective functions, so that it is become indispensably necessary that during the present situation of American affairs, and until an accommodation of the unhappy differences between Great Britain and America can be obtained, (an event which, though traduced and treated as rebels, we still earnestly desire,) some mode should be established by common consent, and for the good of the people, the origin and end of all governments, for regulating the internal polity of this colony’.²⁰² The latter prescribed in the preamble as well that, ‘therefore, for the preservation of peace and good order, and for the security of the lives and properties of the inhabitants of this colony, we conceive ourselves reduced to the necessity of establishing A FORM OF GOVERNMENT to continue during the present unhappy and unnatural contest with Great Britain’.²⁰³

²⁰⁰ Kai Peter Ziegler, ‘Democratic Republic of Congo: The Transitional Constitution of April 1, 2003’ (2005) 3 *International Journal of Constitutional Law* 662.

²⁰¹ Terry W Lipscomb, *The South Carolina Constitution of 1776*, (1976) 77 *South Carolina Historical Magazine*, 138, 139; Clark Bell, ‘New Hampshire: Early Judicial History’ (1099-1900) 17 *Medico - Legal Journal* 457, 458.

²⁰² *Constitution of South Carolina 1776*.

²⁰³ *Constitution of New Hampshire 1776*.

In the more modern era, the Preamble of the Constitution of the Republic of South Africa in 1993, also known as the ‘Interim Constitution’, prescribes that ‘in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principle’, and in chapter 5 a two-year sunset clause was included.²⁰⁴

The use of sunset clauses was discussed before the adoption of the US Constitution. Thus Jefferson, who is named as the American progenitor of sunset laws,²⁰⁵ was concerned with the perpetuity of the constitution, suggesting its sunset after 19 years, writing to Madison that ‘on similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. (...) Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right’.²⁰⁶ Eventually, a sunset clause was included in the US Constitution in Article 1, section 9, as ‘the Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person’.²⁰⁷

²⁰⁴ Constitution of the Republic of South Africa, 1993, Ch 5 art 73 (1). Nonetheless, not all interim constitutions contain a sunset clause. For instance, the interim Constitution of Albania in 1991, although it prescribes in article 44 that ‘the provisions of this law operate till the adoption of the Constitution of the Republic of Albania, whose draft will be worked out by the special commission charged by the People’s Assembly’, does not contain a sunset clause. See Law on Major Constitutional Provisions of Albania 1991, art 44 (1).

²⁰⁵ Guido Calabresi, *A Common Law for the Age of Statutes* (Lowboy Exchange 1999) 59

²⁰⁶ Paul Leicester Ford (ed), *The writings of Thomas Jefferson Vol V* (GP Putnam’s Sons 1895) 121, [Letter from Thomas Jefferson to James Madison (Sept 6, 1789)]. See also Jacob E Gersen, ‘Temporary Legislation’ (2007) 74 *Chicago Law Review* 247, 252.

²⁰⁷ Constitution of the United States, art I, s 9 cl 1. In art 1, s 8, there is an indirect sunset clause as Congress is prescribed to appropriate the funds for the military maximum of two years. Thus all Appropriation Acts regulating the funds for the army shall contain a sunset clause with a maximum duration of two years. See

In Europe, two recent constitutions, the German and the French Constitution, even if they do not contain a sunset clause to ‘sunset’ the whole document, endorse sunset clauses either sunsetting special authority, or imposing an obligation on the legislator to include such clauses when law with specific content is enacted.²⁰⁸ Thus, the German Constitution contains several sunset clauses, especially regarding the state of emergency. Article 81, entitled ‘Legislative emergency’, provides in Clause 3 that, ‘During the term of office of a Federal Chancellor, any other bill rejected by the Bundestag may become law in accordance with paragraphs (1) and (2) of this Article within a period of six months after the first declaration of a state of legislative emergency. After the expiration of this period, no further declaration of a state of legislative emergency may be made during the term of office of the same Federal Chancellor’.²⁰⁹

Article 81 regulates what might be called a ‘legislative state of emergency’. Such a state of emergency happens when there is a crisis in government, for instance if the government and the Parliament no longer work together and there is a blockage. The essence of this rule is that under certain conditions and within temporal limits, the legislative power of the Bundestag (the first ‘directly elected’ chamber) is suspended. Instead, the Bundesrat (second chamber, representing the Länder, to which the government of the Land send a representative), which usually only has the right to participate in certain matters, takes over that function.²¹⁰

Constitution of the United States art I, s 8 cl 12. ‘The Congress shall have the power [...] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years’.

²⁰⁸ Interestingly, in 1975 the draft Constitution for the State of Texas contained sunset clause provision. According to the sunset clause all statutory agencies were subject to a ten year lifespan unless renewed. Eventually the draft Constitution was rejected for reasons not related to the sunset clause: see Janice C May ‘Texas Constitutional Revision’ (1977) 66 National Civic Review 64, 67; Anthony R Licata, ‘Zero - Base Sunset Review’ (1977) 24 Harvard Journal of Legislation 505, 511.

²⁰⁹ Basic Law for the Federal Republic of Germany art 81 ss 2, 3.

²¹⁰ Theodor Maunz, Gunter Dürig (eds), *Grundgesetz Kommentar Vol VI* (Verlag CH Beck) [1].

Furthermore, Article 115k, entitled ‘Rank and duration of emergency provisions’, provides in clause 1 that ‘Laws enacted in accordance with Articles 115c, 115e, and 115g, as well as statutory instruments issued on the basis of such laws, shall suspend the operation of incompatible law so long as they are in effect. This provision shall not apply to earlier law enacted pursuant to Articles 115c, 115e or 115g’. Clause 2 provides that ‘Laws adopted by the Joint Committee, as well as statutory instruments issued on the basis of such laws, shall cease to have effect no later than six months after the termination of a state of defence’. Clause 3 states that ‘Laws containing provisions that diverge from Articles 91a, 91b, 104a, 106 and 107 shall apply no longer than the end of the second fiscal year following the termination of a state of defence (...)’.²¹¹

Article 115k regulates legislative acts in relation to defence (ie military attack). The first paragraph regulates the rank of such laws within the German legal system, and the second and third paragraph regulate how long these acts are valid. The article addresses the so-called laws for the case of defence, Article 115c. These laws, which may be enacted at any time, are dependent on the existence of the state of defence, and only apply as long as the state of defence exists. Likewise, Article 115e refers to emergency laws enacted by a Joint committee of the Bundestag and Bundesrat, which acts in cases of ‘real emergency’ and addresses all decrees or bylaws which are enacted by the Minister or government based on these emergency laws.²¹²

The Article distinguishes between laws that have a sunset clause within them and those that do not, but declares that they apply until further notice. It only regulates their sunset in the case of emergency laws, since the other cases are seen as normal laws and so the normal rules apply. These laws sunset not later than 6 month after the end of the state

²¹¹ Basic Law for the Federal Republic of Germany, art 115k, ss 2, 3.

²¹² Theodor Maunz, Gunter Dürig (eds), *Grundgesetz Kommentar Vol VII* (Verlag CH Beck) [1-7].

of defence, but 'not later' means that they can also sunset earlier, either because the law itself contained a sunset clause, or because the sunset is later enacted. However, the later sunset means real sunset: it must lead back to the normal state of affairs, if not then the sunset clause of Article 115k, clause 3 leads to the expiration of this rule.²¹³

Article 38 of the French Constitution, entitled *ordonnances* (ordinances in English), prescribes that 'In order to implement its programme, the Government may ask Parliament for authorisation, for a limited period, to take measures by Ordinance that are normally the preserve of statute law. Ordinances shall be issued in the Council of Ministers, after consultation with the *Conseil d'État*. They shall come into force upon publication, but shall lapse in the event of failure to table before Parliament the Bill to ratify them by the date set by the Enabling Act. They may only be ratified in explicit terms. At the end of the period referred to in the first paragraph herein above Ordinances may be amended solely by an Act of Parliament in those areas governed by statute law.'

Article 74-1 prescribes that 'In the Overseas territorial communities referred to by Article 74 and in New Caledonia, the Government may, in matters which remain within the power of the State, extend by Ordinance, with any necessary adaptations, the statutory provisions applying in mainland France, or adapt the statutory provisions applying, to the specific organisation of the community in question, provided statute law has not expressly excluded the use of this procedure for the provisions involved. Such Ordinances shall be issued in the Council of Ministers after receiving the opinion of the relevant Deliberative Assemblies and the *Conseil d'État*. They shall come into force upon publication. They shall lapse if they are not ratified by Parliament within eighteen months of their publication'.

²¹³ Theodor Maunz, Gunter Dürig (eds), *Grundgesetz Kommentar Vol VII* (Verlag CH Beck) [39-48].

Article 38 authorises Parliament to delegate the power to the Council of Ministers under a *loi d' habilitation* (enabling act) to issue Ordinances in an area of law which is reserved for ordinary law passed by the Parliament according to article 34 of the French Constitution.²¹⁴ However, Parliament shall include a sunset clause in the *loi d' habilitation*, and as a consequence the Council of Ministers shall present all ordinances enacted according to the *loi d' habilitation* to Parliament for ratification before the expiration of the sunset clause, otherwise they expire.²¹⁵ The first law enacted according to this procedure was in 1960 authorising the Government to take certain measures relating to the maintenance of law and order in Algeria, and it lapsed one year after its promulgation as it was not ratified by the Parliament.²¹⁶

It is noteworthy that the ordinances of Article 38 were not used exclusively to regulate emergency situations. A variety of issues were regulated, such as adoption of European directives²¹⁷ and the codification of law.²¹⁸ On the other hand, Article 74-1, which is a recent clause adopted during the last amendment process of 2008, recognises the adoption of ordinances with subject matter restricted to overseas territorial communities and states explicitly that the sunset clause in these ordinances shall not exceed eighteenth months after their promulgation.

According to a report issued by the French Senate, during the first thirty years of use of the procedural rules of Article 38 (1960-1990), twenty five enabling acts were adopted, on the basis of which one hundred and fifty eight ordinances were adopted and

²¹⁴ Philippe Malaire, Patrick Morvan, *Introduction General* (Defrenois 2009) 98.

²¹⁵ *Ibid.*

²¹⁶ *Loi n° 60-101* (4 Février 1960), art 2.

²¹⁷ See Marc Guillaume, 'Les Ordonnances: Tuer ou Sauver La Loi? Pouvoirs' (2005) 114 *Revue Française d'études Constitutionnelles et Politiques*, 117, 120.

²¹⁸ See Cecile Castaing, 'La ratification implicite des ordonnances de codification' (2004) 58 *Revue Française de Droit Constitutionnel* 275, 281.

only about thirty of these ordinances were explicitly ratified, while until 2007 sixty seven enabling acts were adopted, on the basis of which three hundred and twenty five ordinances were adopted and only two hundred and twenty seven of these ordinances were explicitly ratified.²¹⁹

It can be seen therefore from the preceding examples that sunset clause have been widely used in parliamentary legislation and in constitutional documents. The use of such clauses has been motivated either by the desire to test the quality of the entire Constitution, or by rule of law concerns, in order to promote just or effective legislation. They are part of a broader practice noted by Dixon and Ginsburg who analyse the practice of drafters to leave things undecided and to defer decision making to the future.²²⁰ In so doing, drafters use mechanisms such as ‘deliberate forms of constitutional vagueness, flexible amendment thresholds, mandatory periods of constitutional review and constitutional sunset clauses’.²²¹

Conclusions

This chapter has shown that sunset clauses have not only been an element of the statute book in the legislative history of UK, but also they are an integral part of the contemporary statute book. We have seen how sunset clauses currently operate and the surrounding legal context. The pragmatic perspective on sunset clauses is but one part of the trilogy that comprises the positive analysis of sunset clauses, along with the meaning

²¹⁹ Les Documents de Travail du Sénat, ‘Les Ordonnances, Série Etudes Juridiques, Bilan au 31 Décembre 2007’ (n EJ4) 5, 6.

²²⁰ See Rosalind Dixon, Tom Ginsburg, ‘Deciding not to decide: Deferral in Constitutional Design’ (2011) 9 *International Journal of Constitutional Law* 636.

²²¹ *Ibid* 646.

and the definition of such clauses, which were addressed in the analysis of the first chapter.

Having explored the positive dimension of such clauses, the critical analysis and constitutional evaluation of such clauses will commence in the following chapters. The pragmatic application of such clauses has shown that their time limitation can be the means to regulate occasional and temporary issues. Nonetheless, from the uses of sunset clauses in sunset legislation and fast track legislation, it can be argued that sunset clause perform multiple purposes and serve many functions, not necessarily restricted to temporal considerations. It is evident that the sunset clause in legislation is only a subset of temporary legislation, and that its use is not limited solely to regulating temporary occasions.

Sunset clauses were extensively used in emergency legislation, in policy making and administrative functions, and in constitutional design. This is not to say that the operation of sunset clauses is restricted exclusively to those four fields, since sporadic use of sunset clauses is evident across the whole spectrum of legislative activity and whilst there is a need for a temporary regulation.

The analysis of these four categories has shown that sunset clauses serve different purposes and that rule of law and separation of powers considerations informed the intent of legislators. In emergency legislation, sunset clauses are compatible with the urgent and transitional character of such legislation, and the role of the legislature is advanced and the impact of the restrictions on freedom is limited.

In finance, sunset clauses have provided a useful means to promote better regulation since the efficiency of a new policy is tested. Such clauses in public administration serve to increase the legislature's oversight of the executive, as well as to introduce effective oversight of new institutions. Finally, in constitutional design, such clauses initiate a constitutional dialogue between the present and the future constitutional

drafter, as the drafter of the present leaves some decisions to be made by the future drafter. In addition, the constitutional drafter might prescribe that ordinary legislation shall be temporary in order to accommodate special circumstances.

The value of sunset clause is, however, contestable. There have been opinions highlighting their benefits, but at the same time criticism has been voiced. The final two chapters will, therefore, critically review the constitutional value of such clauses from the perspective of the separation of powers and the rule of law. Specifically, the next chapter will focus on the interaction of such clauses with the separation of powers, while the last will evaluate such clauses from a rule of law perspective.

CHAPTER V: SUNSET CLAUSES AND THEIR INSTITUTIONAL EFFECT

Un peuple a toujours le droit de revoir, de réformer et de changer sa Constitution. Une génération ne peut assujettir à ses lois les générations futures. (People of a nation always have the right of examining, reviewing and amending their Constitution. A generation cannot force the forthcoming ones to follow its rules)

Constitution du 24 Juin 1793, Article 28

Introduction

As was shown in the preceding chapters, a variety of reasons explain why legislators include sunset clauses in legislation. Suffice to mention here, in relation to the institutional effect of such clauses, one of the conclusions of the historical chapters, that the use of such clauses was evolving as the legislative role of Parliament was evolving. Initially, such clauses were used by the King in order to safeguard his sovereignty and they were then used by the Commons in order to claim authority. At the dawn of the 20th century, as soon as the Lords' role in legislation became peripheral, such clauses were used entirely in the interplay between executive and legislature.

Therefore, analysis of sunset clauses through the institutional role of parliament will provide us with the normative content of such clauses. This chapter, by determining how sunset clauses and institutions interact, aims to contribute to our understanding about the use and the constitutional value of sunset clauses.

To focus on the interaction between such clauses and the legislature and the implications of such clauses, this chapter concentrates on three distinctive, albeit inextricably related, subjects. The first is the issue of how the use of such clauses affects the separation of powers, primarily the relations of the legislative body with the executive, and the converse, namely how the separation of powers influences their use. The second

subject concerns the impact of such clauses on successive parliaments and the relationship between present and future parliaments, as it seems that such clauses reveal the inter-temporal dimension of the separation of powers doctrine, which is the interaction between successive parliaments. By examining how the separation of powers interacts with sunset clauses, attention will be given to the possibilities and limitations of such clauses. Finally, the third subject will comprise a consideration of the role of sunset clauses in relation to the two bedrocks of the UK constitution, namely the separation of powers and parliamentary sovereignty.

The discussion of the normative implications of sunset clauses in respect of institutions, especially Parliament, is organised thematically. The chapter proceeds as follows. Part A introduces the two main approaches to the separation of powers doctrine, the pure and the partial approach, and discusses the possible implications for sunset clauses. Part A also examines the influence of such clauses on the separation of powers doctrine and vice versa. Part B first explores the interaction between successive parliaments due to a sunset clause, and then discusses when and how a sunset clause imposes or removes a burden on subsequent parliaments. Finally, part C examines how recent constitutional developments, especially the adoption of the Human Rights Act, affect the separation of powers, and it investigates the role of sunset clauses.

The aim of this chapter is to argue, first, that the use of sunset clauses influences the structure of government, as it permits constitutional experiments and at the same time reinforces the position of the legislature in contrast to the executive. Second, it is submitted that sunset clauses operate in a constitutional environment where consensus is a precondition in the separation of powers model and where the legislature is independent from the executive.

Furthermore, this chapter will lay out the impact of sunset clauses on subsequent parliaments. Provided that such clauses are a means by which to entrench legislation, it

seems that the use of such clauses reveals the inter-temporal dimension of the separation of powers doctrine. Interestingly, as revealed in the parliamentary debates on the European Union Bill, such clauses, like a double-edged sword, might free a future legislature from procedural burdens imposed by past legislation, or might impose a burden.

Finally, this chapter argues that since the adoption of the Human Rights Act in 1998, the judiciary's role in the separation of powers has advanced and Parliament has safeguarded its sovereignty from the expansion of the role of the judiciary through the inclusion of sunset clauses. Accordingly, it seems that such clauses have a role in the constitutional dialogue between the Courts and Parliament.

A. Separation of Powers and Sunset Clauses

I. The Theoretical Framework of the Doctrine

The doctrine of separation of powers is a cornerstone in the foundation of modern democracies. Its roots, though, are drawn from the manuscripts of ancient philosophers, such as Aristotle.¹ Although several authors approached the idea of separation of powers, such as Locke² and Sir Humphrey Mackworth,³ nowadays Montesquieu is considered the

¹ Aristotle, *Politics*, 1297b-1298a 'All forms of constitution then have three factors in reference to which the good lawgiver has to consider what is expedient for each constitution; (...) Of these three factors one is, what is to be the body that deliberates about the common interests, second the one connected with the magistracies, that is, what there are to be and what matters they are to control, and what is to be the method of their election, and a third is, what is to be the judiciary?'

² John Locke, *Two Treatises of Government* (London 1772) 293. Locke claimed that there should be a distinction between the body enacting legislation and body executing it.

³ Sir Humphrey Mackworth, *A Vindication of the Rights of the Commons of England* (London 1701) 2. Mackworth explored his concept about a prudent Distribution of Power, particularly the legislative power that will safeguard the Prerogatives of the King and the Rights of the People.

scholar who established its dogma, as Vile⁴ and Casper⁵ state. By laying out the theoretical framework of the doctrine, the main objective is to discover the potential interaction between sunset clauses and the separation of powers.

To begin with, Montesquieu does not mention the term ‘separation of powers’, but he clearly argues that ‘in each state there are three sorts of powers: legislative power, executive power over the things depending on the right of nations, and the executive power over the things depending on civil rights [the power of judging]’.⁶ Furthermore, he explains that these powers should not be concentrated in the authority of the same person, or body, but they should be separate as ‘all would be lost if the same man or the same body of principal men either of nobles, or of people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals’.⁷

In these words, jurists and political theorists have identified the ‘pure’ separation of powers according to which an evident distinction is drawn between institutions or persons holding and exercising unique functions.⁸ There are three basic elements of the pure theory: first, government is constituted by three autonomous branches; second, each

⁴ MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 83.

⁵ Gerhard Casper, ‘An Essay in Separation of Powers: Some Early Versions and Practices’ (1989) 30 *William and Mary Law Review* 213.

⁶ Montesquieu, *The Spirit of the Laws* (Anne Choler and others trs, CUP 1989) 156. Regarding the criticism against this doctrine see JWF Allison, *English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 83ff. Montesquieu conceptualised the doctrine of separation of powers inspired by the British Constitution, although he misrepresented it. See Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011) 13.

⁷ Montesquieu, *The Spirit of the Laws* (Anne Choler and others trs, CUP 1989) 157.

⁸ ‘The pure doctrine as we have described it embodies what might be called a ‘negative’ approach to the checking of the power of the agencies of government. The mere existence of several autonomous decision-taking bodies with specific functions is considered to be a sufficient brake upon the concentration of power’. See MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 19.

branch exercises exclusively specific function; finally, the three branches comprise distinct people or group of people.⁹

The reference of Montesquieu to several forms of checks and balances, though, inspired some scholars to argue that Montesquieu implied a ‘partial’ separation of powers where a system of checks and balances among the institutions leads to a fusion of powers.¹⁰ Montesquieu, focusing on the relations between the executive and the legislative, endorsed to a degree forms of checks and balances, mentioning that ‘if the executive does not have the right to check the enterprises of the legislative body, the latter will be despotic, for it will wipe out all the other powers, since it will be able to give to itself all the power it can imagine’; and, ‘but if, in a free state, legislative power should not have the right to check executive power, it has the right and should have the faculty to examine the manner in which the laws it has made have been executed’.¹¹

Indeed, the latter interpretation was followed by Madison, who supported the interaction between the branches of the government and established the political theory of ‘check and balances’. His ideas are impressed in three federalist papers, the numbers 47, 48 and 51.¹² Like Montesquieu, Madison advocated that the separation of powers doctrine is a critical principle for a democratic regime, as it would be an answer to tyranny.¹³ Madison argued in favour of a limited sharing of power as the real meaning of Montesquieu was that:

⁹ Ibid 15.

¹⁰ Concerning the debate upon the real meaning of Montesquieu, see *ibid* 94.

¹¹ Montesquieu, *The Spirit of the Laws* (Anne Choler and others trs, CUP 1989) 162.

¹² The Federalist Papers are a series of eighty five essays published anonymously in the New York newspapers with the aim to promote the ratification of the United States Constitution. Although all of them are signed by an author named by the pseudonym ‘Publius’, these three papers are attributed to Madison. See Douglass Adair, ‘The Authorship of the Disputed Federalist Papers’ (1944) 1 *William and Mary Quarterly* 97.

¹³ Ralph Ketcham (ed), *Selected Writings of James Madison* (Hackett Publishing 2006) 109.

‘[H]e did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted’.¹⁴

Furthermore, he advocated the system of checks and balances, explaining that it

‘[D]oes not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained’.¹⁵

Finally, Madison concluded in Federalist Paper no 51 that with the checks and balances system

‘[A] double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second, it is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part’.¹⁶

According to Madison’s understanding, the negative status of checks between the institutions was not enough for good governance. Thus he also stressed the more positive side of separation of powers, where the three functions, and particularly the legislative function, are allocated and entrusted to more than one institution. As a result he introduced in the political theory a functional-based approach to the separation of powers, pursuant to which the three functions remain the same, the government is constituted by three branches, but nonetheless the governmental functions are exercised by more than one institution sharing powers – or, as Vile names it, as a system of ‘partial separation of functions’.¹⁷

¹⁴ Ibid 111.

¹⁵ Ibid 112.

¹⁶ Ibid 123.

¹⁷ MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 20. In practice the exercise of these three functions among the institutions differs from case to case and depends mainly on

Madison himself expressed the view that there was no difference between his approach and that of Montesquieu, as citing him he revealed that ‘from these facts, by which Montesquieu was guided, it may clearly be inferred that, (...) he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other’.¹⁸ A closer examination of the two approaches reveals that both Montesquieu and Madison agreed on the independence of the judicial branch, while the competence of the legislative power and the extent of the checks and balances systems seems to be based on a different approach. From a more theoretical approach, the normative starting point of Montesquieu and Madison is different. Montesquieu’s approach is based on the institutions, expressing a more formal approach of the doctrine, while Madison emphasises the functional element of the separation of powers.

The perceived differences between the two doctrines of separation of powers are blunt or sharp depending on their practical application. Of great importance in the evaluation of each separation of powers system is the hierarchy between the separation of institutions, which is the formal approach, and the separation of functions, which is the functional approach. From the formal point of view, the extent of the institutional independence of the legislative branch from the executive and their interactions represents the first issue, which led to parliamentary, presidential and semi-presidential systems of government. From the functional point of view, legislative competence and institutional roles in the lawmaking process are significant for the extent of the checks and balances.

Bearing in mind the separation of powers paradigm of the United Kingdom, according to which the boundaries between executive, legislative and judicial branch are

necessity. Regarding the functionalist approach, see Daniel Farber, William Eskridge Jr., Philip Frickey, *Constitutional Law, Themes for the Constitution’s Third Century*, (2nd edn, West Group 1998) 909.

¹⁸ Ralph Ketcham (ed), *Selected Writings of James Madison* (Hackett Publishing 2006) 111.

volatile,¹⁹ we shall consider the role of sunset clauses from a formal and functional perspective. The issue will be addressed by examining how the use of sunset clauses affects the separation of powers and how the separation of powers affects the use of sunset clauses.

II. How the Use of Sunset Clauses Affects the Separation of Powers

This part examines the effect of such clauses on the separation of powers. It will be argued that such clauses permit constitutional experimentation by legislators and that their use reinforces the institutional position of the legislature.

Until recently, the separation of powers principle was a neglected doctrine in United Kingdom constitutional theory.²⁰ Prior to the Human Rights Act 1998, the application of the separation powers doctrine from a functional and formal perspective was weak.²¹ The executive branch is incorporated in Parliament and the executive function overlaps with the legislative.²² This is captured by Bagehot, who remarked that ‘the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers’.²³

¹⁹ Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011) 17.

²⁰ For the reasons explaining this stance, see Eric Barendt, ‘Separation of Powers and Constitutional Government’ [1995] PL 599, 603.

²¹ The adoption of the HRA 1998 sharpened the separation of powers in the United Kingdom, particularly between the judiciary on the one hand and the executive and legislative branches on the other hand. See Adam Tomkins, ‘The Rule of Law in Blair’s Britain’ (2007) 26 *University of Queensland Law Journal* 255, 290; cf JWF Allison, *English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 94-5.

²² Committee on Ministers’ Powers, *Report* (Cmd 4060 1932) [1].

²³ Walter Bagehot, *The English Constitution* (2nd edn, 1873) 48.

Sunset clauses affect the Westminster conception of the separation of powers in the following ways. First, they permit legislators to introduce new institutions, new governmental functions and new mechanisms of checks and balances. Through the inclusion of a sunset clause, legislators are able to treat these innovations as experiments and check their compatibility with the constitutional status quo. Furthermore, sunset clause can have another effect on the separation of powers, as they aid the review of executive regulations and enhance legislative oversight, limiting the impact of the centralisation of legislative initiative.

i. The Initiation of Constitutional Experiments

The artificial connection between executive, legislative and judicial power in a specific institution, and the extent of checks and balances between the institutions, is dynamic, especially because a mere legislative act is capable of amending and reshaping the status quo. Therefore, sunset clauses permit legislators to apply the new order for a certain period of time and evaluate its efficiency and results before making permanent a new institution, or a mechanism of check and balances.

In the long constitutional history of the United Kingdom, a plethora of constitutional developments took place prior to the current situation. Remarkably, during the early stage, as seen in the historical chapters,²⁴ the House of Commons, as a condition of granting revenue to Henry IV, requested the list with the names of the Lords participating in the Council to be submitted beforehand to Parliament. This was, in effect, a form of parliamentary check over the executive and consequently a primitive expression of ‘Ministerial Responsibility’. Henry IV complied with the Commons’ request temporarily, because this practice was to last until the following parliament due to a sunset clause. Stubbs describes the whole bill as the ‘trial and failure of a great constitutional

²⁴ See text to n 50 in Ch II.

experiment; a premature testing of the strength of the parliamentary system'.²⁵ This incident is marked in constitutional history as the 'Lancastrian experiment'. It was the first time that a mechanism of checks and balances between the Crown and Commons was introduced, even though the experiment was not revived after the lapse of the sunset clause.

Despite the fact that in the recent constitutional history of the United Kingdom no sunset clause was used in a constitutional experiment, an example can be found in the United States. As noted,²⁶ Congress, in response to the Watergate Scandal, adopted the Ethics in Government Act 1978, which was subject to a five-year sunset clause.²⁷ The Act was twice re-enacted with amendments²⁸ until it lapsed in 1992, as Congress failed to renew it. Although the Act expired, it was re-enacted by the Independent Counsel Reauthorization Act of 1994²⁹ and eventually lapsed in 1999.

According to Title VI of the Act, a new institution was founded, an independent prosecutor to exercise with impartiality and integrity control over the executive and to investigate abuse of executive power. The task of the new body was to ensure public confidence in criminal investigations of high-ranked governmental officials.³⁰ Through this legislation, part of the executive power, the authority to control the administration,

²⁵ William Stubbs, *The Constitutional History of England in its Origin and Development* Vol. III (first published 1878, CUP 2011) 5.

²⁶ See text to n 184 in Ch IV.

²⁷ Pub L No 95-521, 92 Stat 1867 (1978).

²⁸ The act was renewed and amended in 1982 with the Ethics in Government Act Amendments, Pub L No 97-409, 96 Stat 2039 (1983), and it was reauthorized in 1987 by the Independent Counsel Reauthorization Act, Pub L No 100-191, 101 Stat 1293 (1987).

²⁹ Pub L No 103-270, 108 Stat 732 (1994).

³⁰ See Alexander Tachmes, 'Independent Counsels under the Ethics in Government Act of 1978: A Violation of the Separation of Powers Doctrine or an Essential Check on Executive Power' (1987-1988) *University Miami Law Review*, 735; Public Papers of the Presidents, 'Statement on Signing the Independent Counsel Reauthorization Act of 1987' (US Government Printing Office 1989) 1524.

was transferred to an independent body; in practice this was a judicial appointment.³¹ The adoption of the independent prosecutor reshaped the separation of powers in the United States. Suffice to say that President Reagan, while signing the Independent Counsel Reauthorization Act of 1987, stated that ‘during the years leading up to the original enactment of this statute, and thereafter, the Department of Justice has repeatedly expressed profound concern over the serious departures authorized by the act from separation of powers principles’.³²

A challenge to the independent counsel provisions of the Ethics in Government Act of 1978 was brought before the US Supreme Court. A principal question was whether ‘the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel’.³³ Chief Justice Rehnquist delivered the opinion for the majority and concluded that ‘we do not think that the Act works any judicial usurpation of properly executive functions’.³⁴ Justice Scalia, in his dissenting opinion, stressed that ‘This is an open invitation for Congress to experiment’, and he further pondered: ‘What about a special Assistant Secretary of State, with responsibility for one very narrow area of foreign policy, who would not only have to be confirmed by the Senate but could also be removed only pursuant to certain carefully

³¹ According to the US Constitution, art II para 2, the President ‘shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law (...)’ and according to para 3 the President is responsible to ‘take care that the Laws be faithfully executed’. According to that obligation, the President appoints the attorney general to head the Department of Justice to carry out this task. See Constance O’Keefe, Peter Safirstein ‘Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Act’ (1982) 49 Brooklyn Law Review 113, 114.

³² Public Papers of the Presidents, ‘Statement on Signing the Independent Counsel Reauthorization Act of 1987’ (US Government Printing Office 1989) 1524.

³³ *Morrison v Olson* (1988) 487 US 654, 694 (US SC).

³⁴ *Ibid* 696.

designed restrictions? Could this possibly render the President “[un]able to accomplish his constitutional role?” Or a special Assistant Secretary of Defense for Procurement?³⁵

Indeed as Ackerman pointed out, ‘it [Congress] placed a five-year sunset on the statute in light of the risk that the new official might disrupt the traditional system of checks and balances between the legislature and the executive. After the tenure of independent counsel Kenneth W. Starr, few of us mourned the statute when it automatically expired and Congress refused to reauthorize the constitutional experiment’.³⁶ Consequently, the introduction of new institutions and governmental functions inevitably affects the separation of powers. In essence, sunset clauses in such legislation allow an in depth estimation of the circumstances which led to the new institution first, coupled with a subsequent evaluation of its efficiency.

ii. Reinforce the Institutional Role of the Legislature

A principal challenge to separation powers theories, unforeseen by Montesquieu and Madison, is the centralisation of legislative initiative. In principle, legislative power was attributed to parliaments. Nonetheless, as Craig points out, ‘The orthodoxy among political scientists is that, over the last century, the executive has dominated the legislature. This view is reinforced by a whole series of select committee reports, which highlight deficiencies in the legislative process and in the accountability of the executive’.³⁷

³⁵ Ibid 727.

³⁶ Bruce Ackerman ‘Sunset can put a Halt to Twilight of Liberty’ September 20, 2001 <<http://articles.latimes.com/2001/sep/20/local/me-47757>> accessed February 16 2013.

³⁷ Paul Craig, ‘Political Constitutionalism and the Judicial Role: A Response’ (2011) 9 International Journal of Constitutional Law 112, 117.

The centralisation of legislative initiative resulted, nonetheless, in government control over law-making power.³⁸ Montesquieu explicitly criticised the concentration of powers in a single body, saying that ‘when legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically’.³⁹

Craig identifies three main causes for the centralisation of legislative initiative: first, the development and the regular use of standing committees to consider legislation in the shortest possible length of time; second, legislative planning and drafting by cabinet committees; and finally, the delegation of law-making to the executive.⁴⁰ Barendt concludes that ‘the truth is that there is no effective separation of powers between legislative and executive in the United Kingdom in the sense of a system of check and balances’.⁴¹

The first two forms of centralisation were mechanisms to promote legislation adopted in the late 19th century and in the 20th century respectively,⁴² with the effect that Parliament was diminished from a deliberating body to a voting body with limited influence on the final draft of legislation. The delegation of law making powers has its roots in the 16th century.⁴³ The need to delegate power is an endemic feature of polities,

³⁸ Another reason for the increased power of the executive is the development of the party system. See below text to n 102 in Ch V.

³⁹ Montesquieu, *The Spirit of the Laws* (Anne Choler and others trs, CUP 1989) 157.

⁴⁰ See Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) [3-004].

⁴¹ Erin Barendt ‘Separation of Powers and Constitutional Government’ [1995] PL 599, 614.

⁴² Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) [3-005].

⁴³ Regarding the birth and the growth of delegated legislation, see text to n 57ff in Ch III.

but there are constitutional concerns when the delegated legislation covers broad issues of policy and general interest.⁴⁴

In the historical chapters it was shown that when Parliament gained control of the administration in the 18th century and legislation was enacted with delegation of powers, sunset clauses were used to retain the delegated authority and as an oversight mechanism.⁴⁵ Thus the legislative role is not restricted only to the adoption of legislation, but also encompasses legislative oversight of the executive.⁴⁶ Remarkably, Craig admits that ‘little control is possible over the content of legislation, therefore the value of the Commons must lie elsewhere’.⁴⁷

The need for legislative oversight over delegated power was stressed in numerous reports. Concerns were expressed in the Donoghmore report, which stated that ‘we have already expressed the view that the system of delegated legislation is both legitimate and constitutionally desirable for certain purposes, within certain limits, and under certain safeguards’.⁴⁸ The Donoghmore report recommended a series of measures to prevent abuse of delegated powers, including use of sunset clauses as a desirable mechanism to prevent abuse of power, especially in relation to Henry VIII clauses.⁴⁹

⁴⁴ Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) [15-003]. 718. See also Gabriel Ganz, ‘Delegated Legislation: A Necessary Evil or a Constitutional Outrage’ in Peter Leyland and Terry Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackwell 2003) Ch 3.

⁴⁵ See Ch III.

⁴⁶ Regarding the role of the Legislature see Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) [3-006].

⁴⁷ *Ibid* [3-007].

⁴⁸ Committee on Ministers’ Powers, *Report* (Cmd 4060 1932) [11].

⁴⁹ *Ibid* [15].

More recently, Lord Dahrendorf, Chairman of the Delegated Powers and Regulatory Reform Committee, raised the need for sunset clauses in relation to delegated powers, stating that

‘[I]n many, many cases, we should give much more serious consideration to the possibility, feasibility and usefulness of sunset clauses or, at any rate, of procedures which move in the direction of sunset clauses; that is, reviews in set periods and at particular times. That is by far the most effective way of deregulating and reducing the continuing burden of regulation. Those who gave evidence to the Constitution Committee—I believe that only one person gave evidence in support of sunset clauses—made an important point, certainly so far as secondary legislation is concerned. My personal preference would be for every piece of secondary legislation to contain a sunset clause or, at any rate, a severe review clause. In quite a few cases, it would be useful for primary legislation as well. It would offer our scrutiny process an additional weapon, as it were, to that of negative and affirmative resolution’.⁵⁰

Thus a sunset clause can be used as a device for legislative oversight through which the legislature holds the executive to account. Moreover, authors have stressed that a sunset clause is a mechanism which enhances legislative oversight and have explored the rationale for their inclusion.⁵¹ Some have however argued that sunset provisions are not the most efficient way of monitoring administrative rule making. Rockman draws a parallel saying that

‘[S]unset provisions are more like an alarm clock. Nothing is required between the setting and the awakening. If one employs a strict definition of oversight, neither procedure fits, since one is a form of foresight and the other legislative afterthought. In a more general sense, though, each influences executive activity. Apparently, sunset provisions are popular, at least for their symbolic value, in legislatures that are otherwise under equipped to perform continuous oversight’.⁵²

⁵⁰ HL Deb 6 June 2005 vol 672 col 754.

⁵¹ Lowi, arguing in favor sunset clauses, has said that ‘a termination date should not be considered a death sentence but an opportunity to learn from experience. This is why the notion of sunset is appropriate, because it implies a creative time during which the politics of the agency I likely to come unstuck and the opportunity for substantive reconsideration is most propitious’. See Theodore J Lowi, *The End of Liberalism, The second Republic of the United States* (2nd edn, WW Norton & Company 1979); Bruce Adams, ‘Sunset: A Proposal for Accountable Government’ (1976) 28 *Administrative Law Review* 511; Jacob K Javits, Gary J Klein, ‘Congressional Oversight and the Legislative Veto: A Constitutional Analysis’ (1977) 52 *New York University Law Review* 455; Lewis Anthony Davis ‘Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform’ (1981) 33 *Administrative Law Review* 393; Mary K Marvel, ‘Sunset: An early evaluation’ (1984) 42 *Public Choice* 193; William Lyons, Patricia K Freeman, ‘Legislation and the Legislative Process in Tennessee’ (1984) 9 *Legislative Studies Quarterly* 151, 158; John D Huber, Charles R Shipan, Madeline Pfahler ‘Legislatures and Statutory Control of Bureaucracy’ (2001) 45 *American Journal of Political Science* 330.

⁵² Bert A Rockman, ‘Legislative-Executive Relations and Legislative Oversight’ (1984) 9 *Legislative Studies Quarterly* 387, 426.

On the flip side of the coin, it seems that the executive is not keen to accept an extensive use of sunset clauses in delegated legislation.⁵³ The executive has an interest to prevent the use of sunset clauses as its powers are restricted by time limitation. Nonetheless, the Government has issued a report according to which sunset clauses are encouraged in regulations for good reason, such as to keep effective regulations up to date and improve them when this is necessary.⁵⁴

The essential question, therefore, is whether sunset clauses are an efficient mechanism enhancing the legislative role? From a functional perspective, the expiration of sunset clauses gives power back automatically to the legislative branch. Moreover, sunset clauses have a symbolic role, since they act as a reminder that Parliament holds the original power, and that the delegated institution remains accountable to Parliament. Thus, at the expiration of the sunset clause the equilibrium of the original separation of powers is maintained. However, in practice, although the original separation of powers is ostensibly restored, the executive may still dominate the legislature and simply ‘forcibly’ renew the legislation. From a theoretical framework, sunset clauses are compatible with both perspectives of separation of powers that identified the need for checks and balances.

Delegated legislation is, on the one hand, the only way to regulate technical and minor issues,⁵⁵ but on the other hand it can bestow excessive powers to the executive. With the delegation of law making, we have the transfer of certain legislative powers to the executive, albeit with the possibility of some control by the legislature. The inclusion

⁵³ Law Commission, *Post Legislative Scrutiny* (Law Com No 302, 2006) [4.9]; HM Government, *Sunsetting Regulations: Guidance* (April 2011).

⁵⁴ HM Government, *Sunsetting Regulations: Guidance* (March 2011) [6]. For more details on substantial effects of sunset clauses, see Ch VI.

⁵⁵ The Report on Minister has stressed that ‘if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires’ Committee on Ministers’ Powers, *Report* (Cmd 4060 1932) [4].

of a sunset clause means that the legislative branch, instead of enacting the legislation, exercises a monitoring authority. Thus inclusion of sunset legislation in delegated power and in statutory instruments enacted by the executive changes the balance of power between the executive and the legislative branch. Parliament exercises its oversight role more actively and at the same time, at least symbolically, retains its authority at the expiration of the sunset clause.

III. How the separation of powers affects the use of sunset clauses

The previous discussion revealed that sunset clauses can impact on the separation of powers since they permit constitutional experimentation and reinforce the role of the legislature. This part will address how the separation of powers affects the use of sunset clauses. It will focus on the need for consensus in the legislative process and on the institutional position of the legislature.

The main argument here is that use of sunset clauses depends on the separation of powers and especially on the institutional role of the legislature. The use of sunset clauses will be examined from a functional perspective of the separation of powers, and it will be seen how the legislative function affects their use. It will be seen that sunset clauses have a role for enhancing consensus in the law-making process. This will be followed by use of such clauses from a formal separation of powers perspective, particularly in relation to how the institutional position of the legislature affects their use. In this part, a critical factor will be the extent to which the legislature has autonomy over the imposition of such clauses in legislation.

To this end, a comparison is made of two legal systems with different structures and different conceptions of separation of powers, in order to understand the variables that encourage or discourage use of sunset clauses. The comparative analysis is between the

United Kingdom and the United States of America. There are a number of reasons to justify the comparison between these two legal orders. First, the United Kingdom is a parliamentary system, whereas the United States of America has a presidential system. Second, both countries have used temporary legislation on several occasions in their legislative history.⁵⁶

The argument is that the inclusion of sunset clauses in legislation depends on the institutional position of the legislative branch, as the more independent it is, the more possible it is to impose a sunset clause. On the contrary, the less independent the legislature, the more possible it is for the executive to reject a sunset clause amendment. As will be shown, in parliamentary systems, where the executive is a protagonist between the branches, the sunset clause amendment is less likely to succeed. On the contrary, in presidential systems, where the check and balances system prevails, the sunset clause amendment is more likely to succeed.

i. Sunset Clauses: a Mechanism to Reach Consensus

Lijphart, focusing on the law-making process, distinguished between two patterns of democracy: ‘A closely related difference is that the majoritarian model of democracy is exclusive, competitive, and adversarial, whereas the consensus model is characterised by inclusiveness, bargaining and compromise; for this reason, consensus democracy could also be termed “negotiation democracy”’.⁵⁷ To be more specific, consensus is the mode of operation in a separation of powers system where the law-making function is shared

⁵⁶ Regarding the use of sunset clauses in legislation in the United States of America, see Jacob E Gersen, ‘Temporary Legislation’ (2007) 74 *Chicago Law Review* 247.

⁵⁷ Arend Lijphart, *Patterns of Democracy, Government Forms and Performance in Thirty - Six Countries* (Yale University Press, 1999) 2. See also Klaus Armingeon, ‘The Effects of Negotiation Democracy: A Comparative Analysis’ (2002) 41 *European Journal of Political Research* 81.

between different institutions. In contrast, there is less need for consensus when law making depends on a majority in the legislature.

With reference to this classification, the United States is a ‘negotiation democracy’, as a bill must be approved by three different institutions: the House of Representatives, the Senate and the President. Each institution can block legislation, thus sunset clauses may serve as mechanism to reach a consensus between the different institutions.⁵⁸ When there is a disagreement, the branches may be willing to compromise and accept an agreement when the legislation is not permanent. This temporary character of legislation permits the branches to review their stance at the expiration of the law.

In parliamentary systems, such as Westminster, although the legislative branch exercises the law-making power, the executive holds a key role. The Prime Minister is the head of the government and at the same time leader of the majority party in Parliament. Moe and Caldwell explain this when they claim that ‘the executive is the leadership of the majority party, and thus the leadership of the legislature itself. What the executive wants, it sets’.⁵⁹ Therefore, the winning party in an election forms the government, controls the majority in parliament and aims to implement its policy.⁶⁰ In addition, even if Westminster maintains a bicameral system, House of Commons and House of Lords, the latter house does not have the power to veto legislation.⁶¹

⁵⁸ Regarding the power to block legislation, its effect, and the distinction between majoritarian and negotiation democracies, see Andre Kaiser, ‘Types of Democracy: From Classical to New Institutionalism’ (1997) 9 *Journal of Theoretical Politics* 419, 436.

⁵⁹ Terry M Moe, Michael Caldwell, ‘The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems’ (1994) 150 *Journal of Institutional and Theoretical Economics* 171, 178.

⁶⁰ Lijphart explores in more detail nine reasons why the Westminster paradigm is not a system of governance based on consensus. Arend Lijphart, *Patterns of Democracy, Government Forms and Performance in Thirty - Six Countries* (Yale University Press 1999) 10.

⁶¹ See *Jackson and others v Attorney General* [2005] UKHL 56.

Thus the government does not in general seek agreement with the opposition in order to pass legislation, and consensus is not a condition of the legislative process.⁶² Consequently, the use of sunset clauses is expected to be more frequent in a separation of powers system where the legislative function is shared among different institutions. Nonetheless, under the majoritarian separation of powers regime, consensus might be an essential condition, either when no party controls a majority in the House of Commons, or when in spite of there being a single party government, there is strong opposition from backbenchers.⁶³ Although single-party governments may have been the norm in Britain after World War II, coalition governments were a widespread phenomenon especially during the first half of the 20th century.⁶⁴ Where there is a coalition government, there is a need for consensus among the parties participating in government in order to pass legislation. Regarding the existence of opposition within the party in government, if there are enough backbenchers to block legislation, the government has to reach a consensus with them. Consequently Ackerman accurately remarks that legislative obedience to the executive is in general due to party discipline, notwithstanding some instances in which backbenchers secure some changes in executive-driven legislation.⁶⁵

The requirement of consensus is a decisive element to distinguish the respective separation of powers models. Thus, the use of sunset clauses is expected to be more common in separation of powers systems where there is a need to build consensus to pass legislation, such as the presidential system of the United States of America. To the

⁶² On the contrary, as it is shown in the historical chapters, consensus was prerequisite for passing legislation when the Lords had a decisive role in legislation. See Ch II.

⁶³ Regarding the tendency of MPs to vote against their own party, see Philip Norton, 'Parliamentary Oversight' in Patrick Dunleavy and others (eds), *Development in British Politics 5* (MacMillan 1997) 161.

⁶⁴ Regarding a full account of coalition governments in the United Kingdom, see John Dearlove, Peter Saunders, *Introduction to British Politics* (2nd edn, Polity Press 1991) 55.

⁶⁵ Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, 643.

contrary, with the exception of coalition governments or in the event of strong opposition from backbenchers, it is not expected that sunset clause will have a widespread application in parliamentary systems such as Westminster.

ii. The Autonomy of the Legislature

As was mentioned above, the presidential system of the United States of America is a paradigm according to which the legislative function is shared between the Senate and the House of Representatives, while the President is vested with the power to veto legislation. However, as a body Congress is independent of and distinct from the separately-elected executive, As has been precisely stated, ‘the House of Representatives exists as a legislative and oversight forum whose policy preferences may or may not coincide with those of the separately elected government, that is, the presidency and the rest of the executive branch’.⁶⁶

Although Partisanship is the modus operandi in US politics, it is quite rare for a single party to dominate all three institutions – the Senate, the House of Representatives and the Presidency. A party has to win several biennial elections in a row in order to exercise plenary law-making authority. Ackerman puts it correctly when he states that, ‘even if party A wins big at time one, it may have to win n times more before it can gain plenary lawmaking authority’.⁶⁷ In fact, in the recent political history of the United States of America, only a few times has a party dominated all institutions. For instance, in 1992

⁶⁶ Congressional Research Service, ‘Parliament and Congress: A Brief Comparison of the British House of Commons and the US House of Representatives’ (Congress, 19 May 2005).

⁶⁷ Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113 Harvard Law Review 633, 644.

the Democrats gained control of Congress and the Presidency for two years, and in 2000 the Republicans did the same.⁶⁸

Unlike the United States, the Westminster system of governance is considered a parliamentary one which represents the minimum of separation between the executive and the legislative branch. The parliamentary system, as it is known, has received criticism from a separation powers point of view.⁶⁹ Craig points out the role of political parties in the transfer of power to the executive, saying that ‘the very existence of parties provided an avenue for the channelling of power from the legislature to the executive’.⁷⁰ As was shown in more detail above, with the exception of coalition governments or in the event of strong opposition from backbenchers, an endemic and enduring characteristic of the parliamentary system is the fact that the party in government exercises the law-making power of the legislature. Consequently, instead of having the legislative branch controlling the executive, legislation becomes a prerogative of the executive.⁷¹ In other words, government in parliament can implement its agenda and pass legislation according to its desired policy.

At first glance, the comparison between the United States of America and the United Kingdom might not provide accurate results. The dominance of one party in the United Kingdom and the existence of divided government in the United States of America do not create fertile ground for comparison and this difference might explain the use of sunset clauses in the United States of America. In the case of divided government in the

⁶⁸ See Gary C Jacobson, ‘A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000’ (2001) 116 *Political Science Quarterly* 5.

⁶⁹ See Bruce Ackerman, ‘The New Separation of Powers’ [2000] 113 *Harvard Law Review* 633, 640

⁷⁰ Regarding the development of the party system see Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) [3-005].

⁷¹ Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) [1-009]; Paul Craig, ‘Public Law, Political Theory and Legal Theory’ [2000] *Public Law* 222 fn 54.

United States of America, it is plausible that sunset clauses create a common ground between the parties, as happened in England when the Lords and the Commons had an equal role in legislation or as happens when there is a coalition government. Attempting to draw parallels between the two legal systems, the scope of the comparison should be limited, first, to occasions where the presidential party dominates in Congress, so as to avoid the aforementioned ‘divided government’ explanation, and, second, where both legislative branches are discussing similar pieces of legislation under an equivalent state of conditions.

Remarkably, after the presidential election of 2000, a Republican candidate, George W Bush, won the presidency of the United States of America, while at the same time the Republican Party controlled the legislative branch, holding a majority in both the House of Representatives and the Senate.⁷² The September 11 terrorist incident overshadowed the legislative work and emergency lawmaking was at the top of the agenda. Thus, in response to the terrorist actions, the USA Patriot Act⁷³ was adopted, which, among other things, provides the Federal Government with additional powers to combat terrorism.⁷⁴

As Vermeule remarks, ‘in the bargaining over the Patriot Act, a crucial moment occurred when President Bush’s negotiators objected strenuously to the final version because it contained a sunset provision they found objectionable’.⁷⁵ Surprisingly, the

⁷² Even if the Democrats were holding 50 seats and the Republicans 50 respectively, the appointment of Dick Cheney as Vice President gave the control to Republicans with the tie breaking vote. In the House of Representatives, the Republicans were the majority controlling 221 seats out of 435.

⁷³ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*, Pub L No. 107-56, 115 Stat 272 (2001).

⁷⁴ See Michael T McCarthy, ‘Recent Developments: USA Patriot Act’ (2002) 39 *Harvard Journal on Legislation* 435.

⁷⁵ Adrian Vermeule, ‘Emergency Lawmaking after 9/11 and 7/7’ (2008) 75 *University of Chicago Law Review* 1155, 1165.

sunset clause was an amendment in the original bill, which was proposed and supported by the Republican leader of the House, Dick Armey.⁷⁶ As Robert O’Harrow, a reporter for the Washington Post, affirms: ‘a sunset provision would guarantee that some of the most troubling new powers would be revisited by Congress, giving lawmakers an important check on executive authority’.⁷⁷

Likewise, September 11 had an impact on the legislative agenda of Westminster. As is mentioned in previous chapters, in the aftermath of these terrorist attacks, Parliament passed a series of emergency legislation.⁷⁸ Two statutes are particularly relevant for the purpose of this comparison: first, the Anti-terrorism, Crime and Security Act⁷⁹; and second, the Civil Contingencies Act.⁸⁰ Although neither Act contained a sunset clause when introduced by the Labour Government, the inclusion of sunset clauses was proposed during parliamentary debate.

During the debate of the Anti-terrorism, Crime and Security Bill several sunset clause amendments were proposed, and remarkably some of them had the support of Labour MPs. However, the Minister of Home Affairs agreed only with the inclusion of a five-year sunset clause referring specifically to sections 21 to 23⁸¹, and at the same time he rejected other sunset clause amendments, stating that:

‘On sunset clauses, the Government have taken several measures in response to the Select Committee on Home Affairs and to the wishes of individual Members and to debates held earlier on part 4. Those measures include a sunset clause after five years,

⁷⁶ Robert O’Harrow Jr., ‘Six Weeks in Autumn: A Year Ago, as a Nation Reeled from Attack, a Battle Was Joined for America’s Future. Not in Afghanistan. In Washington. Washington Post W6 (27 October 2002).

⁷⁷ Robert O’Harrow Jr., Six Weeks in Autumn: A Year Ago, as a Nation Reeled from Attack, a Battle Was Joined for America’s Future. Not in Afghanistan. In Washington. Washington Post W6 (Oct 27, 2002).

⁷⁸ See text to n 54 in Ch IV.

⁷⁹ Anti-Terrorism, Crime and Security Act 2001.

⁸⁰ Civil Contingencies Act 2004.

⁸¹ Anti-Terrorism, Crime and Security Act 2001, s 29 (7).

review after a year and other provisions that reflect the will of the House. I want to make it clear—so that there is no doubt in the other place—that we strongly resist any further move on sunset clauses. We shall not allow the Bill to be dismembered by the indiscriminate application of sunset clauses to different parts of it’.⁸²

Similarly, when the Civil Contingencies Bill was debated in the Joint Committee, a sunset clause was proposed⁸³ concerning the second part of the Bill, and this was a recognition of the vested in the executive in cases of emergency.⁸⁴ Although the draft Bill included a partial sunset clause regarding emergency regulations issued by the government,⁸⁵ the Lords proposed a three-year sunset clause amendment to limit the duration of the second part of the bill.⁸⁶ Opposition MPs supported this amendment and in doing so claimed that there is a precedent for emergency legislation to contain sunset clauses, mentioning examples such as ‘it was agreed from the outset that the Anti-terrorism, Crime and Security Act 2001 should be subject to sunset provisions, as it contains some draconian powers’.⁸⁷ Eventually, the Government opposed the inclusion of the sunset clause and the amendment was rejected.⁸⁸

Although the evidence is relatively narrow in scope, it is suggested that the conclusions are based on sufficient grounds, due to the parallels drawn. First, both legislative branches, Congress and the House of Commons, elaborated on emergency

⁸² HC Deb 12 December 2001 vol 376 col 952.

⁸³ Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill* (2002-3, HL 184, HC 1074) [200].

⁸⁴ The Part B of the Bill among others allows the government to deploy the armed forces, restrict public assembly, force travel restrictions, and limit public access to prescribed areas. See Civil Contingencies Act 2004, Part B.

⁸⁵ See Civil Contingencies HC Bill (2003-04) 14 cl 26 (1) (a).

⁸⁶ See Civil Contingencies HL Bill (2003-04) 77 cl 34.

⁸⁷ HC Deb 17 November 2004 vol 426 col 1368.

⁸⁸ Government’s position was that ‘It contains provision for detailed parliamentary scrutiny and amendment by Parliament of its provisions. It also contains in-built sunset clauses on the use of the regulations’. HC Deb 17 November 2004 vol 426 col 1367.

legislation in the aftermath of September 11th. Second, at that time, the government comprised a single party, as there was no divided government in United States of America or coalition government in United Kingdom. Accordingly, as Vermeule remarks, ‘in Parliament—and in Congress when the president’s party controls one or both houses—partisanship is the primary source of executive power over legislation’.⁸⁹ As a result, the executive role in legislation is significant in both parliamentary and presidential systems.

Thus, focusing on the sunset clause amendment, it is remarkable that Congress imposed a sunset clause against the will of the executive, whereas Parliament in the United Kingdom failed and the executive’s will prevailed. The words of Lord Dahrendorf, comparing the law-making powers of Westminster and Congress, highlight the institutional competence of these bodies: ‘We are not the United States Congress. In other words, we are not a Parliament in which legislation is created and where the Government are not in a position to create legislation’.⁹⁰ The essential question at this point is when and under which circumstances the legislature has the law-making power to impose a sunset clause amendment.

According to the above, it is apparent that in parliamentary systems, where on the one hand the influence of the executive is more direct and significant, and on the other hand parliament is less distinct as an institution, the sunset clause amendment is less likely to succeed. In other words, although partisanship is the *modus operandi* of both political systems, the use of sunset clauses depends to an extent on the position of the legislative branch. The more independent the institution of the legislative branch is, the more possible it is to impose a sunset clause. On the contrary, the less independent the legislature, the

⁸⁹ Adrian Vermeule, ‘Emergency Lawmaking after 9/11 and 7/7’ (2008) 75 *University of Chicago Law Review* 1155, 1172.

⁹⁰ HL Deb 6 June 2005 vol 672 col 754.

more possible it is for the executive to reject a sunset clause amendment or to limit its effect with a Henry VIII clause.

B. The Inter-temporal Dimension of the Separation of Powers

While the main theories of the separation of powers focus on the balance of powers at a specific moment, the use of sunset clauses reveals a chronological dimension to the separation of powers, leading to an inter-temporal interaction between the institutions.

In exploring the whole history of sunset clauses in the UK, it was shown that such clauses have an effect on future Parliaments if such clauses expire during the session of a following parliament. It will be argued that the impact of such clauses is twofold. On the one hand, a clause may be seen as a burden on future parliaments. Yet, on the other hand, the expiration of a clause may remove a burden. This part concerns the situation when an election takes place between the adoption of a sunset clause and its expiration. The Parliament which is formed after the election has the option either to renew the Act before the expiration of the sunset clause or to let it expire.

More specifically, if the present Parliament includes sunset clauses that will lapse during the session of a future Parliament, the future Parliament has two options – either to leave the legislation to expire or to renew it. Accordingly, an inherent limit or entrenchment of legislation occurs, as the sunset clause restricts the possible movements of subsequent parliaments and limits their discretion.

The two opposing choices faced by subsequent parliaments are recorded in the debates on the European Union Bill, which was later adopted as the European Union Act, requiring a referendum to take place before the ratification of any European treaty.⁹¹ Before the adoption of the European Union Act, a fruitful debate took place in the House

⁹¹ European Union Act 2011, s 1.

on whether a sunset clause would be approved. The expiration date was set to arise on the dissolution of Parliament in order to have the statute lapse before the convening of a new Parliament.⁹²

A Member of Parliament stated that:

‘The sunset clause puts the onus on a Government after an election to reintroduce the legislation, and no doubt a sensible Government would do that, but if there is no sunset clause, the onus is on the new Government to get rid of the legislation. They could do that by repealing it, but they would then face the anger of the British people for having taken away their referendum rights. A sunset clause is very different from the possibility of repeal after election. The House can repeal any legislation—even, I suspect, treaty obligations’.⁹³

In the House of Lords, Lord Kerr of Kinlochard remarked that:

‘I begin with the constitutional argument. I see two of them. First, the provisions of this Bill are all otiose in this Parliament. The coalition has made it clear that there will in this Parliament be no treaty changes, no transfers of power and no extensions of qualified majority voting. Therefore, there will be no referenda and none of the matters which have engaged us through all these days and nights are of any relevance to this Parliament; they apply only in the next Parliament. I cannot think of any previous constitutional Bill which has had that effect. I can think of no precedent for a Bill that is designed solely to influence future Parliaments. Of course, the letter of the doctrine that one Parliament cannot bind its successor will remain the case, because a new Government could repeal the Act. In my contention, however, the spirit of the doctrine would be much better honoured if there were a requirement for an affirmative decision as a first act of each new Parliament that the provisions of this Act should continue. My second constitutional argument concerns the fact that the referenda called for in the Bill would in every case be asking-whatever the substance of the issue -the question, “Do you wish to overrule your Government and your Parliament?”. Before the referendum stage was reached the Government must by definition be in favour of the measure, because they all require unanimity in Brussels and both Houses of Parliament would have voted for the measure before the referendum question. The result of the referendum, if it was no, would be that an Act of Parliament was thereby revoked. I can think of no precedent for that. It has not applied to any past referendum in this country. In my contention, a referendum called for in this Bill is a direct undercutting of parliamentary sovereignty. I believe it entirely right that each successive Parliament should be asked whether it wished its sovereignty to be undercut in the way provided for in this Bill, and that is why I favour a sunrise clause’.⁹⁴

⁹² European Union HL Bill (2010- 2012) [55] s 15 ‘Part 1 and Schedule 1 shall expire on the day on which the Parliament in which this Act is passed dissolves’.

⁹³ HC Deb 11 July 2011 vol 531 col 85.

⁹⁴ HL Deb 15 June 2011 vol 529 col 809.

Indeed, both MPs highlighted the influence of the present Parliament on those that would follow. Having said that, sunset clauses reveal an interesting interaction between present and subsequent parliaments. As a result, sunset clauses reveal the inter-temporal dimension of the separation of powers.

In fact, Posner and Vermeule remark that ‘sunset clauses are the mirror image of entrenching clauses and might also be said to control the authority of later legislatures: An entrenching clause forbids the later legislature to prevent a statute from remaining in force by an affirmative repeal, while the sunset clause forbids the later legislature to allow a statute to remain in force by declining to repeal’.⁹⁵ Consequently, the use of sunset clauses might be regarded as a limit to the way the future parliament would exercise its power. From a different perspective, Calabresi, recognises the implication of such clauses to future parliaments, as he claims that ‘[sunset clauses] only deprives a past majority of the benefit of inertia and gives it to those who object to the laws’.⁹⁶

If a later Parliament wishes to re-enact the specific legislation, it is evident that the legislative agenda is not formed by that Parliament but by the earlier Parliament. The time pressure and the loss of control over the agenda are critical elements in understanding the burden imposed, as the later Parliament has to comply with the deadline set by its ancestor and is obliged to form its agenda according to the sunset clause.⁹⁷

In contrast, and on the assumption that ordinary legislation imposes a burden on successive parliaments, the expiration of a sunset clause may have the exact opposite effect, removing the burden. An example of legislation imposing a burden on subsequent

⁹⁵ Eric A Posner, Adrian Vermeule, ‘Legislative Entrenchment: A Reappraisal’ [2002] 111 Yale Law Journal 1665, 1676.

⁹⁶ Guido Calabresi, *A Common Law for the Age of Statutes* (Lowboy Exchange 1999) 61.

⁹⁷ Regarding the importance of agenda control see Richard D McKelvey, ‘Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control’ (1976) 12 Journal of Economic Theory 472.

parliaments is the requirement of a referendum before a bill becomes statute.⁹⁸ Indeed, Roberts and Chemerinsky argue that ‘sunset clauses are the antithesis of entrenching legislation. A sunset clause frees future legislatures from being constrained even by the existence of a law’.⁹⁹

Several scholars have approached this phenomenon from different perspectives. For instance, Dixon and Ginsburg argue that a sunset clause, among other mechanisms, is a form of delegation to future legislators: ‘Delegating to legislatures also makes sense in thinking about error costs. If the issue is one on which the consequences of the policy will not be immediately apparent, then delegating to a future legislature shifts the decision to a body that will have superior information’.¹⁰⁰ Among other mechanisms, such as constitutional vagueness, flexible constitutional amendment rules and mandatory review periods, ‘sunset clauses are all potentially valuable mechanisms of reducing error costs’.¹⁰¹

The prospective effect of sunset clauses on future parliaments depends on the nature of the law. To the extent that sunset clauses set the agenda for subsequent parliaments, such clauses impose a burden on the latter. On the other hand, on the assumption that ordinary legislation imposes a limit on future parliaments, sunset clauses

⁹⁸ Nonetheless, according to the traditional view on Parliamentary Sovereignty, subsequent Parliaments can repeal the requirement of referendum and consequently there is no burden. See HWR Wade, ‘The Basis of Legal Sovereignty’ (1955) 13 Cambridge Law Journal 172, 176. However, this point of view undermines the effect of path dependence and legislative inertia. Posner and Vermeule remark that some policies might be entrenched due to path dependence and inertia. See Eric A Posner, Adrian Vermeule, ‘Legislative Entrenchment: A Reappraisal’ (2002) 111 Yale Law Journal 1665, 1676.

⁹⁹ John C Roberts, Erwin Chemerinsky, ‘Entrenchment of Ordinary Legislation: A reply to Professors Posner and Vermeule’ [2003] 91 California Law Review 1773, 1784. They endorse as well that sunset clauses may be a burden to future legislators as they admit that ‘It is quite true that a sunset provision makes life harder for legislators who continue to support the legislation because they have to recreate their legislative majority and overcome practical obstacles to legislative action all over again when sunset looms’. See *ibid* at 39.

¹⁰⁰ Rosalind Dixon, Tom Ginsburg ‘Deciding not to decide: deferral in constitutional design’ (2011) 9 International Journal of Constitutional Law 636, 646.

¹⁰¹ *Ibid* 652.

might have the exact opposite effect. Instead of imposing a limit, their expiration might remove it.

C. Sunset Clauses in Defence of Parliamentary Sovereignty

The previous two parts have shown the interaction of such clauses with the separation of powers and have revealed the chronological dimension to the separation of powers and the inter-temporal interaction between the institutions. This section now considers the interaction between the two bedrocks of the UK constitution, the separation of powers and parliamentary sovereignty, and defines the role of sunset clauses.

It will be argued that through the inclusion of sunset clauses, Parliament safeguarded its sovereignty from the expansion of the judiciary's role after the adoption of the Human Rights Act in 1998. The discussion of the first part builds on the longstanding and constructive scholarship on the evolution of the UK Constitution, which is ongoing and concerns the true nature and real meaning of the separation of powers as well as parliamentary sovereignty.¹⁰²

The sovereignty of Parliament, or in other words the supremacy of Parliament as it is also described,¹⁰³ is a doctrine well-respected in the United Kingdom, as all constitutional and political theorists agree that it is the cornerstone of the United Kingdom constitutional theory.¹⁰⁴ Dicey crystallised the concept, famously saying that 'Parliament thus defined has, under the English constitution, the right to make or unmake any law

¹⁰² Regarding the evolution of the UK Constitution, see Elizabeth Wicks, *The Evolution of a Constitution* (Hart Publishing 2006).

¹⁰³ See AW Bradley, KD Ewing, *Constitutional and Administrative Law* (14th edn, Pearson Education 2007) 55; WI Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) Ch 4.

¹⁰⁴ AV Dicey, *Introduction to the Study of the Law of the Constitution Vol I* (JWF Allison ed, OUP 2013) 27; Jeffrey Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Clarendon Press 1999) 1.

whatever; and, further, that no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament'.¹⁰⁵

Parliamentary sovereignty and the separation of powers are two cornerstones of the UK constitutions. Although these two doctrines are distinct from each other, their interaction is inevitable. Masterman asserts that 'the role and powers of Parliament are key to any understanding of the UK constitution, and therefore, to any understanding of the separation of power with the constitution'.¹⁰⁶

After the entry of the United Kingdom into the European Union, the doctrine of parliamentary sovereignty has suffered a series of incursions.¹⁰⁷ One of the first limitations may have been realised in the *Factortame* litigation,¹⁰⁸ and subsequently the adoption of the Human Rights Act in 1998 had great influence.¹⁰⁹ Lord Hope, in his 2005 decision in *Jackson v Attorney General*, remarked that 'our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute'.¹¹⁰

It is commonly accepted that according to section 4 of the Human Rights Act, a distinct dialogue between Parliament and the courts occurs, as the courts declare that a specific provision is not compatible with Convention Rights and subsequently Parliament

¹⁰⁵ AV Dicey, *Introduction to the Study of the Law of the Constitution Vol I* (JWF Allison ed, OUP 2013) 27.

¹⁰⁶ Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011) 20.

¹⁰⁷ Concerning the influence of EU law on the doctrine of Parliamentary Sovereignty see JWF Allison, *English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 103ff.

¹⁰⁸ *Factortame Ltd v Secretary of State for Transport (no 2)* [1991] 1 All ER 70 (HL).

¹⁰⁹ Tomkins admits that the incorporation of the European Convention of Human Rights into the law of the United Kingdom contributed to the strengthening of the judges' role. See Adam Tomkins, 'The Rule of Law in Blair's Britain' (2007) 26 *University of Queensland Law Journal* 255, 277. In addition, the independence of the courts was further advanced, and the separation of powers was enhanced, with the adoption of the Constitutional Reform Act 2005. See JWF Allison, *English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 94-5.

¹¹⁰ *Jackson and others v Attorney General* [2005] UKHL 56 [104].

may debate whether it will amend or replace the relevant provision taking into account the court's decision.¹¹¹

Furthermore, while Masterman states that the 'separation of powers in the UK is both defined and delimited by the doctrine of parliamentary sovereignty and the decisions it takes over where governmental competence may lie at a given time',¹¹² he goes on to admit that 'separation of powers is increasingly used as a tool of judicial reasoning capable of lending coercive support to limitations placed on the executive and possibly Parliament'.¹¹³

On the other hand, Ewing remarks that 'although it is purported to reconcile in "subtle" form the protection of human rights with the sovereignty of Parliament (a claim even more credible after an important but unsung Commons amendment), the Act also represents an unprecedented transfer of political power from the executive and legislature to the judiciary, and a fundamental re-structuring of our "political constitution"'.¹¹⁴

More controversial is the stance of Bogdanor, who argues that

'The constitutional reforms implemented since 1997 have fundamentally altered the balance between the main institutions of government - the legislature, the executive and the judiciary. (...) The consequence may be summarised by saying that the idea of the sovereignty of parliament has been replaced by that of the separation of powers, so putting Britain on the path to becoming a genuine constitutional democracy'.¹¹⁵

Irrespective of the divergent views on the impact of the developments in the constitutional framework of the UK, it is undeniable that the recent developments strengthen the

¹¹¹ Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707; R Clayton, 'Judicial Deference and "Democratic Dialogue", the Legitimacy of Judicial Intervention under the Human Rights Act 1998' [2004] *PL* 33; Tom R Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] *Public Law* 306; Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009) 10.

¹¹² Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011) 23.

¹¹³ *Ibid* 244.

¹¹⁴ KD Ewing, 'The Human Rights Act and Parliamentary Democracy' [1999] *Modern Law Review* 79.

¹¹⁵ Vernon Bogdanov, *The New British Constitution* (Hart Publishing 2009) 285.

judiciary, underpin further the separation of powers and affect at least contemporarily the doctrine of parliamentary sovereignty to a greater or lesser extent.

A main feature in the aforementioned, vigorous debate is the expansion of the role of the judiciary through the adoption of the Human Rights Act and the Constitutional Reform Act, and the judiciary's responsibility to evaluate the compatibility of acts of Parliament with Convention Rights. Nonetheless, the way Parliament reacts to a Declaration of Incompatibility is meaningful in the preservation of its sovereignty and sunset clauses may have a crucial role to play.

Parliament's reaction to a declaration of incompatibility was discussed during the adoption of the HRA, and was a central issue relating to parliamentary sovereignty.¹¹⁶ Gardbaum, comparing the approach of the United States (which gives the authority to courts to strike down legislative acts) with the Commonwealth model of interaction between the courts and Parliament, remarks that:

'Between 1982 and 1998, each of the Commonwealth countries of Canada, New Zealand, and the United Kingdom – countries that were previously among the very last democratic bastions of traditional legislative supremacy – adopted a bill of rights in a form that self-consciously departed from the American model by seeking to reconcile and balance the rival claims, to create a middle ground between them rather than adopt a wholesale transfer from one pole to the other. Most noticeably, while granting courts the power to protect rights, they decouple judicial review from judicial supremacy by empowering legislatures to have the final word'.¹¹⁷

¹¹⁶ The original proposal was to give Ministers the power to enact legislation replacing the incompatible piece of legislation with the Convention Rights. However, this approach was rejected as inconsistent with Parliamentary Sovereignty. Ewing confesses that 'the power which it was proposed to confer on ministers was extraordinary, in the sense that it would not be confined to a power to amend legislation to the extent necessary to deal with the incompatibility, but could include "such incidental, supplemental, consequential and transitional provision as the person making [the order] considers appropriate"'. Although these proposals were warmly supported in some quarters, they were strongly criticised as "unnecessary and unconstitutional" in others, with concern being expressed about "Henry VIII trampling through the statute book". The offending clause (10) was amended at the committee stage in the Commons, in perhaps the most significant victory in the parliamentary history of this particular Bill. The result is to restore the principle that primary legislation should be amended or repealed only by primary legislation, and to this extent the Act gives rather greater weight to the government's commitment to parliamentary sovereignty than had originally been proposed, by restoring Parliament's authority in the legislative process'. See KD Ewing 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *Modern Law Review* 79, 93.

¹¹⁷ Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 709.

Nonetheless, sunset clauses might be a useful mechanism to permit Parliament to respond promptly to courts' decisions, thereby reversing their effect. Interestingly, following the first decision of the Supreme Court that found a piece of legislation incompatible with the Convention Rights, Parliament responded immediately, adopting legislation with a sunset clause. To be more specific, the Court (at that time House of Lords) held on 16 December 2004 that the measure of indefinite detention of foreign suspects for terrorism without trial, introduced with the Anti-Terrorism, Crime and Security Act in 2001,¹¹⁸ was incompatible with the Human Rights Act.¹¹⁹

Parliament had limited time to enact new legislation replacing the indefinite detention measure with a substitution, as on March 14 the detention orders were about to expire.¹²⁰ The Secretary of State introduced the Prevention of Terrorism Bill in Parliament for a first reading on February 22 in 2005,¹²¹ proposing the measure of control orders.¹²² Due to the fast track procedure, the Bill was fiercely debated, and the sunset clause amendment proposed by the Lords was a point of disagreement between the Commons and the Lords and indeed caused delay.¹²³ As the Government did not have the privilege of time, it eventually compromised in order to replace the 'indefinite detention' measure with the new piece of legislation.¹²⁴

¹¹⁸ s 23.

¹¹⁹ *A v Secretary of State for the Home Department* [2004] UKHL 56.

¹²⁰ The Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2004 SI 2004/751, s 2. For further discussion on the political environment at that time see Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9 *International Journal of Constitutional Law* 172, 185

¹²¹ HC Deb 22 February 2005 vol 431 col 186.

¹²² Prevention of Terrorism HC Bill (2004 - 2005) [61].

¹²³ See Ch IV.

¹²⁴ Lord Owen stated that 'And so you come to the sunset clause. It seems to me that the sunset clause is purely and simply a delaying mechanism in circumstances where we are ready not to exercise our delaying power on this legislation. It is a way of effectively retaining the power of delay. I do not feel very strongly

In addition, in 2010 the UK Government passed the Terrorist Asset-Freezing (Temporary Provisions) Act, which was limited in duration through a sunset clause in section (1).¹²⁵ This Act was a parliamentary response to the Supreme Court decision in *Ahmed v HM Treasury*, which invalidated terrorist orders, and according to which the funds of suspects supporting terrorism were frozen.¹²⁶ In this case the sunset clause was introduced by the Government with the aim of maintaining the invalidated terrorism orders until a new and permanent framework was adopted.¹²⁷

The temporary nature of the law permits Parliament to adopt new legislation without delay, reversing the effect of judicial decisions, and therefore reasserting the power to initiate legislation. It is remarkable, though, that sunset clauses were used in the United States as a mechanism to respond to a US Supreme Court decision and reverse its effect. In 1990 the US Supreme Court held as unconstitutional the Indian tribal jurisdiction over non-members of the tribe.¹²⁸ Thereafter, Congress amended the Indian Civil Rights Act to include the power to ‘exercise criminal jurisdiction to all Indians’¹²⁹ and consequently reversed the US Supreme Court Decision *Duro v Reina*.¹³⁰

about whether it is a nine months' delay, a year's delay, 18 months' delay or even, at the uppermost limit, two years' delay; however, I cannot understand the argument of the Lord Chancellor that we are in some way challenging the House of Commons in an unconstitutional way by voting for a sunset clause'. See HL Deb 10 March 2005 vol 670 col 1040.

¹²⁵ Terrorist Asset-Freezing (Temporary Provisions) Act 2010, s 1.

¹²⁶ [2010] UKSC 2 [83].

¹²⁷ Terrorist Asset - Freezing (Temporary Provisions) HC Bill (2009-10) Explanatory Notes [19].

¹²⁸ *Duro v Reina* (1990) 495 US 676 (US SC).

¹²⁹ Indian Civil Rights Act, 25 USC para 1301.

¹³⁰ L Scott Gould, ‘The Congressional Response to *Duro v. Reina*: Compromising Sovereignty and the Constitution’ (1994) 28 *University of California Davis* 53, 63; Mark D Rosen, ‘Multiple Authoritative Interpreters of Quasi - Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act’ (2000) 69 *Fordham Law Review* 479, 571.

Parliamentary sovereignty is the doctrine which epitomises the constitutional law of the United Kingdom. Recent developments in the constitutional framework have strengthened the role of the courts. However, the inclusion of sunset clauses defends the doctrine of parliamentary sovereignty against the increasingly prevalent role of the judiciary. Parliament may use sunset clauses in order to react promptly to a court's decision finding legislation incompatible with Convention Rights, and consequently sunset clauses might be used as a mechanism to preserve Parliament's legislative initiative.

Conclusions

The principal focus of this chapter was on the interaction of sunset clauses with the institutional role of Parliament. Thus the scope of this chapter had two main lines of inquiry. The first was to explore the extent to which sunset clauses and their temporary nature affect the institutional role of Parliament, and the second to investigate whether the institutional position of Parliament affects the use of such clauses. As was shown, the use of sunset clauses has a variety of normative implications in relation to the separation of powers.

Although the pure theory of the separation of powers limits the institutional aspect of such clauses, since no interaction between the branches of government is prescribed, the partial separation of powers, depending on its application, reveals a variety of conclusions. The use of sunset clauses may affect the separation of powers, as sunset clauses, due to their temporary nature, may endorse constitutional experiments reshaping the separation of powers model. In addition, sunset clauses may have a role to play in safeguarding the separation of powers, as their effect of entrenching the role of the

legislature in the end prevents the distortion of the separation of powers which occurs through the centralisation of the legislative initiative.

As regards the influence of the separation of powers model on the use of sunset clauses, it is apparent, first of all, that if a system of governance is based on consensus, such as the presidential system of the United States, sunset clauses might have a more crucial role in legislation. Second, the institutional position of parliament has a significant role on the inclusion of such clauses in legislation. As it was shown, the more independent the legislative branch, the more likely it is that sunset clauses will be included in legislation.

Interestingly, recent constitutional developments in the United Kingdom provide us with useful conclusions. First, the debates on the European Bill revealed that sunset clauses, as a method of entrenching legislation, may impose a procedural burden on future parliaments, while they might also have the exact opposite effect, as the expiration date may free future parliaments from procedural burdens. As a consequence, the use of sunset clauses highlights both the interaction between successive parliaments and the inter-temporal dimension of the separation of powers.

Finally, due to their temporary nature sunset clauses allow Parliament to respond promptly to judicial decisions finding legislative acts incompatible with the Convention Rights, and therefore to preserve the legislative initiative. This was the case in respect of the adoption of the control orders in 2005, as soon as the Supreme Court found that the indefinite detention measure was incompatible with the Human Rights Act.

CHAPTER VI: RULE OF LAW AND SUNSET CLAUSES

We suggested that it [the Supplies and Services (Transitional Powers) Bill] should be put in the expiring Laws Continuance Act, which would enable it to be judged every year

W Churchill, House of Commons 08 August 1947

Introduction

The previous chapters considered why legislators add sunset clauses to legislation, what considerations prompt the use of sunset clauses and how such clauses interact with the separation of powers. This chapter concludes the analysis of the constitutional value of sunset clauses and, in particular, explores the compatibility of such clauses with the rule of law. Their compatibility has been challenged on substantive and procedural grounds, through their use in emergency legislation suspending human rights and their temporary quality respectively.

The systematic analysis of such clauses in the historical parts and in the contemporary era showed that the ultimate effect of such clauses is often far reaching and creates an unstable *modus vivendi* as regards civil liberties. In addition, the temporary character of laws appears on the face of things not to accord with the perception of continuity and stability of the legal order. It is further argued that they burden the legislative procedure and increase the workload of the legislature. Finally, the expiration of the acts is said to increase legal uncertainty.

The concept of the ‘rule of law’ is rooted in early Western philosophy with the scripts of Aristotle.¹ The term was later popularised by Dicey, as Lord Bingham accurately

¹ Aristotle, *Politics* 3.16 ‘Wherefore it is thought to be just that among equals every one be ruled as well as rule, and therefore that an should have their turn. We thus arrive at law; for an order of succession implies law. And the rule of the law, it is argued, is preferable to that of any individual. On the same principle, even

stressess.² Since its crystallisation, the rule of law has inspired thinkers such as Allan,³ Lord Bingham,⁴ Craig,⁵ Dworkin,⁶ Galligan,⁷ Raz,⁸ and Unger,⁹ all of whom have expounded upon different facets of the notion. Indeed this array of divergent views confirms that the rule of law is an ‘essentially contested concept’.¹⁰ Waldron first approached the rule of law from this perspective in 2002 during the legal controversy surrounding the recounting of votes in Florida in the 2000 Presidential elections.¹¹

Although a great deal of literature elaborates on the concept from almost every conceivable dimension, as Paul Craig notes,¹² there is relatively little discussion of its application to temporary legislation, despite its widespread contemporary prominence.

if it be better for certain individuals to govern, they should be made only guardians and ministers of the law’. Regarding the rule of Law in Ancient Greece see Edward M Harris, *The Rule of Law in Action in Democratic Athens* (OUP 2013).

² See Tom Bingham, *The Rule of Law* (Allen Lane 2010) 3.

³ TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (OUP 1995).

⁴ Tom Bingham, *The Rule of Law* (Allen Lane 2010) 3.

⁵ Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] PL 467.

⁶ Ronald Dworkin, *A Matter of Principles* (OUP 1985).

⁷ DJ Galligan, *Law in Modern Society* (OUP 2007).

⁸ Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 LQR 195.

⁹ Roberto Mangabeira Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (Free Press 1976).

¹⁰ Gallie, who introduced the term ‘essential contested concept’ to the Aristotelian Society on 12 March 1956, defines it as ‘concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users’, see WB Gallie ‘Essentially Contested Concepts’ (1956) 56 Proceedings of the Aristotelian Society 167, 169.

¹¹ Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (In Florida)’ (2002) 21 Law and Philosophy 137, 148. For further elaboration on the idea that the rule of law is an ‘essential contested concept’, see David Collier, Fernando Daniel Hidalgo and Andra Olivia Maciuceanu, ‘Essentially Contested Concepts: Debates and Applications’ (2006) 11 Journal of Political Ideologies 211.

¹² Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] PL 467.

Given that there are divergent views on the ‘rule of law’, the purpose of this chapter is neither to restrict the analysis of sunset clauses to only one meaning of the rule of law, nor to formulate a new one. However our understanding of sunset clauses and their constitutional value will be improved by focusing on specific aspects of the rule of law relevant to such clauses based on the construction of the clause and the type of the legislation into which such clauses are incorporated.

This chapter seeks to locate temporary legislation within an overarching theoretical framework of the rule of law; to identify the normative implications of the use of temporary legislation with regard to the promulgation of experimental laws; to clarify whether the sunseting of a law has an impact on the guiding of conduct; to consider such clauses from the perspective of ambiguity; and to consider also the impact of such clauses on human rights when used in emergency legislation.

The analysis in this chapter aims to show how and under which conditions the use of sunset clauses meets the standards of the substantive conception of the rule of law. On the other hand, drawing on formal conceptions of the rule of law, it aims to articulate the undervalued benefits of the use of sunset clauses and thereby justify their retention. The ultimate goal of this chapter is not to approve or disapprove the use of sunset clauses, but, paraphrasing Galligan in his study on law in modern society,¹³ to suggest that that sunset clauses shall not taken ‘too seriously, but seriously enough’.

This chapter, therefore, will evaluate the utility and constitutional legitimacy of sunset clauses, with regard to both formal and substantive conceptions of the rule of law.¹⁴

Structurally reflecting this dichotomy, part A of this chapter will examine the impact of

¹³ DJ Galligan, *Law in Modern Society* (OUP 2007) 4ff,

¹⁴ With regard to the former, Craig includes concerns about the enactment of laws and their procedural effects, and with regard to the latter, he includes concerns about fundamental rights which form core features of our legal system. Besides Craig, Dyzenhaus follows the same dichotomy between substantive and procedural conceptions on the rule of law. See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006) 2.

sunset clauses on the formal, and part B the substantive dimension. It must be noted that the implications upon the formal conception of the rule of law vary according to a clause's construction. Thus part A will evaluate several common legal constructions and propose guidance to legislative drafters in order to remedy constructions that could potentially infringe the rule of law. Part B will focus on the impact of temporary legislation on human rights, specifically on how this effect can be evaluated and limited. It will show that despite the fact that legislators aim to enhance the rule of law with sunset clauses in emergency legislation, the outcome is the opposite when such clauses are used together with Henry VIII clauses, or when the duration of the sunset clause is particularly long.

A. Rule of Law and the Construction of the Clause

This first part considers sunset clauses from the perspective of formal conceptions of the rule of law.¹⁵ It will be argued that the various constructions of sunset clauses, as set out in previous chapters, have different impacts on the formal conception of the rule of law. In particular, as regards sunset clauses, this part aims to demonstrate that formal conceptions of the rule of law address (1) the temporary quality of legislation (2) the clarity of the clause's construction, specifically concerning expiration and (3) the legislative process of enacting and renewing them. The impact of these features on the standards of legal stability, certainty and proper procedure will be examined and alternative constructions proposed where necessary.

This first part has two principal aims. First, it will demonstrate that although temporary legislation does not promote stability and continuity of laws, it complies with

¹⁵ Craig notes that 'formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life etc.); and the temporal dimension of the enacted norm (was it prospective or retrospective etc.)'. Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467.

the rule of law to a certain extent because temporary legislation prevents laws becoming obsolete. Second, it will show that sunset clauses permit legislators to evaluate and improve laws. The second part shows that vague expiration dates and ambiguous legal effects of the expiration do not meet the standards of the rule of law. Finally, the third part notes that the renewal of sunset legislation without parliamentary participation due to Henry VIII clauses is problematic. Consequently it urges that the construction of the clauses should reinforce the requirement for parliamentary intervention in the renewal process.

I. The Rule of Law and the Temporary Nature of Laws

i. Sunset Clauses for Flexible Legislation

Generally, the rule of law demands that the law should guarantee stability and continuity. Raz mentions that ‘stability is essential if people are to be guided by law in their long term decisions’,¹⁶ and that ‘uncertainty generated by instability of law also affects people’s planning and action’.¹⁷ Prima facie, the sunset of a law is not in accordance with this requirement and has a plethora of practical implications.¹⁸ However, it is counter-argued that the absolute and eternal force of specific laws is not always desirable and, to an extent, the flexibility is acceptable.¹⁹ In light of this counterargument, this section suggests that sunset clauses comply to an extent with the rule of law, because they enrich the law with desirable flexibility.

¹⁶ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 215.

¹⁷ *Ibid* 215 ct 5.

¹⁸ Madison namely argues that ‘all the rights depending on positive laws, that is, most of the rights of property would become absolutely defunct; and the most violent struggles be generated between those interested in reviving and those interested in new-modelling the former State of property’ and he adds that ‘the uncertainty incident to such a state of things would on one side discourage the steady exertions of industry produced by permanent laws, and on the other, give a disproportionate advantage to the more, over

Ashford v Thornton highlights this age-old legal issue. In 1818, Abraham Thornton was accused of raping and murdering Mary Ashford. Although the jury found him not guilty during the trial at first instance, the elder brother of Mary Ashford, William, filed a writ of appeal before the court of King's Bench. In response to the appeal, Thornton pleaded not guilty and invoked his right to trial by battle or wager of battle. His counterclaim was approved by the court despite the fact that the right to trial by battle had been inactive for centuries. The Lord Chief Justice stated that 'the general law of the land is in favour of the wager of battle and it is our duty to pronounce the law as it is, and not as we may wish it to be'.²⁰

This decision highlights the fact that the doctrine of desuetude is not applicable in England. Desuetude (desuetudo), unenforced in common law countries, originates in Roman law, and in its early incarnation was a method of repealing inactive custom.²¹ The contemporary version of the doctrine is yet broader and prescribes that even statutory legislation unused for a long time becomes obsolete and does not have legal effect.²² As a result, the right to trial by battle in England, though unused for centuries,²³ was held to be

the less, sagacious and interpreting part of the Society': see Letter from James Madison to Thomas Jefferson (February 4, 1790) in JCA Stagg, ed, *The Papers of James Madison* (Digital edn, University of Virginia Press 2010) 20. In addition, this deficiency is acknowledged by the Mandelkern report as 'in some circumstances, sunset (...) clauses would increase uncertainty and thus have an adverse effect on the investment climate and on individuals' confidence in the protection afforded them by regulation. This would be particularly the case where the regulation required investment in new equipment or facilities or dealt with the rights of individuals or businesses.' Mandelkern Group on Better Regulation, *Final Report* (13 November 2001) 18.

¹⁹ Text to nn 26 - 32 in Ch VI.

²⁰ *Ashford v Thornton* (1818) 106 ER 149, 169 (KB).

²¹ William Warwick Buckland, *Roman Law & Common Law: A Comparison in Outline* (2nd edn, CUP 1952) 17. See *Black's Law Dictionary* (Bryan A Garner ed, 8th edn, Thomson West 2004) 'desuetude'.

²² Appleton Morgan, 'American Law and the Desuetudo' (1916) 50 *American Law Review* 815.

²³ Regarding the origin and the application of the right to battle, see MJ Russell, 'I Trial by Battle and the Writ of Right' (1980) 1 *Journal of Legal History* 111.

in force at that time and thus was a binding law regardless of its compatibility with the contemporary notion of legality and justice.

In the same year, Lord Hamilton, in reference to this case, stated that ‘in England, the old law of appeal of murder had lately occupied the public’s attention. The judges had declared that trial by battle was the law of the land. There was no one who heard him who did not regret that this was the law; but no one would therefore say that the judges had the power of annulling the law’.²⁴ The application of such outdated law prompted the legislature to put forward a Bill abolishing the right in Parliament²⁵ via an expedited process, with three readings in the same night.²⁶ In this respect, one cannot deny the need for the regulation of outdated legislation which would complement Parliamentary process.

English law has never incorporated the doctrine of desuetude, and the difficulty of changing an entire aspect of our legal heritage cannot be overstated. Yet, sunset clauses achieve the same purpose without drastically altering the nature of a well-established legal tradition, and form a more efficient alternative to Parliamentary intervention in each problematic case. Scholarly opinion is inclined to agree – among them, Raz,²⁷ Fuller²⁸ and Hart.²⁹ Hence, constitutional experts recognise the undesirability of the absolute, and the need for ‘relativism’, in law. The question then turns to where the line is to be drawn

²⁴ HC Deb 20 May 1818 vol 38 col 840.

²⁵ Appeal of Murder, etc. Act 1819 (59 Geo III c 46).

²⁶ MJ Russell, ‘II Trial by Battle and the Writ of Right’ (1980) 1 *Journal of Legal History* 135, 157.

²⁷ Raz, although he considers the stability of the laws to be a main tenet of the rule of law, explicitly refers to ‘relatively stable’ laws, and furthermore notes that ‘they [laws] should not be changed too often’. Joseph Raz, *The Authority of Law Essays on Law and Morality* (2nd edn, OUP 2009) 214.

²⁸ Fuller admits that ‘it is difficult to imagine for example, a constitutional convention unwise enough to resolve that no law should be changed more often than, say, once a year’. Lon L Fuller, *The Morality of Law* (Yale University Press 1969) 79.

²⁹ Hart also identifies that the ‘acceptance of a rule by a society at one moment does not guarantee its continued existence. There may be a revolution: society may cease to accept the rule. This may happen either during the lifetime of one legislator’. HLA Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, OUP) 59.

between the absolute and absolutely uncertain.³⁰ Are sunset clauses a constitutionally legitimate mechanism of policing this boundary and ensuring justice for citizens? Or do they cause more injustice than they remedy? In addition, are we to justify them on precarious theoretical grounds?

The creation of temporary legislation by a sunset clause gives legislators flexibility, which is occasionally more important than the stability of permanent laws. Posner and Vermeule point out that ‘the “default” — that statutes persist until repealed — creates a compromise between stability and flexibility, but this balance is more appropriate for some policy areas than others.’³¹ Indeed, Congress recognizes as much when it provides certain statutes with sunset provisions, reflecting the view that greater flexibility than the norm is needed in that policy area’.³²

In conclusion, it is evident that the stability and continuity of laws is not always in accordance with the rule of law. But the impact of unseating a law has is twofold. On the one hand it does not entrench the stability and continuity of laws, but on the other it prevents the distortion of outdated laws since the automatic expiration date removes them from the statute books. Under the latter condition, the sunset clause is desirable and accords with the rule of law. A fortiori, in specific areas, such as economic policies and state of art regulations, where conditions are constantly subject to rapid development, such clauses are highly recommended.

³⁰ Allison accurately points out that the balance between change and continuity is a key constitutional principle. See JWF Allison, *English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 205ff.

³¹ About policies that flexibility is a substantial value such as taxation and emergency laws: see Ch IV.

³² Eric A Posner, Adrian Vermeule, ‘Legislative Entrenchment: A Reappraisal’ (2002) 111 *Yale Law Journal* 1665, 1672.

ii. Better Regulation

In chapter IV it was shown that legislators use sunset clauses in specific areas, for instance in financial law, in order to promote better regulation.³³ To this end, the inclusion of a sunset clause permits legislators to review their past enactments and to evaluate them according to their practice, as well as to experiment on innovative policies and new institutions. This section considers the other side of the coin, in the sense that temporary legislation is a burden in terms of the legislature's time, and it will address possible solutions to this procedural deficiency.

For the purposes of this discussion, good law³⁴ is the need to ensure that the technical quality of all legislation is sustained and improved; bad laws are those that, due to inefficient regulation, create loopholes or produce unreasonable and unfair results. Accordingly, the aim of the legislator is to draft and enact just and watertight legislation.³⁵ Indeed the rule of law prioritises the need to maintain 'good law'.³⁶

In relation to sunset clauses, Gersen demonstrates that 'from an informational perspective, temporary legislation provides concrete advantages over its permanent cousin by specifying windows of opportunity for policymakers to incorporate a greater quantity

³³ Text to nn 118-39 in Ch IV.

³⁴ In *Leviathan* Thomas Hobbes ponders the meaning of 'good law', which is 'To the care of the Sovereign, belongeth the making of Good Laws. But what is a good law? By a Good Law, I mean not a just law: for no law can be unjust. The law is made by the sovereign power, and all that is done by such power, is warranted, and owned by every one of the people; and that which every man will have so, no man can say is unjust. It is in the laws of a Commonwealth, as in the laws of gaming: whatsoever the amesters all agree on, is injustice to none of them. A good Law is that, which is needfull, for the good of the people, and withal perspicuous'. Thomas Hobbes, *Leviathan* (first published 1651, Forgotten Books 2008) 236. Moreover in 1789 Edmund Burke famously observed that 'Bad laws are the worst sort of tyranny'. Edmund Burke, *Speech of Edmund Burke at the Guildhall in Bristol Previous to the late Election in the City* (London 1780) 34.

³⁵ Sir John Laws argues that one of the components of the rule of law is fairness. 'The third elementarily [fairness], requires that like cases be treated alike. It demands also an insistence on fair procedures'. Sir John Laws, 'The constitution: morals and rights' [1996] PL 622, 630;

³⁶ In fact the Select Committee on the Constitution characterized the 'need to maintain good law' as a constitutional principle. See Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-9, 116-II) [16].

and quality of information into legislative judgments. By redistributing the decision costs of producing legislation, temporary measures also facilitate experimentation and adjustment in public policy'.³⁷ Remarkable are the words of Lord Cobbold, who said:

'[M]y Lords, as a humble Back - Bencher from the Cross Benches who has listened to the debate in both this House and looking down from the Gallery in the other, I am amazed that there is still such a political battle on issues on which we all agree. The only issue that could solve the problem is the sunset clause. Whatever the faults, benefits or good qualities of the legislation, all the sunset clause asks is the chance to have a look at it again in a year's time'.³⁸

In addition, during the discussion of the Football Disorder Bill an MP stated that

'[B]y and large, hon. Members on both sides of the House recognise the need to be broadly reasonable and they recognise that the Government has a right, with a democratic majority, to pass their legislation. However, they also recognise the right and duty, to which Madam Speaker referred yesterday, to challenge legislation if we believe it to be bad. Nothing that has happened today or in another place alters the fact that this is a bad Bill, which has been introduced in haste and which we shall repent at leisure. The only fundamental difference between the Bill and the Dangerous Dogs Act 1989 is that, sadly, the Act did not contain the sunset clause that the Minister has now said the Government intends to accept. The Bill is about tokenism; it is a bad Bill'.³⁹

Thus we see that there is a wealth of evidence in favour of the ability of sunset clauses to empower the legislature to review Acts of Parliament and consequently ameliorate the legal position. While the temporary nature of the laws permits legislators to evaluate the practical implementation of the laws and to consider how to improve them, the legislative body, instead of making new laws, spends its time to reviewing pre- enacted laws. As the legislature has limited time, the extensive use of sunset clauses can overburden the legislative process with the review of temporary laws.

Calabresi refutes this, asserting that 'the most obvious response to the problems caused by the ageing of statutes would be seen to be freeing up of the legislatures so that

³⁷ Jacob E Gersen, 'Temporary Legislation' (2007) 74 Chicago Law Review 247, 263.

³⁸ HL Deb 10 March 2005 vol 670 col 1024.

³⁹ HC Deb 27 July 2000 vol 354 col 1290.

they would find it as easy to revise laws as they do to pass them'.⁴⁰ Nevertheless, he points out that adding sunset clauses to all statutes is unsatisfactory, as it becomes time-consuming and ineffective.⁴¹ This procedural deficiency of sunset clauses was noted in the *Mandelkern* report.⁴²

Theoretically, it is correct to identify the need to retain efficacy of law-making by eschewing sunset clauses in the vast majority of legislation. Indeed, Gersen acknowledges that there is neither theoretical nor empirical evidence that temporary legislation burdens the legislative procedure more than permanent legislation in specific cases.⁴³ In practice, the inclusion of sunset clauses in a small amount of legislation does not overburden the legislature.

That said, both proponents and adversaries of sunset clauses share the common concern that such clauses permit legislators to reconsider their enactment at the expiration of the law. Consequently, sunset clauses promote good drafting of laws and can be a useful tool in ameliorating the quality of the content of the law.⁴⁴ Some argue that while the temporary nature of laws is theoretically compatible with the rule of law, in practice constant re-enactment of legislation overwhelms the legislative process. Therefore, it is recommended that sunset clauses be used in a selective, circumspect and discrete manner.

⁴⁰ Guido Calabresi, *A Common Law for the Age of Statutes* (Lowboy Exchange 1999) 59.

⁴¹ *Ibid* 62.

⁴² Mandelkern Group on Better Regulation, *Final Report* (13 November 2001) 18.

⁴³ Jacob E Gersen, 'Temporary Legislation' (2007) 74 *Chicago Law Review* 247, 263.

⁴⁴ However, this category - the aim for better regulation - has substantive implications, for instance when legislation fulfils these procedural requirements, but is not in accordance with fundamental rights. See text to n 97 in Ch VI .

II. Legal Certainty and the Expiration Date

This part focuses on the impact of sunset clauses on the legal expectations of the citizens. It is widely accepted that expiration of laws does not increase the level of legal certainty. However, the following analysis will show that under certain circumstances, sunset clauses may in fact enhance legal certainty. Furthermore, this part will discuss how the construction of sunset clauses affects the notion of legal certainty.

It will be argued that the construction of the sunset clause, in particular the expiration date and the legal effect of the expiration, should be clear and precise in order to enhance predictability and minimize legal uncertainty. Therefore it will be suggested that certain constructions of the clause should be avoided – specifically, expiration dates dependent upon a condition (also known as conditional sunset clauses),⁴⁵ and the use of sunset clauses coupled with a Henry VIII clause. It is also suggested that the legal effect of the expiration should be noted.

Nowadays, the concept of legal certainty is recognised as a central normative modality of the rule of law.⁴⁶ Arbitrary legislation infringes the rule of law because law is unable to provide sufficient guidance to individuals, who then cannot rely on its terms.⁴⁷

⁴⁵ Regarding the typology of sunset clauses as conditional and unconditional, see text to n 48 in Ch I.

⁴⁶ Sir John Laws, 'The constitution: morals and rights' [1996] PL 622, 630; Danilo Zolo 'The Rule of Law: A Critical Reappraisal' in Pietro Costa, Danilo Zolo (eds), *The Rule of Law: History Theory and Criticism* (Springer 2007) 24.

⁴⁷ Hayek, in his definition on the rule of law, suggested the notion of predictability stating that '(...) stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand-rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge'. FA Hayek, *The Road of Selfdom* (George Routledge & Sons 1944) 54. This definition soon became an issue of controversy. In 1977 Raz wrote an article, later included in his book 'The Morality of Law', where he disputed the primacy of the rule of law as opposed to the different values that law serves. Nonetheless, Raz agreed on the conceptual account of the rule of law in that the law should be such that people are able to be guided by it. Furthermore, he agreed that one of the main principles was that 'if it [the law] is to guide people they must be able to find out what it is. For the same reason its meaning must be clear. An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it'. Joseph Raz, *The Authority of Law Essays on Law and Morality* (2nd edn, OUP 2009) 214 - 28.

Laws must provide a predictable guide to behaviour. As a consequence, the law should be clear in order to guide people in planning their lives.⁴⁸ In fact, certainty was one of the main principles of the epistemology of Auguste Comte when he described his perspective of positivism in ‘The Course in the Positive Philosophy’.⁴⁹ Nonetheless, the concept of the legal certainty and its affiliation to the rule of law was first explored by the German lawyer Gustav Radbruch. It was one of the three precepts that defined law, along with purposive construction and justice.

‘(...) we are confronted with a third postulate concerning law, ranking with the other two [justice and expediency], a third element of the idea of the law: legal certainty. The certainty of the law requires law to be positive: if what is just cannot be settled, then what ought to be right must be laid down; and this must be done by an agency able to carry though what it lays down. So, most oddly, the positivity of the law itself becomes a prerequisite of its rightness: to be positive is implicit in the concept of right law just as much as rightness of content is a task of positive law’.⁵⁰

The construction of the sunset clause in relation to expiration has a twofold impact on the legal expectations of the subjects. On the one hand, it is self-evident that the prospect of the expiration does not promote certainty and a fortiori a vague or conditional expiration date increases the level of uncertainty. On the other hand, inasmuch as the certain expiration date makes the law predictable, the subject can plan accordingly and be guided.

Currently, any construction with a vague and ambiguous expiration date based on a future condition, such as ‘that this statute shall continue in force until the end of the

⁴⁸ Fuller explores the need for clarity explicitly, stating that ‘the desideratum of clarity represents one of the most essential ingredients of legality’ nonetheless, he accurately remarks that there is little discussion: see Lon L Fuller, *The Morality of Law* (Yale University Press 1969) 63. Walker, focusing on anti-terrorism legislation, remarks that ‘Perhaps the most important lesson which can be learnt from the considerable experience of anti-terrorism legislation is that the rule of law demands as much clarity in the law before the crisis or emergency arises’. See Appendix 5: Note by Professor Clive Walker Specialist Adviser to the Committee in Joint Committee on the Draft Civil Contingencies Bill, Draft Civil Contingencies Bill (2002-3, HL 184, HC 1074) 96.

⁴⁹ Harriet Martineau (tr), *The Positive Philosophy of Auguste Comte Vol I* (Calvin Blanchard 1858) 47. ‘There is one liability to be guarded against which may mention here. We must be aware of confounding the degree of precision which we are able to attain in regard to any science, with the certainty of the science itself. The certainty of science, and our precision in the knowledge of it, are two very different things, which have been too often confounded; and are so still, though less than formerly’.

⁵⁰ Kurt Wilk (tr), *The Legal Philosophies of Lask, Radbruch and Dabin* (Harvard University Press 1950) 108.

crisis', would be incompatible with contemporary standards of the rule of law.⁵¹ However, expiration dates were not always definite and legal effects were not always clear. Thus the development of the construction of expiration dates in sunset clauses and their effect on parliamentary history occurred at the same time as the development of the rule of law.

In the early parliamentary period of the 15th century, the cardinal constitutional principle of the legal order was based on the king's personal rule.⁵² The rule of law as we understand it today did not exist and legal certainty was a quality far less closely affiliated to legislation. As a consequence, the vast majority of the sunset clauses, as originally worded, prescribed an indefinite expiration date, since the expression 'to expire until the next parliament' was quite common. Over time, though, the expiration date became more precise. From the late 16th century onwards, no temporary law encompassed an indefinite sunset clause. This development arose for a number of reasons, such as the establishment of parliamentary sessions, as well as the need for certainty and clarity in the law.

Nevertheless, the use of conditional sunset clauses with an indefinite duration occurred in the 20th century under states of emergency, during a series of acts recorded during World War I. The Local Government Act, for instance, provided that 'This Act, except the provisions of sections two, three, sixteen, seventeen, eighteen and paragraph (4) of section twenty three thereof, shall have effect only during the continuance, of the present war and afterwards for such period or periods (if any) not exceeding one year as

⁵¹ Nonetheless, in 2011 a sunset clause with vague expiration date it was recorded, namely the Sovereign Grant Act at section 16, which provides that 'The Sovereign Grant provisions cease to have effect 6 months after the end of the present reign unless continued under subsection 3'. On this occasion the vague expiration date was justified using the substance and the content of the law which is quite topical. See The Sovereign Grant Act 2011, s 16 (1).

⁵² Elizabeth Wicks, *The Evolution of a Constitution* (Hart Publishing 2006) 7.

the Local Government Board may fix; and the Board may fix different periods for different provisions of the Act'.⁵³

Finally, it is worth mentioning the National Registration Act of 1915, because although Parliament included a sunset clause with an uncertain expiration date, at the same time, the clause explicitly states the effects of the expiration.⁵⁴ In fact, the National Registration Act prescribes that 'this Act shall continue in force during the continuance of the present war and no longer, without prejudice, however to the taking or prosecution for any offence committed before the expiration of this Act'.⁵⁵

In addition to the use of indefinite expiration dates, interpretational difficulties and uncertainty surround the use of a sunset clause coupled with the Henry VIII clause. As was discussed in chapter IV, the combination of a sunset clause with a Henry VIII clause results in the neutralisation of the sunset clause.⁵⁶ In practice, the Minister might renew the law indefinitely and as a consequence there is no foreseeable expiration date. In fact the Home Secretary, comparing two proposals (the former having a sunset clause and the second having a sunset clause coupled with a Henry VIII clause), said that 'there is a choice with the legislation. One can take the approach, suggested by the Opposition parties, that [with a sunset clause] there is a defined moment at which anti-terrorist legislation simply disappears. The other approach, which I think is better, is to say that we

⁵³ Local Government (Emergency Provisions) Act 1916, s 24 (2). A similar construction of the sunset is recorded in the Price of Coal (Limitation) Act 1915. Another construction of an uncertain expiration date is recorded in the Munitions of War Act, which prescribes in s 20 that 'this Act shall have effect only so long as the office of Minister of Munitions and the Ministry of Munitions exist: Provided that Part I of this Act shall continue to apply for a period of twelve months after the conclusion of the present war to any difference arising in relation to the performance by the owner of any establishment of his undertaking to carry out the provisions set out in the Second Schedule to this Act notwithstanding that the office of Minister of Munitions and the Ministry of Munitions have ceased to exist'. Munitions of War Act 1915, s 20(2).

⁵⁴ The same construction is found in Coastguard Act 1925, s 2.

⁵⁵ s 16 (2). Same construction as the Maintenance of Live Stock Act 1915, s 4 (3).

⁵⁶ Text to n 19 in Ch IV.

need to have a system that improves the operation of our counter-terrorism legislation, learns from experience and decides how, if necessary, we make amendments'.⁵⁷

The constant renewal of temporary legislation with a Henry VIII clause was a core issue in the case *Willcock v Muckle* in 1951.⁵⁸ The novel question before the court was whether the National Registration Act of 1939, which had both a sunset clause and a Henry VIII clause, was still in force.⁵⁹

Section 12 of the Act 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 respect things previously done or omitted to be done'.⁶⁰ Despite the fact that the emergency had been terminated, and that several other temporary Acts with similar construction, such as the Regional Commissioner Act 1939, had expired,⁶¹ no specific order was issued terminating the present Act.

The Court eventually resolved the issue, holding that the Act was still in force. Interestingly, Lord Doddard CJ confessed that 'this Act was passed for security purposes; it was never passed for the purposes for which it is now apparently being used. To use Acts of Parliament passed for particular purposes in wartime when the war is a thing of

⁵⁷ HC Deb 10 March 2005 vol 431 col 1859.

⁵⁸ [1951] 2 KB 844 (KB).

⁵⁹ *Ibid* 850.

⁶⁰ National Registration Act 1939, s 12.

⁶¹ Section 2 of the Regional Commissioners Act (Expiry) Order in 1946 prescribed that 'it is hereby declared that the leventh day of June, nineteen hundred and forty five, is the date on which the emergency that was the occasion of the passing of the Regional Commissioners Act 1939 came to an end'. See Regional Commissioners Act (Expiry) Order 1946 SR & O 1946/164, s 2.

the past – except for the technicality that a state of war exists – tends to turn law-abiding subjects into lawbreakers, which is a most undesirable state of affairs’.⁶²

In addition, uncertainty surrounds the legal effect of the expiration, which is of equal importance. Concerning the legal effect of the expiration, it is worth mentioning the seminal case *Steavenson v Oliver* in 1841.⁶³ The plaintiff claimed for debt on account of the work he had done as a surgeon and apothecary for certain surgical operations. The defendant’s argument was that the plaintiff did not have the right to practice as an apothecary since the statute had expired due to a sunset clause. Consequently the plaintiff argued that ‘though the act itself may have expired, persons who have acquired rights under it are not to be deprived of those rights because the act has ceased to be in force as a law’.⁶⁴

Although the Apothecaries Act in 1815 first regulated the medical profession in the UK by setting several conditions,⁶⁵ in 1825 an amendment was enacted that entitled several persons to practice as an apothecary.⁶⁶ Nonetheless, the latter statute was of a limited duration due to a sunset clause in section 11 prescribing that ‘this act shall take

⁶² *Willcock v Muckle* (1951) 2 KB 844, 851 (KB).

⁶³ (1841) 151 ER 1024.

⁶⁴ *Ibid* 1026.

⁶⁵ For a detailed analysis of the Act, see SWF Holloway, ‘The Apothecaries’ Act, 1815: A Reinterpretation Part 1 The Origin of the Act’ (1966) 10 *Medical History* 107.

⁶⁶ Apothecaries Amendment Act 1825, s 4 ‘That every person who heretofore has held, or who now holds, or hereafter shall hold a commission or warrant as surgeon or assistant - surgeon in his Majesty's navy, or as surgeon or assistant - surgeon or apothecary in his Majesty's army, or a surgeon or assistant-surgeon in the service of the Honourable the East India Company, shall be entitled to practise as an apothecary in any part of England or Wales, without having undergone any such examination, or received any such certificate, as by the said recited act of the 55th year of the reign of his Majesty King George the Third is directed, and without being liable to any penalty or disability whatsoever imposed by the said recited act on persons who, not having been in practice as apothecaries on the said 1st day of August, 1815, without having been examined and received certificates in the manner directed by the said recited act, commenced practice as apothecaries in any part of England or Wales; and no such person shall be obliged, in order to recover in a court of law any charges claimed by him as an apothecary, to prove that he was in practice as an apothecary on the said 1st day of August, 1815, otherwise than as holding a commission or warrant as surgeon or assistant-surgeon in his Majesty's navy, or as surgeon or assistant-surgeon or apothecary in his Majesty's army, or as surgeon or assistant-surgeon in the service of the Honourable the East India Company’.

effect from and after the passing thereof, and shall continue until the 1st day of August next, in the year 1826'.⁶⁷

The Court unanimously decided for the plaintiff. Lord Abinger stated that 'It is by no means a consequence of an act of Parliament's expiring, that rights acquired under it should likewise expire'.⁶⁸ Parke further elaborated that:

'Then comes the question, whether the privilege of practising given by the stat. 6 Geo. 4, referred to in the replication, is one which continues notwithstanding the expiration of that statute. That depends on the construction of the temporary enactment. There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction. We must therefore look at this act, and see whether the restriction in the 11th clause, that the provisions of the statute are only to last for a limited time, is applicable to this privilege'.⁶⁹

In light of the court's decision, a public act clarifying the effect of its expiration was subsequently recorded. In 1873, Parliament adopted the Regulation of Railways Act. Section 37 prescribes that 'This Act shall continue in force for five years next after, the passing of this Act, and thenceforth until the end of the then next session of Parliament, but the expiration of this Act shall not affect the validity of anything done before such expiration'.⁷⁰ Similar constructions are recorded in the 20th century as well, for instance the Coastguard Act 1925.⁷¹

The preceding section discusses the compatibility of sunset clauses with the concept of predictability and admits that the expiration of the laws does not increase the level of legal certainty. Yet while an uncertain expiration date reinforces uncertainty, it is crucial to mention that such clauses might also promote predictability as well. The recent

⁶⁷ Apothecaries Amendment Act 1825, s 11.

⁶⁸ *Steavenson v Oliver* 151 ER 1024, 1026 (CE).

⁶⁹ *Ibid* 1027.

⁷⁰ Regulation of Railways Act (Short title) 1873.

⁷¹ Coastguard Act 1925.

example of the Holocaust Act 2009 is remarkable.⁷² Parliament enacted a private Member's Bill stipulating the return to the lawful owners of items stolen between 1933 and 1945, including those from museums and collections.⁷³

In section 4(7) a sunset clause limits the duration of the Act to ten years,⁷⁴ and as the MP who presented the bill emphasised, 'a sunset clause is important in the particular circumstances of the Bill. We need to give sufficient time to ensure that any outstanding claims can be dealt with, but we also want to be able to give long-term certainty to the institutions concerned. A 10-year period achieves the best of both worlds'.⁷⁵

Indeed, without the inclusion of a sunset clause, this particular act would leave museums, art collectors and owners of artefacts perpetually uncertain as to whether they would retain uncontested possession of their items. Hence, on this occasion, the time limitation of the sunset clause ensures predictability and certainty of the parties' rights to ownership.

Unger also views predictability as one of the defining notions of the rule of law.⁷⁶ The expiration of laws increases uncertainty since people cannot predict whether the law would be renewed or be replaced with a different regulation. But uncertainty also surrounds permanent laws to an extent as well, because nobody can guarantee that an ordinary law will not be amended or repealed in the future.

While an exact expiration date promotes certainty, as it provides a degree of guidance concerning the development of the law, an indefinite date for expiration of the

⁷² Holocaust (Return of Cultural Objects) Act 2009.

⁷³ HC Deb 26 January 2009 vol 487 col 22.

⁷⁴ Holocaust (Return of Cultural Objects) Act 2009, s 4 (7).

⁷⁵ Holocaust (Return of Cultural Objects) (formerly known as Holocaust (Stolen Art) Restitution) Bill Deb 10 June 2009 col 10.

⁷⁶ Roberto Mangabeira Unger, *Law in Modern Society; Towards a Criticism of Social Theory* (Free Press 1976) 176.

clause raises concerns and does not comply with the standards of the rule of law. Finally, as the legal effect of the expiration is not always clear, this should be made clearer in the formulation and construction of the relevant clause.

III. Proper Authority to Renew the Sunset Clause

The final part of the analysis from the perspective of the formal conception of the rule of law explores the parliamentary practice to delegate the power to a Minister to renew sunset legislation. It will be argued that this manner of promulgation of laws undermines the very essence of sunset clauses, which is parliamentary oversight of the legislation and final review.

Several commentators mentioned that the rule of law encompasses the proper manner of promulgation of laws.⁷⁷ Hence the third aspect of the formal conceptions on the rule of law is the process of the renewal of the temporary legislation. In practice Parliament either holds the power to review and re-enact the temporary legislation or it empowers a Minister of the Government with a Henry VIII clause. The latter option consistently raises concerns, though, from a rule of law perspective.

In principle, upon the sunset of a law, parliament debates whether to renew it or let it expire, and accordingly MPs vote on the matter. However, as is evident in a series of Acts, such as the Anti Crime and Security Act, the sunset clause was renewed due to a Henry VIII clause in secondary legislation. Hence Parliament, which in principle has the foremost authority to legislate, ends up with a passive or limited role in the renewal procedure. Strictly speaking, as long as secondary legislation renewing the temporary law has its foundation in the sunset clause, it is properly renewed.

⁷⁷ 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’. AV Dicey, *Introduction to the Study of the Law of the Constitution Vol I* (JWF Allison ed, OUP 2013) 97.

That having been said, the process of renewal of temporary legislation is achieved via two models. Using the first, temporary legislation is renewed by the Parliament due to a simple sunset clause, and according to the second, the legislation is renewed with secondary legislation as the sunset clause is coupled with a Henry VIII clause. It is noteworthy that MPs, during parliamentary debates, and academics define both clauses as sunset clauses, for the sake of simplicity.⁷⁸ However, this is inaccurate.

The distinction between the two clauses was, however, drawn by the House of Lords in their debate on the Anti Crime and Security Bill. Two alternative sunset clauses were proposed, the first clause in combination with a Henry the VIII clause, and the second as a pure sunset clause. Lord Bledisloe proposed the sunset clauses in the Anti Crime and Security Bill as amendment no 105, according to which, in paragraph 1, the expiration dates were set, with the more objectionable measures to expire after two years and the rest after five years;⁷⁹ while in paragraphs 2 and 3, according to a Henry VIII clause, the Secretary of State was empowered to renew the force of the law with statutory instruments after independent consultation.⁸⁰ Finally, the order renewing the force of the law had to be approved by resolution of each House of Parliament.⁸¹

⁷⁸ John Ip, 'Sunset Clauses and Counterterrorism Legislation' [2013] PL 74, 93.

⁷⁹ '(1) Subject to subsections (2) to (5), and without prejudice to any other provisions of this Act— (a) Parts 3, 4, 5, 10, 11 and 13 of this Act shall cease to have effect at the expiry of two years from the date on which the Act is passed; and (b) Parts 1, 2, 6, 7, 8 and 9 of this Act shall cease to have effect at the expiry of five years from the date on which the Act is passed'. See HL Deb 10 December 2001 vol 629 col 1198.

⁸⁰ '(2) If the Secretary of State considers that it may be appropriate that any Part of this Act should continue in force without amendment beyond the expiry of its specified period, he may consult such persons as seem to him appropriate to obtain their views as to whether that Part can safely and properly continue in force without amendment. (3) If, following such consultation, the Secretary of State certifies that no substantial grounds have been advanced as to why that Part should not continue in force, he may by order provide that that Part of the Act shall continue in force for a specified period not exceeding five years'. Ibid.

⁸¹ '(5) An order made by the Secretary of State under subsection (3) or (4) must be made by statutory instrument and may not be made unless a draft has been laid before and approved by resolution of each House of Parliament'. Ibid.

On the other hand, Lord Dixon-Smith, together with Lord Goodhart, proposed another type of sunset clause, amendment 106,⁸² according to which the bill ‘should continue in force through the full parliamentary process’.⁸³ Lord Goodhart added that

‘[W]e believe that it will be much better to take the simple and direct course and to have proper reconsideration of this legislation in Parliament, where we will have a proper opportunity to consider the parts that are contentious and the parts that turn out not to have worked well. We should do that in due course and in proper time’.⁸⁴

Lord Rooker, comparing the two amendments, noted that

‘[A]mendment No. 105 [the sunset clause in combination with the Henry VIII clause] may not fit parliamentary niceties but it is more intelligent than Amendment No. 106. That is not to disparage the Conservative Opposition—far from it. However, Amendment No. 105 is more practicable because implicit in it is that a good part of the Bill should remain permanently in force’.⁸⁵

Eventually, however, amendment no 106 containing the pure sunset clause prevailed in the House of Lords.⁸⁶ Yet despite the fact that some MPs argued in favour of the Lords’ amendment in the Commons, the Lords’ amendment was rejected,⁸⁷ as the Government supported the inclusion of a sunset clause coupled with a Henry VIII clause.⁸⁸ In fact, the

⁸² ‘(1) This Act, apart from Part 12, shall (subject to subsections (2) to (5)) cease to have effect at the end of the period of one year beginning with the day on which the Act receives Royal Assent. (2) The Secretary of State may, subject to subsections (3) to (5), by order provide— (a) that a provision of the Act which is in force (whether or not by virtue of this subsection) shall continue in force for a specified period not exceeding twelve months; (b) that a provision of this Act shall cease to have effect; (c) that a provision of this Act which is not in force (whether or not by virtue of this subsection) shall come into force and remain in force for a specified period not exceeding twelve months. (3) Parts 1, 2, 6, 7, 8, 9 and 14 of this Act shall, by virtue of this subsection, cease to have effect at the end of the period of five years beginning with the day on which this Act is passed. (4) Parts 3, 5, 10, 11 and 13 of this Act shall, by virtue of this subsection, cease to have effect at the end of the period of two years beginning with the day on which this Act is passed. (5) Part 4 of this Act shall, by virtue of this subsection, cease to have effect at the end of the period of one year beginning with the day on which this Act is passed. (6) Any order made by the Secretary of State under subsection (2) must be made by statutory instrument and may not be made unless a draft has been laid before and approved by resolution of each House of Parliament’. Ibid col 1205.

⁸³ Ibid col 1199.

⁸⁴ Ibid col 1201.

⁸⁵ Ibid col 1202.

⁸⁶ Anti - terrorism, Crime and Security HL Bill (2001-02) 33.

⁸⁷ HC Deb 12 December 2001 vol 376 col 959 ‘That this House disagrees Lords amendment No 66: Ayes 322, Noes 215’.

⁸⁸ Ibid col 952.

structure of the latter clause was similar to the amendment proposed by Lord Bledisloe, since in section 29 of the Act, there is a one-year sunset clause in paragraph 1, and in paragraph 2 the minister is empowered to renew the act according to the Henry VIII clause.⁸⁹

The government's proposal was criticised on the grounds that it diminished the role of Parliament. One MP stated that

‘I am not quite clear what the Home Secretary is saying, but if it is that whatever the recommendations made by the review body, the Government will automatically accept them, that is not what was said in the House of Lords. If that is what he is saying, it is welcome, but it is not a substitute for a proper sunset clause that limits emergency, far-reaching and draconian legislation’.⁹⁰

Indeed, a sunset clause, when it is not coupled with a Henry VIII clause, or if it is a pure sunset clause, permits MPs to debate reasonably and to ask the Government to justify their proposal and, ultimately, to carefully scrutinise the bill. However, when the sunset clause is coupled with a Henry VIII clause, the outcome is that the parliamentary procedures are circumvented. Having said that, it is remarkable that without parliamentary intervention, a report issued by the Home affairs provided that: ‘Unless the Bill provided for a final expiry date – or “sunset” provision – beyond which no further renewal could be made, it would be possible for the provisions to continue in force for many years, or even decades’.⁹¹

Although combining sunset clauses with Henry VIII clauses was extensively used before World War II, concerns were raised regarding the extent of review and the lack of

⁸⁹ ‘(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. (3) An order under subsection (2)—(a)must be made by statutory instrument, and(b)may not be made unless a draft has been laid before and approved by resolution of each House of Parliament’. Anti - terrorism, Crime and Security Act, s 29.

⁹⁰ HC Deb 12 December 2001 vol 376 col 956.

⁹¹ Home Affairs Select Committee, The Anti-Terrorism, Crime and Security Bill 2001 (HC 2001-2, 351) [41].

parliamentary intervention in the renewal process.⁹² Indeed it makes a significant difference in relation to the parliamentary role. In order to renew an act that expires by virtue of a sunset clause, new legislation, and therefore strong parliamentary scrutiny, is required. The converse occurs with the combination of sunset clauses and Henry VIII clauses, since parliament might not have a role at all, and thus parliamentary scrutiny is weakened.

Even if the minister who renews the legislation is an authorised person according to an Act of the Parliament, this delegation of power seems to test the rule of law, as the process of renewal from body other than the parliament infringes the legal maxim *cujus est dare ejus est disponere*, which means ‘he who has the power to give, has the right to designate the mode of its application’.⁹³

In light of these remarks, above, Justice Devlin in *Willcock v Muckle* criticised the prolongation of legislation with Henry VIII clauses, even if it would expire due to a sunset clause. He held that ‘it would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated under different circumstances and for different purposes’.⁹⁴

A pure sunset clause demands that parliamentary procedure begins ab initio. In conclusion, the hybrid clauses combining a sunset clause with a Henry VIII clause limits parliamentary intervention and in practice negates the effect of the sunset clause.

⁹² For instance, the Import, Export and Customs Powers (Defence) Act 1939 in s 9 (3) prescribes 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’. This act was eventually repealed in 1990 with the Import and Export Control Act 1990, and was one of the last major pieces of the emergency legislation introduced at the beginning of the Second World War to remain in use until that time. See HC Deb 29 November 1990 vol 181 cols 1059-63.

⁹³ Thomas Tayler, *The Law Glossary: Being a selection of the Greek, Latin, Saxon, French, and Italian Sentences, Phrases and Maxims* (Martin & Marshall 1833) 56.

⁹⁴ *Willcock v Muckle* (1951) 2 KB 844, 853.

In light of the above concerns, in 2011 Parliament enacted the Terrorism Prevention and Investigation Measures Act. According to this Act, although parliament delegates to the Secretary of State the authority to revive the special anti-terrorism powers, it simultaneously imposes upon him the burden to lay the relevant order before parliament for approval.⁹⁵

The taxonomy⁹⁶ of current sunset clause usage has shown that a variety of constructions is possible, with different impacts on legislation. As mentioned earlier, the pure or proper sunset clause causes the law to expire on a specific date and the legislature becomes responsible for renewing the legislation with a new Act, should this be desired. Furthermore, the amalgam of a sunset clause with a Henry VIII clause infringes the rule of law, because the renewal process is delegated to the executive under a specific timetable.

B. Sunset Clauses between Security and Rights

The preceding analysis discussed sunset clauses from the perspective of the formal conception of the rule of law. This part now examines sunset clauses from the perspective of the substantive conceptions of the rule of law.⁹⁷ The substantive conception of the rule of law refers to the content of the law and depends on its compatibility with human rights and/or a theory of justice.⁹⁸ Thus the focus of this section is emergency legislation and

⁹⁵ Terrorism Prevention and Investigation Measures Act 2011, s 21. ‘2. The Secretary of State may, by order made by statutory instrument (a) repeal the Secretary of State’s TPIM powers; (b) at any time revive the Secretary of State’s TPIM powers for a period not exceeding 5 years; [...] 4. An order under this section may not be made unless a draft of it has been laid before Parliament and approved by a resolution of each House. [...] 6. An order that contains such a declaration (a) must be laid before Parliament after being made; and (b) if not approved by a resolution of each House before the end of 40 days beginning with the day on which the order was made, ceases to have effect at the end of that period’.

⁹⁶ See text to n 41ff in Ch I.

⁹⁷ Craig points out that ‘certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between “good” laws, which comply with such rights, and “bad” laws, which do not’. Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] PL 467.

⁹⁸ Ibid 480.

especially Acts which suspend human rights. It will be seen that the use of sunset clauses in emergency legislation restricting human rights is problematic. Therefore, the analysis will highlight the role of such clauses in the tension between security and human rights protection and will suggest that clauses suspending human rights are compatible with the rule of law only if the circumstances make them necessary and if the limitation to the specific right and the duration of the restriction are proportionate to the danger presented by the emergency. Thus the aim of this part is to identify how the inclusion of a sunset clause in the law affects its content and, ultimately, what impact this has on the rule of law.

The discussion begins with arguments for and against the use of sunset clauses in emergencies. Subsequently, it will be argued that such clauses do not suspend or erode the rule of law, but are its expression. There are two facets to this argument. The first is that such clauses enhance security, viewed as the community's interest in its own safety. The second is that four caveats exist to block laws that enhance security disproportionately by sacrificing of individual rights. Finally, this part will conclude with the suggestion that the duration of the sunset clauses should be short in order to prevent the normalisation of the extreme measures.

I. Sunset Clauses and Emergencies

Regardless of the system of government, an emergency has proven to be the Achilles' heel of many a democracy. The dilemma posed during an emergency is enshrined in the words of Abraham Lincoln, who pondered: 'is there, in all republics, this inherent, and fatal weakness? Must a government of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?'⁹⁹ The means are justified by the ends,

⁹⁹ Speeches and Letters of Abraham Lincoln: 1832 - 1865 (ReadHowYouWant 2008) 257.

and in Posner's and Vermeule's words, 'civil liberties are compromised because the protection of human rights interferes with effective response to the threat'.¹⁰⁰

Likewise, Posner has remarked that in a state of emergency, a conflict arises between liberty and public safety.¹⁰¹ Lord Pearce, moreover, has pointed out that 'the flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings',¹⁰² and Justice Jackson, in his dissenting opinion in *Terminiello v City of Chicago*,¹⁰³ said that in a state of emergency 'the choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact'.¹⁰⁴

Broadly speaking, during emergencies the priority of the government is to defend the polity from internal or external peril while the exigencies of the emergency occasionally require the suspension of several liberties. Cicero set the principle in a state of emergency, saying *salus populi suprema lex esto*.¹⁰⁵ Even constitutional provisions are recorded¹⁰⁶ which allow the executive to suspend certain constitutional rights, creating

¹⁰⁰ See Eric A Posner, Adrian Vermeule *Terror in the Balance: Security, Liberty, and the Courts* (OUP 2007) 12.

¹⁰¹ Richard A Posner, *Not a Suicide Pact* (OUP 2006) 1.

¹⁰² *Conway v Rimmer* [1968] AC 910, 982 (HL).

¹⁰³ (1949) 337 US 1, 69 (US SC).

¹⁰⁴ *Ibid* 911.

¹⁰⁵ For further discussion on this principle see Andrew Roy Dick. *A Commentary on Cicero: De Legibus* (University of Michigan Press 2004) 457.

¹⁰⁶ Such as Article 48 of the Greek Constitution entitled 'state of siege', 'The Parliament, issuing a resolution upon a proposal of the Cabinet, puts into effect throughout the State, or in parts there of the statute on the state of siege, establishes extraordinary courts and suspends the force of the provisions of articles 5 paragraph 4, 6, 8, 9, 11, 12 paragraphs 1 to 4 included, 14, 19, 22 paragraph 3, 23, 96 para 4, and 97, in whole or in part'. See Constitution of the Hellenic Republic 1975 art 48.

gaping loopholes.¹⁰⁷ Nowadays the suspension of several liberties is ‘institutionalised’ and it is called derogation. Section 14 of the Human Rights Act provides that the Secretary of State has the power to make a ‘designated derogation order’,¹⁰⁸ which is in accordance with the framework of the European Convention of Human Rights.¹⁰⁹

In liberal constitutional theory,¹¹⁰ there are two traditional strategies used to face emergency situations. The first one is the ‘business as usual model’,¹¹¹ according to which the polity faces the peril with appropriate legislation from its legal arsenal related to war and crime. The second one is the ‘accommodation model’,¹¹² in accordance with which the polity departs from its ordinary legislation, as it is inadequate to respond to the needs of the state of emergency, and adopts specific modifications to face the exact peril.¹¹³

The use of sunset clauses is, thus, compatible with the accommodation model. In times of crisis, like wars and other major emergencies such as terrorism, executive power

¹⁰⁷ Janet Koven Levit, ‘The Constitutionalization of Human Rights in Argentina: Problem or Promise’ (1999) 37 *Columbia Journal Transnational Law* 281, 298.

¹⁰⁸ Human Rights Act 1998, s 14.

¹⁰⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 15. Regarding the legal framework of the derogation in the ECHR, see Rosalyn Higgins, ‘Derogations under Human Rights Treaties’ (1976) 48 *British Yearbook of International Law*, 281; Joan F Hartman, ‘Derogation from Human Rights Treaties in Public Emergencies’ (1981) 22 *Harvard International Law Journal* 1, 4.

¹¹⁰ In constitutional theory a fruitful discussion is intrigued by the early ideas of Carl Schmitt according to which during emergencies the rule of law has no place as the powers of the Sovereign are endless. Carl Schmitt, *Political Theory: Four Chapters on the Theory of Sovereignty* (George Schwab tr, University of Chicago Press 2005) 5.

¹¹¹ One of the proponents of this model is Dyzenhaus. See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006).

¹¹² One proponent of the accommodation model is Ackerman. See Bruce Ackerman, ‘The Emergency Constitution’ (2004) 113 *Yale Law Journal* 1029.

¹¹³ Gross and Tushnet propose a third one – the ‘extra legal measures model’ – which is a model focused on the judicial management of the crisis. For further discussion of these models, see Oren Gross ‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ (2003) 112 *Yale Law Journal* 1011; Mark Tushnet ‘Defending Korematsu?: Reflections on Civil Liberties in Wartime’ (2003) 2003 *Wisconsin Law Review*, 273. For criticism over Gross’ model see David Dyzenhaus ‘The state of emergency in legal theory’ in Michael Yew Meng Hor, Victor Vridar Ramraj and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (CUP 2009) 65; Bruce Ackerman, ‘The Emergency Constitution’ (2004) 113 *Yale Law Journal* 1029, 1041.

is bolstered and rights and liberties are restricted temporarily. One such proponent of the use of sunset clauses in combination with an increasing super majority vote is Ackerman. He proposes that the emergency legislation should expire in a short period, unless it is approved by the majority for a short period again. Further reauthorisation should take place according to a super majority requirement which will increase each time.¹¹⁴

As a matter of fact the temporary erosion of civil liberties during a state of emergency is a common practice of governments worldwide. Examples are tracked in historic depth. In the UK numerous cases are discussed in Chapter III, for instance the successive habeas corpus suspension Acts under George III.¹¹⁵ During the same period in the US, in 1798, President Adams' Administration adopted an emergency framework, the Alien and Sedition Acts, to suppress the Republican critics during the Quasi War with France.¹¹⁶ This framework was constituted by four laws, two among them temporary due to a sunset clause.¹¹⁷ Defending the suspension of habeas corpus, Dicey pointed out that

[T]he so-called "suspension of the Habeas Corpus Act" bears, it is true, a certain similarity to what is called in foreign countries "suspending the constitutional guarantees." But, after all, a statute suspending the Habeas Corpus Act falls very far short of what its popular name seems to imply; and though a serious measure enough, is not, in reality, more than a suspension of one particular remedy for the protection of personal freedom. The Habeas Corpus Act may be suspended and yet Englishmen may enjoy almost all the rights of citizens'.¹¹⁸

¹¹⁴ See Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029, 1047. This proposal is criticized by Posner and Vermeule: see Eric A Posner and Adrian Vermeule, *Terror in the Balance; Security, Liberty, and the Courts* (OUP 2007) 163.

¹¹⁵ Despite the fact that the writ of Habeas Corpus is a remedy which secures the effectiveness of a right, in case a Habeas Corpus Suspension Acts is coupled with an Act of Indemnity, this combination denies any relief to the people deprived from writ of habeas corpus. For more analysis see text to n 163 in Ch III.

¹¹⁶ See Alexander DeConde, *The Quasi - War: The Politics and Diplomacy of the Undeclared War with France 1797 -1801* (Charles Scribner's Sons 1966).

¹¹⁷ An Act in addition to the Act entitled 'An Act for the Punishment of Certain Crimes against the United States' (c 74 1 stat 596) which expiration was on March 3 1801 (section 4). The second one was 'An Act Concerning Aliens' (c 58 1 stat 570) which included a two year sunset clause from the passing of the Act.

¹¹⁸ AV Dicey, *Introduction to the Study of the Law of the Constitution Vol I* (JWF Allison ed, OUP 2013) 118.

Hence, a common element of emergency legislation restricting human rights is the sunset clause. In fact, sunset clauses are highly recommended in emergency legislation that impacts upon human rights.¹¹⁹ Thus, on these occasions the benefits of increased security outweigh the negative aspects of constraints upon liberty. There are several arguments that support the inclusion of sunset clauses in emergency legislation and especially in legislation restricting human rights.

To begin with, there is a notion of temporariness, as the emergency is a temporary event. The Romans used to say that *necessitas est lex temporis et loci* (necessity is the law of a particular time and place).¹²⁰ In addition, Greatly remarks that ‘the reason for that [time limit] would be that it would keep the issue alive and there would be a need for reports and it would maintain the sense of the urgency and the importance and one hopes the temporary nature of the crisis that provoked these powers’.¹²¹

Furthermore, the environment of panic which occurs after an emergency necessitates an immediate parliamentary reaction so that something is seen to be, and is in fact, done.¹²² As Donohue reports, ‘no politician wants to be seen as responsible for the next, possibly more lethal attack’.¹²³ Under the circumstances of panic, parliamentary enactments may not be able to benefit from the appropriate consultation period, so the

¹¹⁹ See Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-9, 116-II) [11].

¹²⁰ John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of United States of America* (1870) 139.

¹²¹ Home Affairs Select Committee, *The Anti-Terrorism, Crime and Security Bill 2001* (HC 2001-2, 351) [38].

¹²² David Cole, ‘No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint’ (2008) 75 *University of Chicago Law Review* 1329, 1343. This was the case of the fast track adoption of the Prevention of Terrorism (Temporary Provisions) Act 1974.

¹²³ Laura K Donohue, *The Cost of Counterterrorism* (CUP 2008) 12.

inclusion of a sunset clause works as a protection against this deficiency.¹²⁴ In addition, another aspect of an emergency situation relates to the cognitive difficulties that arise when legislating in such a hustle, as it is commonly accepted that ‘fear distorts human decision-making’.¹²⁵

As the adoption of security measures with the limitations on liberties is the common practice in emergency situations, it is plain that sunset clauses smooth the consequences of such restrictions. Suffice to mention here criticism made by an MP in relation to the Anti-terrorism, Crime and Security Bill, namely: ‘in my view, the sunset clause only makes part 4 less bad than it was’.¹²⁶

Moreover, the environment of panic, the cognitive difficulties in enacting emergency laws and the concern of legislators in relation to the balance between security and liberties is enshrined in the statement of Senator Clinton regarding the USA Patriot Act Reauthorization Conference Report. She said:

‘[B]ut even in the immediate aftermath of the September 11th tragedy, Congress recognized that in its haste to give law enforcement these expanded powers, there was a risk that this new authority was coming at the expense of constitutionally guaranteed rights and liberties. And so in the wisdom of both Republican and Democratic legislators, several provisions of the Patriot Act included four-year sunsets, allowing Congress the opportunity to revisit whether the Patriot Act strikes the proper balance between securing our safety and ensuring our freedom’.¹²⁷

The inclusion of such clauses in legislation restricting human rights was occasionally a concern of MPs, the Commons and the Lords. For instance, in 1915 an MP criticised the temporary adoption of the Price of Coal (Limitation) Bill, saying that ‘this Bill is of a temporary character to meet a special and urgent national emergency. It is difficult,

¹²⁴ John E Finn ‘Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation’ (2010) 48 Columbia Journal Transitional Law 442, 456; John Ip, ‘Sunset Clauses and Counterterrorism Legislation’ [2013] PL 74, 86.

¹²⁵ John Ip ‘Sunset Clauses and Counterterrorism Legislation’ [2013] PL 74, 83.

¹²⁶ HC Deb 21 November 2001 vol 375 col 394.

¹²⁷ Senator Hillary Rodham Clinton, ‘USA Patriot Act Reauthorization Conference Report’ (16 Dec 2005, Congressional Record, S13713)

however, to retrace a step of this sort if once it is taken, and I urge the House not to adopt a policy of the nature proposed in this Bill without very serious consideration, or in any haphazard fashion. To say the least the Bill is an alarming interference with the hitherto free right to contract, and it is a violation of the principle of Free Trade'.¹²⁸

In emergency situations it is possible that legislators could conspire to pass draconian legislation with a time limitation that would otherwise have been opposed.¹²⁹ Finn remarks that 'we should expect that some opponents of emergency legislation will favor sunsets as the second-best option to voting against antiterrorism legislation altogether'.¹³⁰ Those sceptical of such clauses criticise them because they permit the normalisation of the extraordinary and, second, because they fail to provide safeguards against unwise emergency legislation. Gross remarks:

'[H]owever, as already noted, temporary arrangements in this area have a peculiar tendency to become entrenched over time and thus normalized and made routine. Time-bound emergency legislation is often the subject of future extensions and renewals (...). It is commonplace to find on the statute books legislative acts that had originally been enacted as temporary emergency or counterterrorism measures, but that were subsequently transformed into permanent legislation. Furthermore, the longer that emergency legislation, broadly understood, remains on the statute books, the greater the likelihood that extraordinary powers made available to government under this legislation will become part of the ordinary, normal legal system'.¹³¹

Second, a sunset clause is not an efficient tool to protect individual rights in emergencies.

Finn argues that although sunset clauses offer information and distributive benefits, they

¹²⁸ HC Deb 19 July 1915 vol 73 col 1197.

¹²⁹ John E Finn 'Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation' (2010) 48 Columbia Journal Transitional Law 442, 454.

¹³⁰ Ibid.

¹³¹ Oren Gross 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional' (2003) 112 Yale Law Journal 1011, 1090.

fail to offer deliberative benefits.¹³² Finn's argument is based on the fact that many sunset clauses fail to expire, and thus the restriction on liberties in the end remains.¹³³

Without doubt, according to the theoretical understanding of the rule of law in the 'business as usual model' and the 'extra legal measures model',¹³⁴ as long as the inclusion of sunset clauses permits legislators to enact laws that decrease the level of human rights protection, sunset clauses do not promote the rule of law. The use of sunset clauses in emergency legislation sweetens the pill of human rights limitation. What was once a mechanism of introducing new policies and enhancing legislative oversight transforms into a menace to the rule of law.

Bringing together the principles of security and human rights protection, practice in the UK and at an international level has shown that the most common model to face emergencies is the accommodation model.¹³⁵ In this model, such clauses are not beyond the rule of law but part of it. As Ackerman remarks, in times of crisis 'the challenge is to provide it [regime] with the tools for an effective short run response without doing unnecessary long - run damage'.¹³⁶ To an extent sunset clauses provide the common ground to accommodate both security and human rights concerns. In reality, the accommodation being sought is not between the governmental interest for security and the rights of the individual, but between the rights of the community for safety and the rights of the individual.

¹³² John E Finn 'Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation' (2010) 48 Columbia Journal Transitional Law 442, 501.

¹³³ Ibid 495.

¹³⁴ Text to nn 110 and 112 in Ch VI.

¹³⁵ Text to n 111 in Ch VI .

¹³⁶ Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029, 1040.

II. Limits to the Use of Sunset Clauses

The preceding analysis has shown that the use of sunset clauses in emergencies helps to safeguard society's interest in safety in times of stress. Nonetheless, there have been concerns pertaining to the rule of law due to the disproportionate impact on civil liberties in favour of security, which can lead to the undermining of individual rights. These views are fortified by the words of Justice Brennan, who emphatically remarked that 'After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along'.¹³⁷

Indeed, during emergencies, security is inversely proportional to human right protection. Consequently, the compatibility of temporary restrictions on human rights with the rule of law is impugned. The special emergency powers given to the executive, albeit temporary, raise concerns about the possibility of abuse, ultimately diminishing the democratic character of the polity.

Limitations to the use of sunset clauses exist. First, legislators cannot use such clauses to limit non-derogable rights. Second, the polity must face an imminent danger like an emergency. Third, any restriction upon individual rights has to survive the proportionality test in case of a challenge before the courts. Fourth, such restrictions should not violate any obligation under international law.

As regards the first limitation on the use of sunset clauses, the ECHR prescribes that states cannot derogate from specific rights,¹³⁸ namely the non-derogable rights are the right to life (except in respect of lawful deaths from lawful acts of war), freedom from

¹³⁷ William J Brennan, Jr, 'The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises' (1988) 18 Israeli Yearbook on Human Rights 11.

¹³⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 15 (2).

torture, the right to be free from slavery, and the right not to be subject to retrospective laws. These rights are absolute and no sunset clause can suspend their force.

Second, a state of exception is a precondition and compelling justification for the government's adoption of sunset clauses suspending the rights of individuals.¹³⁹ It is for the political branches of the government, executive and legislature to declare an emergency and the judiciary will be wary of interfering with this conclusion.¹⁴⁰ The use of such clauses is questionable when they are used in a state of normality, which cannot be regarded as times of stress.¹⁴¹

There was recently a questionable use of a sunset clause. In 2003 Parliament enacted the Fire Service Act according to which the power was conferred to the Secretary to interfere with collective bargaining.¹⁴² This law was subject to a two-year sunset clause¹⁴³ and the clause was used to pass legislation in a state of normality which would not otherwise have been enacted. Lord Rooker argued that the existence of the sunset clause smoothed the consequences, saying 'I draw noble Lords' attention to the fact that the powers in the Bill are time limited to two years so the issue will not be around for ever. If the powers in the Bill are not activated after two years, they fall'.¹⁴⁴ Lord

¹³⁹ Ibid art 15(1).

¹⁴⁰ Regarding the deference that the Courts recognize to the executive in times of emergencies, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006) ch 4.

¹⁴¹ For instance, on 21 February a private bill was submitted in the Commons for the first reading according to which the United Kingdom will be withdrawn from the European Convention of Human rights. See European Convention on Human Rights (Temporary Withdrawal) HC Bill 308.

¹⁴² Fire Services Act 2003, s 1 (1) (a).

¹⁴³ Ibid (7). The provision was objected to by the Human Rights Committee, which concluded that 'We therefore conclude that 'the Fire Services Bill, as it stands at present, gives rise to a significant risk of a violation of Article 6 of the European Social Charter and of Article 8 of ILO Convention No 151'. See Joint Committee on Human Rights Scrutiny of Bills: *Further Progress Report* (2002-3, HL 119, HC 765) [1.6]

¹⁴⁴ HL Deb 19 June 2003 vol 649 col 1017.

Campbell of Alloway's criticism is worthy of note. He compared the sunset clause to the sword of Damocles and stated:

'My Lords, I am the third Member on the Back Benches in this House—this makes all three—who is wholly unable to support the Bill. The convention being that on Second Reading we do not turn down a Government Bill, save in wholly exceptional circumstances, I ride by convention, but I want the noble Lord, Lord Rooker, to understand that I merely defer to convention and that I am totally opposed to the Bill. What is a sunset clause, for a start? It is a sword of Damocles to dangle over those workmen, so that if they do not toe the Government line—the imposed resolution of the Government—the sword drops'.¹⁴⁵

While the judiciary is reluctant to assess political issues such as the existence and the extent of an emergency, the courts' role is nonetheless central in the proportionality test. Article 15 of the ECHR prescribes that any measures taken should be 'strictly required by the exigencies of the situation'.¹⁴⁶ Proportionality is the principle through which the balance between competing values is adjudicated.¹⁴⁷ The main question before the courts is whether the exigency justifies the suspension of specific rights, whether the means undertaken are rationally connected to the objective and finally whether these means are no more than is necessary to accomplish the objective. Thus the question of proportionality of the emergency legislation may be linked to the duration of the emergency.

In the case *A v Secretary of State for the Home Department*,¹⁴⁸ comparable issues arose before the Court. As was mentioned in chapter IV, the legislature reacted to the events of September 11 by enacting the Anti-terrorism, Crime and Security Act, sections 21-23 of which delegated the power to the Secretary of State to indefinitely detain non-national suspects of international terrorism. Pursuant to section 28 of the Act, the

¹⁴⁵ Ibid.

¹⁴⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 15.

¹⁴⁷ For further discussion on proportionality in UK law see Paul Craig, *Administrative Law* (7th edn, Sweet and Maxwell 2008) [21-010]ff.

¹⁴⁸ [2004] UKHL 56.

indefinite detention policy was subject to periodic reviews, and subject to a sunset clause until 10 November 2006, unless renewed.

The Government detained nine non-UK nationals, who challenged the lawfulness of their detention. The case was brought before the House of Lords. The court found that the measure of the indefinite detention was disproportionate. Lord Hope lingered over the long duration of the clause in combination with the possibility of renewal and stated that:

‘The effects on the individual of a derogation that deprives him of his right to liberty will vary according to the nature, and above all the length, of the emergency. It will usually be impossible to say when an emergency arises how long it will last. But in some cases it may be perfectly obvious from the outset that it will last for a very long time, perhaps indefinitely. That seems to be the situation in this case’.¹⁴⁹

The evaluation of the compatibility of sunset clauses through proportionality requires a de facto analysis, case by case. There are several important variables: the imminent emergency, the legislative objective, the severity of the derogating measure, the right at stake and the amount of time restricted. The impact on the rule of law is different when there is a short-term sunset clause as compared with a long term one, and it is also different to restrict freedom of religion, on the one hand, and habeas corpus, on the other hand.

The final limit to the use of sunset clauses derives from the obligations of the government under international law. Thus, according to the International Covenant on Civil and Political Rights, no derogation is permitted as long as it has a discriminatory result.¹⁵⁰ This fourth caveat was also discussed in *A v Secretary of State for the Home*

¹⁴⁹ Ibid [122].

¹⁵⁰ International Covenant on Civil and Political Rights, (16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 4.

Department.¹⁵¹ The court found that the measure of indefinite detention of non-nationals was discriminatory in breach of Article 14 ECHR.¹⁵²

Sunset clauses permit legislators to suspend human rights protection temporarily, while subjecting their action to a modicum of judicial control. However, ex post intervention by the courts is not always sufficient to contain the damage to the rule of law. Is it quixotic to discuss human rights protection in a state of emergency? Is Cicero's saying, *salus populi suprema lex esto*, still contemporary, or is it outmoded? Sunset clauses do not per se provide answers to these questions.

That being said the major criticism of sunset clauses in emergency legislation is that they fail to expire and cause the normalisation of extreme measures. Indeed, review clauses and long term sunset clauses or sunset clauses coupled with Henry VIII clauses do not enhance the rule of law: the former weaken parliamentary intervention and the latter do not mitigate the impact on individual rights. Therefore it is suggested that legislators at the preliminary stage of policy making, when adopting emergency laws with sunset clauses, should integrate the duration of sunset clauses into their thinking, thereby best serving the rule of law.

Conclusions

'Rule of law' is a manifold term. Different conceptions map the different perspectives on the rule of law. However, it is clear that the principles of the rule of law affect the form, the construction and the inclusion or abolition of a sunset clause.

¹⁵¹ [2004] UKHL 56.

¹⁵² Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 14.

My argument comes to bear upon its conclusion thus: in applying the formal constructions of the rule of law to sunset clauses, there are three main concerns. First, whether the temporary character of the laws disrupts stability and inhibits the legislative process; second, whether the expiration date increases uncertainty; and finally, whether the process of renewal complies with parliamentary procedure.

Despite the fact that the temporary nature of the legislation is incongruent with the concepts of stability and continuity, inasmuch as it provides the system with flexibility, it is nonetheless acceptable. Furthermore, the use of sunset clauses entrench and bolster the rule of law when it is used for deductive purposes such as to test the application of a law, to raise the accountability of new agencies, and to make law more efficient. In other words, temporary legislation allows experimentation, as it provides a mechanism through which policy choices can be applied and tested. It is noteworthy that a series of important laws—such as the first bankruptcy law, laws governing income taxation, and even the abolition of the death penalty—were initiated with sunset clauses. However, legislators have to be selective in the use of such clauses as their extensive use might consume excessive amounts of legislative time and overburden parliament.

Concerning the expiration of the law and its renewal, the construction of a sunset clause inevitably varies. The variety of constructions depends on particular circumstances such as the historical timing and the substance of the law. In principle, expiration dates based upon a future condition disrupt legal certainty. In addition, the construction of sunset clauses coupled with Henry VIII clauses gives the impression of a non-forceable termination.

The connection between sunset clauses and the rule of law is most problematic when such clauses are used temporarily to suspend the application of human rights. According to the proponents of the ‘business as usual model’ and the ‘extra-legal measures model’, sunset clauses do not promote the rule of law as long as the inclusion of

sunset clauses permits legislators to enact laws which suspend individual rights. Nonetheless, practice worldwide during emergencies has shown that legislators rely on sunset clauses to accommodate the needs of such emergencies. A fortiori, the use of sunset clauses strengthens the right of the community for peace and safety, but such clauses are not panacea. Sunset clauses can however mitigate the impact of extreme measures, provided that they are used subject to the conditions and limits discussed in this chapter.

EPILOGUE

This thesis has examined the constitutional value of sunset clauses. It has demonstrated that such clauses not only affect the separation of powers and the rule of law, but also that concerns with regard to the separation of powers and the rule of law justify the enactment of such clauses. In so doing, the thesis was divided into three parts: the historical, the positive and the normative. All three parts are intertwined, and each builds upon the findings of the earlier part.

The historical part contained a detailed examination of the first uses of sunset clauses and one of the most interesting findings is the willingness of the King to enact such clauses. The legislators were also willing for such clauses to be included in legislation, and this is further exemplified by the frequent presence of sunset clauses in contemporary legislation. This forms the second positive law part of the thesis, which analysed the current use of temporary legislation and contested the widespread view that legislators adopt such legislation only to regulate temporary needs.

The first two parts served to underline the importance of sunset clauses through different historical periods and provided a springboard for the formulation of a normative theory concerning the interaction between sunset clauses and important elements of constitutional theory, namely the separation of powers and the rule of law. The normative analysis revealed that such clauses interact with both the separation of powers doctrine and the rule of law.

The historical part of the thesis demonstrated the long usage of such clauses, which has gone largely unnoticed. Throughout different historical periods sunset clauses were a constant feature in the statute book, ever since the first parliaments. Such clauses were used as soon as the Commons was involved in the legislative process from the period of

Edward III. Their utility was heavily dependent on the balance of powers between King and Parliament. The historical analysis provided an account of the complex evolution of law-making powers and of the role that such clauses played, and still play, in the evolution of the law. Moreover, it developed a model of interaction between sunset clauses and the rule of law and between such clauses and the separation of powers.

The origin of the sunset clause can be traced to the late medieval period. Since they were first used sunset clauses have been a constant feature in the balance of powers between the King and the Parliament. In the late medieval period sunset clauses were used by the King to limit the duration of statutes. At the turn of the 16th century, they were seen as an expression of consensus and in the 17th century onwards they were more a parliamentary mechanism. Interestingly, sunset clauses were used quite commonly in a variety of historical circumstances. Important events are associated with sunset provisions, for instance the Lancastrian constitutional experiment, the Civil War and the Acts of Union.

The positive part elaborated on the components of sunset clauses and showed that, nowadays, the texts of legislation are replete with such clauses. A detailed examination of statute books has shown that sunset clauses are in ‘the legal DNA’ of the UK. Sunset clauses are not simply a mechanism for transitional legislation, but are also used where legislators aim to enhance the rule of law and reinforce the separation of powers. Their use echoes the demand for particular sets of values to be embodied in legislation and in the legislative process as a whole. It was shown that sunset clauses were not used exclusively in emergency legislation or in the regulation of temporary or transitory issues, but also in quotidian policies, for instance in economic policies, and in constitutional documents.

The development of the use of sunset clauses reveals the main reasons that legislators include them in legislation: limited consensus in the majority party or a coalition government (unlike their early 16th century use), experimentation, lack of

information and time pressure. It was also argued that their current function depends upon the separation of powers and the role of the legislature and is less of a mechanism to claim sovereignty.

Building on this historical and positive analysis on sunset clauses, the normative part of the thesis demonstrated that such clauses are used in order to satisfy separation of powers concerns. The abuse of delegated powers can be moderated through their time-limitation, while their use effectuates a transfer of powers from the executive to the legislature. After the establishment of the Human Rights Act 1998, such clauses enhance the legislative role with respect to judicial decisions and establish a dialogue between the UK Supreme Court and the Parliament.

In addition, the normative analysis contained a critique of sunset clauses from the rule of law perspective. It evaluated such clauses from the perspective of flexibility and certainty and discussed how the construction of the clause can provide more certain legislative outcomes. The inclusion of such clauses in legislation restricting human rights has a severe impact on the substantive conception of the rule of law. However, this thesis has argued that such clauses can also be seen as an expression of the rule of law and can, in specific instances, promote the rule of law. Thus the rule of law and such clauses are not always antagonistic, but in fact can complement each other.

Innovative legislation was initiated with a sunset clause and thus the clause was an ingredient in the process of enacting new laws, controversial or experimental, for instance the adoption of income tax, the abolition of censorship and of the death penalty for ordinary crimes. As the examples suggest, such clauses enhanced better regulation, more efficient governance and expanded the scope of human rights. Finally, and most importantly, it was argued that sunset clauses should not be used in emergencies in combination with Henry VIII clauses, nor should they be of longstanding duration.

This thesis has therefore sought to shed light on the development and application of sunset clauses in the UK legal order and the ways in which such clauses have played an integral part in the evolving constitutional order.

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