



WFD

Sunset Clauses and Post-Legislative Scrutiny: Bridging the Gap between Potential and Reality

The PLS series, 3

Sean Molloy, Maria Mousmouti and Franklin De Vrieze
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3. Sunset Clauses and Post-Legislative Scrutiny: Bridging the Gap between Potential and Reality, Sean Molloy, Maria Mousmouti and Franklin De Vrieze
4. Indicators for Post-Legislative Scrutiny

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Foreword

Governments may introduce legislation that embodies provisions creating new offences or conferring order-making powers on public officials. Anyone reading a Bill may need to look at other parts to see that the provisions are qualified. In the United Kingdom, it is common for order-making powers to be subject to commencement orders. In other words, they do not take effect until a minister makes a commencement order. There are many sections of Acts that have never been commenced: they constitute what I have termed “law but not law”. (There is a whole Act – the Easter Act 1928, stipulating a fixed date for Easter – that famously has never been commenced.) Provisions may take effect, but be subject to ‘sunset clauses’, stipulating a date on which they cease to take effect, unless renewed.

Sunset clauses are generally seen in a positive light, ensuring that legislation does not linger unnecessarily on the statute book. They are employed especially for controversial legislation, not least when passed quickly in response to a crisis (such as anti-terrorism legislation), ensuring that, if it is to be continued, it is subject to review. The use of such clauses can facilitate the passage of the legislation, helping assuage the fears of critics in that it will not be permanent and that they will have an opportunity to revisit the arguments, and assess its effects, should there be a move to continue it. Post-legislative review is inherently desirable, ensuring that legislation has had the effect intended.

Despite their significance, sunset clauses have rarely been the subject of serious study. In this report, Sean Molloy, Maria Mousmouti and Franklin De Vrieze offer a detailed and very welcome examination. In addition to providing a valuable and succinct overview of the origins and functions of sunset clauses, they demonstrate that if sunset clauses are to live up to their potential, in effect their reputation for being a “good thing”, they need to be well drafted and be subject to a substantive review process. As they argue, sunset clauses in practice may be poorly drafted, notable more for ambiguity than clarity, and, most importantly of all, not trigger a meaningful review process. The very fact of embodying sunset clauses may lull those discussing the initial legislation into a false sense of security – believing that, as it will be reviewed, much can be taken on trust – and with the subsequent reviews being rather perfunctory. As they note, debates on motions to continue the provisions may be poorly attended and with limited time allocated for their consideration. There may also be problems with the information provided for such reviews.

The authors lay out a roadmap for the effective use of sunset clauses. These include stipulating the conditions for a review, such as requiring the appointment of an independent reviewer who will produce a report to be laid before the legislature. The recommendations merit serious debate by legislators and indeed by ministers. Reviewing measures to ensure that they have achieved what they are intended to achieve is for the good of society. Sunset clauses need to be clear and, if intended to be subject to renewal, to be accompanied by provisions stipulating a process of review that will inform the legislature as to whether they have had the intended effect and merit being continued.



This report shines an invaluable light on an under-researched, but very important subject and it deserves a wide readership.

Philip Norton
Lord Norton of Louth

Summary

Sunset clauses set an expiration date on a particular law or set of provisions, and the expiration is either automatic or subject to a positive or negative authorisation by the legislature.

They are not new in the legislative toolkit but have experienced a resurgence in the past decades, mainly due to their capacity to limit the duration of legislative measures of an extraordinary or controversial nature.

Sunset clauses were in high demand in COVID-19 acts and regulations, with the main function to ensure that the restrictive measures adopted to respond to the pandemic extended no longer than necessary. In other areas where sunset clauses have been used, like terrorism legislation, sunset clauses are used to ensure that controversial measures are temporary or kept under scrutiny.

Sunset clauses in legislation are frequently regarded as important safeguards of democracy, particularly in contexts where emergency legislation is relied upon. However, these legislative devices are also often ineffective at limiting the continuation of emergency legislation.

This publication identifies reviews of emergency law as central to the effectiveness of sunset provisions. After detailing some of the difficulties associated with these reviews, we draw on examples from post-legislative scrutiny (PLS) more generally to identify best practices from a range of contexts. The purpose is to help identify how those involved in both drafting and reviewing emergency legislation might bridge the gap between the potential of sunset clauses and the realities that often arise.

The hypothesis of the present publication is that sunset clauses can only provide effective safeguards for legal certainty and democracy if they are well drafted and accompanied by substantive review processes.

To prove this, the publication looks at the origin and functions of sunset clauses and takes a critical view on their role in emergency legislation - in theory and practice. Based on this, the essential features of effective sunset clauses are identified that can promote legal certainty and democratic deliberation.

This paper:

1. identifies how those involved in both drafting and reviewing emergency legislation might bridge the gap between the potential of sunset clauses and the realities that often arise;
2. identifies the essential features of effective sunset clauses that can promote legal certainty and democratic deliberation;
3. demonstrates that sunset clauses can only provide effective safeguards for legal certainty and democracy if they are well drafted and accompanied by substantive review processes.

1. Introduction

When the American legal scholar Roscoe Pound said “the law must be stable, but it must not stand still” he was referring mainly to the theories that influenced the development of law at different times and the compromises that proved necessary to this end. In a contemporary context, the law often *cannot* stand still because it can rarely provide definite solutions to rapidly changing environments, situations and societies.

Reality openly challenges the assumption of longevity of legislative solutions, especially where emergencies or new social phenomena come into play. Emergency legislation holds a place of its own within this narrative. Emergency legislation is unique in that it often deviates from commonly applicable standards or practices and inevitably raises concerns regarding its impact, especially on democratic processes and fundamental rights. Sunset clauses were a legislative mechanism used to “tame” the challenges posed by emergency legislation by ensuring their limited duration.

Sunset clauses set an expiration date on a particular law or set of provisions, and the expiration is either automatic or subject to a positive or negative authorisation by the legislature.¹ They are not new in the legislative toolkit but have experienced a resurgence in the past decades, mainly due to their capacity to limit the duration of legislative measures of an extraordinary or controversial nature. Sunset clauses were in high demand in COVID-19 acts and regulations, with the main function to ensure that the restrictive measures adopted to respond to the pandemic extended no longer than necessary. In other areas where sunset clauses have been used, like terrorism legislation, sunset clauses are used to ensure that controversial measures are temporary or kept under scrutiny.

Sunset clauses are rarely encountered on their own. Instead, they are often combined with provisions that trigger reviews of the law. They also often require that the executive and the lawmakers - or both - revisit assumptions, enacted provisions, their implementation, and impact before deciding on further steps. These further steps can entail the re-authorisation of provisions due to expire or the amendments necessary to improve the effectiveness of the law. The review clauses that accompany sunset clauses are in essence statutory “trigger” or reflection points that initiate post-legislative scrutiny as a means for evidence-based decision making.

However, despite the good intention behind them, sunset clauses have often failed in practice to either ensure the temporary nature of contentious provisions, or initiate a meaningful scrutiny process, thus being challenged in their adequacy as gatekeepers of legal certainty, democracy or fundamental rights. This publication focuses on selected examples of sunset clauses in terrorism and COVID-19 response legislations and uses them as case studies to decipher the features that are critical for their success and failure.

The hypothesis of the present publication is that sunset clauses can only provide effective safeguards for legal certainty and democracy if they are well drafted and accompanied by substantive review processes. To prove this, the article looks at the origin and functions of sunset clauses and takes a critical view on their role in emergency legislation - in theory and in practice. Based on this, the essential features of effective sunset clauses are identified that can promote legal certainty and democratic deliberation.

1. Kouroutakis, A., (2016), *The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis*, (Routledge).

2. Sunset clauses as safeguards for democracy?

Legislation is ordinarily permanent in that it persists unless and until repealed by subsequent legislation. Sunset clauses, by contrast, seek to achieve the opposite effect. As legal provisions, which provide for the expiry of a law at a future point in time, sunset clauses run against the grain of legislative practices; theirs is the business of temporariness, existing to ensure that legislation, or part of it, is operative for a specified period of time.

These clauses have been employed in different contexts. Some trace the historical usage of sunset provisions to the time of Plato.² In the United Kingdom (UK), they were employed by parliaments since at least the time of the reign of Henry VII and appeared in statutes by 1500,³ while in the United States (US), Mooney traces the history of sunset clauses back to the writings of Thomas Jefferson.⁴

2.1 The origin and functions of sunset clauses

In a contemporary setting, sunset clauses are used in situations when legislation struggles to offer definite or lasting solutions to the regulated problems. In their initial conception, sunset clauses were used in legislation that regulated phenomena with a temporary dimension, such as natural disasters or emergencies. Measures adopted to respond to earthquakes or tsunamis are, by definition, temporary and can reasonably be expected to have a predefined duration and not to remain in the statute book after the emergency or disaster has finished.

The idea was then “borrowed” by sectors where rapid developments quickly rendered legislation outdated, such as financial regulation, and sunset clauses responded to the need for regular review. In other sectors, for example bioethics, genetics, or artificial intelligence, the rapid evolution of science and technology offered little certainty for the definite regulation of legal issues or raised important concerns with regard to potential adverse effects of regulatory options. At the same time insufficient data or evidence was available in order to decide on the best possible regulatory pathway.⁵

In this case, sunset clauses, combined with review clauses, offered a solution by operating as triggers - and safeguards - for *ad hoc* review. More recently, sunset provisions have been used in legal arenas as diverse as tax law,⁶ contract law,⁷ and even in the context of the UK’s departure from the European Union.⁸

From a different viewpoint, sunset clauses played a role in the political game: they were used to facilitate consensus building when there was disagreement between majority and opposition on

2. See, for an excellent discussion of the origins of sunset clauses, Kouroutakis, A., (2016), *The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis*, (Routledge).

3. Kouroutakis, A., (2016), *The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis*, (Routledge 2016).

4. Mooney, C. (2004), “A Short History of Sunsets”, *Legal Affairs* magazine, cited in Kouroutakis, A. and Ranchordás, S., (2016), “Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies”, *Minnesota Journal of International Law*, 264.

5. De Vrieze, F., (2017), “Post-Legislative Scrutiny - Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance”, Westminster Foundation for Democracy, London.

6. See, for example, Kysar, R.M., (2011), “Lasting Legislation”, *University of Pennsylvania Law Review* vol. 159, no. 4; Kysar, R.M., (2006), “The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code”, *Georgia Law Review* vol. 40, no. 2.

7. Ranchordás, S., (2015) “Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?”, *Statute Law Review*, vol. 36, no. 1, pp. 28-45.

8. United Kingdom Government, Department for Transport, Operation Brock: removing sunset clauses and provisions for EU Exit and COVID-19 pandemic from existing traffic management legislation (9 August 2021).

specific provisions or dispositions. For instance, in the US, the first Bush tax cut was passed in 2001 to terminate at the close of 2010. No sooner had the laws been passed than their Republican backers launched a pre-emptive strike, criticising the sunsets and attempting to undo them. The Republican-led House of Representatives subsequently voted to make permanent the repeal of the estate tax contained in Bush's first tax cut.⁹ Thus, in the context of taxation, Manoj Viswanathan assesses that:

sunset provisions ... are the product of political manoeuvring designed to bypass budgetary constraints and are exploited as a means of enacting permanent legislation under the guise of an ostensible expiration date.¹⁰

The admission of the temporality of the provisions, and the commitment to revisit issues at a later moment, was often sufficient to soften reactions and achieve compromises and agreement on the need to test solutions in practice. Even on highly political or contentious topics, like terrorism legislation, sunset clauses were often the "spoonful of sugar"¹¹ that was required to push legislation through parliament.

Last but not least, beyond the functions outlined above, sunset clauses are also a legislative management tool used to clean up the statute book, reduce spending, increase the level of government services,¹² reduce red tape, deliver clearer laws, maintain the alignment of legislation with policy¹³ and monitor regulatory burden.¹⁴ They are seen as triggers to monitor and correct legislation throughout its lifecycle,¹⁵ appraise its responsiveness to the regulated problems and ultimately enhance the effectiveness and the quality of legislation.¹⁶

In practice, the use of sunset clauses and sunset reviews is widespread. In the US, sunset reviews (the process of evaluating the effectiveness of an agency or piece of legislation) range from comprehensive (where all statutory agencies undergo a sunset review on a pre-set schedule), regulatory (where only licensing and regulatory boards undergo sunset reviews), selective (where only selected agencies and regulatory boards are reviewed) or discretionary (the legislature chooses which agencies and statutes to review).¹⁷

9. Molloy, S., (2020), "Coronavirus and Parliament: A Brief History of Sunset Clauses", *Prospect Magazine* (28 April 2020).

10. Viswanathan, M. (2007), "Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future", *New York University Law Review*, vol. 82, no. 1.

11. Expression borrowed from McGarrity, N., Gulati, R. and Williams, G., (2013), "[Sunset Clauses in Australian Anti-Terror Laws](#)" (2 February 2013). *Adelaide Law Review*, vol. 33, 2012, UNSW Law Research Paper No. 2013-14.

12. Waller, J. "[The Expenditure Effects of Sunset Laws in State Governments](#)" (All Dissertations 2009) 381, (last accessed 1 December 2018).

13. Australian Government, [Guide to Managing Sunsetting of Legislative Instruments](#), 2016, last accessed 1 December 2018). See also the Guide to [Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003](#) and the [downloadable report itself](#).

14. UK Government, [Sunsetting Guidance](#), 2011 (last accessed 7 December 2018).

15. Flückiger, A. "L'obligation jurisprudentielle d'évaluation législative: une application du principe de précaution aux droits fondamentaux" in Auer, A., Flückiger, A., and Hottelier, M., *Les droits de l'homme et la constitution: études en l'honneur du Professeur Giorgio Malinverni* (Schulthess 2007) pp. 155-170 at 170.

16. Mousmouti, M. *Designing Effective Legislation* (Elgar 2019); Xanthaki, H; (2020) Sunset clauses: a contribution to legislative quality, in: Ranchordas, S. and Roznai, Y., (eds.) *Time, Law, and Change An Interdisciplinary Study*. Hart Publishing: Oxford, UK.

17. Baugus B. and Bose, F., (2015), "Sunset Legislation in the States: Balancing the Legislature and the Executive" (Mercatus Research, Mercatus Center at George Mason University, 2015) (last accessed 1 December 2018).

In Canada, statutory provisions that require legislation to be reviewed after a period of time are fairly common in statutes at both the provincial and federal level.¹⁸

In Australia, the Legislation Act 2003 (Part 4, Chapter 3) subjected all legislative instruments to a horizontal sunset clause. This means that all legislative instruments are due to expire ten years after the date of their introduction, unless explicitly exempted or unless their sunset is deferred. The performance of the sunset framework was reviewed ten years after its enactment and was found to be effective overall, while a number of improvements and corrections were proposed.¹⁹ The Legislation Amendment (Sunsetting Review and Other Measures) Bill 2018 implemented the recommendations from the review of the sunset provisions by introducing amendments to the Legislation Act 2003.

In the diverse functions and contexts highlighted above, sunset clauses have often been used and misused in different ways. And although they are not a panacea, it is important to learn from success and failure in order to improve practice.

2.2 Monitoring, review and sunset clauses

It is important at this point to clarify that sunset clauses are rarely used on their own. Instead, they operate in combination with other clauses with a complementary nature. Three distinct types of clauses are particularly relevant: monitoring, review and evaluation clauses.

Monitoring clauses focus on the process of overseeing, following up the implementation of legislation and the systematic collection of data on implementation. Review clauses enable an assessment of the “working” of legislation or specific provisions, while evaluation clauses take a broader perspective and appraise the act comprehensively in relation to its policy objectives. Monitoring, review and evaluation clauses differ in terms of scope, timing and focus. Monitoring clauses facilitate a process of data collection on implementation, while review and evaluation clauses take effect at specific moments in time and focus on the performance or the outcomes of the act. The added value of these clauses is the fact that they enable the generation of implementation data and reports (in the case of monitoring clauses) and, most importantly, the fact that they trigger a substantive post-legislative scrutiny of legislation, involving the executive, the legislature or other bodies.

The combination of review and sunset clauses creates an “early warning system” against ineffectiveness and potential adverse effects of legislation, and can keep legislators on their toes to monitor how legislation performs in real life and allow them to revisit issues on which insufficient evidence was available at the time when legislation was adopted.

2.3 Sunset clauses in emergency legislation

Sunset clauses have enjoyed the most prevalent uptake in two distinct arenas. Firstly, sunset clauses have been used in the general context of counter-terrorism and more specifically in post-9/11 legislative responses to terrorist threats, particularly in the UK, US, Canada, and Australia.²⁰ Secondly, and more recently, sunset clauses have been used in the context of COVID-19 where they

18. De Vrieze, F. and Hasson, V., (2017), “[Post-Legislative Scrutiny. Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance](#)”, Westminster Foundation for Democracy, London, p.23.

19. Review of the Sunsetting Framework under the Legislation Act 2003, Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003 (ag.gov.au).

20. See, as examples, McGarrity, N., Gulati, R. and Williams, G., (2012), “Sunset Clauses in Australian anti-Terror Laws” *Adelaide Law Review* vol. 33, 307; Finn, J. E., (2010), “Sunset clauses and democratic deliberation: Assessing the significance of sunset provisions in antiterrorism legislation”, *Columbia Journal of Transnational Law*, vol. 48, no. 3, pp. 442-502.

have acted as an important safeguard for the potential abuse of emergency powers adopted as responses to the pandemic.²¹ The particular modalities for dealing with the COVID-19 emergency differ from country to country.²²

Some countries, such as Madagascar and Colombia, declared a state of emergency in line with their constitutions. Academics Kouroutakis and Ranchordás refer to a process of temporary de-juridification in reference to a state of emergency, which “can mean that special and extraordinary measures are enacted to respond to a certain crisis, in derogation of existing standards and rules”.²³ In their place, states might pass emergency legislation or regulations, “the legal rules that governments make to deal with the threat in the exercise of the wider powers that have been given to the government under a state of emergency”.²⁴ Sometimes, in conjunction with constitutional requirements, states issued formal notifications of their intention to derogate from international human rights law.²⁵

In other cases, despite declaring a state of emergency, no such notifications of derogation were issued. Other countries, such as Sri Lanka and Somalia, adopted a range of emergency measures without a clear legislative basis and outside of an established legal framework,²⁶ founding their COVID-19 responses instead on executive discretion.

Still again, and most relevant for the purposes of this publication, some countries such as the UK, Scotland, Ireland and Singapore passed legislation or relied on existing laws to ground their COVID-19 response. A defining feature of the legislative model is that “however unusual it may be, emergency legislation remains ordinary within the framework of the constitutional system: it is an act of the legislature working within its normal competence”.²⁷

In theory, using legislation ought to ensure compliance with overriding public law and rule of law principles. For example, such laws ought to incorporate formal values such as clarity, non-retroactivity, publicity, universality of reach, and the possibility of compliance and congruence between expressed law and official enforcement. Nevertheless, there are always risks associated with emergency laws and, particularly in the context of legislative-focused responses, sunset clauses might be interpreted as important safeguards of democracy.²⁸

For those countries that relied on legislation as the basis to ground their COVID-19 responses, sunset clauses were frequently held up as sufficient safeguard against the potential misuse of

21. See Molloy, S., (2020), “Coronavirus and parliament: A brief history of sunset clauses”, *Prospect Magazine* (28 April 2020); Molloy, S., “Covid-19, Emergency Legislation and Sunset Clauses”, UK Constitutional Law Blog (8 April 2020).

22. See, for example, Grogan, J., “States of Emergency Analysing Global Use of Emergency Powers in Response to COVID-19”, *European Journal of Law Reform* 2020, vol. 22, no. 4.

23. Kouroutakis, A., and Ranchordás, S. (2016) “Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies”, *Minnesota Journal of International Law*, vol. 25, no. 1, at 31.

24. Welikala, A., (2020), “[COVID-19: Southasian states of emergency](#)” (26 March 2020), *Himal SouthAsian*.

25. Coghlan, N., (2020), [Dissecting Covid-19 Derogations](#), *VerfBlog*, 5 May 2020.

26. Molloy, S. (2021), “Emergency Law Responses to Covid-19 and the Impact on Peace and Transition Processes, International Institute for Democracy and Electoral Assistance.

27. Ferejohn, J. and Pasquino, P., (2004) “The law of the exception: A typology of emergency powers”, *International Journal of Constitutional Law*, vol. 2, no. 2, pp. 210-39, at 215.

28. Molloy, S. (2021), “Approach with Caution: Sunset Clauses as Safeguards of Democracy?”, *European Journal of Law Reform*, vol. 23, no. 2.

emergency powers. For instance, *The Guardian*, in reviewing the UK Coronavirus Bill in an editorial, stated that “the first and most important overarching change that should be made to the bill is to introduce a sunset clause”.²⁹ A sunset clause was subsequently included in the UK Coronavirus Act, 2020.

In Ireland, the Irish Council for Civil Liberties (ICCL) advocated for the inclusion of a sunset clause in the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020, noting the “imperative that any emergency legislation introduced to curb the spread of COVID-19 should be time-limited, or include a sunset clause.”³⁰ Following a detailed analysis of the Irish Government’s proposed emergency law, the ICCL subsequently sent this analysis to parliamentarians and senators in advance of the Dáil (the Irish parliament) debate.³¹ As a result, a sunset clause of 9 November 2020 was included in the legislation, which was celebrated as an important check on executive emergency power.

Other countries, such as Serbia,³² Montenegro,³³ and Morocco,³⁴ have included sunset clauses in laws adopted in response to COVID-19.³⁵

The salience often attached to sunset clauses in the context of COVID-19 can be explained, in part, by drawing on the similarities with inclusion of sunset clauses in counter-terrorism legislation.³⁶ Where counter-terrorism laws empower governments to adopt a range of measures, often ones that significantly impinge on the enjoyment of individual rights and liberties,³⁷ COVID-19 emergency legislation has been used in much the same way.³⁸ For instance, sweeping powers for detention, quarantine and lockdown, measures adopted in most countries, impinge upon rights to freedom of movement, and assembly. The increased use of surveillance through, for instance, contact tracing applications, can adversely affect rights to privacy and private and family life.³⁹

Secondly, as with counter-terrorism legislation, COVID-19 emergency laws have empowered states’ security apparatus, enabling police forces and, in some cases, the military to assume a range of additional responsibilities.⁴⁰ The level of engagement by security personnel varies from country to country.⁴¹ In some cases, the role of the military has been limited to providing logistical

29. [The Guardian view on the coronavirus bill: strengthen the sunset clause | Editorial | The Guardian. The Guardian](#) (19 March 2020).

30. Irish Council for Civil Liberties, “[ICCL says emergency legislation must include sunset clause](#)” (17 March 2020).

31. Irish Council for Civil Liberties, ICCL [Submission on the Health \(Preservation and Protection and other Emergency Measures in the Public Interest\) Bill 2020](#) (18 March 2020).

32. Westminster Foundation for Democracy, Country Overview: Serbia, [WFD Pandemic Democracy Tracker](#).

33. Westminster Foundation for Democracy, Country Overview: Montenegro, [WFD Pandemic Democracy Tracker](#).

34. Westminster Foundation for Democracy, Country Overview: Morocco [WFD Pandemic Democracy Tracker](#).

35. For further examples, see Westminster Foundation for Democracy, Pandemic Democracy Tracker ([WFD Pandemic Democracy Tracker](#)) and V-DEM Institute, Resource Page of Covid Responses [GitHub - vdeminstitute/pandem: The Pandemic Backsliding Project \(PanDem\)](#).

36. See De Vrieze, F., and Molloy, S. (2020), “[Sunset clauses: Don’t let the sun go down on democracy](#)”, Westminster Foundation for Democracy (29 September 2020),

37. See, for a range of examples, the webpage of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ([OHCHR | Special Rapporteur on counter-terrorism and human rights](#)).

38. See United Nations, Human rights are critical - for the response and the recovery, [UN Human rights and Covid, April 2020](#).

39. See Eck, K., and Hatz, S., (2020) “State surveillance and the COVID-19 crisis”, *Journal of Human Rights*, vol. 19, no. 5, pp. 603-612

40. Breen-Smyth, M. (2014), “Theorising the ‘suspect community’: counterterrorism, security practices and the public imagination”, *Critical Studies on Terrorism*, vol. 7, no. 2, pp. 223-240,

41. See, for example, Safer World, “The role of the security sector in COVID-19 response: An opportunity to ‘build back better’?”, [Publications - Saferworld](#); Harm Reduction International, WAGING WAR AGAINST COVID-19: The Securitisation of Health Responses in Five Asian Countries June 2021, [HRI Briefing Emergency Powers Law Enforcement](#).

support.⁴² In other settings, the police and, at times, the military have assumed responsibilities for enforcing lockdown measures.⁴³ Still again, in such contexts as Sri Lanka, Indonesia and Egypt, security personnel have primarily led COVID-19 responses.⁴⁴ A range of civil society reporting and academic contributions over the course of the pandemic implies that as the security apparatus assumes more responsibility, the likelihood of human rights violations increases.⁴⁵ In contexts without a formal legal basis for emergency powers, the involvement of the security apparatus in responses to the pandemic has been directed by the head of state or the head of government and facilitated through emergency legislation. In the UK, for instance, under the Coronavirus Act, various surveillance powers have been expanded in terms of authorising authorities for the taking and retention of personal data (sections 22-24). Other examples of direct intrusions into civil liberties include regulatory powers to direct the suspension of port operations (sections 22-24). Public health officers and other officials can enforce quarantining under section 51. Section 52 allows for regulations to ban events and gatherings. Under Schedule 21 of the Coronavirus Act, police, immigration officers and public health officers are permitted to detain anyone they have “reasonable grounds” to suspect is “potentially infectious” for up to 14 days.

Thirdly, as is often the case with counter-terrorism legislation, COVID-19 emergency laws have generally been fast-tracked, meaning they passed through parliament in an expedited fashion. In normal circumstances, bills can take months to transition through lower and upper houses of parliament before receiving the final seal of approval. This timeframe allows for highly robust processes of review. In the UK, for instance, the legislative processes can include various readings of a bill, parliamentary debate, the work of committees and a bicameral system whereby a bill requires, for the most part, agreement in both houses. In addition, while most bills are introduced directly into parliament, a comparatively recent feature of the legislative process involves the publication of a draft bill by the government and its scrutiny by a parliamentary committee, usually in the parliamentary session preceding that in which a bill is formally introduced to parliament.⁴⁶ There is – as a rule – wide consultation on policies and proposals that may develop into legislation. A two-step procedure of white papers and green papers is used to discuss and consult government policy on a step-by-step basis. Stakeholders and interest groups, as well as citizens, are invited to put forward their views throughout the process.⁴⁷

Counter-terrorism laws, by contrast, are frequently expedited to afford the government additional competences to enable them to respond to unfolding events and in anticipation of potential future attacks. Similar levels of panic and urgency surrounded the global pandemic, particularly as initial cases were recorded in countries across the globe. Understood as necessary to ensure that governments could respond in haste to the emergency at hand, legislatures across the globe rushed through emergency laws. In the UK, the Coronavirus Bill took approximately four days to

42. For example, in Canada and Croatia.

43. For example, in Colombia, Ghana, and Guatemala.

44. See Safer World, “The role of the security sector in COVID-19 response: An opportunity to ‘build back better?’”, Publications – Saferworld.

45. Okech, A., Mwambari, D., and Olonisakin, F., (2020) “COVID-19 responses and human rights in selected African countries”, *Australian Journal of Human Rights*, vol. 26, no. 3, pp. 549-555; Aaron, E., (2020), “[Coronavirus shows the need for a human rights-based approach to public health crises](#)”, Freedom House (3 August 2020); European Centre for Non-for-Profit Law, [Civic Space in the Era of Securitised Covid-19 Responses](#), at 10; Namu, J-A., and Riley, T., “[Nine weeks of bloodshed: how brutal policing of Kenya’s Covid curfew left 15 dead](#)”, *The Guardian* (23 October 2020).

46. See Lynch, C. and Martin, S. (2019), “Can Parliaments be Strengthened? A Case Study of Pre-Legislative Scrutiny”, *Irish Political Studies* vol. 35, no. 1.

47. Voermans, W. ten Napel, H. and Passchier, R. (2015), “Combining efficiency and transparency in legislative processes”, *The Theory and Practice of Legislation*, vol. 3, no. 3, at 287.

become an Act of Parliament. In Scotland, the Coronavirus (Scotland) Bill passed through the full legislative process at Holyrood (where the Scottish Parliament is located) in a single day.

Fourthly and relatedly, in much the same way that terrorism involves an invisible and unpredictable enemy, the uncertainty surrounding the pandemic meant that, at least in the formative stages of the contagion, laws were passed with partial and incomplete information. This uncertainty created a sense of indifference or reluctant pacifism among the wider public when restrictive measures were adopted; they were viewed as unavoidable, justified in the wider context of the greater good.⁴⁸

Sunset clauses, as temporary measures, offer at least a partial response to concerns that emerge from how emergency laws are passed and used. For instance, the existence of sunset clauses in emergency laws helps to ensure that encroachments on civil liberties are time-bound, and that the strengthening of security sector competences are for a limited duration. This temporariness also assists the process of adopting legislation that both emboldens the government and its agencies, while simultaneously removing or reducing many of the rights held by citizens. Because these are viewed as short-term measures, even the more sceptical legislatures can be assured that laws passed in a wider context of fear, uncertainty and partial information, will have effect for only a limited period of time. For this reason, many describe sunset clauses as a spoonful of sugar that helps otherwise unpalatable legislation pass.

48. See discussions on the securitisation of COVID-19 and in particular the use of war rhetoric. As examples, Rizwan, S., "[Securitisation of COVID-19](#)", Centre for Strategic and Contemporary Research (4 February 2021).

3. Theory versus practice

What is particularly striking about the sunset clauses that are included in emergency laws is that they have often proven to be remarkably ineffective.

The prevailing characterisation of sunset clauses as legal provisions which provide for the expiry of a law at a future point in time is only partially accurate. It is the case that sunset clauses can indeed take this simplistic form. For instance, section 224 of the USA's Patriot Act, 2001 stipulates that:

Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

Sunset clauses that specify an end date in these terms can be ineffective in terminating legislation. More often than not, despite the inclusion of a sunset clause, legislation has been renewed for a longer period of time than the original sunset clause or even made permanent.

The Patriot Act, for instance, included 16 sections originally meant to expire on 31 December 2005. Nevertheless, the Act was reauthorised several times in the following years after only very limited evaluation. Finn, in his international study, concluded that the expiry of anti-terrorism legislation is extremely rare.⁴⁹ The reality of sunset clauses, therefore, is that their promise of curtailing emergency powers to prevent the normalisation of emergency powers is often unfulfilled. For some, they are simply ineffective.⁵⁰

However, a more expansive definition of sunset clauses can explain why these provisions are often ineffective. In most cases, sunset clauses are provisions that declare that an act, or provisions within an act, at a set time, cease to have effect *unless reauthorised*.⁵¹ For Ranchordás, sunset clauses introduce two regulatory messages: first, that legislation will expire at a set time; and second, that this expiration is conditional upon a decision of parliament.⁵²

It is the latter aspect - the conditional approval by parliament - that is the more important here. Contrary to the initial definition offered in the introductory remarks, in most cases, sunset clause provisions are usually accompanied by some requirement for renewal. For instance, section 83.32(1) of the Anti-Terrorism Act (Canada) 2001 provided that:

Sections 83.28, 83.29 and 83.3 cease to apply at the end of the fifteenth sitting day of Parliament after December 31, 2006 *unless, before the end of that day, the application of those sections is extended by a resolution - the text of which is established under subsection (2) - passed by both Houses of Parliament in accordance with the rules set out in subsection (3)*.⁵³ [italics added]

49. Finn, J.E., (2010), "Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation", *Columbia Journal of Transnational Law* vol. 48, no. 3.

50. Gross, O., (2003), "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?", *The Yale Law Journal* vol. 112, no. 5.

51. Gouvin, E. J., (2005), "Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism", *Temple Policy and Civil Rights Law Review* vol. 14, pp. 517-541, at 540.

52. Ranchordás, S. (2015), "Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?" *Statute Law Review* vol. 36, no. 1, pp. 28-45, at 30.

53. Anti-Terrorism Act (Canada) 2001 (italics added).

Similarly, in the United Kingdom, the Terrorism Act 2006 stipulated under section 25 that:

(1) This section applies to any time which - (a) is more than one year after the commencement of section 23; and (b) does not fall within a period in relation to which this section is disapplied by an order under subsection (2).

(2) The Secretary of State may by order made by statutory instrument disapply this section in relation to any period of not more than one year beginning with the coming into force of the order.

...

(6) The Secretary of State must not make an order containing (with or without other provision) any provision disapplying this section in relation to any period unless a draft of the order has been laid before Parliament and approved by a resolution of each House.⁵⁴

The COVID-19 legislative landscape in many settings reflects the practice of attaching some form of review alongside the sunset provision. The UK Coronavirus Act 2020, for instance, provides that:

89 Expiry

(1) This Act expires at the end of the period of 2 years beginning with the day on which it is passed, subject to subsection (2) and section 90.

(2)

....

90 Power to alter expiry date

(1) A relevant national authority may by regulations provide that any provision of this Act -

- (a) Does not expire at the time when it would otherwise expire (whether by virtue of section 89 or previous regulations under this subsection or subsection (2)), and
- (b) expires instead at such earlier time as is specified in the regulations.

(2) A relevant national authority may by regulations provide that any provision of this Act -

- (a) does not expire at the time when it would otherwise expire (whether by virtue of section 89 or previous regulations under this subsection or subsection (1)), and
- (b) expires instead at such later time as is specified in the regulations.⁵⁵

To allow for this, section 98 of the Act provides for a motion to be debated within seven sitting days of each six-month period of the Act's operation: "That the temporary provisions of the Coronavirus Act 2020 should not yet expire". If the motion is rejected the minister must ensure the relevant provisions expire no later than 21 days since the beginning of the day of the vote.⁵⁶ In these examples, and while the particular substance varies, the legislation provides that the act or part of the act should cease to have effect on a particular date, unless, following a period of review, they are renewed. There are different ways in which renewals can take place. For instance, in the UK it is typical for the secretary of state to lay a statutory order before parliament. There are then two procedures available for the order to take effect: the affirmative resolution procedure,

54. Terrorism Act 2006.

55. Coronavirus Act.

56. See De Londras, F. (2021), "Six-Monthly Votes on the Coronavirus Act 2020: A Meaningful Mode of Review?", UK Constitutional Law Blog (25 March 2021) (available at <https://ukconstitutionallaw.org/>).

and the negative resolution procedure.⁵⁷ As De Londras explains, under the negative procedure, a statutory instrument automatically becomes law after a specific period of time unless there is an objection from either the House of Commons or the House of Lords - the two legislative chambers in the UK.⁵⁸ Under the affirmative procedure, both Houses of Parliament must formally approve the statutory instrument for it to become law.⁵⁹

Where sunset clauses include provisions that stipulate the process of renewal, it is then more accurate to note that it is in fact these review processes that hold significant potential to bridge the gap between the expectations placed on sunset clauses, and the realities of what they achieve in practice. For instance, where legislation confers a wide range of competences on government actors and agencies, while also impeding the enjoyment of a range of rights, the discontinuation of these measures is decided following the process of review.⁶⁰ These review processes offer opportunities to reintroduce democratic deliberation and accountability, particularly where these important safeguards are sidelined as a result of the fast-tracked nature of lawmaking.

Moreover, there can be the opportunity for scrutiny of the full effect of legislation. As an example, the [Counter-Terrorism Review project](#) (by the University of Birmingham) proposed that review should involve “the retrospective consideration of counter-terrorism laws and measures to assess their lawfulness, propriety, impacts, effectiveness and appropriateness by reference to core principles of democracy, human rights and the rule of law.”⁶¹ In theory, this process of review can assist in making amendments to existing legislation, even if legislation is to be renewed.

Moreover, where legislation is adopted with incomplete or questionable information, it is not the sunset provision that addresses these deficits. Rather, it is the process of review. For Finn, for instance:

Sunset clauses promote democratic oversight and accountability by providing the legislature with periodic opportunities to revisit questions with the additional information or experience necessary to adjust or to recalibrate public policy.⁶²

Concerns over incomplete information were raised during the minimal debates on the Coronavirus Bill in the UK Westminster Parliament. Ian Blackford MP, for instance, expressed concern that:

We know that the Bill sunsets after two years. However, there are serious concerns over the two-year period and the scrutiny of this measure. I know that aspects of the Bill and amendments to it will be discussed at later stages. I hope that the Government will look carefully at the safeguards of regular reporting, review and renewal if it is required.⁶³

To this end, the aforementioned provisions in section 90 of the Coronavirus Act sought to address concerns raised about the lengthy two-year period before the sunset clause kicked in. Amongst

57. De Londras, F., (2018), Sunset Clauses, Counter-Terrorism Review Project, 12 April 2018.

58. De Londras, F., (2018), Sunset Clauses, Counter-Terrorism Review Project, 12 April 2018.

59. De Londras, F., (2018), Sunset Clauses, Counter-Terrorism Review Project, 12 April 2018.

60. Kouroutakis, A. and Ranchordás, S., (2016) “Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies”, *Minnesota Journal of International Law*, vol. 25, no.1, 264.

61. De Londras, F., (2018), Sunset Clauses, Counter-Terrorism Review Project, 12 April 2018

62. Finn, J. E., (2010), “Sunset clauses and democratic deliberation: Assessing the significance of sunset provisions in antiterrorism legislation”. *Columbia Journal of Transnational Law* , vol. 48, no. 3, pp. 442-502, at 447.

63. Coronavirus Bill, Volume 674: debated on Monday 23 March 2020, [Coronavirus Bill - Monday 23 March 2020 - Hansard - UK Parliament](#).

other things, this provision provides for six-monthly reviews to take place. Under section 90, ministers can use their powers to cause particular provisions to expire earlier than the two-year sunset. To allow for this, section 98 of the Act provides for a motion to be debated within seven sitting days of each six-month period of the Act's operation: "That the temporary provisions of the Coronavirus Act 2020 should yet expire". If the motion is rejected the minister must ensure the relevant provisions expire no later than 21 days since the beginning of the day of the vote. In addition, these reviews would be supported by insights and information generated by two-monthly reports and other enquiries, reports and research undertaken on the pandemic.

Of course, it is also the case that emergency laws may well persist longer than the stipulated sunset period. McGarrity *et al* note that it is unrealistic to expect that sunset clauses will always result in the expiry of legislation and indeed, in some cases, the most appropriate decision will be to renew the legislation. Nevertheless, the point remains that the decision of whether or not to continue with legislation should, in theory, be subject to robust scrutiny, by a range of actors, in a democratic and transparent way, with sufficient information.

3.1 The ineffective drafting of sunset clauses

Sunset clauses can only be as effective as their design, drafting and application allows them to be. The sunset clauses identified and examined previously, when scrutinised from the perspective of legislative quality, show a number of deficiencies that can account, even if only partly, for their limited effectiveness.

A first problem, which is common in all the provisions examined, is their opaqueness and lack of clarity in setting out what is subject to sunset, the time of sunset and the processes required for the provisions to sunset. If a measure of good legislation is the extent to which it can communicate effectively to all those concerned the regulatory messages contained there,⁶⁴ then the sunset provisions examined above fail miserably. Rather than sending a clear message they engage in complex, sophisticated and ambiguous or incomprehensible formulations.

The US Patriot Act 2001 starts with an exception before referring to the title and its amendments that are due to expire, but in between lists in detail all sections that are exempt from the sunset. The emphasis is on what does not expire rather than on what expires, the reference to amendments is confusing and the result is a very unclear provision that is incomprehensible to anyone who is not privy to the details of the Act, its sections and amendments:

Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

The Anti-Terrorism Act (Canada) 2001 (section 83.32(1)) is more specific in determining the sections that cease to apply and then proceeds to define the sunset date. Sunset takes place "at the end of the fifteenth sitting day of Parliament after December 31, 2006" This is a complicated formulation that might not be easy to calculate for anyone who is not well versed in the internal procedures of the parliament. When do sitting days start? Are weekends included? Are all weekdays included? When is the fifteenth sitting day? What is more confusing is that there is no obvious reason why the sunset date needs to be set out in such a complicated manner. How easy is it for every interested party to calculate with certainty the fifteenth sitting day of parliament?

64. Mousmouti, M., (2019), *Designing Effective Legislation* (Elgar).

In an equally opaque manner, the Terrorism Act 2006 (UK) under section 25 refers to “any time which - (a) is more than one year after the commencement of section 23; and (b) does not fall within a period in relation to which this section is disapplied by an order under subsection (2)”. How one can figure out what these actual dates are is a mystery, and so is the need for these unnecessarily complicated provisions.

A second problem is that several of these provisions, including those related to COVID-19, set very vague requirements in relation to their extension. The decision to extend the duration of the provisions due to sunset in most examples can be made without an explicit link to a thorough review, other than the need for approval by the Houses of Parliament. The Anti-Terrorism Act (Canada) 2001 refers to *a resolution... passed by both Houses of Parliament and the Terrorism Act 2006 (UK) to an order of the Secretary of State made by statutory instrument (s 25 par. 2) which needs to have been laid before Parliament and approved by a resolution of each House (s 25 par 6)*. These provisions rely on the decision of a specific authority without any explicit reference to a review process that will examine the effectiveness or the working of these measures. The emphasis is more on procedural aspects of the approval than on its substance. But even when substantive aspects are explicitly mentioned, the way in which this is done is so complicated and opaque that the message is lost.

What these examples teach us is that one reason why sunset clauses can fail is because they do not communicate effectively their regulatory messages: what expires, when and how - as well as the substantive requirements that are attached to any extension.

Whether poor design and drafting are a conscious choice to cultivate uncertainty and mysticism around the provisions is difficult to verify *ex-post*. What can be ascertained, however, is that provisions such as sunset clauses, because of their exceptional nature and function, need to meet a very high level of clarity, specificity and unambiguity in order to be effective.

3.2 The problems of review in practice

Nevertheless, there remain many challenges for reviews of sunset clauses. In the context of counter-terrorism, for instance, review processes have often been ineffective. For one, reviews have frequently been poorly attended. The UK civil society group JUSTICE, for instance, has in the past voiced its scepticism about the quality of debate triggered by the sunset clauses in the Anti-Terrorism Crime and Security Act 2001 and the Prevention of Terrorism Act 2005, noting that “the annual debates triggered by these measures have typically been rushed affairs and seem to us to offer little of the substantive scrutiny that is required in respect of such sweeping measures (indefinite detention of foreign nationals and control orders respectively)”.⁶⁵ Similarly, the Counter-Terrorism Review Project highlights that in the 2003 debate in the House of Lords on whether to renew the Part 4 powers of the Anti-Terrorism, Crime and Security Act 2001, just four lords spoke. This included the minister who had introduced the renewal order. Only 13 MPs attended the first debate in 2006 on whether to renew the Prevention of Terrorism Act 2005 - the legislation that established the control order regime.

There is, in addition, often insufficient time allocated to reviews. The House of Commons Third Delegated Legislation Committee, which was entrusted to consider whether the Terrorism Prevention and Investigation Measures Act 2011 should be renewed for a further five years, debated the measures for just 32 minutes.

65. The Law Commission, *Post-Legislative Scrutiny*, (Law Com No 302), at Para. 3.56.

More recently and in the COVID-19 context, De Londras, in assessing the effectiveness of the initial six-month review of the UK Coronavirus Act, noted that members of parliament debated the motion for just over an hour and a half, 90 minutes having been assigned to the debate.⁶⁶

The necessary period between adoption and review and between different review processes also raises additional issues. Although the UK's Coronavirus Act allows for review after a period of six months, this may still be too infrequent. During the House of Lords review of Fast Track Legislation in 2009, for instance, The Better Government Initiative - established in 2007 as a response to growing concern about the poor quality of formation and implementation of government policies in the United Kingdom - argued that "post-legislative scrutiny is all the more necessary" in cases of fast-track legislation, and that "it should perhaps be more frequent".⁶⁷ Such is the nature of the pandemic and such is the extent and wide-ranging scope of powers afforded under the Coronavirus Act (and similar pieces of legislation adopted globally), that more frequent review processes might be required. In addition, the time allotted for debates on sunset clauses is also very short, often limited by parliamentary procedure to only an hour and a half.⁶⁸

Furthermore, there are questions regarding the most effective form of review. If parliamentary post-legislative review is the chosen approach, there may be problems associated with politicisation of the legislation in question. Should, then, the review be undertaken by an independent expert, committees of the House of Commons or Lords, or an independent group? If so, how democratic would the process be?

There are, in addition, problems associated with the information that is used to inform reviews. As noted, one of the supposed benefits of sunset clauses is that, as temporary measures, they enable the accumulation of more information so that reviews can be better informed.⁶⁹ Yet, Berman contests this claim. Examining debates in the US Congress on counter-terrorism laws, she states that:

a close inspection of these debates indicates that Congress has largely continued to rely upon incomplete - and sometimes misleading - information... When it comes to Congress's lack of information, there is plenty of blame to go around; much of it can be laid at Congress's own feet for failing to request information that would allow it to evaluate policy effectiveness or executive abuse or waste.⁷⁰

66. De Londras, F., (2021), "Six-Monthly Votes on the Coronavirus Act 2020: A Meaningful Mode of Review?", UK Constitutional Law Blog (25 March 2021) (available at <https://ukconstitutionalaw.org/>)

67. House of Lords, Constitution Committee: Fifteenth Report, "Fast-Track Legislation: Constitutional Implications and Safeguards" HL 116-1 Session 2008-9, at para. 174.

68. See Counter-Terrorism Review Project, "Sunset Clauses" (12 April 2018).

69. Berman, E., (2013), The Paradox of Counterterrorism Sunset Provisions, Brooklyn Law School, Legal Studies Paper No. 307, Fordham L. Rev. vol. 18, pp. 1793-1794, at 1777. Available at SSRN: <https://ssrn.com/abstract=2149011>.

70. Berman, E., (2013), The Paradox of Counterterrorism Sunset Provisions, Brooklyn Law School, Legal Studies Paper No. 307, Fordham L. Rev. vol. 18, pp. 1793-1794, at 1777. Available at SSRN: <https://ssrn.com/abstract=2149011>.

The UK's Equality and Human Rights Commission has raised similar concerns regarding debates on the Coronavirus Act, stating that:

we remain concerned that the two-monthly reports provide minimal detail. They fail to address the impact of how the provisions have been used, including the equality or human rights impact, and do not include evidence on how the views and experiences of groups sharing protected characteristics have been considered.⁷¹

There are no doubt various reasons for the inadequacies of sunset reviews. For one, while sunset clauses can facilitate compromise, their inclusion can be used to garner cross-party approval to push through contentious pieces of legislation only for them to be later removed. By including sunset clauses, opponents of particular bills (largely because of the wide powers that are afforded under them) are reassured that any measures are time-bound. But this does not necessarily safeguard sunset clauses from political lobbying and subsequent amendments post-adoption. A frequent criticism of sunset clauses is that they provide a convenient political excuse for shortcutting initial parliamentary debate about controversial legislation, thereby postponing the substantive debate until the legislation comes up for expiry or renewal. As Kouroutakis and Ranchordás note:

Sunset clauses have been used to gather consensus regarding controversial, and often emergency, laws that would have not been adopted otherwise. The consensus-gathering virtue attributed to sunset clauses frequently evolves into a vice and “sunset clauses have been transformed from an instrument of better government into a clever political trap”.⁷²

Similarly, in the context of taxation, Manoj Viswanathan assesses that “sunset provisions... are the product of political manoeuvring designed to bypass budgetary constraints and are exploited as a means of enacting permanent legislation under the guise of an ostensible expiration date”.⁷³

There might also be financial or political reasons that deter effective reviews. Kearney has reported a survey of states with sunset legislation providing for agency review and discontinuation of governmental entities over time, and found that 12 states discontinued legislative sunset reviews “because of high monetary and temporal costs of sunset review, intensive lobbying by vested interests, unfulfilled expectations of agency termination, low levels of citizen participation, and other perceived problems”.⁷⁴

It is thus perhaps both inaccurate and unfair to attribute the continuation of legislation to the ineffective functioning of sunset clauses. Rather, if the effect of a sunset clause is to trigger a process of review, whereby decisions are made as to whether to discontinue or reaffirm the existence of legislation or provisions, then sunset clauses, in doing so, have fulfilled their function. The failings fall rather on the review process itself.

71. Equality and Human Rights Commission, Briefing for the Coronavirus Act 2020 Six Month Review Debate House of Commons, 24 September 2020.

72. Mooney, C., (2004), “A Short History of Sunsets”, Legal Affairs magazine, cited in Kouroutakis, A. and Ranchordás, S., (2016), “Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies”, *Minnesota Journal of International Law*, 264.

73. Viswanathan, M., (2007), “Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future”, *New York University Law Review* vol. 82, no. 1.

74. Kearney, R.C., (1990), “Sunset: A Survey and Analysis of the State Experience”, *Public Administration Review*, vol. 50, no.1, at 49.

This is succinctly captured by John Finn:

How we calculate the success or failure of sunset provisions should not reduce to counting how many times such provisions have been repealed. Whether sunset clauses work depends instead upon whether they deliver the informational, distributive and deliberative benefits they promise.⁷⁵

Against this backdrop, the remainder of this paper draws on a number of positive examples of post-legislative scrutiny. We focus primarily on two aspects: firstly, best practices of legislative drafting that have led to more concrete reviews and secondly, wider issues, particularly around the contexts of reviews and level of engagement from legislatures.

75. Finn, J. E., (2010), "Sunset clauses and democratic deliberation: Assessing the significance of sunset provisions in antiterrorism legislation", vol. 48, no.3, *Columbia Journal of Transnational Law*. pp. 442-502.

4. A roadmap for effective sunset clauses

The criticisms and challenges identified above confirm that sunset clauses are not a panacea that can cure the numerous vices associated with legislation and the policies to which they give legislative form. They also confirm that sunset clauses can reduce legal certainty and democratic deliberation if they fail to incorporate two important requirements: a high standard of design and drafting, and a substantive framework for scrutiny and review.

This section examines some fundamental considerations that need to guide the drafting of sunset clauses and some requirements for substantive post-legislative scrutiny process.

4.1 Drafting considerations

The main principle that needs to guide the drafting of effective sunset clauses is clarity and certainty in the regulatory messages around the subject of expiry, the time of expiry, the subject and the time of the review, the competent bodies, the required processes, including their outputs and follow-up activities. Drafted in this way, sunset clauses are likely to be more specific, less open to manipulation and better able to set a meaningful framework for review. Some more specific drafting questions are addressed below.

The subject of sunseting

The most important message that a sunset clause has to communicate is what specifically is subject to the expiration clause. The sunset clause can apply to the entire act or regulations or just a segment of them, in which case these need to be determined with precision. For example, section 89 of the [Coronavirus Act 2020](#) (UK) concerns the entire Act, while section 9 of the [Coronavirus \(Scotland\) \(No.2\) Act 2020](#) concerns only Part 1 of the Act. The reference to parts, sections or subsections that expire must be as straightforward as possible without unnecessary complications. In this part of the sunset clause no level of ambiguity is permissible, in order to safeguard legal certainty. The clauses subject to expiration would need to be preceded by a thorough examination of potential gaps in the enjoyment of rights or factual situations created while the provisions were in force, in which case, transitional provisions (provisions resolving or regulating pending issues) would need to be put in place.

Sunseting date

The expiration date is the second most important regulatory message that a sunset clause has to communicate. In setting the expiration date, a number of factors need to be taken into account, such as the nature of the provisions that expire, the point in time when sufficient evidence will be available to decide on the need to expire, the processes through which this evidence will be generated or collected and so on. However, most importantly, the expiration date needs to be specific. Naming a specific date; for example “(1) Part 1 expires on 30 September 2020” ([Coronavirus \(Scotland\) \(No.2\) Act 2020](#)) is the most straightforward way to regulate this. If naming a date is not possible, then the formulation to calculate the expiry date should be as uncomplicated as possible. The [Coronavirus Act 2020](#) (UK) provides that:

89 Expiry

(1) This Act expires at the end of the period of 2 years beginning with the day on which it is passed, subject to subsection (2) and section 90.

Is it possible for any interested party to identify the date on which the Act was passed with unequivocal certainty? Does everyone know that the date when a law is passed is different from that when it is enacted? If not, a more accessible reference to the expiry date needs to be selected.

4.2 Setting a framework for substantive scrutiny or review

The second element of effective sunset clauses is that expiration is often subject to a review that determines whether the measure should be renewed, amended or allowed to expire. A framework for meaningful and substantive scrutiny needs to determine with clarity and precision an explicit requirement for a review, and determine the subject of the review, its timing, the authority competent to conduct the review and the procedure required.

Explicit requirement for a review and the subject of review

It is common to find sunset clauses being linked to the outcome of the review process. So a provision would expire unless explicitly extended following a review. In such cases, the review clause needs to identify with precision what is subject to review. This can cover “core” or “non core” aspects of a law, including “substantive” provisions or just implementation processes, all or some elements of legislation.

Apart from the subject of the review, it is good practice to specify also the focus of the review, especially if it concerns specific contentious aspects. This can make reference to the degree of attainment of the objectives of the act, implementation, costs, or anything else. A lack of specification in the focus of the review can leave room for a superficial review that shies away from controversial topics. Australia’s [Tasmania Climate Change \(State Action\) Act 2008](#) stipulates that the review of the Act should focus on:

- (a) the extent to which the objects of this Act are being achieved; and
- (b) the extent to which additional legislative measures, if any, are considered necessary to achieve the targets set by this Act within the periods contemplated by this Act, including by the introduction of performance standards and other mandatory requirements; and
- (c) such other matters as the Minister may consider relevant to a review of this Act.

Timing of the review

The timing of the review is an important matter, especially if linked to an expiration clause. Criteria that need to be considered in order to prescribe a reasonable and meaningful review period relate to the content of the law and the provisions under review, an assessment on a reasonable time to expect results or the time when meaningful implementation data will be available to inform the review in a substantive way. Although a period of three to five years is often indicated as a reference period for review, in practice, this needs to be tailored to the intricacies of each act. In Germany, a review of the administrative cost of legislation takes place one year after the adoption of legislation to ensure that no disproportionate burdens are created. The sunset provisions in the Legislation Act 2003 in Australia were reviewed after ten years.

Fixing the expiry time also needs to consider that meaningful reviews require time and resources and, as such, need to be timed in a way that makes them substantive rather than formal and superficial. This comes as a response to requests for more frequent reviews. Reviews are only

effective if they are meaningful, which means that they take place at the right time and can generate substantive information on the operation and effectiveness of the act.

Authority to conduct the review

An effective review clause determines the body responsible to conduct it. Naming the authority needs to consider the body best placed not only to collect implementation data but also to offer a comprehensive and objective assessment of the operation and the working of the act. In principle, implementation agencies, which are often appointed as review bodies, have the advantage of proximity to implementation data but the disadvantage of a potential lack of objectivity, as they might be biased to present a positive picture of reality.

Independent reviews or reviewers are an option that is commonly adopted when the topic of legislation is particularly sensitive or requires enhanced guarantees of independence, objectivity and expertise. For example, the UK's [Terrorism Prevention and Investigation Measures Act 2011](#) provides:

20 Reviews of operation of Act

(1) The Secretary of State must **appoint a person to review the operation of this Act** (“the independent reviewer”).

(2) The independent reviewer must carry **out a review** of the operation of this Act **in respect of each calendar year**, starting with the first complete calendar year beginning after the passing of this Act.

(3) Each review must be completed as soon as reasonably practicable after the end of the calendar year to which the review relates.

(4) The independent reviewer must send to the Secretary of State **a report on the outcome of each review** carried out under subsection (2) **as soon as reasonably practicable after completion of the review**.

(5) On receiving a report under subsection (4), the Secretary of State must lay a copy of it before Parliament.

(6) The Secretary of State may pay to the independent reviewer ...

Procedure for the review or expiry

The expiry or extension of clauses due to expire often require the observance of a specific procedure, a motion or order and a resolution from one or both Houses of Parliament. In terms of procedure, review clauses often provide for the submission of the outcomes of the review to parliament and its consideration. The active involvement of parliament in the decisions around the expiry of legislation is not a matter of courtesy or form but in essence a constitutional issue that adds to the objectivity and the democratic deliberation around sunset clauses. An interesting example is the [Privacy Act 1985 \(Consolidated\)](#), Canada that provides for permanent reviews of the Act by a parliamentary committee to be decided by the houses:

Permanent review of this Act by Parliamentary committee

The administration of this Act shall be reviewed on a permanent basis by such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established by Parliament for that purpose.

Review and report to Parliament

(2) The committee designated or established by Parliament for the purpose of subsection (1) shall, not later than July 1, 1986, undertake a comprehensive review of the provisions and operation of this Act, and shall, within a year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon including a statement of any changes the committee would recommend.

Other procedural provisions might require consultation with specific bodies. For example, the [Tasmania Climate Change \(State Action\) Act 2008](#) requires the competent Minister to consult with “(b) relevant business, scientific, environment and community bodies” (section 18, paragraph 3).

5. Conclusions

Within the panorama of legislation, emergency legislation holds a special place, and sunset clauses are vested with the high hopes of safeguarding rights or values that might be endangered or compromised. Our analysis shows that sunset clauses can fail to do so for two reasons: first, their ineffective design and drafting and second, their superficial or weak link to a substantive process of review.

Sunset clauses are not a panacea for all the vices of legislation and caution is required, when considering firstly whether to include a sunset clause or expiration provision in a bill or a provision for mandatory review of the act, and secondly when designing and drafting them in order to set an enabling framework for meaningful review.

Sunset clauses can only safeguard democracy and legal certainty when drafted effectively and combined with a meaningful review process. On the drafting side, this means that the law sets out in the most clear and precise way what is subject to expiry, when and under what conditions. With regard to the review and scrutiny required prior to sunset, the law must clearly set out what is to be reviewed, when, by whom and how. In practice, the review needs to ensure a meaningful debate that considers objective information and uses evidence as the basis for any decisions made.

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Franklin De Vrieze is the Senior Governance Adviser at Westminster Foundation for Democracy (WFD) in London. He conducts research and develops implementation tools on new and innovative themes for parliamentary programming, such as post-legislative scrutiny and parliament's interaction with independent oversight institutions, among others. He offers programme quality assurance and parliamentary technical advice to WFD country teams. Franklin has worked on governance issues for over 20 years. He is the author of several academic articles and other professional publications on good governance, parliamentary strengthening and post-legislative scrutiny.

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