



Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?

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ABSTRACT

Legislation is often criticized for lagging behind the evolution of society and technology. The excessive regulatory burdens, slow legislative process, and law's aversion towards legal change and uncertainty are some of the underlying reasons. However, the principle of legal certainty cannot be interpreted as a commandment imposing the immutability of legislation. Instead, a certain degree of gradual or temporary uncertainty may be necessary to ensure that laws continue to mirror society and hence grant, in the long-run, sufficient certainty. There are two candidates for this 'mission': sunset clauses and experimental legislation. These temporary legislative instruments determine the expiry of rules after a fixed period. Both instruments have been criticized and praised by the literature and case law in different countries. In this article, I examine whether and why sunset clauses and experimental legislation can be regarded as 'blessings' or 'curses' for the principle of legal certainty.

*Se vogliamo che tutto rimanga come è, bisogna che tutto cambi!*¹

1. INTRODUCTION

In times of crisis, one is overwhelmed by lengthy discourses on the need to stimulate investment, accommodate social and technological novelties, and facilitate innovation.² Legislation and regulation are often accused of playing a detrimental role in this context due to the excessive burdens placed on businesses and high compliance costs. In addition, the slow legislative process often means that legislation tends to lag behind technological development, delaying the introduction of innovative products and services in the marketplace.

The aversion of legislators to reflect the permanent change of the regulated realities, experiment with more effective regulatory solutions, and periodically rethink the need of existing regulations appear to underlie the mentioned objections. A wider implementation

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¹ G Tomasi di Lampedusa *Il Gattopardo* (Feltrinelli Traveller 1958, 2002): this is affirmed by the character Tancredi, the nephew of the main character of the book, Prince of Salina ('everything needs to change, so [that] everything can stay the same').

² President Obama stated, e.g. in 2009 that 'innovation is more important than never', Speech of Barack Obama (5 August 2009), available at <http://www.whitehouse.gov/blog/Spurring-Innovation-Creating-Jobs> (accessed 17 December 2013).

of temporary legislative instruments, such as sunset clauses and experimental regulations could contribute to the solution of these challenges. In the United Kingdom, this would be in line with the recent guideline regarding the inclusion of a sunset clause in a number of new regulations introduced by Whitehall departments where ‘there is a net burden (or cost) on business or civil society organisations’, and in national regulations implementing EU law.³ Sunset clauses determine the expiry of laws on a certain date and are primarily designed to guarantee that the legislator decides on their merits after a determined period.⁴

A perhaps less well-known instrument in the United Kingdom which could equally assist the legislator in the incorporation of change is experimental legislation.⁵ Experimental regulations try out new rules on a small-scale basis so as to test their effectiveness ‘in the real world’, adapt them to evolving circumstances, and enable regulators to learn from the obtained results.

Although the employment of sunset clauses can be susceptible of ‘transforming the role played by regulation in our society’,⁶ an attempt to expand the enactment of temporary rules may face in many jurisdictions a significant hurdle: the principle of legal certainty and the inherent imperative of legal stability. Both sunset clauses and experimental legislation imply the expiry of rules after a fixed period and/or promote their periodic amendment. In this article, I examine whether sunset clauses and experimental regulations can be a ‘blessing’ or a ‘curse’ to the principle of legal certainty. In a rapidly changing society, ensuring that laws continue to provide effective and updated solutions can grant sufficient certainty to outweigh the instability created by periodic amendments or terminations.

This article is introduced by a section devoted to the definition of the concepts of ‘sunset clauses’ and ‘experimental legislation’. An analysis of legal certainty as a principle of good lawmaking follows: this principle is presented in this article as a multidimensional principle which should be interpreted according to the imperatives of our increasingly ‘accelerated society’.⁷ The analysis of the multiple dimensions of the principle of legal certainty in a comparative context is necessary to explain the relationship between this principle and the referred legislative instruments. The current research is based on a comparative study of the literature and case-law of different jurisdictions, including Germany, the Netherlands, and the United States. Reference to the enactment of the mentioned temporary legislative instruments in the United Kingdom shall be equally made. Despite playing a secondary role in this study, the United Kingdom might be able to draw valuable lessons from the experience gained with both legislative instruments in other jurisdictions.

³ HM Government ‘Sunsetting Regulations: Guidance’, December 2011, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31635/11-682-sunsetting-regulations-guidance.pdf (accessed 2 January 2014).

⁴ See definition of ‘sunset clause’ in UK Parliament, ‘Glossary of Parliamentary Terms’, <http://www.parliament.uk/site-information/glossary/sunset-clause/> (accessed 2 January 2014).

⁵ Although the term ‘experimental legislation’ appears to be relatively unknown to most lawyers, this type of legislative instrument has been used for centuries in the United Kingdom, see J Williams ‘Experiment in Legislation’ (1888) 14 *Law Magazine and Review* 299. Experimental laws were, e.g. used in the former British Empire. An example was the *Pánjab Municipal Act of 1850*. The experimental nature of this tax was justified on the need to assess its implementation while adapting the tax to the local specificities. See Council of Governor-General of India, *Laws and Regulations* vol. VII, Authority of the Governor-General 1869.

⁶ HM Government ‘Sunsetting Regulations: Guidance’, December 2011, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31635/11-682-sunsetting-regulations-guidance.pdf (accessed 2 January 2014).

⁷ WE Scheuerman *Liberal Democracy and Social Acceleration of Time* (The John Hopkins University Press 2004).

2. SUNSET CLAUSES AND EXPERIMENTAL LEGISLATION: DEFINITIONS

2.1. Temporary Legislation

Legislation was traditionally conceived as the expression of a 'general will' meant to last. In this light, the idea of a temporary law or regulation would either be restricted to emergency situations or would have to be qualified as a '*contradictio in adjecto*'.⁸ A closer look reveals however that, under a number of circumstances, a temporary law may provide for more legal certainty than a permanent law that no longer reflects the current status of society.

The perception that laws should evolve with society is far from being a novelty of our time.⁹ In 1789, Thomas Jefferson, writing to James Madison, claimed that 'no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. (...) They manage it then, and what proceeds from it, as they please, during their usufruct'.¹⁰ Although the idea that we are mere usufructuaries of the earth and that we should not bind the next generation might frighten us,¹¹ the enactment of temporary legislation may be an undeniable necessity.

'Temporary legislation' is a broad concept that comprises different forms of legislation with a limited duration, such as emergency legislation, temporary-effects laws, zero-base budget laws, sunset clauses, and experimental legislation. A number of reasons can be invoked for the adoption of one of these different forms of temporary law, in detriment of a permanent law. In this article, attention shall be devoted to sunset clauses and experimental legislation.

2.2. Sunset Clauses

A sunset clause is a provision that determines the termination of a statute, specific provision, programme, or agency, unless there is solid evidence that the latter should be renewed for another fixed period.¹² Two elements characterize sunset clauses: (i) limited duration; (ii) ex post evaluation. As the word suggests, a sunset clause does not aim at continuity, rather it 'sets the sun' on a provision or entire statute on a specific date, unless there are substantial reasons to believe that the former should be extended for a determined period. This termination or renewal should only occur after an ex post evaluation has taken place. This evaluation looks into the effects of the sunset disposition and verifies whether the objective for which it was enacted has been achieved, or whether the provision should be renewed for a determined period. The renewal of a sunset provision requires an inversion of the burden of proof: the actors requesting it should be able to argue and demonstrate why the sunset clause should be renewed.¹³

⁸ A Chanos *Möglichkeiten und Grenzen der Befristung parlamentarischer Gesetzgebung* (Duncker & Humblot 1999) 12.

⁹ For a historical perspective on temporary laws and, more specifically, experimental legislation, see J Williams 'Experiment in Legislation' (1888) 14 *Law and Magazine* and Review 299.

¹⁰ T Jefferson *Letter to James Madison* (6 September 1789), (*The Federalist Papers*), <http://www.thefederalistpapers.org/founders/jefferson/thomas-jefferson-september-6-1789>: this letter referred to the possibility 'of the representatives of a nation validly engage debts beyond what they may pay in their own time, that is to say, within thirty-four years of the date of the engagement'.

¹¹ J Steinhaus *Gesetze mit Verfallsdatum* (Books on Demand 2008), 44.

¹² AR Licata 'Zero-Base Sunset Review' (1977) 14 *Harvard Journal on Legislation* 505.

¹³ P Eijlander and Rob van Gestel *Horizonwetgeving: effectief middel in de strijd tegen toenemende regeldruk?—een onderzoek naar de functie van werkingsbeperkingen in wetgeving ter vermindering van regeldruk* (2006), <http://www.portill.nl/articles/Eijlander/Horizonwetgeving.pdf>

The Dutch Council of State has emphasized that the reauthorization of a statute on these terms should only be justified on imperative grounds to avoid that laws are too easily renewed.¹⁴ Anyhow, renewal must not occur before the evaluation moment has taken place and should be based on these exact grounds.¹⁵

Sunset clauses emerged in their current 'format' in the United States in the 1970s as a reaction to the uncontrolled growth of agencies and their powers, excessive bureaucracy and public spending.¹⁶ Between 1976 and 1982, multiple states experienced a 'sunset-clause boom' which aimed to extinguish unnecessary agencies and unnecessary programs.¹⁷ The idea of sunseting agencies had emerged much earlier in 1937 with Justice William O Douglas.¹⁸ This was later developed by Theodore Lowi who suggested a 'tenure of statutes act' with a sunset of 5 to 10 years on the duration of agencies and their regulatory programs.¹⁹ The 'sunset boom' did not however produce the expected results, since evaluations soon became too onerous and automatic renewals took over the review process. In addition, sunset clauses were before long captured by politicians and special interest groups that proposed the inclusion of sunset clauses in bills that otherwise would not obtain sufficient support. This effect was visible in the field of tax law, where sunset clauses were inserted in multiple tax cuts provisions so that lawmakers could reduce the estimation of revenue costs of these laws to the sunset period.²⁰ By including a sunset clause, politicians could circumvent budgetary constraints and enact laws meant to last under the 'cover' of a temporary provision.²¹

More recently, sunset clauses have been employed in different countries to fulfil other functions. First, in line with Jefferson's words, sunset clauses have been used to guarantee a renewed legislative oversight on a particular legislative topic and respective laws. Sunset clauses can be employed to update laws which would otherwise become obsolete and terminate laws that are no longer necessary or effective. Attitudes, perceptions, and judgments towards behaviour evolve over time²²: groups that used to be subjugated and segregated are now free and equal to the others; social behaviours that used to be forbidden are now commonly accepted. The introduction of sunset provisions in statutes imposing the limited duration of rules can ensure that legislation continues

¹⁴ See the Opinion of the Dutch Council of State on the suggested amendment of the statute aiming to stimulate the participation of minorities in the labour market, see *Voorstel van de leden Vos en Stuurman betreffende het wijzigen van de wet stimulering arbeidsdeelname minderheden*, Advies van de Raad van State en reactie van de indieners, *Kamerstukken II*, (2003–04), 29 275, nr.4, 1, 2.

¹⁵ Opinion of the Dutch Council of State. Advies Raad van State en nader rapport, *Kamerstukken II* (2008–09), 32 058, nr.4, 3 *Tijdelijke vervulling artikel 668a van Boek 7 van het Burgerlijk Wetboek om arbeidsovereenkomsten voor bepaalde tijd aan te gaan in verband met het bevorderen van de arbeidsparticipatie van jongeren*.

¹⁶ L Curry 'Politics of Sunset Review in Texas' (1990) 50 *Public Administration Review* 58.

¹⁷ The first sunset law was enacted in 1976 in Colorado, see MB Bickle 'The National Sunset Movement' (1985) 9 *Seton Hall Legislative Journal* 209.

¹⁸ MD Crain 'Time for the Sun to Rise on Federal Sunset Legislation' (2000) 8 *Public Law* 10.

¹⁹ See TJ Lowi *The End of Liberalism: The Second Republic of the United States* (W.W. Norton 1979) (originally published in 1969 without the subtitle).

²⁰ RM Kysar 'The Sun also Rises: The Political Economy of Sunset Provisions in the Tax Code' (2006) 40 *Georgia Law Review* 335.

²¹ M Viswanathan 'Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future' (2011) 82 *New York University Law Review* 656.

²² RE Myers 'Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment' (2008) 49 *Boston College Law Review* 1327.

to reflect the current state of society and that the required legislative oversight on the merits of particularly grave dispositions is not forgotten.

Wars, economic crises, or other extraordinary circumstances may require temporary legislative measures. The most well-known form of temporary legislation is in fact ‘emergency legislation’. However, sunset clauses can also be employed in non-emergency (but still) temporary scenarios. This is the case of the sunset provisions introduced in counter-terrorism laws in numerous countries. The choice for sunset clauses was partially based on the uncertainty regarding the duration of the high terrorist threat. In the United States, the USA Patriot Act, enacted as a response to the 9/11 terrorist attacks, included in 2001 a number of sunset clauses which were renewed on different occasions in the scenario of the continuous fight against terrorism.²³ Sunset provisions were included in order to limit the duration of measures constraining fundamental rights to a five-year period (sunset clause).²⁴ The 2002 German *Terrorismusbekämpfungsgesetz* introduced also several limitations to fundamental rights on a temporary basis.²⁵ In the United Kingdom, multiple anti-terrorism statutes have included sunset clauses. Examples are the Prevention of Violence (Temporary Provisions) Act of 1939, Prevention of Terrorism Act of 1979, or the Prevention of Terrorism Act of 2005. The use of sunset clauses in the context of counter-terrorism policies has been criticized since this instrument has not been able to ensure a rigorous legislative oversight and scrutiny of the need of sunset provisions.²⁶

Secondly, sunset clauses have been used as a means to improve the effectiveness of public administration and regulations, and reduce regulatory pressure. This was suggested in 2002 by the Mandelkern Group on Better Regulation that argued that sunseting regulations could ensure that regulators reassess the underlying regulatory problem and evaluate ex post the regulation.²⁷ In Germany and in the Netherlands, sunset clauses were also included in the strategy to tackle excessive bureaucracy and reduce the excessive regulatory burdens placed on private actors. In the Netherlands, the Council of Economic Advisors submitted a report to Parliament, where it argued that all new regulations should include a sunset clause.²⁸ This proposal was rejected and has been criticized by the literature since an excessive number of sunset clauses may be counter-productive, placing a disproportional review burden on regulators and creating uncertainty.²⁹

²³ See JE Finn ‘Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation’ (2010) 48 *Columbia Journal Transnational Law* 442.

²⁴ Examples are the interception of communications, disclosure of communication, surveillance orders. Section 224 of the USA Patriot Act which contained a sunset clause of five years.

²⁵ *Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfung)* of 2002, *Bundesgesetzblatt* 2002, Teil I, Nr. 3, 361.

²⁶ M McGovern and A Tobin ‘Countering Terror or Counter-Productive? Comparing Irish and British Muslims Experiences of Counter Insurgency Law and Policy’ (2010) Report of a Symposium held in CulturCann McAdam O Fiach, Edge Hill University, available at <http://www.edgehill.ac.uk/documents/news/CounteringTerror.pdf>.

²⁷ Mandelkern Group on Better Regulation, Final Report, 13 November 2001, p. 18, available at http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf

²⁸ Opinion of the Council of Economic Advisors (Advies van de Raad van Economisch Adviseurs, REA) of 19 May 2005, *De wetten en regels die droom en daad verstoren; Bureaucratisering en overregulering*, Tweede Kamer, 2004–05, 30 123, nr. 2.

²⁹ Ph Eijlander and RAJ van Gestel ‘Horizonwetgeving: effectief middel in de strijd tegen toenemende regeldruk?: een onderzoek naar de functie van werkingsbeperkingen in wetgeving ter vermindering van regeldruk’ (2006), available at <http://www.portill.nl/articles/Eijlander/Horizonwetgeving.pdf>.

In Germany, sunset clauses have also been employed to tackle excessive bureaucracy since they put an end to unnecessary policies.³⁰ In a number of German states, sunset clauses have included in multiple laws.³¹ However, at the federal level, sunset clauses are still scarcely employed.

In the United Kingdom, the use of sunset clauses is mandatory for secondary legislation 'where there is net burden (or cost) on business or civil society organisations.'³² This obligation includes statutory instruments made under UK Acts of Parliament; codes of practice and self-regulation backed by statutory force, guidance issued under statutory powers. The advancement of sunset clauses reflects the idea of 'one in, one out.'³³ The governmental guidance on 'Sunsetting Regulations' issued in 2011 in the United Kingdom is applicable as well to European Union Regulations, Decisions and Directives implemented through domestic legislation. The use of sunset clauses in this context appears to be directed at the improvement of the effectiveness of the implementation laws. Any amendments or the termination of dispositions as a result of the introduction of a sunset clause should be executed within the scope of the EU legislation in question and should not constitute an attempt to circumvent EU obligations.

Although sunset clauses have often been inserted in the context of 'better regulation' policies, notably as an instrument to reduce regulatory pressure, there is no evidence that the first is achieving this goal. An abundant number of sunset clauses may not necessarily translate the required decrease in regulatory pressure. At the same time, an inadequate use of this instrument may also trigger a number of undesirable side-effects. According to the Mandelkern Group on Better Regulation, a high level of uncertainty and the consequent negative impact on the investment climate was pointed out as two of the most significant disadvantages of sunset clauses climate.³⁴

2.3. Experimental Legislation

Experimental legislation refers to laws or, more commonly, regulations (secondary legislation) which introduce rules in deviation of existing law for a fixed period, for a limited group of citizens or territory and which are subject to a periodic or final evaluation.

At the resemblance of sunset clauses, experimental laws or regulations are valid for a fixed period. While some argue that this fixed deadline constitutes a legality requirement of any experimental law,³⁵ others have claimed that the experiment should terminate as soon as its underlying motives cease to exist and enough evidence has been gathered in order to perform a solid evaluation of the effects of the implementation

³⁰ J Steinhaus *Gesetze mit Verfallsdatum: Ein Instrument des Bürokratieabbaus?* (Books on Demand 2008).

³¹ B Stiftung 'Sunset Legislation and Better Regulation: Empirical Evidence from Four Countries' 2010, available at http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-E8B3D0D1-5443791C/bst_engl/xcms_bst_dms_35739__2.pdf, p. 16.

³² HM Government 'Sunsetting Regulations: Guidance', December 2011, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31635/11-682-sunsetting-regulations-guidance.pdf (accessed 2 January 2014)

³³ *ibid.*

³⁴ Mandelkern Group on Better Regulation (2001). *Final Report*, available at http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf (accessed 3 January 2014).

³⁵ FC Durand, 'Réflexions sur le concept d'expérimentation législative (à propos de la loi constitutionnelle du 28 mars 2003 relative à l'organisation décentralisée de la République)' (2003) 56 *Revue Française de Droit Constitutionnel* 687.

of the experimental law.³⁶ Another intrinsic element of experimental regulations is the derogation from existing rules or standards. This aspect implies the observation of general national rules on delegation of legislative competences and/or, when applicable, the grant of a waiver or other forms of exemptions on an experimental basis. In this context, the statutory ground authorizing the experimental derogation should be explicit about this possibility, its objectives, duration, and limits.³⁷ These legality requirements also imply that the object of the experiment as well as the evaluation criteria are beforehand clearly defined.

Experimental rules should be applied to a predetermined part of the national territory or to a group of citizens. A 'sample group' is chosen for the implementation of the experimental rules, and the results obtained here are compared with the ones verified in the 'control group' (the rest of the population).³⁸

The added learning value of experimental legislation would be lost without accurate rules on the evaluation of the experiment. At the end of the fixed period, the obtained results should be evaluated and a follow-up decision on the termination or renewal of the experiment must be taken. The evaluation of the effects of the implementation of an experimental law can be performed by the ministry or state authority in charge of the experiment, special governmental authority or independent agency.³⁹ Depending on the result of this evaluation, the law might be adapted in conformity and then converted into permanent legislation or, in the case of absolutely negative results, simply perish at the end of its duration.

The word 'experimental' suggests that experimental legislation implies testing legislative subjects, specific rules, programs, or entire statutes.⁴⁰ However, this does mean that experimental regulations can be judged by the same validity requirements imposed on scientific experiments. The implementation of this type of legislation abides by different rules and methods. Experimental regulations do not aim, for example, to test further the safety of new products in the 'real world'. Instead, they try to gather more information on a new legislative approach to a problem or on the regulation of new phenomena by comparing on a small-scale basis the effectiveness of old and new rules. Hence, experimental regulations could also be more accurately qualified as 'exploratory' or 'learning' legislative instruments.

The basic distinction between sunset clauses and experimental legislation resides in the functions performed and the aspiration of permanence of the former. While with the first, legislators seek the sunset of ineffective laws; the second aims to be the sunrise of better and more effective legislation. Notwithstanding the fact that sunset clauses can perform diverse functions, these are first and foremost intrinsically instruments of policy termination⁴¹; whereas, experimental legislation is the first attempt to introduce a good lasting regulation.

³⁶ GD Pascual 'Los experimentos jurídicos' (2004) 164 *Revista de Administración Pública* 149, 183; B Desjardins 'Réflexions à partir d'une loi expérimentale: l'expression dans quelques PME d'Aquitaine' (1985) 24 *Travail et Emploi* 26.

³⁷ See A Chanos *Möglichkeiten und Grenzen der Befristung parlamentarischer Gesetzgebung* (Berlin: Duncker & Humblot), 33, 36.

³⁸ GD Pascual 'Los experimentos jurídicos' (2004) 164 *Revista de Administración Pública* 149, 183.

³⁹ A Kletzen *Évaluation du Risque et Prévention de la Criminalité dans le Processus Législatif* (Paris: Centre de Recherches Sociologiques sur le Droit et les Institutions Pénales 2000), <http://www.cesdip.msh-paris.fr>, 19.

⁴⁰ T Freund *Kommunale Standardöffnungs- und Experimentierklauseln im Lichte der Verfassung* (Berlin: WVB 2003), 16.

⁴¹ Th. Camps, WJM Kickert, and AFA Korsten 'Horizonwet, een nieuwe coloradokever' (1982) 2 *Bestuur* 10, 11.

Experimental legislation aims mainly to gather information regarding new and complex phenomena or gain more experience with new legislative approaches. This legislative instrument has been typically described on these terms in the German literature that sees experimental legislation as a mechanism to submit laws to a reality check, gather information as to their effects, rationalize and ‘optimize’ legislation through the incorporation of new and fact-based elements.⁴²

Experimental legislation can be an instrument to tackle uncertainty and the lack of information. In the case of innovative products and services, regulators, on the one hand, lack sufficient information to regulate; and, on the other, face the problem of information asymmetries caused by the reluctance of firms to disclose relevant information as to the risks of the products in question. While it may be a challenging task to compel firms to disclose this type of information, the missing informational elements can be more easily provided over time through repeated interaction.⁴³ This ‘repeated interaction’ can be promoted by sunset clauses and experimental legislation: due to the temporary character and periodic evaluations of these instruments, lawmakers can easily incorporate the information obtained either through observing the effects of the laws in question, by acknowledging the results of the participation of stakeholders or taking into account the evaluation reports. Zachary Gubler argues that regulators can base regulation on more accurate information if they divide the decision-making process in different stages, using the information in the experimental phase to adapt, in posterior phases, regulations accordingly.⁴⁴ Gersen adds that temporary legislation can be elected as an important means to tackle social, legal, or economic problems or situations characterized by *uncertainty*,⁴⁵ uncertainty which can refer to the duration, complexity, or effects of the latter. When little is known about this type of situations, an experimental regulation can be a better alternative to regulating in the dark or ‘putting the whole nation at risk’.⁴⁶

The enactment of regulations for a fixed period of time on a small-scale basis can however raise questions as to the compatibility of these rules with the principle of legal certainty: are rules sufficiently stable and predictable if the legislature successively experiments with them? Do citizens know where they stand if experimental rules are applied to a part of the population, while the rest must observe the existing law? These and other challenging aspects shall be analysed in the following section. By exploring the meaning of the principle of legal certainty, more light shall be shed on the relationship between this principle and sunset clauses and experimental legislation.

⁴² W Beck and C Schürmeier, ‘Die kommunalrechtliche Experimentierklausel als Reforminstrument’ (2004) *Landes- und Kommunalverwaltung* 488; R Stettner ‘Verfassungsbindungen des experimentierenden Gesetzgebers’ (1989) *Neue Zeitschrift für Verwaltungsrecht*, 806.

⁴³ C Coglianese, R Zeckhauser and E Parson ‘Seeking Truth for Power: Informational Strategy and Regulatory Policymaking’ (2004) 89 *Minnesota Law Review* 277, 311.

⁴⁴ Z J Gubler ‘Experimental Rules’ (2013) 55 *Boston College Law Review* 129.

⁴⁵ J E Gersen ‘Temporary Legislation’ (2007) 74 *University of Chicago Law Review* 247.

⁴⁶ See Justice Brandeis’ ‘states-as-laboratories’ metaphor in his dissent opinion in *New State Ice Co v. Liebmann*, 285 US 262, 52 S. Ct. 371, 76 L.ed.(1932).

3. THE PRINCIPLE OF LEGAL CERTAINTY

3.1. Introduction

The principle of legal certainty is a relatively modern principle that emerged in the 19th century and evolved alongside the *Rechtsstaat*.⁴⁷ Both the German Constitutional Court⁴⁸ and the French *Conseil d'État*⁴⁹ have described it as one of the pillars of the *Rechtsstaat* or *l'État de Droit*. This principle does not play the same role in all jurisdictions. In the United States, for example, legal certainty and legal stability are not regarded as fundamental principles of law. The limited role played by legal certainty has been recently criticized by James R Maxeiner who argues that 'Americans should not resign to legal indeterminacy' but should rather seek inspiration in the German approach to the principle of legal certainty.⁵⁰ Although not all countries grant the same meaning and value to the principle of legal certainty, the approach to this principle adopted in this article will be inspired in the German interpretation of the mentioned principle.

From a positivist point of view, legal certainty can be defined as 'the possibility of knowing in advance what legal consequences will follow from one's conduct'.⁵¹ This principle guarantees notably that norms enacted in a setting of 'the rule of law and not by men' are predictable, applied with respect for comparable precedents, and foreseeable.⁵² These goals can only be achieved if the law is clearly formulated and is not constantly or unreasonably amended. A certain amount of stability is therefore desirable. However, the challenge lies in the exact definition of this 'amount': should laws live forever? How stable is 'stable enough'?

The principle of legal *Terrorismusbekämpfungsgesetz* certainty was traditionally associated with the ideas of durability, continuity, and stability of law, and thus regarded as a shield against legal surprises and a synonym of the calculability of law.⁵³ In civil law countries, the legislature has been expected to generate the continuity and stability of law, and the executive and courts to maintain it.⁵⁴ This idea of stability derives from the traditional German perception of legal certainty as the legitimate expectation in the existence and continuation of law and its impartial and fair administration.⁵⁵ Permanent legislation appeared to have been until now the most suitable and common instrument to pursue this legal certainty.⁵⁶ However, in a rapidly changing society like ours, it is worth questioning whether legal certainty can always be achieved through lasting legislation.

⁴⁷ F Scholz *Die Rechtssicherheit* (Walter De Gruyter & Co 1955) 3.

⁴⁸ German Constitutional Court, BVerfGE, 2 BvR 2661/06, 6.7 (2010), Abs. 81.

⁴⁹ Conseil d'État, Rapport Public, 2006, available at <http://www.conseil-etat.fr/media/document//rapportpublic2006.pdf> (accessed 16 December 2013).

⁵⁰ J R Maxeiner 'Legal Certainty: A European Alternative to American Legal Indeterminacy?' (2006) 15 *Tulane Journal of International L. & Comparative Law* 541.

⁵¹ S Berteau 'Towards a New Paradigm of Legal Certainty' (2008) 2 *Legisprudence* 29.

⁵² K Günther 'The Pragmatic and Functional Indeterminacy of Law' (2011) 12 *German Law Journal* 407, 411.

⁵³ W Herschel, 'Rechtssicherheit und Rechtsklarheit' (1967) 23/24 *Juristenzeitung* 728.

⁵⁴ P Popelier *Rechtssicherheit als beginsel van behoorlijke wetgeving* (Intersentia 1997) 109.

⁵⁵ F Stolz *Die Rechtssicherheit* (Walter de Gruyter & Co 1955), 4.

⁵⁶ F Fagan 'After the Sunset: The Residual Effect of Temporary Legislation' (2011) *European Journal of Law and Economics*, published online on 2 February 2011.

As argued by Carl August Emge, the pursuit of legal certainty may be highly dependent on social and political circumstances; and on the 'stage of development' or education of citizens. To wit, in times of social or political crisis, citizens may prefer to pursue legal certainty, but in more stable periods the same citizens may prefer justice to legal certainty.⁵⁷ As far as the second aspect is concerned, highly educated people may also expect less legal certainty and less legislative stability, as they are aware of the fact that law needs to be adaptable to science and the evolution of society.⁵⁸

The meaning of the principle of legal certainty transcends the idea of the continuity of laws. This principle can be deconstructed in a myriad of dimensions that translate the multiple 'certainties' required by an impartial and fair administration of law.⁵⁹ These different certainties can in some cases be achieved not by ensuring that laws remain the same, but rather by terminating them and incorporating legal change.⁶⁰ In the following subsection (3.2.), I analyse the multiple dimensions of the principle of legal certainty and examine whether sunset clauses and experimental legislation can be regarded as a 'blessing' or a 'curse' for the concretization of this principle.

3.2. The Multiple Dimensions of Legal Certainty

For the purposes of this article, the most relevant dimensions of legal certainty to be considered are stability (or continuity) and predictability. 'Stability' in this context refers to the citizens' legitimate expectation that the law will endure and shall not be arbitrarily changed. This apparently straightforward dimension of legal certainty does not exclude the required amendments of existing laws or even the adoption of temporary rules, since legislation is not expected to 'live forever'. As Roscoe Pound famously declared 'law must be stable, and yet it cannot stand still'.⁶¹ This means that the desired stability of law is not affected by a coherent and reasonable introduction of changes in the legal order.

'Predictability' can be defined as the ability to foresee the legal consequences of one's conduct.⁶² The effects of legislative change on the predictability of law vary according to the extent and implications of the concrete changes in question. Should the new rules impose duties or cause a decisive rupture in the status quo, legislators should equally ensure the protection of a third dimension of the principle of legal certainty: 'reliability'. Unexpected legislative changes can produce a negative effect on the legitimate expectations of those who relied and acted upon the predictions made, and should therefore be limited if they can be detrimental to a group of citizens.⁶³

⁵⁷ CA Emge *Sicherheit und Gerechtigkeit. Ihre gemeinsame metajuristische Wurzel* (Berlin: De Gruyter 1940) 10.; CA Emge Über das Verhältnis von 'Normativem Rechtsdenken' zur 'Lebenswirklichkeit', in: *Abhandlungen der Geistes- und sozialwissenschaftlichen Klasse der Akademie der Wissenschaften und der Literatur in Mainz* (1956) 84, 110, *apud* Anna Leisner, *Kontinuität als Verfassungsprinzip* (Tübingen: Mohr Siebeck 2002) 104, 105.

⁵⁸ A Leisner *Kontinuität als Verfassungsprinzip* (Tübingen: Mohr Siebeck 2002) 105.

⁵⁹ See HA Oldenziel *Wetgeving en rechtszekerheid: een onderzoek naar de bijdrage van het legaliteitsvereiste aan de rechtszekerheid van de burger* (Kluwer 1998); J Lücke *Vorläufige Staatsakte, Auslegung, Rechtsfortbildung und Verfassung am Beispiel vorläufiger Gesetze, Urteile, Beschlüsse und Verwaltungsakte* (Mohr Siebeck 1991) 352; P E Loving 'The Justice of Certainty' (1994) 73 *Oregon Law Review* 746.

⁶⁰ See P Popelier *Rechtszekerheid als beginsel van behoorlijke wetgeving* (Antwerpen: Intersentia 1997).

⁶¹ R Pound *Interpretations of Legal History* (New York: Cambridge University Press 1923) I.

⁶² MD Bayles 'On Legal Reform: Legal Stability and Legislative Questions' (1977) 65 *Kentucky Law Journal* 638.

⁶³ *ibid.*

The foundation of the principle of legal certainty in the *Rechtsstaat*, or in the Anglo-Saxon world, the rule of law⁶⁴, reveals why this principle should be open to dynamic and flexible legislation. Legal certainty and the *Rechtsstaatlichkeit* have been described as two poles of modern statehood.⁶⁵ The *Rechtsstaat* conveys fundamentally a perception of the relationship between law and the state, and, as such, it cannot be conceived as a totally static concept. Rather, its concrete ‘shape’ and contents evolve with society, while its abstract core-concept remains intangible.⁶⁶ In this light, temporary laws should be allowed to concretize this evolution while preserving the core-concept of the *Rechtsstaat*. This intangible core includes the liberal concept of *Rechtsstaat* as the protection of citizens from the arbitrary exercise of authority. Hence, the principle of legal certainty should not be interpreted as a guarantee of immutability of laws and regulations. Instead, this principle appears to be compatible with legislative instruments that bid determinability as to the citizens’ rights and duties *in concreto* but that are also permeable to future possibilities of change.⁶⁷ As Hart explains, legal systems must find the middle ground between the need for certain rules, which can be safely applied by private individuals, and ‘the need to leave open for later settlements by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.’⁶⁸ This describes the difference between evolving from general and abstract legal statements, which are designed to last; and specific rulings which ‘are bound to remain out of reach [because] we will not them in advance even within legal settings shaped by the principle of legal certainty.’⁶⁹

3.3. A ‘Blessing’ for Legal Certainty

As earlier explained in this article, sunset clauses can be used not only as ‘a quick fix’ for temporary problems but also as adequate instruments to tackle new, uncertain and complex situations. The legislature can employ sunset clauses to ensure that obsolete legislation expires and that the law that subsists reflects reality. The German Constitutional Court has pointed out that the legislature,

when challenged with the need to regulate new phenomena, should not be constrained by existing and traditional precedents that do not reflect the modern society and its common interests, but should rather ensure a timely modification of regulations in order to incorporate these changes.⁷⁰

In this light, there are sufficient arguments to defend that sunset clauses and experimental legislation can be used as ‘a blessing’ for legal certainty. I start by analysing when and why sunset provisions may be beneficial for the legal certainty provided by legislation.

⁶⁴ P Popelier *Rechtszekerheid als beginsel van behoorlijke regelgeving* (Intersentia 1997) 35.

⁶⁵ U Volkman ‘Sicherheit und Risiko als Probleme des Rechtsstaats’ (2004) 14 *Juristenzeitung* 696.

⁶⁶ P Popelier *Rechtszekerheid als beginsel van behoorlijke regelgeving* (Intersentia 1997) 81, 82.

⁶⁷ P Popelier *Rechtszekerheid als beginsel van behoorlijke regelgeving* (Intersentia 1997) 115.

⁶⁸ H Hart *The Concept of Law* (Oxford University Press 1961).

⁶⁹ S Bertea ‘Towards a New Paradigm of Legal Certainty’ (2008) II *Legisprudence* 25.

⁷⁰ German Constitutional Court, 2 BvF 1/01 (24 October 2002), Paragraphs 210–16 (on the regulation of geriatric care).

3.3.1. *Sunset Clauses as a 'Blessing'*

Sunset clauses may be regarded as a 'blessing' for legal certainty since: first, they may provide more legal certainty than permanent legislation in a number of situations; secondly, sunset clauses constitute an instrument to tackle legal uncertainty.

First, the uncertainty allegedly caused by sunset clauses is merely potential, since sunset clauses do not introduce more uncertainty in the legal order than permanent legislation does.⁷¹ In the case of permanent legislation, the legislature can at any time amend existing laws, as long as a sufficient parliamentary support is gathered. This argument is even acknowledged by sceptics of sunset clauses in the United States who agree that 'permanent legislation [only] creates a certainty illusion, whereby taxpayers are not mindful of the frequent changes of legislation.'⁷² In addition, no previous warning as to the intention of the legislator to revise laws shall be given, so this 'surprise effect' can in abstract interfere with the principle of legal certainty.⁷³ In the case of sunset clauses, sudden amendments before the sunset date are not expected. Any changes or revisions will exclusively be accepted on extraordinary grounds.⁷⁴ Sunset clauses, if correctly implemented, can provide a greater continuity guarantee and time framework on which citizens can rely.⁷⁵ In this light, the principle of legal certainty is not endangered but rather furthered by sunset clauses, since the latter can function as an impediment for abrupt and unjustified changes before the sunset occurs.

In the Netherlands, *uncertainty* as such has been purported as a ground or a justification for the use of sunset clauses.⁷⁶ This was the case of the law on experiments with human embryos and stem cells where the lack of information as to the possible side-effects of the introduction of a new law on experiments with stem cells and the controversial character of the topic justified the inclusion of a sunset clause so as to ensure continuous legislative oversight.⁷⁷ In this case, sunset clauses tackled the legal uncertainty that characterized the subject under analysis, instead of causing it. Legal uncertainty should only result from sunset clauses if it is unclear what will happen after the expiration date of a law. However, this uncertainty can be avoided by means of an evaluation performed on the grounds of clear evaluation criteria and the enactment of sunset clauses within a clear framework.

Sunset clauses can also contribute to 'greater certainty' than a permanent law does because, as times goes by, the effectiveness of a rule may diminish.⁷⁸ The evolution of social circumstances are susceptible of creating new possibilities for legal disputes that

⁷¹ A Chanos *Möglichkeiten und Grenzen der Befristung parlamentarischer Gesetzgebung*, (Duncker & Humblot 1999) 71.

⁷² E Dewey 'Sunset and You Better Take Care: Why Sunset Provisions Harm the Renewable Energy Industry and Violate Tax Principles' (2011) 52 Boston College Law Review 1125.

⁷³ P Popelier *Rechtszekerheid als beginsel van behoorlijke wetgeving* (Intersentia 1997) 115.

⁷⁴ J Funke *Bürokratieabbau mit Hilfe zeitlich befristeter Gesetze: zu den Erfolgsbedingungen der Sunset-Gesetzgebung* (AVM 2011) 57.

⁷⁵ A Chanos *Möglichkeiten und Grenzen der Befristung parlamentarischer Gesetzgebung* (Duncker & Humblot 1999) 71.

⁷⁶ See FJ Douglas and Tessa van den Berg (ZENC, in opdracht van ACTAL), *Horizonwetgeving Dichterbij: onderzoek naar horizonwetgeving en regeldrukvermindering voor bedrijven*, ZENC(2010).

⁷⁷ *Wet houdende regels inzake handelingen met geslachtcellen en embryo's (Embryowet)*, Stb. (2002) 338: this law regulates the use of stem cells and human embryos for scientific purposes. See also P Eijlander and Rob van Gestel 'Horizonwetgeving: effectief middel in de strijd tegen toenemende regeldruk? een onderzoek naar de functie van werkingsbeperkingen in wetgeving ter vermindering van regeldruk' (2006), <http://www.portill.nl/articles/Eijlander/Horizonwetgeving.pdf>

⁷⁸ A D'Amato 'Legal Uncertainty' (1983) 71(1) California Law Review 11.

are not comprehended by the scope of lasting rules, or potential litigants may try to readjust their conduct in order to avoid the application of this specific rule.⁷⁹ This growing reduction of the effectiveness of rules may constitute a ground for justifying the need for legal change. In this light, D' Amato argues that a (judicial) sunseting of statutes comparable to the amendment of precedents performed by courts, would increase legal certainty and ensure that legislation reflects the changed reality.⁸⁰

In addition, sunset clauses, if correctly designed and implemented, are susceptible of stimulating long-term investment.⁸¹ To wit, in cases involving taxes as the example on tax production credits, a sunset may still accelerate investment because tax payers may fear losing tax benefits. Moreover, 'a calculable legal system' in the sense desired by entrepreneurs, does not necessarily mean that private actors may expect that legal systems are solely inhabited by lasting, clear and unambiguous bright-line rules.⁸² There is a discrepancy between the certainty pursued by lawyers, and the one pursued by economic parties. The latter are mainly interested in the certainty regarding their contractual rights and duties: the consequences of their actions.⁸³ Lawyers, on the contrary, identify legal certainty with the predictability of applying legal rules to specific cases. This is why it has been purported that although lawyers prefer clear, precise and determinate legal rules, entrepreneurs might be often satisfied by vague legal standards as long as they can allow them to calculate the consequences of their actions.⁸⁴

In conclusion, sunset clauses are susceptible of constituting a 'blessing' for legal certainty since: first, a palpable 'temporary legal certainty' may be preferable to the illusion of an everlasting one. Secondly, sunset clauses can ensure that legislation continues to reflect reality as it is and as citizens see it, and not as it should be or it was at the time of the original legislative drafting.

3.3.2. *Experimental Legislation as a 'Blessing'*

Experimental legislation can be an important legislative instrument since it allows legislators to try out new rules on a small-scale basis, observe their effects, and ground future amendments on the evidence found. Experimental legislation is, therefore, the ultimate form of evidence-based lawmaking. Legislation that is based on solid evidence and broader experience is also more susceptible of meeting the current societal and technological challenges, reflecting the status quo and providing more certainty to citizens. In this subsection, I argue based on a number of arguments that experimental legislation can assist legislators in ensuring that legislation continues to be predictable and a mirror of reality, despite the challenges of the 'accelerated society' we live in.⁸⁵

First, as described in the German literature, experimental regulations can be regarded as 'preliminary' legislative acts that are meant to generate knowledge and experience and by this means reduce the uncertainty connected with the effects of

⁷⁹ *ibid.*

⁸⁰ A D' Amato 'Legal Uncertainty' (1983) 71 (1) *California Law Review* 47.

⁸¹ See G K Yin 'Temporary-effect Legislation, Political Accountability, and Fiscal Restraint' (2008) 84 *NYUL Review* 174.

⁸² O Raban 'The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism' (2010) 19 (2) *Public Interest Law Journal* 182, 183.

⁸³ O Raban 'The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism' (2010) 19 (2) *Public Interest Law Journal* 182, 190.

⁸⁴ *ibid.*

⁸⁵ WE Scheuerman *Liberal Democracy and Social Acceleration of Time* (The John Hopkins University Press 2004).

new legal rules.⁸⁶ By experimenting and consequently evaluating these new rules, the legislature prepares the legal order for the incorporation of change and creates a solid ground for the enactment of permanent rules.⁸⁷ This has also been the position adopted by the German Constitutional Court that affirmed, in the context of a regulation on geriatric care, that ‘the introduction of an experimental clause was essential to create room for the temporary test of integrated and general forms of education and training [of geriatric care professionals] with novel contents and specializations related to the occupational area.’⁸⁸ This Court regarded experimentation as an uncontroversial form of testing novelties and improving the long-term objective of the law, which was to achieve more uniformity of geriatric care. In the United States, a similar position can be found in the case-law. Here the United States Court of Appeals (District of Columbia) affirmed in 1970 that the imperative to keep up with ‘technical advancements and improvements in the modes of communication so that the benefits of new inventions and developments may be made available’ to the public could justify the enactment of experimental regulations.⁸⁹ Moreover, considering ‘the congressional desire that [administrative agencies] encourage technological innovation’ and the relevance of the implementation of experimental regulation for ‘informational input that makes such an innovation possible’, the court would only strike down an experiment in the presence of ‘a compelling showing of legislative prohibition.’⁹⁰ Although experimental legislation does not emerge here as a ‘blessing’, it is possible to find clear evidence that this legislative instrument can be of significant importance in innovative fields.

Secondly, experimental regulations can be used to ensure a smooth transition between existing and new dispositions, current paradigms and new approaches to a new social problem. Patricia Popelier considers that instruction 10a on experimental regulations of the Dutch instructions for legislative drafting comprises the possibility of using this legislative instrument as a ‘transition’ mechanism.⁹¹ Experimenting with new rules on a small-scale basis allows citizens to adapt and often to accept legislative changes.

Thirdly, a static concept of legal certainty makes little sense in the 21st century. Particularly in the last few decades, the concept of legal certainty has evolved and so has the awareness that in a fast changing society, laws are unable to keep pace with social and technological developments and foresee all the phenomena to which they apply.⁹² It is necessary to constantly adjust the legal text to the social reality, which means that legal certainty has to be dynamically interpreted. In this scenario, there are arguments to suggest that experimental legislation can represent a ‘blessing’ for legal certainty: experimenting can be a better option to abrupt amendments, it can be a source of evidence and experience that can ground better legislation and avoid future and more detrimental legal revisions.⁹³ However, if this ‘coin’ would only have this side, it would

⁸⁶ J Funke *Bürokratieabbau mit Hilfe zeitlich befristeter Gesetze: zu den Erfolgsbedingungen der Sunset-Gesetzgebung* (AVM 2011) 48.

⁸⁷ *ibid.*

⁸⁸ German Constitutional Court, 2 BvF 1/01 (24 October 2002), Paragraph 383.

⁸⁹ *United Telegraph Workers v. Federal Communications Commission*, 141 US App. DC 190, 436 F. 2d 920.

⁹⁰ *ibid.*

⁹¹ P Popelier *Rechtszekerheid als beginsel van behoorlijke wetgeving* (Intersentia 1997) 429, 430.

⁹² P Popelier ‘Five Paradoxes on Legal Certainty and the Lawmaker’ (2008) 2 (1) *Legisprudence* 50.

⁹³ GD Pascual ‘Los Experimentos Juridicos’ (2004) 164 *Revista de Administración Pública* 145.

not be worth writing this article: sunset clauses and experimental legislation have often been regarded as a threat—a ‘curse’—rather than as a ‘blessing’ to legal certainty. This is the topic examined in the following section.

3.4. Sunset Clauses as a ‘Curse’ for Legal Certainty

3.4.1. *Sunset Clauses as a ‘Curse’*

Max Weber claimed that legal certainty is one of the pillars of capitalism since without sufficient legal stability and predictability, investment may be significantly discouraged.⁹⁴ To wit, investors may not invest in new technologies, for example, if they fear sudden and disadvantageous legislative changes. According to this perspective, a capitalist system presupposes a sound degree of legislative certainty since uncertain rules, on the one hand, do not allow private actors to predict their rights and duties and, on the other, may grant unconstrained discretion to official decision makers.⁹⁵ More recently, the EU Mandelkern Group on Better Regulation expressed similar concerns regarding a broad enactment of sunset clauses. Although this legislative instrument could be advantageous in a number of situations, it was equally acknowledged that sunset clauses could have a negative impact on the investment climate. If regulations designed to incentivize substantial investment in a determined technology expire within a beforehand known period of time, private actors may be more reluctant to respond to these incentives. This will be particularly true if the sunset period is shorter than the time span required for recovering the investment made. In addition, individuals might experience distrust in the protection granted by law and feel that the regulations imposing or stimulating them to invest in a new technology are not providing them with sufficient legal certainty upon which they can ground their investment decisions.⁹⁶

The potential negative impact of sunset clauses on investments may particularly occur when legislators set fixed periods that disregard the development cycles of the regulated sector.⁹⁷ An example comes from the United States: here a sunset provision was included in the regulations on the production tax credits which were deemed to fuel investment in renewable energy and advance clean energy innovation. Although the sunset provisions imposed on these tax credits could be renewed for a period of one to three years, this renewal appeared to be insufficient since at least three to seven years are required for the development of a wind farm. Under such circumstances, the uncertainty regarding the possible renewal of the tax credit slowed down long-term investment.⁹⁸

Although in Germany, sunset clauses have been in the last decade welcomed as a tool to reduce regulatory pressure and indirectly create better conditions for investment, the limits for the enactment of this legislative instrument have been clearly established here. In Germany, the introduction (or its discussion) of all-embracing sunset clauses by states like Nordrhein-Westfalen, Hessen, and Thüringen has also raised multiple question marks. These sunset clauses determine the termination of a large number of

⁹⁴ M Weber *Economy and Society* (University of California Press 1978) vol 2, 883.

⁹⁵ A D’Amato ‘Legal Uncertainty’ (1983) 71(1) *California Law Review* 3.

⁹⁶ Mandelkern Group on Better Regulation (2001). *Final Report*, available at http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf (accessed 3 January 2014).

⁹⁷ E Dewey ‘Sunset and You Better Take Care: Why Sunset Provisions Harm the Renewable Energy Industry and Violate Tax Principles’ (2011) 52 *Boston College Law Review* 1105.

⁹⁸ *ibid* 1122.

regulations as a means to reduce the amount of rules and burdens placed on private actors. This apparent ‘good idea’ has been however criticized since a temporal limitation of a large number of laws might weaken the exercise of the central functions of the State, such as the safeguard of freedom (*Freiheitssicherung*) and the authority of the State.⁹⁹ In addition, an all-embracing sunset clause may equally put at stake the required predictability of state intervention, particularly when an almost indeterminate number of laws is submitted to such a sunset clause. In such cases, the principle of legal certainty and its inherent protection of legitimate expectations shall stand in the way of the enactment of sunset clauses.¹⁰⁰ This would strongly constrain citizens in the exercise of their freedom to make plans for the long-run, since they would be permanently limited by short-term laws. The Minister of Justice of the Free State of Thüringen claimed that the general introduction of sunset clauses in regulations (even if aimed at reducing bureaucracy) should be avoided whenever the efficiency or the operational capability of the State could be endangered, constitutional dispositions or federal law could be violated, and impede the implementation of EU law.¹⁰¹

In the United States, critical voices against sunset clauses have also been heard. It has been argued that sunset clauses introduce uncertainty in the legislative process since citizens and companies are not always aware of the provisions which will in fact be terminated after a fixed period and those which may be renewed. This lack of predictability may affect citizens’ decisions as to how they should arrange their financial affairs.¹⁰² These effects are particularly visible in tax legislation. However, in the New World, it has been claimed as well that this uncertainty does not result from sunset clauses as such, but from other factors, namely the pressure exercised by lobbies and interest groups, which often characterizes tax legislation.¹⁰³

3.4.2. *Experimental Legislation as ‘Curse’ for Legal Certainty*

In the Netherlands, the potential tension between experimental legislation and the principle of legal certainty has been expressed at several levels. The Dutch Council of State has expressed on numerous occasions its apprehension as to the tension between experimental legislation and the principle of legal certainty.¹⁰⁴ None the less, this institution has not been the only one to point out this possible conflict. Not rarely do parliamentary discussions in this field refer to the same constraint.¹⁰⁵ The problematic

⁹⁹ P Zimmermann ‘Reform der Staatstätigkeit durch generelle Befristung von Gesetzen—Aspekte einer Problembewältigung mit verfassungswidrigen Mitteln’ (2003) 22 *DÖV* 943.

¹⁰⁰ *ibid* 944.

¹⁰¹ J Funke *Bürokratieabbau mit Hilfe zeitlich befristeter Gesetze: zu den Erfolgsbedingungen der Sunset-Gesetzgebung* (München: AVM 2011) 56.

¹⁰² M Viswanathan ‘Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future’ (2011) 82 *New York University Law Review* 657, 671, 672.

¹⁰³ *ibid* 672. See also, for a critical perspective on sunset clauses in tax legislation, RM Kysar ‘Lasting Legislation’ (2011) 159 *University of Pennsylvania Law Review* 101.

¹⁰⁴ An example of this objection was the Opinion of the Council of State of June 8, (2009), Nr. W13.09.0098/1, *Voorstel van wet tot wijziging van de Drank- en Horecawet met het oog op de terugdringing van het alcoholgebruik onder met name jongeren, de voorkoming van alcohol gerelateerde verstoring van de openbare orde, almede ter reductie van de administratieve lasten*.

¹⁰⁵ E Kamer *Telecommunicatiewet*, wet van 19 October 1998, Toelichting op artikel 18.1 lid (Kamerstuk 25 533, nr.3, blz. 135). In this debate at the Dutch Senate, it is explicitly argued that legal certainty should be carefully considered when enacting experimental laws or regulations that deviate from the regime of the statute in question.

safeguard of legal certainty in the case of experimental legislation was also pointed out in the Dutch report on the EU experimental directive on reduced VAT rates on labour-intensive services. Here the lack of impact of the experimental reduced VAT rate on consumer prices was partially explained by the ‘uncertainty as to whether the measure would be made permanent (35%)’.¹⁰⁶ This explanation reminds us of the importance of certainty for the average citizen, who relies in the continuity of laws and might be sceptical of experimental solutions. Although average citizens might find it troublesome to be exposed to an experimental implementation of laws, the uncertainty emerging from experimental legislation remains within ‘acceptable levels’ according to German case law. To wit, experimental rules do not expose citizens to a ‘bare uncertainty’ regarding the future legislative developments, as it was initially claimed (and accepted) by a German county (*Landkreis*) before the Berliner Gerichte für Arbeitssachen.¹⁰⁷ In this case, the defendant argued that the enactment of an experimental regulation introducing alternatives to the existing rules on the reintegration of job-seekers could be qualified as an adequate technique of gaining experience and knowledge. Since the ‘rules of the game’ regarding the experiment were beforehand known and the first was limited to a five-year period, citizens were not exposed to ‘bare uncertainty’.

4. CONCLUSION

Although certainty can be seen as a goal of law that a legal system can try to realize to the greatest possible extent,¹⁰⁸ legislators do not aim at absolute certainty. This objective is impossible (and even undesirable) to achieve since, first, legislators and regulators do not possess complete information about all the required elements which can cause or solve the social problems requiring legislative or regulatory intervention; secondly, legislators are unable to eliminate the risk-factor which underlies legislation;¹⁰⁹ thirdly, legislators are constantly confronted with the obsolescence of laws and the possible occurrence of mistakes in lawmaking.¹¹⁰ In addition, absolute certainty in legislation or regulation does not have a place in a world characterized by constant change. Instead, in the real world, legal change is required because lawmakers cannot foresee all future contingencies when drafting a law.¹¹¹ Does this mean that sunset clauses and experimental legislation are the ‘blessed’ instruments legislators have been long waiting for? Yes and no: it all depends on how and where these legislative instruments are enacted and implemented.

¹⁰⁶ Report from the Commission to the Council and the European Parliament, COM/2003/0309 final).

¹⁰⁷ LAG Berlin-Brandenburg, Berliner Gerichte für Arbeitssachen, Urteil vom 25 August 2011—14 Sa 977/11, BeckRS (2012), 70177: the parties were disputing the effectiveness of a time and the provisional employment of the petitioner. At stake was namely the dispute of the influence of an experimental clause on the duration of the labour contract. This experimental clause was incorporated in §6a SGB II which granted, on an experimental basis, the competence for unemployment benefits to the municipalities instead of the Employment agencies. The experimental period was six years and it imposed a restructuring of the services of the defendant. The court decided that when the petitioner signed her labour contract, she was not exposed to bare uncertainty regarding the termination of her contract in 2010 (sunset of the experimental clause). It was at the time unclear what the legislature would do at the end of the experiment, so the petitioner could not count on an extension of her contract beyond the experimental period, because the results of the experiment were then not known yet.

¹⁰⁸ S Bertea ‘Towards a New Paradigm of Legal Certainty’ (2008) 2 *Legisprudence* 29, 41.

¹⁰⁹ P Popelier *Rechtszekerheid als beginsel van behoorlijke wetgeving* (Intersentia 1997) 123.

¹¹⁰ J Barnes ‘Sources of Doubt and the Quest for Legal Certainty’ (2008) 2 (2) *Legisprudence* 129.

¹¹¹ K Pistor, Y Keinan, J Kleinheisterkamp and MD West ‘Innovation in Corporate Law’ (2003) 31 *Journal of Comparative Economics* 676, 690.

This article has provided an overview of the different functions of sunset clauses and experimental legislation and evidenced that both instruments are useful instruments to ensure that legislation remains updated and assists legislators in incorporating legal change. However, they are far from being a panacea. Nevertheless, neither sunset clauses nor experimental legislation can be qualified as such as a ‘curse’ for legal certainty. The multidimensional meaning of the principle legal certainty goes beyond the pure continuity of rules. There can be no legal certainty in a world where laws lag behind reality.

The principle of legal certainty cannot be reduced to the mere continuity or stability of law; rather it is a multidimensional concept that can only be perceived on both an abstract and concrete levels; grounded on a concept of *Rechtsstaat* in contact with reality, which therefore, should guarantee the accommodation of ‘changed societal conditions’ and accept ‘some unpredictability’.¹¹² This multidimensional concept of legal certainty leaves the door open for the enactment of flexible legislative instruments that respond rapidly to changing circumstances and allow progressive and experimental legal innovations to enter the legal order. In this context, sunset clauses and experimental legislation can ‘add flexibility’ and dynamism to the principle of legal certainty and assist it in ‘keeping up’ with the rapid changes of society and technology. By terminating laws when they cease to be effective or experimenting on a small scale with novel legislative approaches, instead of frequently correcting permanent laws; legislators can incorporate new information, legislate better and avoid frequent legal revisions. There is only one ‘but’: sunset clauses and experimental legislation are not all-embracing instruments that can be enacted in any sector or under any circumstances. Legislators should at all times question whether the concrete situation in question can benefit from a temporary and/or experimental provision. Temporary problems and the regulation of fast-changing and innovative sectors will in principle benefit from it, however, no abstract judgments should be made beforehand. In addition, these instruments should observe a clear legal framework to avoid that legislators attempt to circumvent EU law, for example, or unacceptably derogate fundamental rights on an experimental basis. This also means that compelling legislators to include a sunset clause in abstract can be a dangerous wish: the sunset shall set on the provisions after a fixed period, but the sun may continue to shine on the effects of the expired rules for a longer period of time.

To sum up, sunset clauses and experimental legislation are not *an sich* a curse for legal certainty, but they should not be embraced as ‘blessings’ either. However, in order to ensure that the principle of legal certainty continues to bid stability and predictability in a fast changing world, it is not necessary to ‘change everything’ about lawmaking. Rather, legislators should ensure that sunset clauses and experimental legislation are given a clear place in the legislator’s ‘toolbox’, and then ‘everything will remain the same’.¹¹³

¹¹² PE Loving ‘The Justice of Certainty’ (1994) 73 Oregon Law Review 747.

¹¹³ See initial quote of the article. G Tomasi di Lampedusa, *Il Gattopardo* (Feltrinelli Traveller 1958, 2002).