1. Lawmaking in a time of change

‘He’s very sad’, Ursula answered, ‘because he thinks that you’re going to die’. ‘Tell him’, the colonel said smiling, ‘that a person doesn’t die when he should but when he can’.

Gabriel García Márquez, One Hundred Years of Solitude (1967)

1.1 INTRODUCTION

In the ideal world, laws ‘mirror society’: they are based on perfect information, regulate social behaviour in its multiple forms and rapid mutations, and reflect the social, economic and political conditions of their time.¹ These ‘perfect laws’ are born of an informed, deliberative and efficient process, in other words, key legislative decisions are only made when sufficient and relevant information has been gathered, ‘a full interchange of views and arguments among those making the decisions’ has taken place and ‘legislative proposals [have been] disposed of in the time available’.² In addition, in the ideal world, laws are the result of a fair decision-making process impermeable to political hurdles and lobbying,³ lead a life of effective and efficient implementation, and expire when they are no longer necessary. Unfortunately in the real world, laws do not expire when they should, but when they can. Moreover, reflecting the current society has become increasingly challenging due to the rapid ‘social and technological acceleration of society’.⁴ This acceleration of reality does not interact well with slow-going legislators, resistance to

legal change, obsolete laws, excessive administrative burdens and a perception of the rule of law as ‘a law of [permanent] rules’.

Most jurisdictions have been struggling for the past decades with legislative and regulatory challenges. On the one hand, legislators and regulators are required to be ‘smarter’, enact ‘simpler’ rules, minimize bad laws and regulations, regulate without stifling innovation, and reduce unnecessary costs or burdens on the private sector. However, these challenges are particularly difficult to surmount due to the abundance of unnecessary and obsolete statutes and regulations, their poor quality and contradictory character, and the risk-aversion and scarce information of legislators and regulators. These challenges do not mean that in a time of frequent and complex changes, law should stop aiming to ‘mirror society’. Rather, a greater awareness of the interaction between the evolution of society and the adoption and implementation of laws should be developed. Briefly, in a time of change, dynamic legislative instruments must be sought, not cosmetic mirrors. A quest for such instruments implies, first of all, an understanding of the main informational challenges posed by the modern society and its evolution, and then an introductory analysis of two valuable legislative instruments that can offer an adequate response to these circumstances: experimental legislation and sunset clauses. These legislative instruments will be the leading actors in this book.

1.1.1 The Ignorance Society

Knowledge – understood as clear and valid operative schemes of the observation of the world and not as assemblages of information – is a key element to understand modern society and, consequently, to regulate it. However, as originally claimed by Ulrich Beck and later by Hoffmann-Riem, the ‘Wissensgesellschaft’ (knowledge society) can be merely regarded as a euphemism. In a risk-society we are often impeded from perceiving what really matters due, on the one hand, to the abundance of

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information, and, on the other, to the lack of concrete details as to the potential risks of new products and their regulation. There is too much of the same, and too little of what we really need: insight on the effects of new laws and regulations. We thus live in a ‘Nichtwissensgesellschaft’: an ignorance society.9 Resembling what Kuhnian ‘normal science’ does, law can only pretend to know ‘what the world is like’.10

According to the German literature, in the context of innovative fields, the mentioned lack of knowledge is enhanced by the rapid changes of society and technology, converting lawmaking into a greater challenge. Here, lawmaking implies regulating knowledge (Wissen), its evolution or even the lack of it.11 To wit, legislators are required to consider different forms of knowledge: Prognosewissen as the attempt to predict the expected innovations and make a prognostic of their potential regulation; Risikoentscheidungs-Wissen referring to the knowledge or the conscious acceptance of the unknown risks and opportunities involved; and finally regulierungstechnisches Wissen, comprising the complete sum of empirical and theoretical political and legal research on the regulation.12

Like scientists, legislators are, amongst others, ‘problem-solvers’,13 who seek to understand the problem they are asked to solve and try to find the most effective and efficient solution within the boundaries of law. When dealing with novel and complex situations, these problem-solvers do not know everything, but they are asked to acquire the above-mentioned forms of knowledge. While scientists search for evidence through ‘trial and error’, lawmakers often try to justify their Bills by ipse dixit or on the grounds of mysterious opinions, without relying

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12 Ibid. 24, 31–4.
on the facts and on the criterion of ‘reason informed by experience’. \(^{14}\) Nowadays, a consultation with the Oracle of Delphi will not be a sufficiently strong ground to justify legislation. The world is far too complex and the Oracle of Delphi has ceased to keep up with reality. New problem-solving methodologies and information-gathering instruments are required. Legislators must admit their ‘ignorance’, engage in a pursuit of facts and evidence in order to make prognostics as to the effects of new laws.

Making prognostics (Prognosewissen) is decisive for the enactment of legislation and implies predicting the most effective approach and rules to a societal problem. Recalling Hart and Sacks’ criteria of ‘legislative quality’, these predictions often constitute the most ‘relevant information’ that should be gathered before making the key decisions as to new Bills. \(^{15}\)

Gathering information is, however, not enough: periodic oversight and monitoring are essential to ensure that lawmakers and drafters learn from the implementation of new laws. More than two decades ago, Robert Seidman tried to put us on ‘the right track’, arguing that ‘every social intervention, including all legislation, necessarily generates new data; each constitutes an experiment. … All legislation should contain provisions so as to make periodic assessment of its performance likely’. \(^{16}\) The inclusion of sunset clauses was one of the suggested instruments. Ex ante evaluations and impact assessments could potentially provide a part of the information required. Nonetheless, they would not submit new rules to a true ‘reality test’, allying prognostics with real-world evidence. Sunset clauses and, particularly, experimental legislation do. Experimenting with new rules with a small sample may enable lawmakers to make predictions for the current or future periods. \(^{17}\) The information gathered through experimental provisions can be then used to assist lawmakers in the process of learning about the effects of a new legal regime or innovation-oriented policy. This justifies why this legislative instrument is valuable in a time of fast social and technological changes.


\(^{16}\) Seidman, ‘Justifying Legislation’, n. 14 above, 75.

1.1.2 An Experiment Named Lawmaking

Although the safety of innovative products has often been previously tested in a laboratory, the information resulting from these tests may not provide sufficient information or insight as to their effective regulation. In the case of social innovations, the legislator will have even less knowledge as to the most effective instruments to regulate them. The concept of experimental legislation is a broad term which comprises statutes but, in most cases, new temporary regulations (secondary legislation) with a circumscribed scope that, derogating from existing law or waiving the observance of a number of rules or standards, are designed to try out novel legal approaches or to regulate new products or services so as to gather more information about them. Experimental regulations imply close monitoring and are submitted to a periodic or final evaluation. Once evaluated, an experimental legislative instrument denoting positive outcomes can be adapted in conformity with the results observed and transformed into a permanent act. The terms ‘experimental legislation’, experimental rules or clauses are the most common in the literature; these ‘experiments’ are usually executed through the enactment of

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18 For a historical perspective on the origins of experimental legislation, see J. Williams, ‘Experiment in Legislation’ (1888) 14 Law Magazine and Review 299. According to this author, the roots of this type of legislation can be traced back to Ancient Greece. There are limited sources explaining the evolution of experimental legislation between Ancient times and the emergence of experimental laws in England in the last few centuries and how they spread to other countries. Older examples of these legislative instruments can be found in the former British colonies. This is the case of the seventeenth century experimental legislation on land tenure enacted in the American colonies (see Henry W. Farnam and C. Day, Chapters in the History of Social Legislation in the U.S. to 1860 (Lawbook Exchange Ltd, 2000) 25). Another illustration of early experimental laws is the Pánjab Municipal Act of 1850 regarding the taxation of the inhabitants of that state without previous consultation. The government justified the experimental character of the measure with the ‘need to take the opportunity of judging of its operation’ while adapting the tax to the local specificities. See Council of Governor-General of India, Laws and Regulations (Authority of the Governor-General, 1869) vol. VII. As will become clear, the United Kingdom is not included in this study; however, reference to this country is made for historical and contextual purposes. The United States is one of the jurisdictions under analysis and appears to have inherited this legislative instrument from the former British Empire.

19 See also Gabriel Doménech Pascual, ‘Los experimentos jurídicos’ (2004) 164 Revista de Administración Pública 149.
regulations. For example, in the Netherlands, Parliament typically delegates the competence to experiment with a number of dispositions in an Act of Parliament to the executive, agencies or other public bodies with regulatory powers.

Experimental legislation implies submitting new rules to a ‘reality check’, but allows legislators to gather more information, progressively extend the new rules to other parts of the jurisdiction in question, and adapt and improve existing laws based on evidence of what works and what does not.

The idea of converting the lawmaking process into an experimental and learning process is far from being recent. In 1953, Jahrreiss, in Germany, stated that ‘legislating is [always] an experiment with human destinies’.20 To wit, it is impossible to predict beforehand whether a certain law will achieve its objectives, generate undesirable side-effects, or respond adequately to the social imperatives for which it was enacted. In addition, this uncertainty increases in the case of rapidly evolving sectors where the reality under regulation today might be drastically another one tomorrow.

Nevertheless, when the legislator’s priority resides in guaranteeing a continuous legislative oversight so as to avoid laws becoming ineffective or even obsolete, legislators can opt for sunset clauses.

1.1.3 Setting the Sun on Legislation

Both sunset clauses and experimental legislation are temporary legislative instruments that provide legislators with the required flexibility to determine the destiny of legislative provisions according to the evolution of society, economy and technology. While experimental regulations aim to be a first step towards lasting legislation, sunset clauses are usually ‘born’ to fulfil a mission and then ‘die’ after a fixed period.

Sunset clauses (or provisions) are dispositions that determine the expiration of a law or regulation within a period determined beforehand. A sunset clause submits a legislative act to a final evaluation, on the grounds of which renewal based on exceptional circumstances can occur.21 Since a sunset clause is designed to be terminated at a certain point in time, its renewal implies an inversion of the burden of proof:

contrarily to permanent legislation, parties claiming that a sunset clause should be reauthorized must prove that this reauthorization is necessary. Sunset clauses allow for the adjustment of regulation to changing social or technological circumstances and determine the expiration of unnecessary acts, avoiding in this way ‘overregulating’ the sector and placing more burdens on the industry. In addition, the introduction of temporary laws may be useful to assess the underlying risks of a novel policy. In this context, sunset clauses can be used as a ‘precautionary instrument’ to assess new policies and verify whether relevant risks for the environment or public health may emerge from technological novelties.22

1.2 STRANGE SILENCES AND GUIDING VOICES

Despite the above-mentioned virtues of sunset clauses and experimental legislation, these legislative instruments do not proliferate in most legal orders. In practice, sunset clauses and experimental laws are almost unknown instruments to legal practitioners and represent a minority of the annual production of legislation in the three jurisdictions under analysis: the United States, the Netherlands and Germany.23 In the three mentioned jurisdictions, diverse examples of these legislative instruments can be found, but it is clear that sunset clauses and experimental legislation are not systematically used. According to a thorough study conducted by Zachary Gubler, federal agencies in the United States have rarely employed experimental rules in the last decades (c. 1 per cent of total enacted regulations).24 Up until now, little research has been conducted on the reasons underlying the scarce enactment of sunset

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23 As to the Netherlands, see Frans Jan Douglas and Tessa van den Berg (ZENC, study commissioned by ACTAL), Horizonwetgeving Dichterbij: onderzoek naar horizonwetgeving en regeldrukvermindering voor bedrijven (ZENC, 2010): the authors concluded that sunset clauses still constitute an almost known term to most civil servants and policy-makers; Simon Bulut and Gert-Jan Veerman, Over horizon- en experimenteerbepalingen (Ministerie van Justitie, 2010) 36: according to the authors, between 1985 and 2009, only 85 Bills contained a sunset clause.

clauses and experimental legislation. This strange silence is broken in this book by the following question: in a time of fast and complex changes, why have sunset clauses and experimental legislation been so scarcely used?

The reluctance towards a broader enactment of sunset clauses and experimental legislation can be partially explained, both in different European countries and in the United States, by legal and non-legal reasons. There is first a notorious concern that these instruments may endanger a number of fundamental values and principles of law. Lawyers, legal academics and other actors such as environmental NGOs view experimental dispositions with suspicion, fearing that an experimental approach to legislation may open the door to unpredictable rules, unprincipled legislative compromise and pose a threat to the fundamental precepts of the rule of law. On the one hand, legislators in Europe and in the United States are explicitly or implicitly constrained not only by the rule of law but also by a number of principles that derive from it. Laws are expected to be long-standing, predictable, reasonable and non-discriminatory. However, sunset clauses and experimental laws and regulations expire within a period determined beforehand and one could argue that it is not always possible to predict whether these dispositions will be renewed or terminated after their evaluation.

From a traditional legal perspective, temporary legislation has been conceived as a ‘contradictio in adjecto’: if legislation is normally perceived as a synonym of continuity and a source of stability and predictability, the enactment of temporary rules, outside emergency scenarios, appears to defy a common perception of legislation as a lasting phenomenon. Citizens should be able to understand clearly what laws require and entitle them to do so as to be able to exercise their autonomy and effectively manage their affairs. Achieving this stability has implied ensuring the continuity of laws, restricting the number of amendments to


them, which meant that lawmakers often had to act as if they were already aware of all relevant circumstances at the time of the legislative drafting.\textsuperscript{29} The preservation of stability has been highly valued over time since, as Fuller explains, legislative inconstancy could be one route to the failure of any legal system.\textsuperscript{30} This does not mean that laws cannot be amended. Instead, this scholar’s criticism targets mainly frequent and capricious changes in law. Fuller compares the problems of sudden changes in law to the evils of retrospective law; however, the scholar, citing the US Supreme Court in \textit{Ochoa v. Hernandez y Morales}, acknowledges the possibility of amending law ‘while the time is still running, and so that a reasonable time still remains for the commence-ment of an action’.\textsuperscript{31} This type of amendment could allow legislators to incorporate new information in a preliminary period so as to adapt new laws not only to changing realities but also to the progressive acquisition of information.

Moreover, experimental regulations will only deserve this designation if a differentiation occurs, that is, not all citizens will be equal before the law since only experimental rules are only applicable to a part of the population. The other questions that should break the vast and strange silences on the present topic are: is the rule of law threatened by a law of ‘sunset and experimental rules’?\textsuperscript{32} What are constitutional sunsets and experimental regulations?

\subsection*{1.3 APPROACH AND METHOD}

\subsubsection*{1.3.1 Approach}

This is not a technical book on sunset clauses and experimental legislation. Instead, this is a comparative law study that reflects on the framework, potentialities and constitutional limits of these legislative instruments. These legislative instruments are nowadays enacted in

\begin{footnotesize}
\textsuperscript{29} For a brief historical insight on the perception of ‘legal certainty’, see Patricia Popelier, ‘Five Paradoxes on Legal Certainty and the Lawmaker’ (2008) \textit{II Legisprudence} 51.
\textsuperscript{30} Lon Fuller, \textit{The Morality of Law} (Yale University Press, 1969) 39.
\textsuperscript{32} The expression is inspired by the article by Justice Scalia: Antonin Scalia, ‘The Rule of Law as a Law of Rules’ (1989) 56 \textit{University of Chicago Law Review} 1175.
\end{footnotesize}
Constitutional sunsets and experimental legislation

diverse Western jurisdictions, notably Germany, the Netherlands, the United States, Spain, the United Kingdom, France and Switzerland, and even at the EU level. For the purposes of this study, the United States, the Netherlands and Germany have been selected. These jurisdictions were selected since, on the one hand, in all of them experimental legislation and sunset clauses have been enacted in the last decades – though under different designations. On the other, these jurisdictions have different experiences with their implementation. In none of these jurisdictions is there a clear framework for the enactment and implementation of sunset clauses and experimental legislation. There is thus room for learning in the three countries. An introductory overview of these jurisdictions is provided here.

(a) United States
In the United States, sunset clauses were mainly used at state level to tackle the overwhelming power of agencies in the 1970s, but they have also been more recently adopted by Congress in the fight against terrorism (USA Patriot Act). In addition, a substantial number of programmes aiming to stimulate investments in research and development (R&D) have included sunset clauses. Since the United States has a long experience with the implementation of sunset clauses, valuable lessons can be drawn from the rise and failure of state sunsets.

Experimental legislation has a relatively old tradition in the United States, and some examples date back to child labour laws at the very


beginning of the twentieth century. Moreover, policy and legislative experimentation has been regarded here as a motor of innovation and an instrument to further federalism. In 1932, Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, pled for ‘power in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs’. Brandeis stated that ‘it [was] one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country’. Most experiments with laws are still performed at state level through the use of waivers: states may apply for an exemption of the observance of a number of federal dispositions, experimenting with policy and legislative solutions that fit their socioeconomic conditions. As it will be explained later in this book (see Chapter 2), experimental regulations are also conceivable at the federal level and federal agencies could benefit from this instrument when regulating complex problems.

(b) Germany

In Germany, experimental legislation is not a recent phenomenon, but it has been traditionally implemented in the context of municipal law. In addition, it has constituted an important tool in the last decade in the process of modernizing the public administration. In the last two decades, experimental laws have been placed in the context of the regulation of innovative fields in order to guarantee legislative updates.

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39 Ibid. 311.

40 See Julius Ofner, ‘Das Experiment im Recht, Vortrag gehalten in der Juristischen Gesellschaft in Wien 28 Dezember 1881’ in *Beiträge zur exacte Rechtswissenschaft* (1883).


However, in the 1990s experimental legislation and other types of temporary legislation raised doubts as to their constitutionality.\textsuperscript{43}

The debate regarding the introduction of experimental acts and sunset clauses has re-emerged in the past decades and occurred, for example, in the postal and telecommunications sectors in the context of the process of deregulation. Sunset clauses have also been suggested in Germany as a tool to combat excessive bureaucracy and regulatory pressure.\textsuperscript{44}

\textbf{(c) The Netherlands}

The Netherlands does not have a long experience with either experimental legislation or sunset clauses. However, this jurisdiction has revealed a growing curiosity as to these instruments, which has been accompanied by a vast silence in the literature and the Dutch Council of State’s frequent critical remarks.\textsuperscript{45} This may explain why sunset clauses and experimental legislation have been regarded here as an \textit{ultimum remedium}. A number of constitutional objections have been raised against experimental legislation and sunset clauses, namely, the potential violation of the principles of legal certainty, equal treatment, proportionality and legality.

\textbf{1.3.2 Method}

The research underlying this book was mainly based on qualitative research into the nature of sunset clauses and experimental legislation and the literature on the regulation of innovation. Empirical data was only indirectly used in the process of exploring the outcomes of the implementation of sunset clauses and experimental laws.\textsuperscript{46} For this purpose, evaluation reports elaborated by sunset commissions, ministries and national or local committees, and other documents containing

\textsuperscript{43} Hans-Detlef Horn, \textit{Experimentelle Gesetzgebung unter dem Grundgesetz} (Duncker & Humblot, 1989).

\textsuperscript{44} In 2005, the introduction of a sunset clause was suggested in every new regulation in order to tackle overregulation, see for example, the proposal submitted to the Bundestag, on the enactment of sunset clauses in the context of the combat of terrorism, available at www.bundestag.de/blickpunkt/101_Themen/0507/0507044_3.html http://www.bundestag.de/dokumente/analysen/2007/Terrorismusbekaempfung_kor.pdf.

\textsuperscript{45} The opinions of the Dutch Council of State regarding the legality of experimental legislation in the light of the basic principles of law will be analyzed in Chapter 3.

\textsuperscript{46} For an empirical study of the enactment of temporary legislation, see Frank Fagan, \textit{Law and Limits of Government: Temporary versus Permanent Legislation} (Edward Elgar, 2013).
empirical data about the execution of pilot projects, have been selected. Since most lawyers are not familiar with sunset clauses and experimental legislation, a number of examples of these instruments from different jurisdictions will be provided throughout the book.

1.4 ROADMAP TO CONSTITUTIONAL SUNSETS AND EXPERIMENTAL REGULATIONS

This is not a book just about sunset clauses and experimental legislation. It is also a book that aims to unveil important debates on legislative studies. First, the study of these legislative instruments implies rethinking our perception of lawmaking: from opinion-based to evidence-based, from a tendentially static approach to a dynamic one (particularly in Europe). Secondly, by analyzing the relationship between sunset clauses and experimental legislation and fundamental constitutional principles, the urge to adopt a dynamic perspective of lawmaking and a living interpretation of the mentioned principles will be also demonstrated. Thirdly, non-legal elements underlying the legislative process are also analyzed in this book, reminding us that the lawmaking process cannot be isolated from political, social and economic considerations.

This book is divided into four parts. The first part is dedicated to an overview, definitions, historical background, functions and legal framework of sunset clauses and experimental legislation (Chapters 1, 2 and 3). The terms ‘experimental legislation’ and ‘experimental regulations’ are used interchangeably, however, the first term is broader and includes in this context both experimental statutes and regulations (secondary legislation). There will in principle be less experimental statutes than regulations since the details concerning the implementation of experiments do not fit the primordial tasks of Congress (or its equivalent in other countries). The legislature often remains the ‘master of the experiment’ but its execution must be delegated to the executive. This is why, in Chapter 3, the principles of separation of powers and legality are analyzed. Chapter 3 reflects upon a ‘legality framework’ for sunset clauses and experimental legislation: according to what legal conditions can sunset clauses and experimental legislation be implemented? Another important question discussed in this chapter refers to the situations and fields where sunset clauses and experimental legislation should be implemented: is there a ‘promised land’ for these instruments? And is there a ‘forbidden fruit’?

In the second part of this book, the ‘constitutionality’ of sunset clauses and experimental legislation is scrutinized in light of the literature and
case law of the jurisdictions under analysis. This analysis is focused on a number of fundamental principles that could be potentially endangered by sunset clauses and experimental legislation. Chapter 4 departs from the rule of law as a source of predictability. This chapter tries to combine the American and European perspectives on the principle of legal certainty as an imperative guarding the stability and predictability of legislation. Chapter 5 devotes more attention to experimental legislation and its relationship with the principle of equal treatment. Chapter 6 inquires when and how sunset clauses and experimental legislation should be regarded as proportionate legislative responses to social or economic problems. In order to understand whether sunset clauses and experimental legislation are at odds with these principles, their meaning will be analyzed not only in light of their traditional meanings, but also considering their current significance in a fast-changing world. In a time of rapid and complex changes, fundamental principles of law can only remain meaningful if they reflect and accompany the most significant changes in society, economy and technology. Thus, besides examining the constraining function of these principles on the enactment of sunset clauses and experimental legislation, I also explore whether these legislative instruments can further the concrete application of fundamental principles of law in a time and world of changes (see Chapters 3 to 6).

Nonetheless, legal objections do not exhaust the repertoire of arguments against sunset clauses and experimental legislation. Lawmakers are not only influenced by legal arguments but are equally under pressure from interest groups, politics and economic limitations. This is the tension between law and politics that plays an inevitable role in the choice and implementation of the legislative instruments under analysis. Although this tension cannot easily be resolved, it deserves considerable attention: experimental legislation and sunset clauses can be, depending on the subject in question, an appealing or a repulsive instrument to realize certain political goals. This is the topic of the third part of the book (Chapter 7). Here I also investigate whether unsuccessful experiences may explain why lawmakers may be reluctant to enact these instruments in other contexts. Chapter 7 analyzes the intellectual, practical, and political reasons underlying the limited enactment of sunset clauses and experimental legislation.

In the fourth and last part of this book, the conclusions and ‘instructions for use’ are presented. Chapter 8 provides an overview of the legal framework to be taken into account by legislators when drafting sunset clauses and experimental legislation.