

THE LIVES AND TIMES OF TEMPORARY LEGISLATION AND SUNSET CLAUSES

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ANTONIOS KOUROUTAKIS, *THE CONSTITUTIONAL VALUE OF SUNSET CLAUSES: AN HISTORICAL AND NORMATIVE ANALYSIS* (Routledge, 2017).

*Reviewed by Ittai Bar-Siman-Tov**

I. A GOLDEN AGE OF SCHOLARSHIP ON TEMPORARY LEGISLATION

Antonios Kouroutakis's new book on "sunset clauses"—defined as "statutory provisions providing that a particular law will expire automatically on a particular date unless it is re-authorised by the legislature"¹—comes at just the right time. We are in the golden age of the study of temporary legislation.

As the sunset movement in American state legislatures began to wane toward the end of the 1980s,² so did scholarly interest in the field.³ In the last decade or so, however, we see rekindled scholarly interest, manifested by a growing number of articles and books on temporary legislation,⁴ with Kouroutakis being the third in the last four years to dedicate a full book to the subject.⁵ Kouroutakis's book can therefore be seen both as an indication of and a major contribution to a burgeoning global interest in temporary legislation.

Kouroutakis makes several important contributions to the field. In addition to offering an in-depth examination of sunset clauses in the UK (in contrast to existing scholarship's focus on other jurisdictions),⁶ Kouroutakis provides a

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¹ ANTONIOS KOUROUTAKIS, *THE CONSTITUTIONAL VALUE OF SUNSET CLAUSES: AN HISTORICAL AND NORMATIVE ANALYSIS* 3 (2017).

² Richard C. Kearney, *Sunset: A Survey And Analysis Of The State Experience*, 50 PUB. ADMIN. REV. 49 (1990).

³ FRANK FAGAN, *LAW AND THE LIMITS OF GOVERNMENT: TEMPORARY VERSUS PERMANENT LEGISLATION* 4 (2013).

⁴ *Id.*; see also Ittai Bar-Siman-Tov, *Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study*, 11 REGUL. GOV. (forthcoming 2017), available at: <http://ssrn.com/abstract=2807564> (citing additional recent publications indicating burgeoning global interest in the field).

⁵ The other two are FAGAN, *supra* note 3, and SOFIA RANCHORDÁS, *CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE* (2014). See also the special issue on *Time, Timing, And Experimental Legislation*, 3 THEORY PRACT. LEGIS. 135-229 (2015).

⁶ *E.g.*, RANCHORDÁS, *supra* note 5; S. Veit & B. Jantz, *Sunset Legislation: Theoretical Reflections and International Experiences*, in *BETTER BUSINESS REGULATION IN A RISK SOCIETY* 267 (Alberto Alemanno et al. eds., 2012).

missing historical perspective in addition to important normative insights. Nonetheless, as is inevitable in any one book, he leaves open several questions for further research, which I will briefly highlight in each Part to follow.

II. THE HISTORY OF SUNSET CLAUSES

In one of the main articles that revived interest in the field, Jacob Gersen observed that “[m]ost discussions of temporary legislation treat it as a relatively rare and modern innovation in lawmaking.”⁷ Gersen cited historical examples to challenge this notion, but acknowledged that his purpose was not to give an exhaustive historical survey.⁸ To the best of my knowledge, Kouroutakis is the first to begin to fill this gap.

Chapter 1 shows that while earlier references can be traced to Ancient Greece, the Roman Empire marks the genesis of sunset clauses. Chapters 2-4 provide a comprehensive historical overview of sunset clauses since the first parliaments in England. Kouroutakis shows that sunset clauses have been used for a long time and quite extensively during some periods. However, they have become less common in modern times, partly due to difficulties caused by the extensive use of sunset clauses and to the opposition’s diminishing influence on the adoption of bills. Kouroutakis moreover tracks the evolution of sunset clauses: from an exclusive royal prerogative to amend legislation by adding sunset clauses, used to provide flexibility to the sovereign; to a legislative bargaining tool used to garner agreement; to a variety of additional uses, such as a tool of legislative oversight over subordinate powers with delegated powers, a tool for institutional and policy experimentation, and a tool for dealing with emergencies.

Kouroutakis convincingly shows that “[t]he temporary nature of laws as a tool in law making is rooted deeply in our legal civilisation...”⁹ He therefore makes a valuable contribution by challenging the conventional wisdom that “temporary legislation is a rarely used modern legislative oddity.”¹⁰ To be sure, Kouroutakis is more convincing in dispelling the misconception that sunset clauses are a recent phenomenon than in providing a clear picture of their prevalence in the UK. This of course is no fault of the book; it is a natural consequence of its focus on historical rather than empirical analysis.

The book’s historical analysis prepares the ground for its normative exploration of sunset clauses, which comprises the balance of the book.

⁷ Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 249 (2007).

⁸ *Id.* at 250.

⁹ KOUROUTAKIS, *supra* note 1, at 16.

¹⁰ Gersen, *supra* note 7, at 261.

III. NORMATIVE ANALYSIS OF SUNSET CLAUSES

Chapter 5 discusses the relationship between sunset clauses and the separation of powers, focusing mostly on the separation of executive and legislative powers. Kouroutakis examines both how the use of sunset clauses affects the separation of powers and how the separation of powers affects the use of sunset clauses. Chapter 6 discusses the relationship between sunset clauses and the interactions between parliaments and courts, between past and future parliaments, and between parliament and the electorate—all while linking them to concepts of parliamentary sovereignty, constitutional dialogue, and deliberative and participatory democracy. Chapters 7-8 explore temporary legislation within an overarching theoretical framework of the rule of law, in both its formal and substantive conceptions.

This ambitious wide-ranging approach has both advantages and disadvantages. On the one hand, it makes possible a comprehensive normative look at sunset clauses, addressing many of the main issues in the debates in the field. On the other, any effort to explore so many facets of complicated questions—each subject to much debate and requiring extensive discussion, and also much more empirical research than is possible in the book—inevitably leaves the reader feeling that much more could have been said.

Consequently, the thoroughness of the discussion varies. To be sure, the discussion on many issues (particularly in chapters 7-8) is excellent. Yet some of the normative arguments could have benefited from more elaborate arguments and evidence to substantiate them. For example, more could have been said to explicate the claims that sunset clauses facilitate dialogue between courts and Parliament, and that sunset clauses preserve parliamentary sovereignty in the face of judicial review. Support for these broad claims boils down to the argument that adding a sunset clause to the law responding to the judicial decision may help facilitate the legislative response and accelerate its legislative adoption. The provocative claim that sunset clauses create a working model for the concepts of deliberative and participatory democracy turns out to be based on the unsatisfying argument that “if the present Parliament enacts temporary laws that will lapse during the session of a future Parliament, the elections [to the future Parliament]... give the opportunity to the voters to participate indirectly in the law making process and influence the stance of the political parties regarding the renewal of the sunset.”¹¹ In addition to the obvious criticism that voting in elections is a far cry from meaningful realization of

¹¹ KOUROUTAKIS, *supra* note 1, at 107.

participatory and deliberative democracy, elections are usually unrealistic mechanisms for voters to influence legislators' votes on specific laws.¹²

Other arguments about the benefits of sunset clauses are well developed and theoretically sound, but could nonetheless benefit from more empirical support. To his credit, Kouroutakis appears to be well aware of this limitation, and at times readily admits it. Consider his argument that sunset clauses reinforce the institutional role of the legislature, since they can be used as a device for legislative oversight over the executive. As Kouroutakis correctly notes, the question is whether sunset clauses are, in practice, an "efficient mechanism enhancing the legislative role."¹³ The same can be said about other putative theoretical benefits of sunset clauses, including claims that sunset clauses can facilitate experimentation and adjustment in public policy and can improve the technical and substantive quality of legislation and its effectiveness. These claims also require much more empirical research. Many of Kouroutakis's arguments in favor of sunset clauses, while elegant and oftentimes theoretically persuasive, should therefore be viewed as plausible rather than proven.¹⁴ Here as well, Kouroutakis deserves credit for being aware that the theoretical benefits of sunset clauses are very much contingent on their design and use in practice,¹⁵ and he therefore provides valuable advice about proper usage that will bring sunset clauses closer to the formal and substantive ideals of the rule of law.

The discussion about how the separation of powers affects the use of sunset clauses should likewise be seen as raising insightful hypotheses for further study, rather than providing definite answers. Kouroutakis places too much emphasis on the well-known distinction between the American presidentialism and Westminster parliamentarism. I nevertheless accept his broader assumption that sunset clauses should be more prevalent in consensus democracies, where lawmaking is shared by various bodies, and in which the executive's power to force its policy agenda thorough the legislative process is more constrained.¹⁶

All in all, even if some arguments require more research, these chapters provide a wealth of insightful arguments, some of them particularly original. For example, while the link between sunset clauses and experimentalist regula-

¹² For an elaborate explanation of this point, see Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 329-33 (2010).

¹³ KOUROUTAKIS, *supra* note 1, at 91.

¹⁴ Bar-Siman-Tov, *supra* note 4.

¹⁵ *Id.*

¹⁶ For more on this point, see *id.*

tion and governance has been discussed at length elsewhere,¹⁷ Kouroutakis draws attention to the interaction between sunset clauses as an experimental mechanism and its impact on separation of powers. Drawing on insights from his historical analysis, he shows that sunset clauses enable and may even promote constitutional experiments to reshape the separation of powers. Indeed, this is a fine example of one of the strengths of this book: the historical and normative analyses intertwine, and reinforce each other. A related strength is that Kouroutakis augments his theoretical normative arguments with a wealth of historical and contemporary examples of actual uses of temporary legislation in the UK (and occasionally elsewhere), and with rich citations from parliamentary debates. At times, these real-life examples provide insights and normative lessons (such as the risks of the overuse of sunset clauses or of using such clauses in conjunction with Henry VIII clauses),¹⁸ at times they clarify by way of illustration, and at times they fascinatingly demonstrate that many of the arguments in the theoretical scholarship are also raised by participants in the legislative processes of temporary legislation.

CONCLUSION

As one would expect from a book that is a product of four years of doctoral research at Oxford, it is comprehensive and extensive, well-researched and erudite, insightful and illuminating. At the same time, it is not entirely immune from the common tendency of doctoral projects to try to cover all aspects of the subject, at times at the expense of thoroughness.¹⁹ Most the time, however, the book masterfully manages to achieve its ambitious aims. It is an impressive accomplishment, and it makes a valuable contribution to the fields of constitutional law, legislation and jurisprudence, and to the growing global debate on temporary legislation.

¹⁷ E.g., RANCHORDÁS, *supra* note 5; R.A.J. Van Gestel & G. Van Dijck, *Better Regulation through Experimental Legislation*, 17 EUR. PUB. L. 539 (2011); Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129 (2014); Bar-Siman-Tov, *supra* note 4.

¹⁸ Henry VIII clauses allow primary legislation to be extended, amended or repealed by subordinate legislation with or without further parliamentary scrutiny.

¹⁹ Other common parts of doctoral dissertations that could have been edited out of this book are its unnecessarily long introductory explanations and scholarship reviews about widely known concepts, such as separation of powers, parliamentary sovereignty, constitutional dialogue, and the rule of law. At the same time, the book could have benefited from explanations necessary for readers not familiar with the English Parliament and its history (for example, the recurring and important term “Henry VIII clause” is defined only in a footnote on page 140).