The Lives and Times of Temporary Legislation and Sunset Clauses

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THE LIVES AND TIMES OF TEMPORARY LEGISLATION AND SUNSET CLAUSES


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I. A GOLDEN AGE OF SCHOLARSHIP ON TEMPORARY LEGISLATION

Offering a comprehensive exploration of “sunset clauses” – “statutory provisions providing that a particular law will expire automatically on a particular date unless it is re-authorised by the legislature” (3) – Kouroutakis’s masterful book signifies a new golden age of scholarship on temporary legislation.¹

As the sunset movement in American state legislatures began to wane toward the end of the 1980s,² so did legal scholarship’s interest in the field.³ In the past 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 as major contribution to, a “burgeoning global theoretical debate about temporary legislation.”⁶

Indeed, while not being the first in this new trend in legal scholarship, Kouroutakis’s book remarkably manages to make several important unique contributions. First, whereas other scholarship, including comparative works, fo-

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¹ Assistant Professor, Bar-Ilan University Faculty of Law. © 2017, Ittai Bar-Siman-Tov.
² As Kouroutakis correctly points out, the term “sunset clauses” is not synonymous with “temporary legislation,” but is rather more accurately seen as belonging to the family of temporary legislation.
⁶ The other two are Fagan, supra note____; Sofía 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).
⁷ Bar-Siman-Tov, supra note 4.
cused on other jurisdictions, Kouroutakis’s is the first in-depth study of sunset clauses in the UK. Second, as Part II will elaborate, Kouroutakis makes a valuable contribution by providing a missing historical perspective. Third, as Part III will explicate, Kouroutakis provides several important normative insights. Indeed, as I will argue in the concluding Part, Kouroutakis’s work is comprehensive and impressive. Yet, as is inevitable in any one book, it leaves several questions for further research, which I will briefly highlight in each part.

II. THE HISTORY OF SUNSET CLAUSES

In one of the main articles that marked revived interest in the field, Gersen observed that “[m]ost discussions of temporary legislation treat it as a relatively rare and modern innovation in lawmaking.” Gersen provided historical examples that seem to dispel this notion, but acknowledged that he was not providing a comprehensive historical survey. To the best of my knowledge, Kouroutakis’s book is the first to begin to fill this gap.

Starting with the Roman empire, but focusing mainly on English history since medieval times, Kouroutakis makes a very convincing case for his claim that “[t]he temporary nature of laws as a tool in law making is rooted deeply in our legal civilisation…” (16). Chapter I shows that while earlier references can be traced back to Ancient Greece, “the Roman Empire marks the genesis of sunset clauses” (15). Chapters 2-4 then provide a comprehensive historical overview of sunset clauses since the first parliaments in England. In addition to revealing that sunset clauses have been used for a very long time, Kouroutakis shows that during some periods (particularly in the era of the Stuarts in the 17th century), their use was quite extensive. He also argues, however, that their use has become more temperate in modern times, partly due to difficulties caused by extensive use of sunset clauses (and the resources required to renew temporary legislation), and partially due to opposition’s diminishing role in influencing the adoption of bills.

Hence, Kouroutakis makes a valuable contribution, and the most comprehensive effort to date, in following Gresen’s call to challenge the belief that “temporary legislation is a rarely used modern legislative oddity.” This in

8 As affirmed in Paul Craig’s preface to the book at ix.
10 Id. at 250.
11 Id. at 261.
itself is an important contribution, as this belief is apparently common wisdom in much of the scholarship from various countries, and as there is still much uncertainty (and probably misconceptions) about the prevalence of temporary legislation in many jurisdictions. I believe Kouroutakis’s contribution is stronger in dispelling the misconception that sunset clauses are a recent modern invention, than in providing a clear an accurate picture of exactly how prevalent is their use in the UK. This of course is no fault of the book, but a natural consequence of it being more focused on historical analysis, whereas the latter question will require a more rigorous empirical study.

Kouroutakis’s historical contribution goes further. It shows how the uses of sunset clauses evolved: 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 in money bills and emergency acts, as a tool of legislative oversight over subordinate powers with delegated powers, and as a tool for institutional and policy experimentation.

Kouroutakis’s historical analysis’s additional contribution is that it provides valuable insights to his normative discussion of sunset clauses, which comprise the balance of the book.

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 powers between the executive and the legislature. It aims to examine 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 trying to link these questions with the concepts of parliamentary sovereignty, constitutional dialogue, and deliberative and participatory democracy. Chapters 7-8 seek to “locate temporary legislation within an overarching theoretical framework of the rule of law,” in both its formal and substantive conceptions (112).

This ambitious wide-ranging approach has both advantages and disadvantages. The advantage is that it provides a very comprehensive normative look at sunset clauses, covering many of the main issues in the theoretical and normative debates in the field. The disadvantage is that any effort to explore so

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12 Bar-Siman-Tov, supra note 4 (citing sources from various contries about this common wisdom).
13 Id.
many complicated questions – each subject to much debate and requiring extensive discussion, and also much more empirical research – inevitably leaves the reader with a feeling that much more could have been said on each of these questions.

Consequently, the thoroughness of the discussion varies. To be sure, the discussion over most issues (particularly in chapters 7-8) is excellent. Yet, some parts give the impression that the far-reaching normative arguments could have benefited from more elaborate arguments and evidence to substantiate them. For example, the broad claims that sunset clauses facilitate the dialogue between courts and Parliament and that sunset clauses preserve parliamentary sovereignty in the face of judicial review, boil down to resting on the argument that the option of adding a sunset clause to the law responding to the judicial decision may help accelerate its legislative process and facilitate the legislative response. The heroic claim that sunset clauses create a working model for the concepts of deliberative and participatory democracy turns out to be based on the tenuous argument that “if the present Parliament enacts temporary laws that will lapse during the session of a future Parliament, the elections that take place in between the past and 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” (107).

Other arguments about the benefits of sunset clauses are much more developed and theoretically sound, but could also benefit from more supporting empirical evidence. To Kouroutakis’s credit, he appears to be well cognizant of this limitation, and at times readily admits it. An example is the argument that sunset clauses reinforce the institutional role of the legislature vis-à-vis the executive, since “a sunset clause can be used as a device for legislative oversight through which the legislature holds the executive to account” (91). Yet, as Kouroutakis correctly notes, “[t]he essential question… is: are sunset clauses an efficient mechanism enhancing the legislative role” not only in theory but also in practice (91). 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. It is not a fault of

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14 In addition to the obvious criticism that voting in elections is a far-cry from meaningful realization of participatory and deliberative democracy, elections are usually an unrealistic mechanisms for voters to influence legislative performance on specific policy questions, for a host of reasons elaborated in Ittai Bar-Siman-Tov, Lawmakers as Lawbreakers, 52 WILLIAM MARY LAW REV. 805, 329-33 (2010).
the book that it cannot persuasively prove these benefits, as this obviously requires much more empirical research. It just means that Kouroutakis’s arguments in favor of sunset clauses, while elegant and oftentimes theoretically persuasive, should be viewed as tentatively plausible rather than certain.\(^{15}\) Here as well, Kouroutakis deserves credit for being well-aware that the theoretical benefits of sunset clauses are very much contingent upon their design and use in practice, and he therefore provides valuable advice about proper usage that will bring sunset clauses closer to formal and substantive ideals of the rule of law.

I see the discussion on how the separation of powers affects the use of sunset clauses as also raising insightful and interesting hypotheses for further study, rather than providing definite answers. I believe it places too much emphasis on the well-known distinction between the American presidential/Westminsterian parliamentary models of separation of powers. Yet, I share its broader intuitively-plausible assumption that sunset clauses should be more prevalent in consensus democracies, characterized by a separation of powers model where law making is shared by various powers, and in which the executive’s power to force its policy agenda through the legislative process is more limited.\(^{16}\) The chapter’s insightful anecdotal examples from the UK and US provide a valuable contribution in developing a hypothesis toward a much-needed broader empirical-comparative research agenda on this question.\(^{17}\)

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, I found particularly interesting and not immediately intuitive, Kouroutakis’s link between the experimental function of sunset clauses and the separation of powers. While the link between sunset clauses and experimentalist regulation and governance has been discussed at length elsewhere,\(^{18}\) 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 endorse constitutional experiments reshaping the separation of powers.

Indeed, this is a fine example of one of the strengths of this book: the way the historical analysis intertwines with the normative analysis, and provides it

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\(^{15}\) Bar-Siman-Tov, supra note 4.

\(^{16}\) For a much more detailed explanation of this point see Bar-Siman-Tov, supra note 4.

\(^{17}\) Id.

with valuable insights. A related strength of the book is that it augments the 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 novel insights and normative lessons (such as the risks of overly extensive use of sunset clauses or of using such clauses in conjunction with Henry VIII clauses),19 at times they clarify by way of illustration, and at times they fascinatingly demonstrate that much of the arguments in the theoretical scholarship are also evident in the arguments of ministers and legislators 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, very 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 researched subject, leading at times to overbreadth at the expense of thoroughness.20 Most the time, however, the book masterfully manages to accomplish its ambitious aims. Hence, all in all, this book is an impressive accomplishment. It makes a valuable contribution to the fields of constitutional law, legislation and legiprudence, and to the growing global debate on temporary legislation.

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19 This clause enables primary legislation to be extended, amended or repealed by subordinate legislation with or without further parliamentary scrutiny.
20 Another feature of doctoral dissertations that could have been edited out of the book is unnecessary 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 only defined in a footnote in page 140).