The [virtues] of sunset clauses in relation to constitutional authority

*Dr. Antonios Kouroutakis**

Abstract

This article focuses on the [virtues] of sunset clauses pertaining to authority. It examines the utility of such clauses in three instances: first, when there is a transfer of constitutional authority; second, when there is an exclusively attributed authority but it is not exercised; and third, when there is a creation of a new authority.

In the case of a transfer of authority subject to sunset clauses, unless such authority is re-authorised, the sunset clause brings about its expiration on a prescribed date. In practice, the benefits from the sunset clause are twofold. First, such a clause allows the comprehensive evaluation of the transferred authority, minimising the risk of any abuse. Second, such a clause sets the timetable, which promotes legal certainty.

In the case of inactivity while there is an exclusive authority, the use of a sunset clause as an alarm clock creates an incentive for action; or alternatively, with the expiration of the sunset clause, the authority is considered ipso jure and simultaneously exercised. Finally, in the case where new authority is created, such authority may be subject to a sunset clause if it is implemented as a constitutional experiment or if it is controversial in nature because it possibly distorts the system of separation of powers.

Introduction

Constitutional documents around the world regulate two broad areas. First, the sharing of powers and the interaction between different institutions, and second, the relationship between the government and the people. The provisions dealing with the allocation of powers provide a more or less detailed description of the scope, and the manner of exercise, of each authority conferred on an institution. Such authority has the power to impose duties and confer rights but at the same time it is subject to constitutional limits. It may be in substance be legislative, executive or judicial, and in nature may be exclusive, concurrent and shared, ex-

plicit or implicit, absolute or limited.[1] Within this context, authority is defined as 'constitutional' because it functions within the boundaries of the constitution and of constitutional conventions.[2]

The focus of the present article is on limited authority based on a time limitation or a sunset clause. Sunset clauses are statutory provisions having the effect that a [law], or a particular part of a law, [lapses] on a fixed and precise date or after a specified and determined period of time.[3] Thus an authority may be regarded as being in force, but through the inclusion of a sunset clause, the duration of the authority is limited and such authority may be commonly described as temporary. Accordingly, sunset clauses pertaining to authority are provisions that mean that the authority assigned to an institution [lapses] on a fixed date or after a certain period of time.

Authority may be subject to a sunset clause because of an explicit, codified constitutional requirement which sets the minimum or the maximum time duration of the authority. For instance, the constitution of Spain provides that the Senate has a two month authority to

---

* Assistant Professor IE University, Madrid, Spain. This article was presented during the International Conference on Law and Time at IDC, Herzliya, Israel in December 2017. The author would like to thank the organizers of this conference, Prof. Dr. Sofia Ranchordas and Dr. Yaniv Roznai and the participants in this conference for their constructive comments. All errors remain those of the author.

[1] As to 'authority', a variety of conceptual accounts are expressed by philosophers and political thinkers: it suffices to mention here Hart, Raz and Rawls. See for HLA Hart, *The Concept of Law* (OUP 1961); Joseph Raz, 'Authority and Justification' (1985) 14 Philosophy and Public Affairs, 3; John Rawls, *Political Liberalism* (Columbia University Press 1996). For the purposes of this article, 'authority' is approached in the descriptive sense.

[2] In that sense constitutional authority is distinct from the term of art '*pouvoir constituant' or constituent power*, that is, the power of a polity to define its own destiny.

[3] According to Black's Law Dictionary, sunset clauses are statutory provisions providing that a particular law will expire automatically on a particular date unless it is re-authorized. See *Black's Law Dictionary* (Bryan A Gadner ed. 8th edn, Thomson West 2004) [sunset clause].

veto bills passed by the Congress.[4] This is a direct sunset clause. On the other hand, an indirect sunset clause regarding the delegated legislative power of the executive is also recorded in the Spanish constitution . According to article 82, when the legislative body drafts bills in order to delegate lawmaking power to the executive, it must include sunset clauses as such delegated authority 'must be expressly granted to the Government for a concrete matter and with a fixed time limit for its exercise.[5]'

Yet the use of sunset clauses was popularised in the US in the 70s by the better regulation movement.[6] At that time, it was claimed that sunset clauses are a device employed by the legislature to offset the comparative advantages of the executive. It was not until a decade later that the practice of sunsetting legislation, as it was called, in other words making legislation subject to a sunset clause but with the aim of its review before the expiration, faded away. Interestingly, the mechanism of sunset clauses was first conceived as a time limitation to the authority of several agencies.

More recently, however, sunset clauses pertaining to emergency laws have been implemented by lawmakers. In particular, the emergency legislation adopted in the aftermath of the al-Qaeda terrorist attacks in New York and London highlighted the use of sunset

[4] Constitution of Spain, Article 90 (2).
[5] Constitution of Spain, Article 82 (3).
[6] Sunset clauses were popularized after the Watergate Scandal in the US, and Lowi, one of their proponents, has argued that 'a termination date should not be considered a death sentence but an opportunity to learn from experience. This is why the notion of sunset is appropriate, because it implies a creative time during which the politics of the agency is likely to come unstuck and the opportunity for substantive reconsideration is most propitious'. See Theodore J Lowi, *The End of Liberalism, The Second Republic of the United States* (2nd edn, WW Norton & Company 1979).

clauses in legislation concerning (indeed restricting) human rights. The academic interaction between time and laws was opened up during the last decade with a series of monographs[7] and articles.[8] In theory,[9] sunset clauses in legislation enhance the role of the legislature, especially in parliamentarian systems like the Westminster model; promote constitutional dialogue between the courts and the political branches of government; permit institutional experiments; render governments more accountable; and support consensus democracy. They also remove obsolete laws from the statute books, update and improve legislation, and finally, encourage innovative legislation, especially in a period when law's ability to keep pace with technological changes is questioned.

[7] See Frank Fagan, *Law and the Limits of Government: Temporary versus Permanent Legislation* (Edward Elgar, 2013); Sofia Ranchordás, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective* (Edward Elgar, 2014); Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017).

[8] Suffice to mention here: Francesco Parisi, Vincy Fon, Nita Ghei, 'The Value of Waiting in Lawmaking' 18 European Journal of Law and Economics 131 (2004); Jacob E Gersen, Eric Posner, 'Timing Rules and Legal Institutions' 121 Harvard Law Review 543, (2007); Jacob E Gersen, 'Temporary Legislation' 74 Chicago Law Review 247 (2007); Richard Albert, 'Temporal Limitations in Constitutional Amendment' 21 Review of Constitutional Studies 37 (2016); Sofia Ranchordas, 'Constitutional Sunrise' in Richard Albert, Xenophon Contiades, Alkimini Fotiadou (eds) *The Foundation and Traditions of Constitutional Amendment* (Hart Publishing 2017); Ittai Bar-Siman-Tov, 'Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study' 11 Regulation and Governance (forthcoming 2017 - JR note: should this be updated?).

[9] For more details on the value of sunset clauses see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017).

However, it seems that there is a need to revisit and re-evaluate the utility of sunset clauses when used in conjunction with authority. Their extensive use in the 70s in the US had led legislators to let them expire without evaluating their use. This resulted in discredit to their utility. Despite the fact that a number of proponents have highlighted the benefits from their use at a theoretical level,[10] a more contemporary systematic review in combination with a caveat for more moderate use might be useful to emphasise their potential.

Accordingly, this paper aims to focus on the virtues of sunset clauses pertaining to the exercise of constitutional authority and in particular, it will examine the utility of such clauses in three instances: first, when there is a transfer of authority; second, when there is an exclusively attributed authority but it is not exercised, i.e. what we call 'constitutional inactivity'; and third, when there is [a deviation from an existing authority].

Part A will focus on the case of a transfer of authority which is subject to sunset clauses, and will examine the benefits from such a clause in such a transfer of power. It will argue that in practice, the benefits from the sunset clause are twofold. First, such a clause allows comprehensive evaluation of the transferred authority, thus minimising the risk of any abuse. Second, such a clause sets a timetable, thus promoting legal certainty. In addition, in the case of a transfer of authority due to emergencies, the utility of sunset clauses is explained by the temporary nature of the emergencies. Furthermore, sunset clauses enhance legislative

[10] Bruce Adams, 'Sunset: A Proposal for Accountable Government' (1976) 28 Administrative Law Review 511; Edmund S Muskie, 'Sunset Legislation, Restoring Public Confidence in Government' (1977) 4 Journal of Legislation 11; Dan R Price, 'Sunset Legislation in the United States' (1978) 30 Baylor Law Review 401; Theodore J Lowi, *The End of Liberalism, the Second Republic of the United States* (2nd edn, WW Norton & Company 1979); Lewis Anthony Davis, 'Review Procedure and Public Accountability in Sunset Legislation: an analysis and Proposal for Reform' (1981) 33 Administrative Law Review 393.

oversight, as the expiration of such transferred power provides the legislature with the opportunity to reassess the situation.

Part B will focus on the case of inactivity while there is an exclusive authority. Constitutional systems are built on the assumption that each authority will fulfil its duty in office. But a sunset clause, like an alarm clock, creates an incentive for action, or the legal effect of a sunset clause on an authority might be that with the expiration of the sunset clause, the authority is considered *ipso jure* and simultaneously exercised. To illustrate this case, the paradigm of the inactivity of the law making authority of the Head of the State and of the second chamber in bicameral systems will be examined.

Finally, Part C will examine the creation of a new authority subject to a sunset clause. In a case where a new authority is created, it may be subject to a sunset clause depending on the circumstances. This Part will argue that the authority may be temporary in principle if such authority is implemented via a fast-track law making procedure or as a constitutional experiment reshaping the balance and the separation of powers. Second, such authority may be temporary due to lack of consensus in the political system, or because it is controversial in its nature, deviating from, and possibly distorting, the system of balance and separation of powers.

A. Sunset clauses and the transfer of authority

While, historically, constitutional authority was absolute and concentrated in the hands of the monarch, the diffusion of authority progressively became a worldwide paradigm with the

establishment of the doctrine of the separation of powers.[11] In practice, the scriptural totalitarianism and the absolutist nature of authority to a lesser or greater extent was diffused and transferred to the tripartite institutional form of statehood, with its legislative, executive and judicial branches.

However, this transfer of power was not a lump sum transfer that happened once with the exercise of the constituent power and adoption of the constitution. On the contrary, constitutions around the world leave room for flexibility and alternative configurations of authority. It will suffice to mention here the mechanism of delegation of law making powers, and the emergency configuration of such powers under extreme conditions.

a. Delegation of powers

In principle, according to the doctrine of the separation of powers, the legislature is entrusted with the authority for law making. Blackstone, in his early work describing the authority of the British Parliament, famously remarked that Parliament 'hath sovereign and controllable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military maritime, or criminal'.[12]

[11] For the history of the separation of powers see MJC Vile, *Constitutionalism and the Separation of Powers* (2nd ed. 1967).

[12] W Blackstone, *Commentaries*, Book 1, 17.

However, under certain circumstances, when there is a need for very specific legislation regulating technical details, the executive, due to its expertise, is placed in a better position to accomplish this role in a more efficient way by adopting laws by way of so-called secondary or executive legislation. While, in most cases, technical changes are made by the enactment of secondary legislation, such power must be subject to safeguards against constitutional risks. Suffice to mention here that the institutional interests of the majority in the legislative branch (legislators) and those in the executive branch (ministers) are not identical. Legislators, unlike ministers, make collective decisions combining different and even conflicting interests.

The scrutiny of such delegated power might take place in one of two ways. First, via judicial review of secondary legislation by the courts, [which is a standard process]; and secondly there might be additional legislative scrutiny, in a case where the proposed secondary legislation requires as a precondition approval by the legislature.

Besides such legislative and judicial scrutiny of the delegated power, an extra safeguard may be included in the legislation itself. This is the so-called sunset clause. The glossary of the UK Parliament provides the following definition: 'A provision in a Bill that gives it an expiry date once it is passed into law. Sunset clauses are included in legislation when it is felt that Parliament should have the chance to decide on its merits again after a fixed period'.[13]

In the UK, the delegation of law making powers is a longstanding practice recorded from the 18th century. For instance, the turnpike trustees were entrusted with the power to

[13] http://www.parliament.uk/site-information/glossary/sunset-clause/

collect road tolls and highways[14], or in the 19th century the Tithe Commissions were entrusted with the power to collect a special tax,[15] and they were subject to consecutive sunset clauses.[16] However the autonomy of such institutions became a concern and at the beginning of the 20th century a committee was formed, the so called Donoughmore Committee, with the remit to investigate the issue. Among the conclusions of the Donoughmore Report was that sunset clauses are a desirable mechanism to prevent abuse of delegated power.[17]

Nowadays the delegation of legislative powers, subject to a sunset clause, is a common practice for the western democracies: suffice it to mention the examples of Italy,[18] Spain,[19] France[20] and Greece.[21] Indeed sunset clauses are an appropriate mechanism to allow wide delegated powers and simultaneously enhance parliamentary oversight during the whole process. Unless re-authorised by the legislature, a sunset clause brings about the expiration of the delegated power on a prescribed date. In practice, the benefits from the sunset clause in legislative acts are twofold. First, such a clause sets the timetable for the whole

[14] Highgate and Chipping Barnet Road Act 1720.

[15] The Tithe Commutation Act 1836.

[16] See Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) 66.

[17] Committee on Ministers' Powers, Report (Cmd 4060 1932).

[18] Constitution of Italy, Article 76.

[19] Constitution of Spain, Article 82 (3).

[20] Constitution of the Fifth Republic, Article 38 (1).

[21] Constitution of Greece, Article 43 (4).

process of the transposition of EU secondary legislation into domestic laws, thus promoting legal certainty. Second, such a clause acts as an alarm clock, in that it creates the incentive for comprehensive legislative evaluation of the delegated powers, thus minimising the risks from the abuse of such powers.

Interestingly, both the length of the delegation and the scope of delegation are of paramount importance. On the one hand, the length of the delegation is important for the demonstration of confidence and trust by the original institution to the delegate institution.[22] In addition, the degree of the determination of the expiration date is crucial. Technically speaking, sunset clauses are classified based on their expiration date as either conditional or unconditional. A sunset clause is unconditional when the expiration date is certain, and does not depend upon any condition.[23] For instance, in the European Union (Withdrawal) Bill the sunset clauses in the Bill as it was originally proposed were conditional, as the automatic expiration of the delegated powers depends upon a condition, in particular the 'exit day'.[24] It is readily apparent that a conditional sunset clause may engender concerns regarding legal certainty.

On the other hand, the breadth of scope of a delegated law making power is significant. For instance, constitutional documents impose limits on the extent of delegated law

[22] See Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) 99.

[23] See Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) Ch 1 .

[24] European Union (Withdrawal) Bill (HC Bill 5) cl 14.

making powers. Thus for example the Constitution of Spain that allows the delegation of law making powers to legislative committees[25] at the same time explicitly exempts from such delegation bills on constitutional reform or international affairs, organic bills, bills that regulate basic principles and the Budget.[26]

Similarly in the UK, where there is a 'Henry VIII' clause in a parliamentary Act, the executive is enabled to repeal or amend even primary legislation. In other words and according to the glossary of the British Parliament, such a clause 'enables primary legislation to be amended or repealed by subordinate legislation with or without further parliamentary scrutiny'.[27] The Donoughmore Committee recommended that all Henry VIII powers should be subject to sunset clauses.[28]

But this theoretical benefit from the use of sunset clauses in relation to delegation of powers is neutralised when the sunset clause itself is also subject to Henry VIII powers. The combination of a sunset clause with a Henry VIII clause results in the neutralisation of the sunset clause.[29] In practice, a minister might renew the law indefinitely, and as a consequence, there would be no foreseeable expiration date. In other words, the safeguard of time

[25] Constitution of Spain, Article 75 para 2.

[26] Constitution of Spain, Article 75 para 3.

[27] http://www.parliament.uk/site-information/glossary/henry-viii-clauses/

[28] Committee on Ministers' Powers, Report (Cmd 4060 1932).

[29] Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) 88 and 132.

limitation of the delegated power is circumvented when secondary legislation can even alter the expiration of the sunset provision.

In the past, the constant renewal of temporary legislation with a Henry VIII clause was a core issue in the 1951 case *Willcock v Muckle*.[30] In that case, the novel question before the court was whether the National Registration Act of 1939, which had both a sunset clause and a Henry VIII clause, was still in force.

In the present day, the original draft of the Cabinet bill entitled the European Union (Withdrawal) Bill provided that the expiration ("exit day") would be decided by a Minister of the Crown.[31] In addition, clause 9 of the European Union (Withdrawal) Bill on the implementation of the withdrawal agreement delegates wide power to the executive even to "amend the Act", including the sunset provisions. Without doubt, the combination of sunset clauses with Henry VIII powers is problematic. If the executive branch has the legal power to decide and extend the expiration date, in reality parliamentary procedures are circumvented, and Parliament is left impoverished in its constitutional role in the separation of powers.

As a conclusion, a sunset clause, when it is not coupled with a Henry VIII clause, or if it is a pure (unconditional) sunset clause, sets limits to delegated power and enhances legal certainty. However, when a sunset clause is coupled with a Henry VIII clause, the outcome is that parliamentary procedures can be circumvented. Having said that, it is remarkable that without parliamentary intervention, a report issued by the Home Affairs Select Committee

[30] Willcock v Muckle (1951) 2 KB 844.

[31] European Union (Withdrawal) Bill (HC Bill 5); see cl 14, paras 1 and 2.

stated that '[u]nless the Bill provided for a final expiry date – or "sunset" provision – beyond which no further renewal could be made, it would be possible for the provisions to continue in force for many years, or even decades'.[32]

b. The transfer of powers during emergencies

An explicit transfer of powers occurs at a state of emergency. The prescription in constitutional documents of several procedures, such as the role of an institution in the lawmaking power, of institutional guarantees such as checks and balances, and of human rights protections, makes the legal order firm and solid. But in times of stress, an age-old problem, constitutions, like materials, are in need of flexibility and of the ability to absorb energy and tolerate stress, in order to avoid fracture.

Such flexibility is incorporated in a number of constitutional provisions that provide for a special emergency regime affecting constitutional guarantees and rights, and in particular the separation of powers. Indeed provisions in numerous constitutions prescribe for a deviation from the original attribution of authority, upon conditions and within constraints.

To begin with, the state of exception is a concept opposed to the state of normality[33] and four conditions must be met. First, there is no emergency if the circumstances are not extraordinary. Wars, sieges, or social unrest are not incidents of our ordinary life. They are

[32] Home Affairs Select Committee, The Anti- Terrorism, Crime and Security Bill 2001 (HC 2001–2, 351) [41].

[33] For more details on the state of exception, see Giorgio Agamben, *State of Exception* (trs Kevin Attell, University of Chicago Press).

unusual, extremes outside the state of normality. Second, emergencies by nature include a feeling of urgency and of time pressure. Thus, there is no luxury of time to prepare and plan a response according to ordinary procedures. Third, there is no sense of predictability of consequences, as a general sense of the unexpected prevails. Finally, emergencies are expected to be temporary. If the circumstances are irreversible, then there is no emergency: it is not a perpetual state of exception, but a state of a new normality.[34]

Under a state of emergency, a transfer of authority occurs. 'More powers are concentrated in the hands of the executive, which often means that public officials are allowed to limit fundamental guarantees, enacting 'extra-legal measures' to protect a nation confronted with grave peril.'[35] The roots of temporary transfer of authority during emergencies can be traced from the Roman period, with the establishment of Roman dictatorship in the appointment of one out of the two governing Consuls as Dictator for a short period.[36] In the UK, once the authority of the executive to suspend laws was abolished with the Bill of Rights,[37] in times of exigency Parliament had to pass a law with an explicit and temporary transfer of

[34] At the same time lawmaking during emergencies is carried out under conditions of social pressure, uncertainty and public pressure.

[35] Antonios Kouroutakis and Sofia Ranchordás, 'Snoozing Democracy: The De-juridification of Emergencies' (2016) 25 Minnesota Journal of International Law 52.

[36] Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) 16.

[37] 1 Gul&Mar c 5 [An Act declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne].

authority to the Crown, allowing the ad hoc suspension of the right of habeas corpus. The first law empowering the executive to suspend habeas corpus was made in 1700.[38]

Nowadays constitutional documents may provide for the temporary transfer of certain powers to the executive. For instance, the Basic Law of the Federal Republic of Germany upon the promulgation of a state of defence, automatically passes the power of commander over the armed forces to the Federal Chancellor[39] and this transfer expires once the conclusion of peace occurs.[40] Thus, sunset clauses are a common feature when there is a transfer of powers during emergencies and their main role is to accommodate the transitional nature of emergencies. Once normality is restored and the exceptional conditions of the emergency have disappeared, the extraordinary transfer of powers to the executive is likewise expected to sunset. In addition, sunset clauses enhance legislative oversight, as the expiration of such transferred power provides the legislature with the opportunity to reassess the emergency.

But the utility of sunset clauses in such transfers of authority due to emergencies is a double-edged sword.[41] In the past, such transfer of authority, regardless of the fact that it was subject to a sunset clause, has proved fatal for the constitutional order. It suffices to mention here the well-known collapse of the Weimar Republic. While there was a continuous failure

[38] 1 Gul&Mar c 2 [An Act for Impowering His Majestie to Apprehend and Detaine such Persons as He shall finde just Cause to Suspect are Conspireing against the Government].

[39] Basic Law Article 115b.

[40] Basic Law Article 115l.

[41] Sunset clauses in emergency legislation are also criticised because they allow the adoption of substantive measures and policies having an impact on constitutional guarantees and rights. See Antonios Kouroutakis and Sofia Ranchordás, 'Snoozing Democracy: The De- juridification of Emergencies' (2016) 25 Minnesota Journal of International Law 29.

of the use of the emergency powers of Article 48 of the Weimar Constitution,[42] the *coup de grâce* took place in 1933 with the adoption of the Enabling Act of 1933.[43] According to this law, Hitler was endowed with wide lawmaking powers. Such powers, ironically, were set to expire on April I, 1937, after four years, or alternatively when the replacement of the national cabinet would occur.[44]

In theory, such temporary transfer of powers falls within the so-called accommodation model, a proponent of which is Ackerman.[45] This model, which facilitates the temporary adjustment and modification of the constitutional system in order to face an emergency, is criticised by Gross.[46] Gross argues that such practices, even if they are temporary in nature, in reality move the constitutional system down a slippery slope of excessive executive action.[47]

B. The inactivity of an authority; the paradigm of the law making authority

Within the spirit of the constitution, there is a sense of fair play, in the expectation that each authority will fulfil the duty of its office. This is of paramount importance especially when

[42] For the scope of Article 48 and the series of emergencies laws adopted after 1923, see Frederick Mundell Watkins, *The Failure of Constitutional Emergency Powers under the German Republic* (Harvard University Press, 1939) 73ff.
[43] Gesetz zur Behebung der Not von Volk und Reich ("Law to Remedy the Distress of the People and the State") (RGB. I, 141).
[44] Gesetz zur Behebung der Not von Volk und Reich ("Law to Remedy the Distress of the People and the State") (RGB. I, 141) sec 5 'This law becomes effective on the day of publication. It becomes invalid on April I, 1937; it also becomes invalid when the present national cabinet is replaced by another'.
[45] Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029.
[46] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional' (2003) 112 Yale Law Journal 1011.
[47] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional' (2003) 112 Yale Law Journal 1011, 1022.

there is exclusive authority. In principle, to each constitutional actor an authority is assigned and it falls within its discretion whether to exercise this authority or not. If the constitutional actor decides not to exercise its authority, this inaction can be seen as a veto power and it can occasionally lead to constitutional dead ends and constitutional crisis.

A recent example that attracted the interest of academics and the press alike concerns the authority of the US Senate to confirm nominations for the US Supreme Court according to Article 2 Section 2 of the US Constitution. The provisions in question prescribed that '[The President] shall have Power, (...) by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court (...)'. However, after Justice Antonin Scalia's sudden death in 2016, the US Senate refused to organize a confirmation hearing about President Obama's nominee to replace Justice Scalia.[48] According to the New York Times, '…Republicans claimed that though the Constitution calls for the Senate's "advice and consent," senators aren't obligated to do anything. This is a bad-faith reading of that clause, even if there is no clear way to force a vote.'[49]

[48] New York Times, G.O.P. Senators Say Obama Supreme Court Pick Will Be Rejectedhttps://www.nytimes.com/2016/02/24/us/politics/supreme-court-nomination-obama.html

[49] New York Times, The Stolen Supreme Court Seat https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html

Apparently, the constitutional drafters did not include mechanisms to enforce the nominations because the Supreme Court may operate and function with less than nine Justices as Richard Albert has pointed out.[50] In other words, if the drafters considered the nature of this authority to be imperative for the function of the polity, they could have limited the discretion of the Senate by obliging it to act within a specific time framework, e.g. making the Senate's authority subject to a sunset clause**.** Furthermore, it can be argued that some issues, such as the nomination of Supreme Court justices, are very political in nature, and the actions of each actor - the President or the Senate in this case - are evaluated via the political processes, and in particular by means of elections.

While inactivity is some areas is an option within the political spectrum, inactivity during the law making process, especially when it requires the cooperation of different institutions, may lead to constitutional dead ends and may give rise to unprecedented constitutional crisis. For example, in unicameral systems, the law making process is an amalgam of enactment of a bill by the legislature and confirmation of the bill by the head of the state, the executive body.[51] In bicameral systems the process is an amalgam of the enactment of a bill by both the upper and the lower house and the confirmation of the bill, likewise, by the head of the state.[52]

---

[50] Richard Albert No need for nine on the Supreme Court https://www.bostonglobe.com/opinion/2016/02/22/need-for-nine-supreme-court/7SnAzJWXMveAxlTzOsDWzM/story.html

[51] See Constitution of Greece (1975) Article 42

[52] See Constitution of the US Article 1, sec 7.

a. Inactivity and lawmaking authority of the Head of the State

To begin with, the authority of a head of the state to sign, promulgate or veto bills, in the case where such authority is not subject to a sunset clause, equals a *de facto* and absolute veto to block bills passed by the legislative body. This might take place with the passive nullification of a legislative act, the so called 'pocket veto'[53] as is the case in India with the power of the President to pocket veto bills.[54]

By contrast, a time limitation might restrict the power of the Head of the State in different ways. First, when the time limitation expires, the authority is considered as exercised *ipso jure*. This is the case with the authority of the US President to sign bills. According to Article 1, section 7 clause 2 of the US Constitution,[55] any bill that has been presented to the President becomes a law automatically after ten days have passed without the President exercising a veto. That said, in a case where exclusive authority is conferred on an institution and the institution does not exercise it, with the inclusion of a sunset clause such authority is

[53] For more information about the pocket veto see Edward M Kennedy, 'Congress, the President, and the Pocket Veto' (1977) 63 Virginia Law Review 355 and John Houston Pope, 'The Pocket Veto Reconsidered' (1986) 72 Iowa L. Rev. 163

[54] Constitution of India Article 111.

[55] US Constitution, Article 1, sec 7 cl 2 'If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it'.

subject to an automatic enforcement mechanism. In particular, with the expiration of the sun-set clause, the authority is considered *ipso jure* and simultaneously exercised and therefore dead ends are avoided.

However, the effect of the expiration of such clause in not always the automatic *ipso jure* exercise of the authority. The basic law of Hong Kong Special Administrative Region provides an alternative as by the expiration of the set period, the Chief Executive has the power either to dissolve the legislative body,[56] or to resign.[57]

An alternative case is when the Constitution drafters subjected an authority to a sunset clause with the aim of provoking action, or to enhance legal certainty. In this case, if the authority is not exercised within the set period then it is lost. Thus a sunset clause acting as

---

[56] See Hong Kong SAR Basic Law Article 49 in combination with Article 50. Article 49: 'If the Chief Executive of the Hong Kong Special Administrative Region considers that a bill passed by the Legislative Council is not compatible with the overall interests of the Region, he or she may return it to the Legislative Council within three months for reconsideration. If the Legislative Council passes the original bill again by not less than a two-thirds majority of all the members, the Chief Executive must sign and promulgate it within one month, or act in accordance with the provisions of Article 50 of this Law.' Article 50: 'If the Chief Executive of the Hong Kong Special Administrative Region refuses to sign a bill passed the second time by the Legislative Council, (…), and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council. The Chief Executive must consult the Executive Council before dissolving the Legislative Council. The Chief Executive may dissolve the Legislative Council only once in each term of his or her office.'

[57] Hong Kong SAR Basic Law, Article 52 'The Chief Executive of the Hong Kong Special Administrative Region must resign under any of the following circumstances: (2) When, after the Legislative Council is dissolved because he or she twice refuses to sign a bill passed by it, the new Legislative Council again passes by a two-thirds majority of all the members the original bill in dispute, but he or she still refuses to sign it.'

an alarm clock might create the incentive for action, which is the case in numerous constitutions. It suffices to mention here the power of the French and the Greek Presidents to promulgate laws[58], or perhaps the power of the Queen to veto acts of the Australian Parliament, which is subject to a one-year sunset clause.[59]

b. inactivity of the second law making chamber

Likewise the utility of sunset clauses and time limitations is crucial for transforming the bicameral and symmetrical system, also known as strong bicameralism, into a system which is bicameral and asymmetrical, the so called weak bicameralism.[60] In theory, in bicameral and

[58] This is the case for instance in France where the 'President of the Republic shall promulgate Acts of Parliament within fifteen days following the final passage of an Act and its transmission to the Government'. See French Constitution, Article 10. Constitution of Greece Article 42 para 2.

[59] Section 59 of Australia 'The Queen may disallow any law within one year from the Governor General's assent, and such disallowance on being made known by the Governor General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known'.

[60] Lijphard argues that 'Three features of bicameral parliaments determine the strength or weakness of bicameralism. The first important aspect is the formal constitutional powers that the two chambers have…. Second, the actual political importance of second chambers depends not only on their formal powers but also on their method of selection…. The third crucial difference between the two chambers of bicameral legislatures is that second chambers may be elected by different methods or designed so as to overrepresent certain minorities'. About bicameralism and its different formation see Arend Lijphard, *Patterns of Democracy; Government Forms and Performance in Thirty-Six Countries* (Yale University Press, 2nd ed. 2012) 192; See also G Tsebelis and J Money, *Bicameralism* (CUP 1997).

symmetrical systems, both legislative assemblies equally participate in the law making process, and without the consent of one of them, the proposed bills stay in the drawers. However, in a case where the authority of one branch of the legislative assembly is subject to a sunset clause, its power to review legislative bills is constrained.

The most notable example is the Parliamentary Acts of 1911 and 1949, according to which the lawmaking authority of the House of Lords was time-limited, initially for two years and then for one year.[61] Thus, the House of Lords may review a bill for a maximum period of a year; it cannot delay the law making process for more than a year, and Bills become Acts of Parliament with the sole consent of the House of Commons once the one-year law making authority of the House of Lords has expired.

c. Is action always desirable?

This Part has shown how law drafters may avert inactivity when there is exclusive authority by making the exercise of such authority subject to a sunset clause. In particular, the use of a sunset clause as an alarm clock creates an incentive for action, or with the expiration of the sunset clause, the authority is considered *ipso jure* and simultaneously exercised.

However, inactivity under certain occasions may be seen as a positive expression of a position - just as silence may also be regarded as music. And such inactivity might be

[61] About the Parliament Acts of 1911 and 1949 and their impact on how they redefined the process of enacting statutes see Rivka Weill, 'Centennial to the Parliament Act 1911: the manner and form fallacy' [2012] Public Law 105. However for Money Bills passed by the Commons, the House of Lords can delay them only for a month. See Parliament Act of 1911, sec 1.

desirable for the constitutional system and compatible with the will and the expectations of society. An outcome which is 'forced' and 'automatic' might not always be the optimum solution. Furthermore, subjecting every authority to time limitations might overburden the legislative process and might create a constitutional system running on auto-pilot.

C. Creation of a new authority subject to sunset clauses

Having explored the cases of transfer of authority and that of inactivity, a quite distinct case is when there is a creation of a new authority subject to a sunset clause. The temporary nature of such authority may be broadly explained in two ways. First, the new authority may be created under conditions of duress, for instance as a response to public pressure; or the legislature may decide to make a new authority temporary because it is initiated as a constitutional experiment. In both instances, before the expiration of the authority, the lawmakers will examine and evaluate the new authority and they might re-authorise the authority with or without amendments, or even make it permanent or let it expire instead.

The second broad category is the creation of a new authority which is considered controversial. A new authority may be seen as controversial because there is no consensus among the lawmakers about the need for the new authority, or because the new authority has a controversial impact on the balance and the separation of powers between existing authorities.

a. New authority as a constitutional experiment or due to exigency

In 2009 the political system of the UK was shaken by a major political scandal, the so called 'parliamentary expenses scandal'. In a period of strenuous financial conditions, it was revealed that certain members of parliament had misused and abused the system of parliamentary expenses claims over previous years, a situation that angered the electorate and discredited the politicians in the public mind.[62] Parliament was put under public pressure to adopt legislation in order to enhance scrutiny of parliamentary expenses. In particular, an external authority was established to handle Members' expenses, finances and salaries.[63]

Accordingly, the Government brought forward the Parliament Standards Bill and in the initial draft, interestingly, the new authority was not subject to a sunset clause.[64] However, during the Parliamentary debate on the Bill, Sir Robert Smith, MP urged the Government to make the bill temporary 'so that in the autumn [Parliament] would be able to come forward again with the full scrutiny of effective legislation, fully worked out, so that [Parliament] had a permanent solution that dealt with all the concerns that have been raised in this debate'.[65] Similarly, the Select Committee on the Constitution recommended that the Bill must be subject to a sunset clause as it was supposed to be enacted with a fast track lawmaking procedure.[66] Eventually, when the Bill was debated in the House of Lords, the sunset

[62] The Daily Telegraph, 'MPs' expenses scandal: a timeline' 4 Nov 2009.

[63] Parliamentary Standards Act 2009.

[64] Parliamentary Standards Bill 2009 HC (2008-09).

[65] HC Deb 1 July 2009 vol 495 col 407.

[66] Select Committee on the Constitution, *Parliamentary Standards Bill* (17th Report of Session 2008-09) HL 130 [198].

clause was introduced by way of a successful amendment,[67] and likewise, the House of Commons approved the new Independent Parliamentary Standards Authority, making it temporary for two years and subject to review.[68]

To sum up, the Independent Parliamentary Standards Authority was created on a temporary basis as a result of the speedy and meticulous lawmaking process according to which it was enacted.

An alternative case, though, is making of a new authority temporary due to the intent of the lawmakers to adopt the new authority for an experimental period. That was the case in the US in 1978 with the adoption of the new Ethics in Government Act[69] in response to the Watergate Scandal. In accordance with this law, an independent prosecutor was established and given the authority to investigate abuses of executive powers.[70] The new authority conferred on the independent prosecutor was in reality a parallel authority to the authority of the Department of Justice to monitor the administration.[71] This institution and its authority was

[67] HL Deb 16 July 2009 vol 712 col 1324.

[68] Parliamentary Standard Act 2009 s 15.

[69] Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1824-1867.

[70] See Alexander I Tachmes, 'Independent Counsels under the Ethics in Government Act of 1978: A Violation of the Separation of Powers Doctrine or an Essential Check on Executive Power' (1988) 42 University of Miami Law Review 735.

[71] Constance O'Keefe and Peter Safirstein, 'Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional and Political Tensions in the Special Prosecutor Provi-

subject to a 5 year sunset clause,[72] which was re-authorised twice with amendments.[73] The law expired in 1992; however in 1994 it was re-authorised[74] until 1999 when the constitutional experiment came to an end.

The separation of powers determines the relationship between executive, legislative and judicial power in a specific institution, and formulates checks and balances between the institutions. However, this relationship is not static; on the contrary, it is dynamic, especially because a mere legislative act is capable of amending and reshaping the status quo. The creation of new institutions with new authorities reshapes the balance of power, but the use of sunset clauses permits lawmakers to apply a new order for a certain period of time, evaluate its efficiency and, based on their conclusions, to make the new authority permanent.

b. Authority, new but controversial

sions of the Ethics in Government Act' (1982) 49 Brooklyn Law Review 113, 114. A challenge to the independent counsel provisions of the Ethics in Government Act of 1978 was brought before the US Supreme Court which was unsuccessful, see Morrison v Olson (1988) 487 US 654, 694 (US SC).

[72] Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) 86.

[73] The act was renewed and amended in 1982 with the Ethics in Government Act Amendments, Pub L [JR note - is this citation complete? Cp. note 74 below]
No 97–409, 96 Stat 2039 (1983), and it was reauthorized in 1987 by the Independent Counsel Reauthorization Act, Pub L No 100–191, 101 Stat 1293 (1987).

[74] Independent Counsel Reauthorization Act Pub L No 103–270, 108 Stat 732 (1994).

Another reason that may drive the lawmakers to make an authority temporary may be a lack of consensus between political actors. For example, in England during the period of Henry IV an unusual bill was tabled in the Commons which sparked a debate among scholars.[75] This Bill introduced an innovation in the constitutional system of England as it regulated the status of the King's Council by granting authority to the Commons to confirm the members of the council.[76] According to Stubbs, 'these articles comprise a scheme of reform in government, and enunciate a view of the constitution far more thoroughly matured than could be expected'.[77]

In other words, Commons were granted the authority to confirm the members of the King's Council before their appointment, according to which a kind of ministerial responsibility was established. [78] This special and novel authority attributed to the Commons was

[75] About the different opinions expressed about the value of the bill see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) 30

[76] Ror Parl C 65/68 III 585 (article 1).

[77] William Stubbs, *The Constitutional History of England in Its Origin and Development Vol III* (first published 1878, CUP 2011) 55. About the controversy that this bill caused and the different opinions expressed about the value of this bill see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) 30.

[78] Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) 29.

subject to a sunset clause, and according to the wording of the sunset clause, having a duration 'only until the end of the next parliament' [79] this authority was not meant to be reauthorised.

Without doubt, this Bill introduced into the system of governance of medieval England an innovation which was a departure from the unlimited and unconditional authority of the King to appoint the members of his Council. Therefore, this Bill was made temporary, as the king was not willing to limit his authority indefinitely, and from his perspective, the new law did not have his full consent.

Another example of the paradigm in which, similarly, consensus is not enshrined is the Bill about the revival of the royal authority to suspend laws of parliament. After the Restoration, the constitutional setting in the UK altered, as the power of Westminster was consolidated and the authority of the Crown was limited.[80] However, a bill was introduced into the House of Lords in 1662–3 to revive the royal authority to suspend laws of Parliament which was subject to a 5-year sunset clause.[81] It appears that the sunset clause in the bill was

[79] Ror Parl C 65/68 III 589 (article 31).

[80] Craig accurately remarks, 'the restoration of the monarchy in the person of Charles II did not restore the previous constitutional status quo': see Paul Craig, 'Public Law, Political Theory and Legal Theory' [2000] PL 211, 215. Also Holdsworth further points out, Parliament possessed a more central role in the government 'with an initiative of its own, and an acknowledged right to survey the whole field of political action' see WS Holdsworth, *A History of English Law Vol VI* (Methuen 1924) 162.

[81] 7th Report of Historical Manuscripts Commission 167–8. Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) 55.

used, unsuccessfully, in an effort to create a common ground of consensus so that the proposed bill would be passed by Parliament.

On the other side of the Atlantic Ocean, we find a more recent example of new authority made temporary due to its controversial nature. This is the case of the Voting Rights Act 1965 in the US. Although the member States share an equal status and broadly have the power and authority to structure their governments and adopt their own voting procedures[82], Congress, based on Amendment 15,[83] passed the Voting Rights Act to prohibit tests and devices employed by States in order to prevent African-Americans from voting and thus to entrench racial discrimination in voting.

By section 5 the law provided in particular that, in order to take effect, any change in voting procedures had to be pre-approved by federal authorities.[84] This pre-clearance authority in fact was a substantial departure from the original authority of each member state to adopt laws on electoral procedure, and differentiated between the states despite their equality of sovereignty.

Congress aimed to limit some States' authority to adopt voting procedures resulting in the denial of the right to vote on account of race and colour. In particular, it required a number of

[82] US Constitution Amendment 10. Gregory v. Ashcroft, 501 U. S. 452, 461.

[83] US Constitution, Amendment 15, The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.

[84] Pub L No 89–110, 79 Stat 437 (1965) s 4 and 5.

States to obtain federal permission before adopting any voting law.[85] Such law in reality disturbed the balance of powers in the federalism system and eventually in 2010 the US Supreme Court struck down[86] the Act, and the authority of States to determine their own voting procedures was re-authorised in 2006 with a 25- year life span.[87]

c. The excessive use of sunset clauses

This Part has argued that the use of sunset clauses in the creation of new authorities might, first, facilitate experimentation in the constitutional system; or, when a proposed new authority may be seen as controversial, might secondly create the necessary common ground for decision makers to reach a consensus.

However the excessive use of sunset clauses may have side effects. As past experience in the US after the Watergate Scandal[88] has shown, the very frequent (and to an extent excessive) use of sunset clauses limiting the duration of agencies burdens the lawmaking process and the workload of law makers. And as a result, the very frequent use of sunset clauses limiting the lifespan of authorities might prove to be impractical and inefficient.

---

[85] Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses; An Historical and Normative Analysis* (Routledge 2017) 157.

[86] Shelby County v. Holder, 570 U.S. 2 (2013).

[87] An act to amend the Voting Rights Act of 1965 Pub L No 109–246, 120 Stat. 577 (2006).

[88] See text to n [This note appears to be incomplete! JR]

In addition, it can be argued that the creation of a new institution or authority subject to sunset clause may spur a sense of instability. The forthcoming expiration of the authority might work in a very counterproductive way making the authority failed from the outset.

Conclusion

Overall this paper has focused on the [virtues] of sunset clauses pertaining to constitutional authority and in particular, it has examined the utility of such clauses in three instances: first, when there is a transfer of constitutional authority; second, when there is an exclusively attributed authority but it is not exercised, the case of so-called constitutional inactivity; and third, when there is a creation of a new authority.

This article has demonstrated that the benefits from the use of sunset clauses in delegated powers are twofold. Such clauses allow the comprehensive evaluation of transferred authority, minimising the risks of abuse, and it also sets a timetable, thus promoting legal certainty. During emergencies when there is a transfer of power, mainly from the legislature to the executive, such clauses also enhance legislative oversight, as the expiration of such transferred power provides the legislature with the opportunity to reassess the emergency situation. In addition, the time limitation of such transfers of power aims to accommodate the transitional and temporary nature of emergencies. Once normality is restored and the exceptional conditions of the emergency have disappeared, likewise the extraordinary transfer of powers to the executive is expected to sunset.

Second, in case of inactivity while there is an exclusive authority, this article has shown that a sunset clause acting as an alarm clock may create an incentive for action, or

alternatively, depending on the construction of the provision, with the expiration of the sunset clause the authority is considered *ipso jure* and simultaneously exercised. All in all, the use of sunset clauses in relation to exclusive authority may prevent constitutional deadlocks arising in the case in which a political actor stays inactive.

Finally, in the case where a new authority is created, such authority may be subject to a sunset clause depending on the circumstances. In particular, the authority may be temporary in principle if it is conferred as a constitutional experiment within the system of balance and separation of powers. Secondly, such authority may be temporary due to its controversial nature because it deviates from, and possibly distorts, the system of balance and separation of powers.