


A Framework for Conditional Sunset Clauses

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Abstract: Sunset clauses are a legislative method ensuring that a law expires at a certain time. This legislative tool can be further divided into conditional and unconditional sunset clauses. While unconditional sunset clauses are well-known and without much controversy – the duration of a law in such a case is usually dependent on a specific date – conditional sunset clauses are more complex and less debated. This article develops a structured framework of conditional sunset clauses that distinguishes these clauses primarily by a measure of legal certainty. The article divides conditional sunset clauses into three distinct categories: formal, semi-formal, and non-formal sunset clauses. With examples of their use across jurisdictions, it shows their differences – formal sunset clauses are based on public authority and are an official source of law (they are typically also published in an official statute book or public register), while semi-formal ones are also based on public authority, but any transparently published information is sufficient for their classification. Non-formal sunset clauses may be linked to actors other than the public authority and the reference to them may be non-public; however, the key question regarding these sunset clauses is whether they can be considered legal. This study highlights the challenges in applying conditional sunset clauses, their impact on the predictability of law, the separation of powers and the democratic rule of law as a whole. This framework

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enables legislators, judges and especially legal scholars to effectively classify these sunset clauses and to contrast them with their local legal orders, constitutions and laws.

1. Introduction

Sunset clauses are a specific type of legislative technique that ensures that a law will cease to have an effect at a specified time.¹ Traditionally, this time is tied to a specific date, but more rarely it can be tied to another circumstance.² The potential uses of sunset clauses in legislation are varied, ranging from temporary or experimental legislation by design³ to emergency legislation.⁴

The division of sunset clauses into unconditional, i.e. tied to a specific moment (date), and conditional, i.e. tied to another situation, is not fully explored. We can also note some confusion of terms in the above-mentioned definition of a sunset clause; in fact, some authors tie a sunset clause only to a specific date, not a specific moment.⁵ This nuance is crucial, if only because sunset clauses tied to situations other than a specific date do exist in many jurisdictions, as I will describe later in this article. Of course, this

¹ Frank Fagan and Firat Bilgel, “Sunsets and Federal Lawmaking: Evidence from the 110th Congress,” *International Review of Law and Economics* 41 (2015): 1–16; Helen Xanthaki, *Drafting Legislation: The Art and Technology of Rules for Regulation* (Oxford: Hart Publishing, 2014), 188–9.

² Ittai Bar-Siman-Tov, “Temporary Legislation, Better Regulation, and Experimentalist Governance: An Empirical Study,” *Regulation & Governance* 12, no. 2 (2018): 192–219.

³ Tom Ginsburg, Jonathan S. Masur, and Richard H. McAdams, “Libertarian Paternalism, Path Dependence, and Temporary Law,” *University of Chicago Law Review* 81, no. 1 (2013): 325 et seq.

⁴ There is controversy over whether and to what extent sunset clauses are part of emergency legislation. Only S. Ranchordás is in favor of separating sunset clauses and emergency legislation, while other authors tend to argue that emergency legislation also contains sunset clauses and is not a “special” category. Sofia Ranchordás, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective* (Cheltenham: Edward Elgar Publishing, 2015), 35 et seq.; Sean Molloy, “Approach with Caution: Sunset Clauses as Safeguards of Democracy?,” *European Journal of Law Reform* 23, no. 2 (2021): 147–66; Antonios Kouroutakis, “The Virtues of Sunset Clauses in Relation to Constitutional Authority,” *Statute Law Review* 41, no. 1 (2020): 16–31; Jakub Dienstbier, *Teorie mimořádného vládnutí* (Prague: Wolters Kluwer, 2024), 175 et seq.

⁵ Sofia Ranchordás, “Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies,” *Minnesota Journal of International Law* 25, no. 1 (2016): 33.

is not the only way to subdivide sunset clauses; there are other subdivisions devoted to, for example, ex post review of sunset clauses in statutes.⁶

Tying the effectiveness of a statute to a specific point in time potentially creates a wide range of situations that vary in their interference with legal certainty. It is legal certainty that I aim to use to confront the concept of conditional sunset clauses in this article. To do so, I draw on a series of previous papers by various authors across the globe. We do not traditionally associate substantial interference with legal certainty with unconditional sunset clauses. On the contrary, an awareness of the temporariness of the law may lead to reassurance to legal actors in advance of the limits of the legislation in question.⁷

In this Article, I conclude that conditional sunset clauses can be divided in terms of legal certainty into formal sunset clauses, semi-formal sunset clauses, and non-formal sunset clauses.

As much as the constitutionality of conditional sunset clauses may vary substantially across jurisdictions, this division may assist legal academics in determining which conditional sunset clauses are or may be used in a given jurisdiction, or, conversely, that the use of certain clauses from the typology would certainly be unconstitutional. The division may also serve future reference for legislators, judges, and other legal practitioners in creating, classifying, and assessing conditional sunset clauses in particular jurisdictions.

2. Unconditional and Conditional Sunset Clauses

At the outset, I think it appropriate to detail the initial distinction between unconditional and conditional sunset clauses. Unconditional sunset clauses will not be dealt with too exhaustively in this article, as their function is much more established, better studied by the legal academy, and their use is also much less controversial given their widespread use.

Other examples of distinction can be found in literature. One is the seemingly more elegant distinction between time-based vs. event-based

⁶ Brian Baugus, Feler Bose, and Jeffrey Jacob, “Get in Line: Do Part-Time Legislatures Use Sunset Laws to Keep Executive Agencies in Check,” *Regulation & Governance* 15, no. 1 (2021): 185–99.

⁷ Ranchordás, *Constitutional Sunsets*, 78 et seq.; Michal Říha, “Dočasnost zákona jako hodnota chtěná a nechtěná,” *Acta Universitatis Carolinae Iuridica* 66, no. 1 (2020): 76.

sunset clauses.⁸ However, this distinction is more characteristic of private law or contract law.

In the field of public law, sunset clauses are more likely to be divided into conditional and unconditional.⁹ However, this distinction by A. Kouroutakis can be perceived in several ways, which is why I consider it necessary to elaborate on this distinction.

I find the distinction between conditional and unconditional sunset clauses as dependent on whether it is possible to determine from the terms of the sunset clause exactly on which date the law will cease to have effect. Thus, an unconditional sunset clause may be best described as a situation where it sets a time limit linked to the promulgation of the law, if it is a legal order or legal culture where the promulgation of the law is quite clearly determined, e.g. (“This Act shall cease to have effect 3 years after its promulgation”). Similarly, it is a matter of setting a specific date, e.g. “1 January 2025,” or a specific date in another way, e.g. “Tuesday next after the first Monday in November.”¹⁰ Within the limits of the old Latin principles of Roman law, it is essentially an expression of the principle *dies certus an, certus quando*.¹¹

I consider all other sunset clauses, tied more typically to a less certain moment, to be conditional sunset clauses. The purpose of this division, essentially by simple negation, is to remove unconditional sunset clauses relatively easily, which will allow me to work further only with the conditional ones covered in this paper.

Conditional sunset clauses are a very varied set, consisting of very predictable situations with almost no impact on the predictability of the law to situations quite on the borderline of arbitrariness. An example is the sunset

⁸ Jill Fisch and Steven Davidoff Solomon, “The Problem of Sunsets Symposium: Institutional Investor Activism in the 21st Century: Responses to a Changing Landscape,” *Boston University Law Review* 99, no. 3 (2019): 1057–94; Charlie Xiao-chuan Weng and Arena Jingjing Hu, “Every Sunset Is an Opportunity to Reset: An Analysis of Dual-Class Share Regulations and Sunset Clauses,” *Journal of Corporate Law Studies* 22, no. 1 (2022): 571–603.

⁹ Kouroutakis, “The Virtues of Sunset Clauses,” 21.

¹⁰ This is a loose paraphrase referring to the Election Day determination in the election of the President of the United States of America. See: Title 3, sec. 21 of the Act on Presidential Elections and Vacancies of 4 October 1961 of the United States Code, as amended.

¹¹ See in greater depth “Condition and Time Term – Max-EuP 2012,” accessed January 7, 2025, https://max-eup2012.mpipriv.de/index.php/Condition_and_Time_Term.

clause linked to the end of the current parliamentary term. This is a real example; it refers to the legislation in Israel, as described by Bar-Siman-Tov: 32.35 % of all sunset clauses in the Israeli legislation are conditional sunset clauses. The regulation also includes, for example, a sunset clause linked to the tax period.¹²

The end of the current parliamentary term cannot be a condition for an unconditional sunset clause, since in principle one cannot be absolutely certain when the election period will end. Although not every legislature necessarily knows the concept of early elections; even so, one cannot rule out a situation where constitutional reform occurs and early elections are newly possible.¹³ This example, however, may serve as an example of the most predictable conditional clauses. In many cases, the application of an unconditional sunset clause would serve a very similar purpose, but tying it to the end of the term is more flexible and, in many ways, similarly predictable.

A contrasting hypothetical example might be a sunset clause that is tied purely to the public interest. That is, a law whose sunset clause provides that “this Act shall cease to have effect when it becomes apparent that it is no longer in the public interest.” This case is wholly hypothetical and would of course raise more legal problems than simply interfering with the legal certainty of the addressees of the law. This hypothetical example illustrates the absolute legal uncertainty – it is not clear who will interpret the public interest in relation to this law and who will declare the existence of this fact and, thus, invalidate the law itself. This is an example of the absolute extreme in terms of potential interference with legal certainty.

The initial distinction of conditional sunset clauses illustrated by the two extreme situations can now be divided into groups on the criterion of legal certainty.

3. Briefly on the Principle of Legal Certainty

Before the actual division, the principle of legal certainty itself deserves a few words. It is a well-known legal concept, associated with the possibility

¹² Bar-Siman-Tov, “Temporary Legislation,” 192–219.

¹³ Edward Morgan-Jones and Mathew Loveless, “Early Election Calling and Satisfaction with Democracy,” *Government and Opposition* 58, no. 3 (2023): 598–622.

of law being identifiable,¹⁴ achievable, and predictable.¹⁵ It is closely associated¹⁶ with Lon Fuller's definition of the legal system as *inter alia* clear, consistent, and relatively rigid.¹⁷

Central to this article is the consideration of legal certainty from a highly formal standpoint. A wholly formal source that is formally well identifiable, accessible, and predictable is the statute book or its equivalent under each individual constitutional system. From this wholly formal source are derived sources that are at the level of the statute book, i.e. other collections of regulations of both state institutions and local governments, including public registers.

4. Distinction According to the Impact on Legal Certainty

4.1. Formal Conditional Sunset Clause

It is difficult to give an example of an entirely formal conditional clause, as each legal system has a different obligation to publish information in a statute book or similar register. Likewise, in some jurisdictions, some authorities may publish in the statute book whatever they see fit.¹⁸ This procedure can then formalize many different kinds of notices, even if they take the form of *ad hoc* communications. For instance, the adoption of another law may still be an example, i.e., “the law will cease to have effect upon the adoption of the Banking Act.” This law presupposes the adoption of a law with the same name, assuming that such a law does not already exist in the legal system. An analogous hypothetical example may be other notices that are

¹⁴ Robert Alexy, “Legal Certainty and Correctness,” *Ratio Juris* 28, no. 4 (2015): 443.

¹⁵ Patricia Popelier, “Five Paradoxes on Legal Certainty and the Lawmaker,” *Legisprudence* 2, no. 1 (2008): 48.

¹⁶ Patricia Popelier, “Legal Certainty and Principles of Proper Law Making,” *European Journal of Law Reform* 2, no. 3 (2000): 325.

¹⁷ Lon Luvois Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1973), 262.

¹⁸ Cf. Polish Article 10 sec. 3 of the Act on publishing normative acts of 20 July 2000, *Journal of Laws* 2019, No. 1461, as amended or cf. Czech Article 4(f) of the Act on the Collection of Laws and International Treaties and on the Production of Legal Regulations Announced in the Collection of Laws and International Treaties of 5 June 2016, *Journal of Laws* 2016, No. 222, as amended.

published in the law books of some states, e.g., notices of the negotiation of an international treaty.¹⁹

In the field of communications other than in the statute book, this may also include, for example, the official collection of the central bank under the condition that it is maintained by the central bank. This seemingly complex construction may have an in-depth justification, e.g. when the effectiveness of a law is linked to high interest rates, whereby the law will cease to be effective once the interest rates are reduced to or below a certain level.²⁰

I consider clauses that derive their formality from an official source that is governed by the legal principle *ignorantia juris non excusat* as “formal sunset clauses.” This is the first category of the triad outlined in the introduction.

4.2. Semi-Formal Conditional Sunset Clauses

The second category is the semi-formal conditional sunset clauses. These clauses are activated by a situation that is not formalized in any official collection but, nevertheless, they (1) refer to immediately publicly available sources or (2) originate from public authority. An example of a sunset clause linked to such a publicly available source emanating from public authority can typically be statistical data.²¹ An example is the monthly unemployment figure for the national economy. Similarly, it may be a simple resolution of a public authority that is not formally published, but is publicly available. It is conceivable that the unemployment data could be published periodically (e.g. monthly) in an official collection – in which case it would be a formal sunset clause, not a semi-formal sunset clause.

The immediate public availability of the source deserves further clarification. It is not just a situation where we know that the information is

¹⁹ Cf. e.g. in Slovakia see Article 20 sec. 11 of the Act on the creation of legal regulations and on the Collection of Laws of the Slovak Republic and on the amendment and supplementation of certain acts of 18 November 2014, Journal of Laws 2015, No. 400, as amended.

²⁰ For a more thorough description of the current roles of central banks cf. Charles A.E. Goodhart, “The Changing Role of Central Banks,” *Financial History Review* 18, no. 2 (2011): 135–54.

²¹ See in greater depth on open data of public sector: Marijn Janssen, Yannis Charalabidis, and Anneke Zuiderwijk, “Benefits, Adoption Barriers and Myths of Open Data and Open Government,” *Information Systems Management* 29, no. 4 (2012): 258–68.

somehow available (e.g. at the request of an individual). In that case, the condition of partial formality is not met. It must be information that is made publicly available without request to all, typically information available by accessing a website. A problem in the typology may arise if the sunset clause were tied to a specific (oral) act of a public official, typically the president or prime minister. Here, of course, it depends on the specific constitutional (statutory) implementation and the particular constitutional or other custom in the jurisdiction. Criterion (2) is met without much difficulty in policy statements, but the question is whether they can be said to be immediately publicly available sources. Again, I think it depends on the particular implementation.

A mere oral statement made “behind closed doors” would not satisfy the immediate public availability test. There is little chance of such information reaching the addressees of the law and there would be substantial confusion as to whether the clause was triggered at all. However, the possibility of announcing the act by television, radio and print will satisfy this condition. It is certainly possible to talk about individual nuances – e.g. publication only on radio or only on television – but this information will, in any case, be immediately taken up organically in the media world, and the information will, therefore, be at least partially formally delivered to the addressees. An example of the use of such a sunset clause can be found in anti-terrorism legislation, whereby once the political power knows that the danger has passed, it immediately refrains from appreciably restricting the rights of citizens because of the terrorist threat.²²

The boundary between governmental power and the private sphere can certainly vary from jurisdiction to jurisdiction and may also not be entirely fixed. However, partial formality is ensured precisely by reference to governmental power as a manifestation of the law’s legitimacy. Blurred edges may be evident, for example, in the case of forth-branch

²² The sunset clause in anti-terrorism legislation has become increasingly important over time. Cf. Nicola McGarrity, Rishi Gulati, and George Williams, “Sunset Clauses in Australian Anti-Terror Laws,” *Adelaide Law Review* 33, no. 2 (2012): 307; John Ip, “Sunset Clauses and Counterterrorism Legislation,” *Public Law* 74, (2012), <https://dx.doi.org/10.2139/ssrn.1853945>.

institutions,²³ independent administrative authorities and state-owned companies. Local or professional self-governments or public media may similarly be on the edge.

4.3. Non-Formal Conditional Sunset Clauses

The third and final category is non-formal sunset clauses. These clauses may be based on publicly available sources, but their origin does not come from public authority. Conversely, they may originate from public authority, but may not be publicly available. Of course, there is also a third option, namely non-public information not tied to public authority.

An example of the first modality of non-formal sunset clauses might be tying the clause to the price of a commodity on a publicly traded exchange. The usefulness of such a clause is visible, for example, in the context of the recent energy crisis in Europe, where the price of 1 MWh was essentially an informal metric of many state interventions and public support, tied precisely to temporary legislation.²⁴ The idea of a law being tied to the price of a commodity is undoubtedly controversial. Such a regulation would most likely have an impact on the sovereignty of the people, on the principle of legality, and on legal certainty.

A clause linked to the fullness of gas reserves in connection with the gas crisis caused by the aggression of Russian troops in Ukraine leads to very similar controversies. The mechanism of linking the law to the fullness of gas storage facilities could, for example, lead to the end of the imposed restrictions on factories requiring substantial quantities of gas when there is sufficient gas in storage facilities.²⁵ This example assumes that gas storage facilities are not owned or held by the governmental authorities.

²³ These can take different forms or have different content, cf. Michael Pal, “Electoral Management Bodies as a Fourth Branch of Government,” *Review of Constitutional Studies* 21, no. 1 (2016): 85–114.

²⁴ See in greater depth about energy crisis in Europe: Eva M. Urbano, Konstantinos Kampouropoulos, and Luis Romeral, “Energy Crisis in Europe: The European Union’s Objectives and Countries’ Policy Trends-New Transition Paths?,” *Energies* 16, no. 16 (2023): 5957, <https://doi.org/10.3390/en16165957>.

²⁵ On the impact of the Russian invasion, see: James Henderson, “The Impact of the Russia-Ukraine War on Global Gas Markets,” *Current Sustainable/Renewable Energy Reports* 11, no. 1 (2024): 1–9.

Various internal decisions and internal events may be examples of the second, non-formal sunset clauses tied to public power, but not available to the public. This does not necessarily mean that the information must be confidential; it is sufficient if its attainment is solely on request. Examples include being tied to the number of civil servants (if the information is not publicly available without further information), or the number of requests made under the law (if there are too few, the law ceases to apply because it is not useful).

The argument for these clauses may be that the sunset clause is primarily directed inward to the public power, and thus the public power itself is best able to know when the law ceases to be effective. The counterargument, however, may be the damage that such uncertainty may cause – indeed, the legitimate expectations of the addressees of the law may lead them, without knowing that the moment of sunset has occurred, to continue to act (e.g. to apply) as if the law had never ceased to be effective.

As can be seen from these varied examples, it is very difficult to determine which of the above-mentioned sunset clauses would be more inadmissible or threatened with unconstitutionality for a given legal order. The law's reference to private entities can be a very inorganic turn in existing standard-setting and, in the case of non-public information, similar controversies arise.

5. Who Is the Trigger?

Conditional sunset clauses bring with them another difficulty – that is, the problem of who or what triggers the sunset clause. This element is also central to the assessment of legal certainty in the area of conditional sunset clauses. Let me now illustrate the predictability of the triggering authority again on a spectrum.

Let us return to the example of the end-of-term sunset clause – as I said above, this is a conditional sunset clause, but it can take many forms. An example of a formal conditional sunset clause would be a situation where the end of a term is somehow formalized in a public collection. It is possible to imagine several situations where this could be the case.

The first possibility is that the end of an electoral term is a clearly legally determinable unit of time that cannot be challenged in any way, e.g. by the

institution of early elections. In such a situation, a mere reference to a statutory provision would suffice.

However, let us imagine a more complex, second situation where, in a particular jurisdiction, the electoral period would be linked to the moment of publication of the election results in the statute book. Nevertheless, this kind of enforceability must be outlined in a specific statutory or constitutional provision. At that point, the moment of announcement of the results would merge with the moment of the sunset. It would then be up to the specific body announcing the results of the elections in the Collection of Laws; here many different bodies can be imagined, ranging from the highest actors of government to ministries and offices. This scenario also retains the sunset clause as it stands, i.e., linked to the end of the electoral term.²⁶

The third situation then entails a situation where the end of the electoral term is not indisputably fixed, but its exact moment is subject to dispute. Such an example may be the end of an electoral period linked to the next election, but it may already be disputed whether the moment of the triggering of the electoral clause is the opening of the election, the closing of the polling stations, the counting and announcement of the results, or another moment altogether. It also follows that there may be a chain of vague legal concepts, one being the term of office, the other being the commencement of the election, etc. At such a time, it would be necessary to amend the sunset clause itself. The optimal approach is to choose an exact, formalized moment and link it to the sunset clause.

6. Conclusion

Conditional sunset clauses are one of the tools that legislators or legislative bodies can use to flexibly determine the end of a piece of legislation. This flexibility is, however, paid for by an interference with the legal certainty of the addressees of the law. In this article, I have classified the issue of legal unpredictability in sunset clauses into three isolated categories, fully formal

²⁶ Of course, an additional problem may arise here as well, consisting of the competition between the two authorities entitled to trigger the sunset clause. If the two authorities disagree as to whether or not a situation warranting triggering the sunset clause has occurred, there may be substantial uncertainty as to the effectiveness of the standard. The optimal solution is to resolve this issue in the sunset clause itself, i.e., that only one authority is authorized to trigger it.

sunset clauses, semi-formal sunset clauses, and non-formal sunset clauses. In the paper, I also pointed out that the essence of the formality of a sunset clause is not just the wording of the clause, but also the definition of the actor or actors who trigger the sunset. In particular, this article contributes to clarifying the basic typology of conditional sunset clauses, an area that has not been fully considered by legal scholarship to date. This distinction may be useful not only to legal actors, but especially in comparative studies in legal scholarship, where the limits of abstractness or contingency are difficult to determine.

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