

FUNDAÇÃO GETULIO VARGAS

FGV DIREITO RIO

UNDERGRADUATE LAW PROGRAM

Waldo Almeida Ramalho

**Data Markets' Sunset: How Temporary Legislation can Promote Innovation in
the Brazilian Privacy and Personal Data Regulation**

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the Brazilian Privacy and Personal Data Regulation**

Undergraduate thesis under supervision by Professor **Eduardo Ferreira Jordão**, PhD, (FGV Direito Rio) and Professor **Konstantinos Stylianou**, PhD, (University of Leeds' School of Law) presented to FGV Direito Rio as requisite for approval in the TCC III course.

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"[...] No society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. "

— Thomas Jefferson to James Madison, Paris, Sep. 6, 1789

“Data is a precious thing and will last longer than the systems themselves”

— Sir Tim Berners-Lee, March 2006

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1. Introduction

In 2015, the Data Protection Draft Bill was submitted to a public consultation process conducted by two organs of the Brazilian Ministry of Justice – the National Consumer Secretariat (SENACON) and the Secretariat of Legislative Affairs (SAL). Through its online platform, several contributions were made by different stakeholders (specially companies, academia, and NGOs) towards this possibility of a general law for data protection in Brazil. This draft bill, which later turned into House of Deputies' Bill No. 5276/2016, is not the only proposal of its kind in Brazil, as there is also Bill No. 4060/2012, authored by Deputy Milton Monti, and Bill No. 181/2014, authored by Senator Vital do Rego.

Nevertheless, a general legal framework is the regulatory strategy chosen by the stakeholders as the playing field in which different interests will compete. However, it is a complex dispute. A comprehensive personal data regulation means to equate interests that range from the employment of big data in the collection and processing of data to enacting limits to these capabilities as a condition for the protection of privacy – stakeholders compete around multiple sensitive points in this debate (Antonialli e Brito Cruz, 2016). Additionally, meaningful privacy and personal data regulation nowadays implies Internet regulation which poses several challenges of its own as the Internet has a decentralized and transnational infrastructure, stakeholders, and governance.

Nevertheless, Brazil's challenge in this kind of regulation is not a zero-sum game of costs and benefits between the maximization of innovation and privacy protection: inefficient legal provisions and bad regulation in general may hinder innovation without any equivalent positive outcomes. In turn, better regulation may provide solutions that promotes innovation while also protecting privacy and other personal data concerns.

This paper argues that temporary legislation and sunset clauses are adequate tools to better promote innovation within the regulatory debate of privacy and personal data in Brazil. They could be easily adapted to current regulatory debate and also poses different but sinergic advantages when regulating innovative data markets. In fact, they could lead to better, more informed, regulation without giving up our hopes to protect citizens' data and privacy.

This monograph is structured in three sections. The first section summarizes what are the essential characteristics of temporary legislation and sunset clauses, as well as the benefits for innovation-centered regulation such as personal data and privacy regulation. Afterwards, the second sections provides an overview of the current state of the regulation of personal data and privacy in Brazil, aiming to answer questions such as “What are the key issues and key developments?”, “What is our current regulatory framework?”, and “What are the main law proposals towards a general framework?”. Finally, the third section is going to expose which characteristics of data markets makes them ideal to benefit from sunset clauses and temporary legislation. The third section will also provide specific examples of applications of temporary legislation and sunset clauses to some topics of a Brazilian Framework on Privacy and Personal Data based upon the three current bills in Congress.

1. Temporary Legislation as a Tool for Innovation

“The regulation of innovation through statutes and regulations has often been criticized and qualified as a true antithesis: innovation is a fast changing and fluid reality that does not go well with either consensus-building or rigid top-down rules” (Eifert, 2009)

1.1 Definition of temporary legislation and sunset clauses

‘Temporary legislation’ is a term rarely used in the day-to-day activities of lawyers, policymakers, and politicians¹. Usually, a legislation or a regulation is usually thought as a permanent measure, that is, until another one takes its place or revokes it. Often, whenever a temporary legislation is enacted it is associated with an “emergencial need” or as a extraordinary hiatus or transition in the regular legal framework (e.g. the World Cup legislation or the Constitutional Transitory Provisions in Brazil). Its is a broad concept used in the literature to refer to different forms of temporary legislation and regulation, such as “temporary-effects, emergency legislation, sunset clauses, and experimental legislation” (Ranchordás, 2014, p. 61). The defining characteristic of any kind of this type of legislation or regulation is that it terminates in a previously established specific date or it is only valid in a specific period of time.

Particularly, I will further explore the concept of sunset clauses as a temporary legislation mechanism and describe different functions for this technique of legislative production other than as the aforementioned response to an “emergencial need”.

Young (1978) has defined ‘sunset’ as “a statutory method of forcing legislators to make a periodic determination whether to allow a particular program or agency to continue”. Sunset clauses are applicable to entire statutes or determined provisions within those statutes. A sunset clause not only means the imposition of the termination of a clause or an act, but it should also submit this legislative act to a final evaluation which could lead – exceptionally – to its renewal. Indeed, the default rule is of non-renewal, as claims Ranchordás: “sunset clauses may be

¹ Despite being in the shadow of scholarly work, temporary legislation are actually widely used in the legislative *praxis* of several countries, such as the United States, Belgium, and Germany (reference). An empirical study indicates that [...].

renewed but this would imply the verification of exceptional circumstances, which would have to be evidenced by those defending the renewal” (2015, p. 205).

One possible framework to understand sunset clauses is that they are necessarily composed by three elements (Ranchordás, 2014, p. 70):

- (a) a *reason* to submit a law to a *time limit*;
- (b) its *temporary character* as sunset clauses does not aim for renewal or continuity, unless there are substantial reasons to do so; and
- (c) a *evaluation moment*, when the effects of sunset dispositions should be assessed to verify whether the objective for which it was enacted has been achieved, and whether the provision should ‘sunset’ or should be renewed.

There is no hard rule on the duration of a sunset provision, as it can easily oscillates between a few months to several years. For instance, it usually lasts about five years in the United States, but renewal is common (Ranchordás, 2014, p. 70). Empirical evidences suggest, however, that indefinite renewal for extensive periods of time (without significant changes to the legislation) are quite uncommon (reference).

The evaluation moment of a sunset clause signifies an inversion of the burden of proof. Unlike a regular statute, which lasts until it is replaced or revoked, a change based upon upcoming strong technical or political reasons, a sunset clause’s continuity is ideally dependent of a demonstration of these reasons that can substantiate a renewal of the provision.

A sunset clause may be further classified as ‘reflexive’ or ‘irreflexive’. A reflexive sunset clause means that it is contained within the legislation or regulation that it applies to, the opposite of a irreflexive sunset clause. Additionally, sunset clauses should not be confused as the same of renewal clauses, which implies automatic renewal and, thus, no inversion of burden of proof. Sunset provisions are “born to die” (Ranchordás, 2014, p. 72).

In Brazil, there is no reason to believe that sunset clauses cannot be used in any level of government, be it federal, state, or municipal legislations or regulations (either governments’ or agencies’ provisions).

2.1 Benefits of temporary legislation to innovation

Policymakers invested in promoting innovation may reap several benefits from temporary legislation and sunset clauses, namely: (a) dealing with uncertainty and lack of information related issues; (b) enhancing legislation and regulation quality, uncluttering legacy provisions; (c) adequate response to temporary problems; (d) promotes political consensus/compromises; and (e) deals with the pacing problem between regulation and innovation.

[inserir depois, preciso entender um pouco melhor das discussões regulatórias de dados pessoais]

1. Uncertainty, lack of information and prognosis

pps

203-204

2. Legislation and regulation quality

2. Effectiveness of Public Administration

3. Response to temporary problems

4. Consensus-finder

5. Innovation / cluttering out the regulatory framework

6. Pacing

problem

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i.

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