입법평가 Issue Paper 17-15-③

The Use of Sunset and Evaluation Clauses in the Norwegian Legal System

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노르웨이 법체계에서의 일몰 및 평가 조항의 활용

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■ 이슈페이퍼 발간배경

- 2017년 입법평가연구사업의 중점사업 중 하나인 규제연구의 일환으로 북유럽의 일몰법제와 관련한 내용을 소개하기 위한 목적으로 기획
- 북유럽의 경우 정치적 · 문화적으로 합의도출을 통한 지배 및 참여를 가장 중요한 가치체계로 인정하고 있다는 점에서, 임시적 입법 혹은 실험적 입법 형태의 일몰법제 활용에 소극적이거나 상이한 관점의 논의가 있을 수 있으므로 북유럽의 일몰법제 활용 현황을 중심으로 한 내용을 이슈페이퍼 형태로 발간
- 북유럽은 유럽연합에서 추진하는 방향에 부합하고자 노력하고 있다는 점에서 제도적 시각의 변화가 예상되기도 하며, 아직까지 우리나라에 북유럽의 법제현황은 물론 일몰법제에 대해서도 소개된 바가 없다는 점에서 우리나라 일몰법제에 대한 이론적 기반 및 법체계를 정비하는 데 시사점을 줄 수도 있을 것으로 기대

■ 이슈페이퍼의 주요내용

- 본 이슈페이퍼의 저자는 노르웨이 법무부 소속의 실무가로서 이슈페이퍼의 주요내용을 업무경험에 기초하여 작성하였음을 밝힘
- 본 이슈페이퍼의 구성은 크게 5가지 장으로 구분되며, Ⅰ에서는 들어가는 말로서 노르웨이에서의 일몰과 평가에 대한 이해에 대한 개관, Ⅱ에서는 노르웨이 법제의 일반적 특징, Ⅲ에서는 일몰조항에 대한 발전과 현재 상황, Ⅳ에서는 평가조항에 대한 발전과 현재 상황, Ⅴ에서는 결론으로 구성

- 이슈페이퍼의 내용을 간단히 개관하면,

Ⅰ. 노르웨이에서는 일몰조항에 관련한 일반법이 없으므로 일몰법제의 개념을 명확히 하는데 난점이 있다는 점을 밝히고, 노르웨이 법체계에서 일몰조항이나 평가조항이 주로 사용되는 영역을 소개

Ⅱ. 노르웨이법제에서는 의회, 정부, 법원 등 기관이 각각, 그리고 각 기관과 국민간의 신뢰도가 매우 높고, 공식 비공식을 불문한 다양한 피드백에 기초한 지속적인 조정에 대한 요구가 법체계에 반영되고 있다는 점을 소개

Ⅲ. 일몰조항의 발전과 현재상황에 대한 전반적인 서술로서, 한시법이나 일몰조항의 방식은 새로운 영역은 아니고 필요한 영역이 있지만, 정부의 규제개혁백서에 일몰법제의 방식이 규제개혁의 일반적 수단이 되는 것은 적합하지 않다는 지적. 그 외에 통과되지 못했으나 2001년에 2차입법에 대해서는 일반적으로 일몰조항을 신설하는 법률안이 제안된 바 있는 등 그간의 동향을 소개하고 현행 일몰설정법제를 예시

Ⅳ. 평가조항의 발전과 현재상황에 대한 전반적인 서술로서, 규제에 대한 사후평가를 수행하여야 하는 의무를 두는 법적 근거는 없는 상황이나, 규제의 효과성에 대한 후속조치에 관한 문제가 쟁점이 되면서 일부부처에서는 규제에 대한 재평가의무를 적용하도록 권고를 마련하거나 지침을 마련하고 있는 등 잠정적으로 접근되고 있으며, 평가기능을 갖춘 특수기관으로서 노르웨이 감사원을 소개

■ 이슈페이퍼를 통한 시사점

- 노르웨이에서도 법률과 규제의 증가로 이에 대한 정비의 필요성이 증대되고 있다는 점에서 여러 가지 사후평가에 대한 연구와 시도가 이루어지는 중

- 특히, 현재 일몰이나 평가에 대한 구속력 있는 의무부과 조항이 있는 것은 아니고, 일몰에 대해 부정적인 입장은 아닐지라도 과잉적 일몰은 확실성에 대한 불필요한 위협이나 과잉적 평가의 이유가 된다는 점을 지적하고 있으며, 때문에 노르웨이에서는 규제에 대해서 국제적 추세에 맞추어 오히려 사후평가의 중요성을 강조하는 경향이 있다는 내용을 통하여 우리의 일몰법제에의 시사점을 찾을 수 있음

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Ⅰ. Introduction

1. The Challenge

The law should at any given time correspond to the needs of society. Laws should create the intended effects and to the least possible extent produce unwanted negative effects. The positive effects should be reached by the most cost-efficient and least intrusive means possible. However, it is very difficult to predict more precisely the effects of legislation, both positive and negative. In the long run, there will be little trust in a legislator or a legal system that overburdens society and its citizens and enterprises with costly and ineffective legislation.

Even if the law at the time of adoption was a good response to societal needs, this might change over time for a number of reasons. The "needs of society" is not only a question of facts, but also a question of politics and ideology.

This article explores the use of sunset clauses and evaluation clauses ("sunset for review") in the Norwegian legal system. I will show their development and current status in the Norwegian legal system, and I will try to explain how these instruments interplay with other mechanisms that contribute to a dynamic legal system that can respond to the changing needs of society. In my view, it is extremely important not to isolate a discussion on the use of this kind of clauses from the totality of mechanisms that can create a good legal system. In line with the general approach in the Norwegian legislative system, a great deal of pragmatism is an essential element also when such clauses are employed.

2. Sunset Clauses, Evaluation and Other Kinds of Ex Post Assessment

2.1 Defining sunset clauses and evaluation

By a "sunset clause" I mean a clause that determines the expiration of a law after a fixed period unless there are substantial reasons to believe that their law should be extended for a further period. Sunset clauses form part of a broader concept of temporary legislation.[1)]

As there in Norway is no general legislation regulating the use of sunset clauses, there is no commonly agreed or precise definition of sunset clauses, and the distinction between sunset clauses and other kinds of clauses indicating the temporary nature of legislation might not always be clear.

The concept of sunset clauses is closely linked to the idea that the law should undergo some kind of evaluation before its expiry date in order to determine whether the law should expire according to the sunset clause, or whether it should be prolonged for a further period.

By "evaluation" in the context of this article I mean a collection of data, analysis and assessment related to a legal regulation taking place after its adoption. The evaluation will typically focus on whether the intended effects of the regulation have occurred, as well as what other consequences have been the result, either in the form of (intended or unintended) positive or negative effects (including costs and other burdens on individuals or society). An evaluation could be performed by persons or institutions that are external to and independent of the lawmakers, but I do not see this as a prerequisite. An evaluation, at least taken in a strict

1) As this article is primarily is meant to be a contribution based on my experiences and reflections as a practioner working with legislative drafting in Norway, there are very few references to literature. However, I have consulted in particular Sofia Ranchordás, Constitutional Sunsets and Experimental Legislation – a Comparative Perspective, 2014. My definition of "sunset clauses" and temporary legislation are close to hers (at 2.4.2 and 2.1 in her book). According to Ranchordás, "[t]emporary legislation is a broad term used to refer to different forms of temporary legislation and regulations, such as temporary effects legislation, emergency legislation, sunset clauses and expermimental legislation".

sense, must be based on a systematic approach and an objective and verifiable methodology. An evaluation should be evidence-based. Thus not all kinds of ex post assessment of legislation will satisfy a strict definition of "evaluation".

2.2 Evaluation and other ex post assessment of legislation in Norway

There is quite a lot of ex post assessment of both primary and secondary legislation in Norway, done as an integrated part of the continuous and cyclical process of overseeing the bulk of legislation. However, much of this assessment will probably not include stages that fulfil the more specific methodological criteria of "evaluation" in a strict sense. In its 2003 Review of Regulatory Reform in Norway, OECD has pointed out that there is a tension between the evidence-based model of regulatory procedures that is promoted there and the consensus-based of governance in Norway:[2)]

> "[T]he valued tradition of consensus building that drives the current approach to making regulations, which is based on informality rather than formality, discourages a central strategy [for a regulatory policy], *and does not promote analytical rigour or evidence-based decision-making.*"

In the same 2003 document, the following was said about "[t]he Nordic governance model and value system":[3)]

> "Another marked institutional feature [of the Nordic governance model] is a political and societal culture characterised by consensus building. There is widespread participation in decision-making, a search for consensus, and institutionalised contact arrangements among government, employers and the

2) Norway – Preparing for the Future Now, OECD Reviews of Regulatory Reform, 2003 p. 42.– All italics in quotations in this article is added by me.

3) Norway – Preparing for the Future Now, OECD Reviews of Regulatory Reform, 2003 p. 19.

> unions. Consensus-building tends to promote gradual rather than rapid change and reduces conflict. Pragmatic solutions are favoured. Norway makes extensive use of preparatory committees with broad participation to build consensus wherever possible."

In the mentioned preparatory committees, which are also used in ex post assessment of legislation, fact-finding (including assumptions about the effects of the legislation) often forms an integrated part of the whole process of reviewing the legislation. The same is the case when the Ministries do not make use of external preparatory committees, but on their own produce documents for public consultation of proposed legislation. In any case, the following public consultations, involving the stakeholders, must also be looked at as part of the fact-finding process. All this might not promote the "analytical rigour" that OECD asks for, but it can be a very efficient way to secure a close link between fact-finding on the one hand and what are the real life challenges and the practically relevant solutions to those challenges on the other hand. In my view, it could be said that the Norwegian regulatory process makes use of mixed methods, consisting of a mix of expertise judgment and practical judgment, combined with both qualitative and quantitative methods. Evaluations in a stricter sense are sometimes made use of as one step in the regulatory process, sometimes not.

In this connection it must be remembered that also the trend of increased use of evaluations of various kinds also is challenging on some points, both in Norway and in other countries. For instance, in a very recent Norwegian report (2016) on the use of evaluation as a tool in state governance, it is stated that the major challenge was that the knowledge that is achieved through evaluations is not made use of afterwards.[4)] There may be many reasons for this, and it would be unfair to direct all criticism against the idea of evaluations as a useful tool in order to achieve better legislation, also in the Norwegian (and Nordic) context. However, there might be reasons to take a careful approach to the use of evaluations. For

4) Bruk av evaluering i statlig styring, rapport 28. september 2016, Direktoratet for økonomistyring, pp. 9, 40.

instance, it could be risky to decide on evaluation at a very early stage of the life span of a regulation (i.e. at the time of adoption in the individual case, or by way of general evaluation clauses demanding that an evaluation is finished at a fixed point of time after the adoption or entry into force of a piece of legislation). It is also of importance that evaluation of legislation in particular can be an extremely complex matter, where a lot of factors are into play. Regardless of how thorough an evaluation is done, there will often be considerable uncertainty with regard to for instance causes and effects. There is definitely more research to be done on the question of choice of methodology for both ex-ante and ex post assessment of effects of legislation. [5)]

3. Practical Tools to Facilitate Evaluation

There is no doubt that evaluations are in fashion also in Norway today. Here I will mention a couple of practical tools that have been developed in order to facilitate good evaluation practices.

In 2009 the Ministry of Justice and the Agency on Financial Management jointly issued a 28 page practitioner's guide to evaluation of legislation (including secondary legislation). The guide applies both to evaluations that are based on the standing obligation and evaluations that are decided ad hoc (see IV.2.1below). This was the first publication of its kind in Norway.

Another instrument that promotes evaluations in general, as part of public governance, is a web portal, "The Evaluation Portal", run by the Norwegian Government Agency for Financial Management.[6)] The purpose of this portal is to collect and make accessible in one place

5) An important contribution in this field a recently finished Norwegian Ph.D. dissertation (still under review), written by Jon Christian Fløysvik Nordrum, with the title (my own translation): "Better regulation? Cause-Effect-Analysis in the Norwegian Regulatory Process, with Examples from Environmental Regulation of Businesses".

6) www.evalueringsportalen.no

all evaluations commissioned or produced by the state. This also includes all kinds of evaluations, including those related to legislation. Currently, this portal makes available more than 2500 evaluations.

4. Reasons for Using Sunset and Evaluation Clauses in Norwegian Legislation

Sunset and evaluation clauses can be grouped according to the reasons underlying the use of such clauses. While the use of sunset clauses is based on a presumption that the law shall be repealed at sunset, evaluation clauses may also be used in situations where there is no such presumption. For instance, evaluation might be performed with a view to improving the functioning of an existing regulation relating to its effectiveness, efficiency or negative effects.

In the Norwegian system, sunset or evaluation clauses may typically be applied for the following reasons:

- A sunset or evaluation clause is introduced where there is uncertainty as to the *effects* of a regulation or parts of it. This might cover a broad array of effects, some of which might be easy to measure, while others are difficult to describe and measure in any precise way.
- A sunset or evaluation clause is introduced as part of a *political compromise* at the time of adoption of the regulation. A temporary solution might, for part of a majority voting in favour of a regulation, be easier to swallow than a permanent one.
- The regulation covers a political need but it *does not represent the preferred permanent solution* to the political problem and therefore should be temporary.
- The regulation is given in order to gain time and to *prevent irreversible detrimental effects,* for instance related to the environment.

– In some instances a sunset clause is introduced for temporary legislation that has the character of *"amnesty" legislation.*

In addition a number of regulations are temporary due to the very nature or subject matter of the regulation. But then we are hardly talking about sunset clauses at all. The function of the temporality is limited to «tidying up» the number of regulations on the books.

Ⅱ. Special Features of the Norwegian Legal System

The Norwegian Parliament has a very strong position in the constitutional system (a parliamentary democracy and a unitary state). Parliamentary legislation (statutes) has since the 19th century played a very important role. Legislation has not in general been looked at with scepticism (even though there are different opinions on the matter according to political and ideological views).

The Norwegian legal system reflects the very high degree of trust that exists in the Norwegian society: both between the state; and its citizens and between the different state institutions (Parliament, Government and the executive branch in general, as well as the courts).

This allows for framework legislation combined with delegation of law making powers from the Parliament to the executive branch. It also means that the law is developed in a dynamic interplay between Parliament and institutions within the executive branch with formal legislative powers at different levels.

Such interplay is allowed for also through a specific style of drafting legislation: The wording of the legislation is kept in a brief style, focusing on the main rules and the most important exceptions or modifications, leaving considerable discretion to administrative agencies in the first place in cases where they have the task to ensure compliance with the law. The legislation quite often makes use of legal standards or other relatively open-ended legal criteria, the aim being to facilitate dynamic legislation that reflects developments in society and the enables taking into account the particularities of the individual case at hand. This is par-

ticularly true when it comes to parliamentary legislation, but this style also is present in the secondary legislation. In last instance, the courts will define the boundaries of the discretion that in the first place is given to the administrative agencies.

In addition, the authorities have discretion as to how strictly they want to enforce the various duties flowing from a certain regulatory regime.

In a number of sectors there is an extensive use of systems of individual permits. This includes very important sectors such as the petroleum sector and the sea farming sector. Such permits are used actively as a flexible regulatory tool. Permits could be limited in time and adjusted in other ways in line with changed circumstances, as long as basic principles of legal certainty are respected.

All this means that the administrative agencies have a number of various tools to use and a great deal of flexibility, when performing their tasks. Important policy choices may be made at a relatively low level in the hierarchy of the executive branch. To some extent, the *parliamentary legislation itself is only a starting point* for developing a complete regulatory regime. One great advantage with such a system is that it gives room for continuous adjustments, either by formally amending details of the regulatory regime, or more informally, based on the feedback that the system offers at any given time.

The Norwegian regulatory process at various levels (both primary and secondary legislation) in general seems to be relatively responsive to new regulatory needs or even needs to adjust legislation that does not any longer correspond to any need. The regulatory process is relatively transparent and inclusive.

In a thorough study from 1973,[7] with the titled «Administrative and economic consequences of legislation etc.», issued by the Norwegian Directorate for Efficiency, the view was expressed that the law making process should be considered *as a continuous and cyclic*

7) NOU 1973: 52 Administrative og økonomiske konsekvenser av lover m.v.

process that never ends, the basic aim being that every law should have effects according to its intentions. This was illustrated very clearly with a figure in the form of a "wheel" with the following spikes:[8] Assessment of need for legislation → study → public consultation → preparing a bill in the Ministry →involvement of the Cabinet of Ministers →Parliament → entry into force →informing about the legislation → observing and evaluating effects of legislation → feedback → assessment of need for legislation (adjustments) etc. The study was an early acknowledgement that there was more to be done in gathering information about the effects of legislation and put this feedback into the process of assessing the need for further development.

All in all, this makes for a legal system that is characterised by *a pragmatic and flexible approach*, with a high ability in practice to take into account the need for *continuous adjustments* based on various kinds of feedback, either formalised or informal. Such a system contributes to the overarching goal, mentioned at the very outset of this article in that the law should at any given time correspond to the needs of society.

8) NOU 1973: 52 p. 16.

Ⅲ. Sunset Clauses

1. Development

1.1 Temporary legislation and sunset clauses – no novelty

The use of temporary legislation, including sunset clauses, has always been part of the Norwegian Constitutional legal order since it was established in 1814, albeit in special fields or circumstances.

The Constitution itself contained – and still today contains – a sunset clause in the field of taxation. Section 75 litra a of the Constitution reads:

> "It devolves upon the *Storting* [Parliament]:a) to enact and repeal laws; *to impose taxes, duties, customs and other public charges, which shall not, however, remain operative beyond 31 December of the succeeding year,* unless they are expressly renewed by a new Storting; …"

In other words: According to the Constitution, all material tax legislation imposing taxes on the citizens, is automatically invalidated 31 December the succeeding year (unless it is expressly renewed).

The rationale behind this limitation is twofold: First, the purpose is to secure that each Parliament is free to consider the totality of the finances of the state every year. Second, the purpose is to secure that the citizens (and businesses) are not burdened with unnecessary taxes.

For the sake of completeness, it should be mentioned that the state budget in Norway is adopted on a one-yearly basis. As a matter of principle, one could then say that any measure

that is dependent on government appropriations, "sunsets" every year when the term of the budget comes to an end. The annual proposal for a national budget does indeed contain a presentation of a considerable number of evaluation reports and other kinds of assessments of current measures that are conditioned on appropriations.

In addition to the special regime related to tax laws, Article 17 of the Constitution has from 1814 had an article devoted to *temporary laws* in a wider field:

> "The King may issue and repeal ordinances relating to commerce, customs, all livelihoods and the public administration and regulation, although these must not conflict with the Constitution or with the laws passed by the Parliament... *They shall apply on a provisional basis until the next [session of Parliament]."*

Ordinances (regulations) that are passed with Article 17 as its legal basis, are limited by the mentioned sunset clause: "They shall apply on a provisional basis until the next Storting." Article 17 can be used only at times when the Parliament is not assembled. If such temporary regulations are not repealed earlier, they will automatically lose their validity as the "next [session of] Parliament" expires, i.e. 1–2 years later (depending on when the ordinance was passed). This special sunset clause is based on a constitutional compromise related to the doctrine of separation of powers: The power to enact legislation should be vested in Parliament. Historically, with Parliament assembled only for a brief period every three years (until 1869), it was strictly necessary to give the executive some legislative powers when Parliament was not assembled.

1.2 1985 White Paper on regulatory reform

In 1985, the Government issued a White Paper to the Parliament on regulatory reform.[9] This White Paper was in part inspired by the new international wave of regulatory reform and regulatory policies at the time.

9) St.meld. nr. 57 (1984–85) Arbeidet med regelreform i forvaltningen.

One section of this white paper briefly discussed the introduction of sunset clauses.[10] As far as I know, this is the first time where the question of sunset legislation was debated in governmental documents as a general question of legislative or regulatory policy, and where the use of sunset clauses was debated as a "modern" regulatory tool in order to improve the quality of legislation. This paper very much set the standard for the current approach to the use of sunset clauses in Norwegian legislation.

The overall conclusion of the White Paper was that sunset clauses hardly were suitable as a general measure. However, it was not ruled out that sunset clauses should be considered in certain areas, for instance where the government introduced major new regulatory schemes, in order to ensure that the effects of the regulations are considered after the measure has worked for some time and in this way secure a reassessment of the benefits of the regulations and the suitability of the employed means.

After all, the basic approach should still be to work continuously with regulatory reform, very much in line with the view from 1973 that legislation is a continuous and cyclical process (see II above). In this way, the question of reassessment and amendments could be addressed according to specific needs and in the light of experience that has been gained in the time after the regulations have been adopted.

1.3 Radical shift? 2001 proposal for a general sunset clause relating to secondary legislation

In 2001, several members of Parliament proposed a general parliamentary statute on a sunset clause having effect for all secondary legislation (i.e. legislation adopted by the administration according to legislative powers delegated from the Parliament).[11]

10) St.meld. nr. 57 (1984–85) pp. 44–45.

11) Dokument 8:76 (2000–2001).

The proposal was very simple, see Section 1:

> "Rules adopted … are not valid for more than ten years after adoption. If the secondary legislation by then is not re-adopted, it will be repealed [automatically]."

Section 2 read:

> "The procedural rules that apply for adoption of secondary regulations shall also apply for re-enactment of the regulation."

If this proposal had been adopted, it would have meant a radical shift in the approach to the use of sunset clauses in the Norwegian system, at least concerning secondary legislation.

The primary underlying concern was to ensure the quality of regulations so that rules and regulations that are in force at anytime, correspond to real needs. In the current system it is far easier to adopt regulations in response to the needs of the administration as opposed to cases where the citizens have similar needs. In addition, new needs of the administration will lead to amended regulations, whereas termination of a need seldom will lead to repeal.

The ideal would be that the administration continuously considered the need to uphold regulations, and that regulations were amended or repealed when appropriate. However, it is often difficult to have the required overview, and the necessary incentives are not in place in the current regulatory system. A system with sunset clauses will lead the administration to evaluate systematically and at regular intervals the benefits of the various regulations, and to arrange public consultations where the stakeholders are given the opportunity to give their views.

The Parliament rejected the proposal. In particular, the Minister of Justice was opposed to the proposal. Her main argument in the parliamentary debate was that a general law on sunset clauses could have a number of unintended effects:

Many regulations also give rights to the citizens, for instance regulations concerning pensions of social security benefits, or – within the field of business regulations – regulations that allow for certain activities. Sunset clauses limiting the validity of a regulation to ten years could create uncertainty. She also feared that such a law would increase bureaucracy and public spending. Due to limited resources the administration should prioritise a thorough ex post review of the most important regulations, rather than a more superfluous assessment of the bulk of secondary legislation.

However, the Minister was not generally opposed to the use of sunset clauses. On the contrary, such clauses could be sensible in some cases, for instance for important regulations in cases where there is uncertainty about the effects of the regulation. The point is that the need to introduce a sunset clause must be considered on a case to case basis.

Introduction of sunset clauses in specific cases should also often be combined with a specific plan for ex post evaluation of the regulation, the purpose being primarily to find out whether the regulation is working according to its intention. She also stressed that the administration should increase its awareness concerning ex post evaluation, and that there is room for improvement. She also pointed to international trends towards simplification and ex post evaluation of regulations.

The Justice Minister's views pretty much sum up current policy on sunset clauses – more than 15 years later. Since 2001 there has been no systematic development towards a more active use of sunset legislation or any new proposals to introduce general sunset clauses. It also shows that the policy on use of sunset clauses was pretty much unchanged since the 1985 White Paper. However, the 2001 position signalled a somewhat more active and systematic use of ex post evaluation of legislation. The general response in Parliament was in line with this.

1.4 More recent development (2005–2016)

This policy, related to legislation, was formalised and made legally binding in 2005 by an amendment to the 2000 Instructions on Official Studies and Reports. The relevant provision read as follows:[12)]

> "When preparing laws and regulations, it must be considered whether the rules should be valid for a limited time or be evaluated after a specific period of time."

The instructions were supplemented with additional guidelines.

In the revised Instructions for Preparation of Central Government Measures from 2016,[13)] there is – perhaps somewhat surprising – no similar provision, neither regarding sunset nor evaluation clauses. This might have been a result of a general aim of simplifying the instructions (!). The result, in any case, is that there is today no legally binding obligation to consider the need for sunset clauses in these important instructions. A duty to consider evaluation clauses, however, follows from a different set of instructions (see IV.2.1 below).

2. Current Status – Sunset Clauses

2.1 Introduction

As mentioned above, there is no general provision obliging the legislator to introduce sunset clauses in new (or existing) legislation. The approach today therefore is ad hoc based. One has to look at current practice to get the picture.

12) Instructions for Official Studies and Reports (given by Royal Decree 18 February 2000, revised 2005) Section 2-1 paragraph 4.

13) Adopted by Royal decree 19 February 2016.These instruction replaced the 2000 instructions. The revision was in part due to criticisms related to weak compliance with existing requirements to perform ex ante regulatory impact assessments (RIA).

Many Norwegian lawyers would probably intuitively reply that sunset clauses are very rare in Norway. However, a closer look at what is actually in the law books provides a more nuanced picture.Even though such clauses do not apply to any great proportion of the legislation at any given time, they are not a rarity. The legal system in Norway actually shows quite great diversity when it comes to various kinds of sunset clauses or related mechanisms.

There are no reliable statistics on the use of sunset clauses in Norway. However, I have tried to show, through typical examples (most of them being from the last five years), to give a somewhat deeper understanding of the situation.

There are at any given time a number of temporary statutes or temporary secondary legislation. Normally, their title will indicate their state of temporality, for instance like this: "Temporary law [date of adoption] on x", or "Temporary regulation [date of adoption] on y" (see examples below).

It might vary whether such "temporary" legislation has a proper sunset clause included or not. The general recommendation is that temporary regulations *should* contain a clause defining when they are repealed;[14] otherwise, the "temporality" might last indefinitely.

Normally, the sunset clause fixes a specific date of repeal is fixed (see examples below). However, the current Legislation Department guidelines on legislative quality also mention another option: The repeal could be defined by a specific happening of other kind, provided that this happening is easy to identify. As an example the guidelines mention decisions by public authorities or other happenings that will be known to the general public.

14) Lovteknikk ogl ovforberedelse (2000) p. 72 (current Legislation Department guidelines on legislative quality).

2.2 Sunset clauses limiting the duration of parliamentary legislation

- *Historical glimpse: The «panic law» of 1906*

A classic example of early use of sunset legislation in Norway is the socalled «panic law» from 1906. As a result of foreign citizens starting to buy waterfalls in Norway (to produce electrical energy, made possible by new technology), a law was passed in Parliament, only seven days after the Government had presented a bill to Parliament. According to the new law, property rights or other rights to exploit waterfalls could for the time being not be acquired by foreigners or by companies where not all participants are personally liable. The sunset clause had the following wording:

> "This law enters into force immediately and will under no circumstance be valid for longer than to the dissolution of this Parliament."

Then a new similar law was passed by Parliament 12 June 1906, with the expiry date being 1 April 1907. A more permanent law was passed 18 September 1909.

- *Temporary law on drug injection sites (2004)*

In 2004, after much debates, Parliament adopted a law that legalised arrangements where public authorities could run facilities where drug addicts legally can bring with them and inject drugs (heroin only).[15] The purpose of this special arrangement, that would otherwise be a criminal offence, is to serve human dignity as well as to reduce the numbers of people dying from overdoses. This arrangement has been criticised by the UN organisation ICNB (*International Narcotics Control Board*) for running counter to underlying intentions of international treaties on drugs control. Because of the complexity of the issue, the Government in its proposal included the following sunset clause:[16]

15) Midlertidig lov 2. juni 2004 nr. 64 om prøveordning med lokaler for injeksjon av narkotika (sprøyteromsordning).

16) Ot.prp. nr. 56 (2003–2004).

"This law enters into force at the time decided by the King in Council, and it is valid for three years from its entry into force."

In 2007 the validity of the law was prolonged for a period of two further years, in order to have sufficient time for a proper evaluation and subsequent follow-up.[17] In 2009, based on the completed evaluation, a public consultation and adjustments in the law, the law was made permanent.

- *Temporary law on certain land lease contracts (2012)*

In June 2012, the European Court of Human Rights, in a case against the Norwegian state, concluded that an important piece of Norwegian parliamentary legislation on land lease contracts in effect contravened the right to protection of property according to Protocol 1 Article 1 of the European Convention on Human Rights. The judgment potentially affected a very large number of land lease contracts (there are several hundred thousand such contracts) and created considerable uncertainty between the contracting parties (lessors and lessees). In order to avoid unnecessary disputes in a transitory situation and to give time for a proper assessment of what should be done on a permanent basis, a temporary law was passed later the same year.[18] The wording of the sunset clause was as follows (Section 5):

"This law enters into force immediately. The law is repealed from 1 July 2014."

In June 2014, the date of repeal of the temporary arrangement was postponed until 1 July 2015, as more time was needed to find a permanent solution. In June 2015 Parliament gave permanent rules on the matter.

17) Ot.prp. nr. 36 (2006–2007) p. 8.

18) Midlertidig lov 14. desember 2012 nr. 89om rett til forlengelse av feste til bolighus og fritidshus.

- *Temporary law on surrogacy» (2013)*

In 2013 Parliament passed a temporary law[19] to allow for, in the best interest of the child, transfer of parental rights over children living in Norway but born by a surrogate mother abroad. The background for this law was several individual cases where the persons taking care of the child did not have (and elsewise could not legally be given) legal status as parents according to Norwegian law. The law entered into force immediately (8 March 2013) and would be repealed 31 December 2015. An application for parental rights had to be lodged by 1 January 2014.

This temporary law had a touch of "amnesty" legislation: There was no wish to legalise this kind of surrogacy arrangements, but at the same time there was a strong desire to take care of the interests of the involved children. Thus the law created a "window of opportunity" to take care of the affected children, while at the same time discouraging other persons from entering into this kind of arrangements later.

- *2015 amendment to the Execution of Sentences Act – execution of prison sentences abroad*

In 2015, due to shortage of prison capacity in Norway, the Government forwarded a politically controversial and much debated proposal that made it possible to rent capacity abroad (in the Netherlands). This had never been done before in Norway, but Belgium had had a similar agreement with the Netherlands.

A clear minority in the Parliament voted against the measure altogether, but a majority voted for.[20] However, Parliament introduced a sunset clause:

> "The law enters into force immediately. The law is repealed as of 1 September 2020."

19) Midlertidig lov 8. mars 2013 nr. 9 om overføring av foreldreskap for barn i Norge født av surrogatmori utlandet mv.

20) Lov 19. juni 2015 nr. 66.

According to the deciding majority, there were several important questions that could be raised regarding this measure altogether. Therefore this should clearly be a temporary measure with a clear time limit for its duration. There were no proposals for an evaluation clause. This was naturally due to the fact that even the deciding majority was very clear that this was supposed to be an exceptional measure for a limited time period and not to be repeated.

• *2015 amendments to the Immigration Act*

In 2015, in an unprecedented law making process, a number of amendments to the Immigration Act were proposed by the Government in order to regain control over an immigration situation that was about to get out of hand, due to the great unrest in the Middle East.[21] The Government found no time for a public consultation, and Parliament did not find time for the ordinary preparatory deliberations in the relevant Standing Committee in the Parliament. The law was adopted by Parliament one week after it had been proposed by the Government,[22] and it entered into force "immediately". However, Parliament introduced a sunset clause:

> "The law is repealed as of 1 January 2018."

The Parliament also decided the following:

> "The Parliament requests the Government, due to the short time limit and lack of public consultation, to return to the Parliament with an evaluation of the amendments within two years. This evaluation must allow for a public consultation."

At the time of writing the evaluation process is not yet finished, but a public consultation, as part of the evaluation process, has taken place.

21) Prop. 16 L (2015–2016).

22) Lov 20. november 2015 nr. 94 om endringer i utlendingsloven (innstramninger).

An interesting detail in the consultation paper is that some parts of the legislation in question (concerning extended power to apprehend, imprison of otherwise restrict the freedom of movement of immigrants) has not yet been applied in practice. This challenge has been address by saying that the Government has invited the Parliament to adopt an evaluation clause asking the Government to "present an evaluation at the latest one year after the relevant piece of the legislation has been applied in a considerable number of cases".

- *Catskiing (2017)*

In 2017, the Government proposed a law to allow for so called catskiing, against the advice given from the Environmental Protection Directorate.[23] (Catskiing allows for a certain kind of motorized vehicles – "snowcats" – to transport skiiers from established downhill ski slopes to the wilderness in order to do downhill skiing.) However, to ameliorate the situation, it introduced a sunset clause in its proposal. In its reasoning the Government pointed to the limited experience with catskiing in other countries, that it was uncertain how popular this new activity, and thus the negative effects, would be, in case of new legislation on the matter. Therefore, the solution was to propose a legal framework that was limited in time (six years) and scope (only six of the more than 400 municipalities in Norway would be given permit to allow for this new activity). Like with the drug injection sites (see above), this was also a combination of experimental legislation and a sunset clause. The Government in its proposal also gave a promise to evaluate the law. Parliament accepted this package, adopted the law[24] and expressed its agreement that there should be an evaluation as well.

23) Prop. 83 L (2016–2017).

24) Lov 16. juni 2017 nr. 61 om endringer i motorferdselloven (forsøksordning for catskiing).

2.3 Sunset clauses limiting delegated law making powers

• *Introduction*

As mentioned in II above, it is very common to delegate law making powers from the Parliament to the executive branch. Sometimes such delegation is combined with a sunset clause that secures that the exercise of the delegated powers is given a limited duration only.

• *Temporary armament of the police force*

In general, the Norwegian police force is unarmed in their daily service. However, the authorities can legislate in order to arm the police if needed. A decision to arm the police very much depends on the security situation at any given time. Therefore Section 29 of the Police Act[25] delegates powers to decide armament of the police to the executive branch (the Government). However, this delegation is combined with a sunset clause saying that the King or the Ministry decides on:

> "instructions concerning armament of policemen in daily service *for a limited time period* when it is deemed necessary in order to handle a serious threat."

This provision, combined with further rules given, means that the Ministry can decide on temporary armament for a fixed period of maximum three months, and after that can prolong the armament for eight weeks at a time. However, the quoted provision prevents this armament from turning into a permanent situation. This example shows the diversity (and complexity) in legislative techniques in order to limit the duration of legislation.

• *Licences at municipal level to serve alcohol*

An even more complex regime involving a kind of sunset clause is found in the law on trade in alcoholic beverages.[26] The law is based on the principle that trade (including sale

25) Lov 4. august 1995 nr. 53 om politiet (politiloven).

26) Lov 2. juni 1989 nr. 27 om omsetning av alkoholholdig drikk m.v. (alkoholloven).

to consumers) of alcoholic beverages is forbidden, unless an individual permit is given by either the state or a municipality. A municipal permit, giving licence to sell alcoholic beverages, can be granted for a period of maximum four years, and the permit must expire at the latest about one year into the four-year period that a new municipal council is elected for (by popular vote). The interesting point related to sunset clauses, however, is that the municipal council has the power to prolong the individual permits for a new four year period, but *only provided that the municipality first has reassessed (evaluated) its general alcohol policy, including its policy on granting individual permits.*[27] This is indeed quite an innovative arrangement that secures a reassessment of the general conditions for granting permits in this field.

- *The 1992 law on experiments in public administration ["forsøksloven"]*

In Norway there is a general law on experiments in the public sector.[28] The purpose of this law is to allow for experiments – at all levels within the executive branch (state, regional, municipal) – in order to develop functional and efficient forms of organising and running the public sector as well as to develop a suitable distribution of tasks within the whole public sector. The law allows for derogation from other statutes, by way of permit from the King. However, the experiments are limited by a sunset clause:

> "A permit can be given for a maximum period of four years. The period of the experiment may be prolonged by maximum two years. If a (general) reform is planned or decided in accordance with the subject of the experiment, the period of the experiment may be prolonged until the general reform enters into force."

27) Section 1-6 of the Act.

28) Lov 26. juni 1992 nr. 87 om forsøk i offentlig forvaltning.

2.4 Specific sectors with secondary legislation subject to annual re-enactment (fisheries regulations)

In some sectors it is common to adopt new secondary regulations on a yearly basis. At the same time, the old regulations are repealed. Such a regulatory technique has elements of sun-setting included, even if the relevant primary legislation does not require this.

This arrangement is very much put into system in the fisheries sector. A lot of secondary regulations in this sector are adopted with a title indicating that they are valid for the next calendar year (e.g. "Regulation on fishing of prawns in the North Sea and Skagerrak for 2017").[29] Their final provision (in this case Section 11) will be like this:

> "The regulation enters into force 1 January 2017 and is valid until 31 December 2017."

The main reason for such a legislative technique is that the fisheries are based on a quota system. For each calendar year various kinds of quotas are fixed by the authorities, based on scientific data (i.e. relating to the status for the species in question, the number of registered fishing vessels etc.) and other relevant criteria. The quota will necessarily fluctuate from one year to another.

Instead of simply adjusting the quota every year, the entire regulation is passed anew. The point related to sunset clauses in a strict sense is that an *annual re-enactment has been seen as a good opportunity to oversee the regulation in its entirety and to make necessary adjustments.*

This practice follows a yearly cycle that is fixed and well known within the industry, to the benefit both for the regulators and the regulated. For instance, the industry knows that there will be a public consultation (in the form of a meeting) as part of the regulatory process in November every year before the quota for the next year is fixed and other amendments are made.

29) Forskrift 21. desember 2016 nr. 1852 om regulering av fisket etter reker i Nordsjøen og Skagerrak i 2017.

Ⅳ. Evaluation Clauses

1. Development

In Norway, the question of more systematic feedback on the effects of regulations has for a long time been on the agenda. Based on a major study from 1973, (see II above) the Ministry of consumer and administrative affairs in 1975 issued a circular ("Guidelines to the Ministries on the work with regulations") with the following recommendation:

> "When new provisions have entered into force, the relevant Ministry is under a duty to keep itself informed about the effects of the provisions. … The data achieved by this shall be applied by the Ministry in its continuous work with bringing up to date and adjusting the [regulations].] *Major pieces of legislation and other important rules shall be assessed at regular intervals, and not more seldom that every five years."*

This recommendation was quite progressive for the time, not least by fixing a maximum interval for reassessing major pieces of legislation (five years). However, it would be an anachronism to think about the «evaluation» of the time as something very similar to the kind of evaluations that are in vogue today, with stricter requirements of policies being "evidence-based". These were still early days.

It is probably fair to say that there has been a cautious, but gradually increased interest in a more systematic approach to evaluation or other kinds of ex post assessment of legislation the following more than 40 years, but there have been no real quantum leaps in the period.[30)]

2. Current Status – Evaluation Clauses

2.1 Legal basis. Standing and ad hoc obligation to evaluate

- *Standing obligation: 2003 Instructions on Financial Management*

Today there is no legal basis in primary legislation for a general obligation to perform ex post evaluation of regulations (either primary or secondary legislation).

Instead, a rather weak general obligation (at least when speaking in legal terms) to perform such evaluations follows from a set of internal instructions from 2003, "Regulations on Financial Management in Central Government".[31)] Section 16 of the Instructions reads:

"Section 16 Evaluations

> All agencies shall ensure that evaluations are performed to obtain information on efficiency, achievement of objectives and results within the agency's entire area of responsibility and activities or within parts thereof. The evaluations shall focus on the appropriateness of for instance ownership, organisation and instruments, including grant schemes. The frequency and scope of the evaluations shall be based on the agency's distinctive characteristics, its risk profile and its significance."

30) A 1992 study, NOU 1992: 32 Bedre struktur i lovverket pp. 90–91 discusses the issue. Another point of reference is Ot.prp. nr. 87 (2002–2003) p. 7.

31) "Reglement for økonomistyringistaten", adopted by Royal decree 12 December 2003.

There is no duty to evaluate specific measures or a specific percentage of regulations that have been passed. Section 16 is concerned with government measures in general, and does not mention regulations specifically. To be sure, the relevant administrative agency is under a general duty to make a selection based on the «distinctive characteristics as well as the risk profile and significance of the measure», but these criteria leave a lot of discretion to the agency. The instructions do not say anything about methodology, when a decision to evaluate should be taken or what the time limit for finishing an evaluation should be.[32)]

Furthermore, this duty to evaluate follows from internal instructions that primarily are concerned with financial management. The context in which the duty is placed does not give much attention to special challenges related to evaluation legislation.

The result is that evaluation of legislation is very much based on an ad hoc approach(see below).

• *Ad hoc approach*

Given the rather weak general obligation to perform evaluations, it is fair to say that evaluation of regulations today is based on *an ad hoc approach.* In practice, there is no real distinction between evaluations that are based on Section 16 and ad hoc initiated evaluations.

• *Evaluations and primary legislation – Parliament and Government*

By far the most (primary) legislation that eventually is adopted by Parliament is proposed by the Government (and not by Members of Parliament). There is no tradition for the Government, when introducing a bill of legislation to Parliament, to propose any *binding* (legal) obligation to perform an ex post evaluation of the proposed legislation. Instead, the Government might, when introducing a bill, give a political statement in the bill that it intends to evaluate the law that is adopted.

32) There are some more specific requirements concerning evaluation of grant schemes (Section 6.5), benefit schemes (Section 7.4) and guarantee schemes (Section 8.5). These evaluations can also best be seen as tools to secure good financial management within the state (but they might of course include elements of evaluations of the relevant regulatory framework).

However, Parliament will from time to time, based on an ad hoc approach, decide that the Government is under an obligation to evaluate the adopted legislation. Technically, this is not done by introducing a specific clause in the legislation per se, but rather as a *separate parliamentary decision.*[33)]

A decision by Parliament that the Government must evaluate could be made at the time of adoption of the legislation, but such a decision might also be made by Parliament later.

Over the last 20 years, there has been a steady increase in the number of parliamentary decisions that obliges the executive branch to initiate ex post evaluation of adopted primarylegislation. Several factors have contributed to this development: There is a general tendency towards increased use of evaluations as a tool in public decision-making also in Norway. This is in part probably due to international trends with increased focus on evaluation as a useful tool as part of evidence-based decision-making. One factor in the picture is increased interest in the efficiency of public spending. Another factor has got to do with a constitutional trend in Norway (regardless of the question of evaluations): There has been a steady increase in cases where the Parliament requests (instructs) the Government to do this or that, and as a consequence, there has also been an increase in the requests concerning evaluations (included evaluations of legislation).

How are the evaluation clauses formulated in Norway? Typically, an evaluation clause decided by Parliament will be formulated in very general terms, limiting itself to saying what law should be evaluated, in addition to perhaps saying something about when the evaluation should start or be finished. It is then very much up to the executive branch to clarify the scope of the evaluation activity, methodology etc. I will give some examples below.

33) I am not aware of any single instance where a parliamentary statute itself has stated a duty to evaluate the statute itself or parts of it. The current practice is due to constitutional peculiarities that I will not deal with here.

Sometimes, Parliament could also decide that the executive branch must evaluate secondary legislation, but that is not so common. It is more common that the executive branch itself decides that a piece of secondary legislation should be evaluated.

- *Specific institutions with evaluative functions: Office of the Auditor General of Norway*

So far I have focused on evaluations initiated ad hoc by the Parliament or the executive branch. Evaluations can also be initiated by other institutions. Above all, the performance audits of the *Office of the Auditor General (OAG)* deserve mention.

So called performance auditing has the last 25 years, very much in line with the international development, become an important part of the work of the OAG of Norway. Through systematic analysis of the economy, productivity, goal attainment and effectiveness of the Parliament's decisions and intentions, the OAG shall furnish the Parliament with relevant information about e.g. the implementation and effectiveness of government measures. This also includes measures in the form of legislation. The OAG reports the results of its work to Parliament, but the statute regulating the OAG[34] states that the "OAG shall perform its tasks independently and decides itself how the work shall be organised" (Section 2). Thus, these audits are normally not the result of a decision by the Parliament to evaluate, but based on a decision by the OAG itself.

Each year the OAG completes approximately 15 major performance auditing reports that are presented to the Parliament. A closer look at these performance audits reveals that they contain important evaluations that involve effects of legislation. A very recent example of such a performance audit is the OAGs investigation of archiving and transparency in the central government administration (2017).[35] This audit gave a lot of information about to

34) Lov 7. mai 2004 nr. 21 om Riksrevisjonen.

35) A summary in English is available here: https://www.riksrevisjonen.no/en/Reports/Pages/ArchivingAndTransparency.aspx

what extent the Government complied with important rules in the regulations on archiving of public documents and the Freedom of Information Act. This audit has sparked considerable debate. While this audit focused on the compliance with relevant legislation, other audits will to a greater extent focus on the *efficiency* of certain regulatory schemes.

2.2 Evaluation clauses in practice

• *Introduction. A snapshot*

As with sunset clauses, there are no reliable statistics on the use of evaluation clauses in the Norwegian legal system.

In order to give a snapshot of the current situation, I have gone through and tried to identify every formal decision the Parliament made in the session October 2016–September 2017 concerning evaluation of (parliamentary) statutes. I have also looked for requests to evaluate secondary legislation. In this period, 12 such decisions were identified, and by far the most of them concerned primary legislation. The 12 decisions concerned diverse fields such as legal aid, regulation of shared parental responsibility (after divorce), effect of child custody rules on the position of fathers, restraining orders (against criminals), liberalisation of the money games market (of which one decision partly concerned the organisational model), regulation of bullying in schools, rights to parental leave at birth (gender equality concerns), effects of a new national register with information about consumer's debt, the effect of new rules allowing for more use of temporary employment contracts, the law on keeping of domestic dogs, and the effect of tax deduction for scientific research.

Out of the 12 decisions, 5 of them said something about the time perspective: 3 of them said that the law etc. should be in force a certain time (two or three years) before an evaluation took place, but did not say anything about a time limit for finishing the evaluation. The last 2 of the 5 instead said that the evaluation had to be finished within two years of the implementation of the amended rules.

Now I will give a few examples of typical ad hoc decisions to evaluate and evaluations of legislation from the last 12 years.

• *Evaluation of the new (2005) Civil Procedure Act*

An archetypical example of evaluation of legislation in the Norwegian system is the evaluation of the new Civil Procedure Act,[36] which was adopted by the Parliament in 2005 (it entered into force in 2008). The evaluation clause is representative of such clauses in Norway:

> "The Parliament asks the Government to evaluate the Civil Procedure Act within three years after the law has entered into force."

The task flowing from such a clause is very open-ended, given that the Act contains around 50.000 words. It would be impossible (and meaningless) to evaluate every aspect of that law. In a subsequent paper to the Parliament, the Government presented a detailed plan for an evaluation of important aspects of the new law.[37] According to the resulting 2013 evaluation report (finished well after the set time limit) the evaluation was in many respects ground breaking, in that it for the first time has had a complete plan for evaluation ready already at the time of entry into force of the new law. The evaluation report is an important background document for the Ministry of Justice and Public Security's work on a consultation paper on possible amendments in the law (ongoing work).

• *Evaluation of the 2008 criminalisation of buying sexual services*

In 2008, after a long and heated debate, a ban (criminalisation) on buying sexual services was adopted by the Parliament.[38] The main purpose of the law was to prevent and reduce human trafficking in Norway. There were other purposes as well, such as reducing the amount

36) Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven).

37) Ot.prp. nr. 76 (2005–2006).

38) Lov 12. desember 2008 nr. 104 om endringer i straffeloven 1902 og straffeprosessloven (kriminalisering av kjøp av seksuell omgang eller handling mv.).

of prostitution. The law entered into force in 2009. At the same time, there were worries about negative side effects, for instance that the law had negative side effects for people in prostitution. No evaluation clause was introduced by Parliament, though. However, due to the mentioned worries, the Government decided (in 2013) to evaluate the law. The purpose was to evaluate the effect of the ban on purchasing of sexual services with emphasis on the conditions for prostituted women, as well as the development in the prostitution markets. An external evaluation report was commissioned by the Ministry of Justice and Public Security, and a report was finished in 2014.[39] According to the evaluation report, the amount of prostitution in Norway was reduced by 20–25 per cent compared with the year prior to year that the law entered into force (there were also estimates on what the amount of prostitution would have been in 2014 in the hypothetical situation of the law not having been in place). The evaluation report is pretty thorough, and it is a good illustration of the methodological problems that arise when legislation is evaluated.

- *Evaluation of the 2008 Planning and Building Act*

Another ongoing evaluation project is the evaluation of the 2008 Planning and Building Act.[40] The main question for evaluation is whether the planning part of the Act works according to its intentions, and potential areas for improvement shall be identified. The project is multidisciplinary, with groups of lawyers, architects, planners and political scientists, all doing research on planning from different perspectives. The evaluation process takes place between 2014 and 2018. The estimated cost of the project is 1.6 million USD. This seems to be a very complex evaluation task, and it might illustrate that the effects of a new piece of legislation very much must be seen in connection with other measures that are taken within a field.

39) A summary of the evaluation report in English is found here (se pp. 11–14): https://www.regjeringen.no/contentassets/0823f01fb3d646328f20465a2afa9477/evaluering_sexkjoepsloven_2014.pdf

40) Lov 27. juni 2008 nr. 71 om planlegging og byggesaksbehandling (plan- og bygningsloven).

V. Some Concluding Observations

The total amount of legislation has been increasing steadily from the 19th century till today. By the last decades of the 20thcentury the growth of regulations, not least due to the increase in the use of delegated law making powers, had increased the consciousness about legislation both as a tool to achieve intended societal effects, but also as an instrument that can create unnecessary harm or burdens on citizens and businesses. From the early 1970s onwards this consciousness has resulted in several studies etc. discussing the need for simplification, improved ex ante RIA, ex post evaluation, external regulatory oversight bodies etc. Later on a clear connection has been established between the domestic and international debate on these matters.

It must be noted in this connection that the question of *regulatory burdens* has only been a minor part of the debate in Norway, at least when you look at what politicians in fact have been interested in: When considering sunset clauses and evaluation clauses (or ad hoc evaluations), particularly when it comes to effects of parliamentary legislation, politicians seem to have focused mainly on issues related more directly to the welfare state (like the educational or health care system) and social policy issues, including criminal law and family law.

The regulatory system has been dominated by the fact that the Norwegian society is a relatively small one, with a high degree of trust in general, and where flexibility, pragmatism and lack of formality are important features. This has had consequences also for the policy – or some would say lack of policy – relating to the question of sunset and evaluation clauses. Even though there have been a proposal towards a more systematic approach towards the use sunset clauses (see III.1.3 above) and evaluation clauses, there has been no will to bind

the state in advance to formal and rigid systems of sunset or evaluation clauses. Instead, the policy has been on of an ad *hoc approach.* Most of the evaluations of legislation that take place, are not based on an ex ante decision or clause that such an evaluation must be done.

In my view, there are both advantages and disadvantages with such an ad hoc approach.

Lack of clear criteria in advance might make it difficult to make the right choices as to in what cases resources should be spent on evaluation (or in what cases sunset clauses should be introduced). Decisions to evaluate might instead be decided by the media situation, small or large mis-happenings etc. Lack of consistency in the overall approach to evaluation of legislation might be the result.

On the other hand, an ad hoc approach, or at least a *rather flexible approach,* might secure that ex post evaluations are conducted only when there is a real need for them, in terms of the specific subject matter and the timing. And even if there is need for an evaluation, this might not be feasible, for instance due to lack of relevant manpower (expertise) or due to lack of an adequate methodology. Other kinds of ex post assessment of the legislation might turn out to be more adequate in the circumstances. And even if "evaluation" in a stricter sense is the preferred method for ex post assessment, there should be considerable flexibility in choice of methodology. This is the approach that best serves the purpose to give useful input to decision-makers taking care of real-life problems that need to be addressed also in a short term. Evaluations might often give a deeper knowledge about understanding of a certain field where legislation is involved, but this does not necessarily translate into increased regulatory quality.

Practical experience gained after adoption of a regulation will give important information about what should be the precise subject matter of an evaluation. When adopting larger pieces of legislation, it is probably in most cases wise to limit the subject matter of an evaluation to certain major points of interest. This also calls for not fixing too many details of a possible evaluation in advance. However, a dilemma lies in the fact that a proper evaluation will require some kind of baseline study.

Another question is whether it might be somewhat arbitrary to link an evaluation to the question of adoption or entry into force of new legislation. In real life legislation coexists and functions together with a series of other factors, and this cannot be overlooked for instance when it comes to the question of the timing of an evaluation.

In any case, an evaluation clause, whether it is adopted in an individual case or is of a more general nature, should allow for the relevant legislation to work for a sufficient time before an evaluation is finished. In Norway the experience is that politicians are too impatient when they set time limits for evaluations to be performed.

The question of sunset and evaluation clauses cannot, in a practical setting, i.e. when discussing what should be done in a specific legal system (e.g. in Norway or Korea), be approached without looking at what other mechanisms are suited to take care of the underlying concern: How to secure that the law at any given time corresponds to the needs of society. I have addressed this question in the Norwegian context in II above. However, this point is valid in any legal system and regardless of whether one thinks that an ad hoc or a more principled approach is best.

Speaking particularly about *sunset clauses,* fixing a time for repeal of legislation, they are in their simplest form a rather crude instrument. Extensive use of such clauses will easily lead to superfluous – and thus useless – evaluations of assessments of the need to renew the relevant piece of legislation. More general sunset clauses might also be an unnecessary threat to legal certainty.

However, the Norwegian legal system is not hostile to the idea of sun-setting in general. Practice also shows that the idea of sunset clauses could be used in an innovative way in order to distribute power between the legislative and executive branch or between the state and municipal level of the government. In addition, the idea of sun-setting is also available as a tool in order to fine-tune systems where primary legislation, secondary legislation and individual permits interplay in a more complete and flexible regulatory system.

입법평가 Issue Paper 17-15-③

The Use of Sunset and Evaluation Clauses in the Norwegian Legal System

발 행 일 2017년 10월 31일
발 행 인 이익현
발 행 처 한국법제연구원

세종특별자치시 국책연구원로 15 (반곡동, 한국법제연구원)
T.044)861-0300 F.044)868-9913
등록번호 1981.8.11. 제2014-000009호
http://www.klri.re.kr

ISBN 978-89-6684-770-9 93360

The Use of Sunset and Evaluation Clauses in the Norwegian Legal System

Printed on October 31, 2017
Publisher Rhee, IkHyeon
Published by Korea Legislation Research Institute

15, Gukchaegyeonguwon-ro, Sejong-si, Korea (KLRI)
T. +82-44-861-0300 **F**. +82-44-868-9913

Registered no. October 11, 1981. 2014-000009
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ISBN 978-89-6684-770-9
값 5,500원