

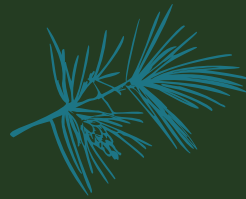


# On Balancing and Proportionality

THE CASE OF DATA PROTECTION AND  
OPEN DATA

Dr. Lorenzo Dalla Corte

# Balancing open data and data protection?



# My thesis:

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- **Open data is not a right on its own:** it's a data sharing 'policy' that may support a broad range of rights and freedoms
- **Whenever the rights and freedoms underlying open data clash with competing rights and freedoms,** and a balancing exercise has to be performed, **open data publishing and reuse cannot be the outcome by default**
- That is due to (or explained by) the fact that such projected outcome would **fail all three prongs of the *lato sensu* proportionality test** (suitability, necessity, and proportionality *stricto sensu*)



# Outline

1. Rules and subsumption; principles and “balancing”

2. Balancing as *lato sensu* proportionality

*Proportionality and legal formalism*

*The balancing of interests*

3. Proportionality testing

*Suitability*

*Necessity*

*Proportionality stricto sensu*

...through the lenses of the OD/DP conflict

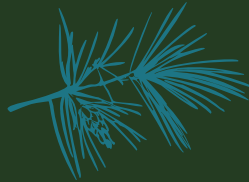
# Subsumption and balancing

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Two prongs of legal/judicial reasoning:

**A. Subsumption** of a case under a rule

**B. Balancing** competing principles



# Subsumption

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- **Subsumption** of a case under a rule  
if (this) {  
    (that)};
- Used with norms that are **rules**  
i.e. “binary” prescriptions
- Possible **antinomy** (conflict of laws)  
Solved through other rules declaring the inapplicable rule(s)
- In the case of **open data and data protection**:  
Exemptions and non-prejudice clause in the PSI Directive  
Removal of the Art. 80aa from the Council proposal for a GDPR

# “Balancing”

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- *Lato sensu* **proportionality** testing:
  - Suitability
  - Necessity
  - Proportionality *stricto sensu*
- Used with norms that are **principles**  
i.e. optimization requirements
- Possible **competition of principles**  
Solved by assessing prevalence
- In the case of **open data** and **data protection**:
  - Don't need it; we have rules
  - But how would it look?

# (Balancing and proportionality)

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- Developed in tandem in early modernity
- Balancing of interests:
  - Largely political
  - Characterises jurisdictions with weak textual support for the limitation of rights
  - Curtails the exercise of a right
  - E.g. US
- Proportionality:
  - Grounded in legal formalism
  - Characterises jurisdictions with strong textual support for the limitation of rights
  - Curtails the possibility to limit a right
  - E.g. DE, EU, ECHR...



# Suitability

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- **Rationality** of a measure vis-à-vis the objective to be achieved
- **Binary judgement:** suitable or unsuitable
- **In abstract:** OD is suitable for a broad range of objective that deserve normative protection
- **Yet:** the *ex ante* definition of the objective to be achieved is a requirement of a suitability assessment; hard to do in light of the 'serendipitous' nature of the open data *ethos*

# Necessity

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- Is the restriction to the competing rights and freedoms (strictly) **necessary** (in a democratic society)?
- Traditionally: “least restrictive measure” (**LRM**) test  
But other tests are used in different jurisdictions/contexts (e.g. manifest non-necessity)
- Assessed on a range
- OD is – by definition – at the most extreme end of the ‘openness spectrum’; any sort of access control and use restriction would amount to a LRM

# Proportionality *stricto sensu*

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- Is the detriment deriving from the restriction to the competing rights and freedoms lower than the benefit deriving from the measure?
- $W_{a,b} = \frac{W_a \cdot I_a \cdot R_a^n \cdot R_a^e}{W_b \cdot I_b \cdot R_b^n \cdot R_b^e}$ ; When finding the balance between two competing rights ( $W_{a,b}$ ) one should consider their weight ( $W_a$  and  $W_b$ ), the intensity of the interference of the one upon the other ( $I_a$  and  $I_b$ ), and the degree of normative and empirical reliability of the premises of the assessment ( $R_a^n \cdot R_a^e$  and  $R_b^n \cdot R_b^e$ )
- Sharing and reusing personal data as open data would require rendering the rules and principles substantiating the right to data protection basically meaningless.

# (Other issues)

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- Respect for the essence of the competing right
- Legal basis for a normative intervention
- Quality requirements thereof
- Fundamental antinomies

# To sum things up:

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- The OD ethos clashes with the requirements of a proper **suitability** assessment – what would we do that *for*, exactly?
- Running the idea of balancing OD and data protection through a proportionality test highlights that it is **unnecessary** and it would surely be **disproportionate**
- The idea of a balance between OD and data protection is flawed as a result of the construction of OD as an end, rather than a **means**.
- The role of open data in a balancing exercise is of an **output**, rather than an input

The background features three overlapping, wavy green lines that create a sense of movement and depth. A white, stylized pine branch with needles is positioned in the center, partially overlapping the green waves.

# Thanks!

QUESTIONS?