Ten Questions about Balancing

*Bart van der Sloot**

I want to thank Raphaël Gellert for his elaborate reply and interesting points for further discussion. I see this only as the beginning of a longer debate and will respond briefly, trying to distinguish between ten different questions.

1. **What Is Balancing?**

I think the main point of my editorial in issue 1/2017 was that the metaphor of 'balancing' or 'weighing' different interests is inapt for the legal domain. The concepts of balancing and weighing are taken from the physical domain, where they connote a situation in which two different objects with a certain weight, say a cup of sugar and a chunk of gold, are balanced against each other on a weighing scale. The process of weighing is accurate and neutral, because there are international agreements on how the weight of an item can be measured. For example, there is an international agreement on what is the International Prototype of the Kilogram (IPK) – it is 'defined as the mass of the international prototype of the kilogram [1st Conférence Générale des Poids et Mesures (CGPM), 1889]. The international prototype of the kilogram is a cylinder of platinum -10 per cent iridium alloy about 39 mm high and 39 mm in diameter.'[1] In addition, there are set standards and methods for neutrally and objectively weighing different objects against each other.[2] Consequently, objects have weight, there is an impartial way to determine their weight and a neutral procedure for balancing those objects.

In the legal realm, however, this does not hold true. A legal principle does not have any weight – the right to property has no weight, nor does the right to privacy or national security. Rather, we (researchers), politicians and judges can 'assign' weight to a legal principle – for example, liberals might find 'liberty' more important than 'equality', while for socialists, this may be the other way around. Both assigning weight to a legal principle and the question of which principle outweighs the other is a subjective choice. Consequently, rather than saying that a legal principle has weight or that one outweighs the other, it would be more useful to speak of the fact that we find 'liberty' more important than 'equality', or the other way around – and avoid using the concepts of weighing and balancing. A final difference is that there is a common base unit in the physical realm in which we can express weight – for example a kilogram. This

* Bart van der Sloot, Senior Researcher, Tilburg Institute for Law, Technology, and Society (TILT)Tilburg University, Netherlands; EdpL Managing Editor. For correspondence: <B.vdrSloot@uvt.nl>.
DOI: 10.21552/edpl/2017/2/8

1 TJ Quinn, 'New Techniques in the Manufacture of Platinum-Iridium Mass Standards' (1986) 30(2) Platinum Metals Rev 7 <http://www.technology.matthey.com/article/30/2/74-79/> accessed 24 July 2017.

2 Bureau International des Poids et Mesures, 'Resolution of the 1st CGPM (1889)' (1890) <http://www.bipm.org/en/CGPM/db/1/1/> accessed 24 July 2017.

means that objects can be measured on the same scale – object A may weigh 2 kilogram while object B might weigh 6.5. But in the legal realm, there is no base unit in which we can express the privacy, security or other interests.

2. Should Balancing Be Used In the Legal Realm?

The second point I tried to make in my editorial is that it is undesirable to rely on the metaphor of balancing in the legal domain. The first reason is simply that what is described by 'balancing' in the legal domain lacks a number of the essential characteristics of weighing and balancing in the physical domain – neutrality and objectivity – and is thus simply an incorrect metaphor to describe what judges and others do when they supposedly balance. The second reason is that using the terms balancing and weighing can be misleading. When used in the legal domain, the terms have an aura of neutrality and objectivity – but because legal principles have no weight and because there is no objective and neutral method of weighing legal principles, the legal form of 'balancing' is in the end purely subjective. Using 'balancing' and 'weighing' to describe this subjective interpretation borders on newspeak.

3. Do Legal Texts Themselves Speak of 'Balancing'?

Consequently, I think legal scholars and judges should try to avoid using these terms as much as possible.[3] The question then is whether it is possible to do so. That is why I have meticulously analysed the legal texts to stress that the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights do not use the term 'balancing' at all and that the General Data Protection Regulation (GDPR) uses this concept only two times in its recitals. Consequently, although I'm aware that the term is used more and more by scholars and judges, the legal documents themselves do not necessitate using terms such as 'balancing'.

4. Is Balancing Inherent to the Proportionality Test?

Even though 'balancing' may not play any role of significance in legal texts, it is often pointed out that the proportionality analysis requires a form of balancing. Gellert also makes clear that his idea of balancing is very close to the notion of proportionality:

> Concerning the presence of the balancing test in human rights law, and as I have tried to make clear in the paper, my use of the notion of the balancing test is directly related to the proportionality test featured in the [ECHR]. As is well-known, the possibility of restricting certain human rights featured in the Convention is bound by the general limita-

3 If the counter-argument is that subjectivity cannot be avoided in full I would of course agree but stress that this only increases the need for an objective and neutral methodology. University researchers are also never fully neutral and objective – that does not mean that anything goes, it means that they have an obligation to be even clearer about their methodology, choices and assumptions, so that their peers can repeat the research and either verify or falsify findings.

> tion clauses, which provide for three conditions (legality, legitimate aim, necessity in a democratic society). The condition of necessity in a democratic society, though unclear and multidimensional, amounts also to an analysis of the proportionality of the measure restricting the right at stake.[4]

First, I want to point out that 'proportionality' is not mentioned in the text of the ECHR and to my recollection, neither is it present in the discussion represented in the *travaux préparatoires*. The ECHR uses the 'necessity' test and for me, the preliminary question is whether the necessity test requires a proportionality analysis. But suppose we cannot avoid relying on a proportionality analysis, seeing that it is an integral part of the jurisprudence of the European Court of Human Rights (ECtHR) and that proportionality is explicitly mentioned in the Charter of Fundamental Rights of the European Union, the second question becomes, does a proportionality analysis imply 'balancing' or 'weighing' different interests? To answer this question, it would first be necessary to determine what exactly a proportionality analysis entails. The more I think about it, and read my way through the thousands of books and articles that have been written on this concept, the more I feel that maybe the concept of 'proportionality' is at least as muddled as that of 'balancing'.

But I do not want to drive the reader to despair by questioning yet another legal principle, so the only thing I want to point out is that the proportionality analysis does not imply a balancing exercise per sé. A number of alternative ways for approaching the notion of proportionality have been developed in the literature. For example, Martin Luterán has stressed that the interpretation of 'proportionality as balancing' is rather novel and that it was preceded by the idea of 'proportionality between means and ends'. Luterán

> proposes a reconstructed proportionality test, one that focuses on ends and means rather than balancing, and argues that it provides resources for resolving several qualitatively different kinds of constitutional conflict that are not identifiable in the standard fare of balancing conflicts of rights, interests, or values. Furthermore, where balancing ultimately leaves a court without a rational basis for choosing one option over another, the reconstructed proportionality test provides determinate rules capable of resolving at least some classes of disputes.[5]

5. Is There an Alternative to Balancing Interests?

The question is of course: suppose we would agree to avoid using the concepts of 'balancing' and 'weighing', how could one determine the outcome of a legal case? In my editorial, I have tried to give examples of how legal principles could be interpreted and applied in concrete cases, relying on binary legal questions. First, the question is

4 Raphaël Gellert, 'On Risk, Balancing, and Data Protection: A Response to van der Sloot' (2017) 3(2) EDPL 180-186, 182.
5 Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law Rights, Justification, Reasoning* (Cambridge University Press 2014) 5.

whether a legal principle applies and whether the conditions for doing so have been met. Second, the question is whether the conditions for limiting the right or principle have been met. I will come back to this point later on. I am of course aware that my own proposal may be too radical for some and unconvincing to others. But my main point is not that this is *the* way to move forward. It is only *a* suggestion of how we could potentially approach legal cases without running into the methodological quagmire of 'balancing'. I think this is only the starting point of the discussion and I'm open to other alternative ways for determining the outcome of legal cases.

6. Can 'Balancing' and Other Methods Coexist Side by Side?

Gellert stresses that accepting some forms of 'balancing' does not mean that everything should be balanced. This is of course true. But both Gellert and I agree that we live in an 'age of balancing'. 'Balancing' and 'weighing' are becoming increasingly dominant methods for delivering legal verdicts by judges, and what I see happening in the case law of courts, such as the Court of Justice of the European Union (CJEU) and the ECtHR, is that they increasingly avoid answering difficult legal questions and instead rely on notions such as 'balancing' and 'weighing'. This means foregoing assessment of (1) the interest invoked by a claimant falls under the material scope of the right invoked, (2) whether there has been a significant interference with this right, (3) whether the limitation was prescribed for by law, (4) serves a legitimate interest and (5) is necessary in a democratic society. I have shown how balancing tends to overshadow more principled legal questions by analysing the *Coty* case by the CJEU and the *Delfi* case by the ECtHR, but the general points made there are I think symbolic for a significant part of the jurisprudential corpus.[6] That is another reason why I would be hesitant to use the notion of 'balancing', even in addition to the more principled arguments provided above.

7. Should Legal Disputes Be Determined on a Case-by-Case Basis?

A common belief is that balancing is necessary because judges should determine the outcome of legal conflicts on a case-by-case basis. For example, the ECtHR has stressed:

> The Court determines the existence of family life on a case-by-case basis, looking at the circumstances of each case. The relevant criterion in such matters is the existence of effective ties between the individuals concerned.[7]

I am not sure what it means in this sense to decide a matter on a case-by-case basis – of course, with every case, a court would need to determine whether in a specific case there is indeed a family tie or what qualifies as a 'home'. What is meant by the term 'case-by-case' determination of matters is I think that rather than looking at broad the-

6 Bart van der Sloot, 'The Practical and Theoretical Problems with 'balancing': Delfi, Coty and the redundancy of the human rights framework' (2016) Maastricht Journal of European and Comparative Law, 3.

7 *NADA v Switzerland* App no 10593/08 (ECtHR, 12 September 2012).

ories and fundamental debates, the court will assess whether in a concrete case, the applicant's interests are protected to a sufficient level. It is again a more subjective or intuitive approach than a procedural one, which is more objective and theory-laden.

I am hesitant to accept that legal disputes should be determined on a case-by-case basis in this sense. First, it is not necessary for judges to rely on this type ofanalysis; there are alternative ways for determining the outcome of legal procedures, for example relying on standardised procedures.[8] Second, the problem with judging on a case-by-case basis is that courts develop no or very limited legal principles. Rather than analysing whether in general it can be considered necessary for a state to have a law in place that sanctions user comments on online fora that damage the reputation of third parties, a court will analyse whether in one specific case, the freedom of speech of A will 'outweigh' the right to privacy and reputation of B, taking into account the circumstances of the case. This means that each case is judged anew and very limited legal principles are developed, which in turn undermines legal certainty, jurisprudential clarity and consistency. Third, and related to that, because every case will be judged on its own merits and because of the legal uncertainty, every case has to be brought to a judge to determine the outcome, which will only add to the already huge workload for courts and to the juridification of society.

8. **Is Privacy an Absolute Right?**

Another counter-argument might be that the common understanding is that privacy is a relative right – it is not absolute and can be limited under specific circumstances, when certain conditions have been fulfilled. Consequently, it is said, concepts such as privacy and notions such as 'national interests' are relative and should be balanced and weighed against each other. The conception of privacy as a relative right is based on the idea that paragraph 1 of Article 8 of the ECHR gives the individual a right to privacy, and that paragraph 2 of Article 8 ECHR gives the state a legitimate claim to limit this right when certain conditions apply. In such an understanding, the individual interest in privacy and the public interest in, for example, national security can be weighed and balanced against each other.[9] Similar to horizontal cases, in which two fundamental rights clash (for example the freedom of speech of A and the right to privacy of B), neither interest has principle priority over the other – it depends on the context and the circumstances of the case.

I am cautious about accepting such an understanding. As a preliminary point, I think there could be discussion on what actually is the legal principle contained in Article 8 ECHR. Is it 'the right to privacy', as described in the first paragraph, or is it 'the right to privacy can be limited only under specific conditions'. Along the lines of the first

8 See for example, Wayne R LaFave, '"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma' (1974) The Supreme Court Review.

9 Some scholars have even coined security a human right, which would mean that 'security' and 'privacy' can clash as two equal rights or principles.

interpretation, privacy will be seen as an independent, but relative principle which can be limited or, if you will, 'outweighed' by other principles. In the second mode of interpretation, the legal principle is 'the state can only curtail the right to privacy of a citizen if the limitation is prescribed by law, necessary in a democratic society and serves a legitimate aim'. No balancing takes place when the latter interpretation is chosen. It is a matter of semantics maybe, but the formulation of the legal principle has a big impact on how rights and obligations are perceived. For me, the core idea behind the European Convention on Human Rights was not so much to grant natural persons subjective rights, but to set limits on and conditions for the use of power by states.

In addition, I have two reasons for being hesitant about the idea that privacy is a relative right. First, I think that if we would accept such an interpretation, we would have to say that every right and legal principle is relative. For example, Article 2 ECHR protects the right to life and specifies:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

So if we say that privacy is a relative right, one should be careful not to limit the relativity argument to Articles 8-11 ECHR, often referred to as qualified rights. There is one right which is often seen as absolute, namely Article 3 ECHR specifying 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment', as it contains no limitations clause nor can it been curtailed by invoking Article 15 ECHR, the state of emergency. This right too, however, is not an 'absolute' right – the notions of ratione personae, ratione materiae, ratione loci and ratione temporis still apply.[10] In addition, of course Articles 17 and 18 of the Convention (on the abuse of right and the abuse of power) still apply. Consequently, if it is true that the right to privacy is relative, then all rights and legal principles must be relative. It this sense, it does not add anything to say that privacy is a relative right.

Second, I think these examples show that the connection between the supposed 'relativeness' of rights and legal principles and notions of 'balancing' and 'weighing' is misguided. If person A attacks B with a knife and gets shot by the police and a judge has to determine the validity of that action, relying on Article 2 ECHR, does a judge need to balance A's right to life against B's right to life? If this is seen as a legitimate action, does that mean that A's life is less valuable than that of B? Instead of saying that all legal principles are relative and should be balanced against each other, I would say

10 Council of Europe/ECtHR, 'Practical Guide on Admissability Criteria' (2014) <http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed 24 July 2017.

that all legal cases boil down to answering two questions of conditionality: (1) do the conditions for relying on an article or legal principle apply and (2) do the conditions for limiting the article or legal principle apply? If the first question is negative, than it does not mean that the analysis of the second question can be approached more flexible – they are not communicating vessels.

9. Are Not All Legal Principles Context Dependent?

But another argument could be, to determine whether the conditions are fulfilled or not, one should look at the context – the circumstances of the case – and this requires balancing. For example, there is no universal concept of the 'home': what constitutes a home might differ from person to person and from context to context. As the ECtHR has stressed, in situations in which a person lives and sleeps in his car, a car might qualify as a 'home' in the meaning of Article 8 ECHR. It may even differ from person to person what constitutes as torture – playing continuously loud music may be considered torture, but not when the person in question is deaf. Consequently, all legal principles are context dependent and there is always a need for balancing, it can be said.

I think it is important here to distinguish between two aspects: questions as to fact and legal questions. Whether something qualifies as a 'home' or as 'torture' might be considered context dependent as there is no universal and absolute notion of 'home' or 'torture'. But this, I would say, is a characteristic of language, not so much of law. 'I will only eat when sitting at a table' requires a determination of what 'eating' is, what 'sitting' is, what a 'table' is, etc. Whether an object is a table or not depends on the definition one uses and one needs to check whether the specific object correlates with the concept or the idea of a table. Consequently, when answering questions as to fact, the context has to be taken into account. But I do not think the second question – the legal question - is context dependent in this way. One cannot torture a person – the state cannot enter a home without a legal basis. The legal principle as such is consequently not context dependent. What is context dependent is only the question of fact, whether in a concrete case, an action has to be qualified as 'torture' or whether an object can be considered a 'home'.

10. Are Not All Factual Questions Context Dependent?

Consequently, only the questions of fact are context dependent. But I wonder whether 'balancing' or 'weighing' are the right terms for describing what we do when answering such questions. I would say it depends on the definition one uses and the interpretative model. To start with the latter, there are different modes of interpretation. A common example is the interpretation of the second amendment in the United States specifying: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.' Does 'arms' also include, for example, a tank or a bazooka. A textual approach might suggest yes, because a bazooka and a tank can clearly be seen as weapons, an originalist interpretation might

suggest no, because those weapons were not envisioned by the authors of the amendments, and a teleological interpretation will focus on the reason for adopting this amendment, etc. I am not sure whether any of these interpretations require balancing.

Then there are different ways to define concepts. One could say 'A table is an object with four legs and a rectangular board on top of it'. If a specific object has three legs, it is not a table. One could also say: 'A table is an object that is commonly used for eating'. Then the use of the object in question should be analysed. Here, different factors might be taken into account. To determine whether an object is a 'home', one can look at whether a person enjoys his private life there. This may depended on a number of factors such as how much time a person spends in that object and whether he sleeps, eats and has sex there. Neither of those factors are determinative, they are communicating vessels. The different factors and the extent to which they are fulfilled in a certain context should be analysed as a whole. If all factors are fulfilled 100%, then an object is surely a home, but if one factor is not fulfilled, an object may still be qualified as a home, for example when a person always eats outside. In this sense, what is a 'home' is dependent on personal preferences but also on cultural commonalities – in some countries, the home may only serve as a place to sleep, while in others, it might be the center of a person's social life. I think in this case, we do not 'balance' or 'weigh' different factors, but analyse in how far a specific object and the way in which it is used approaches the ideal concept of a 'home' in a certain time and context.