



MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

Human Rights Discussion Group

Wednesday, 27 January 2016, 14:30 – 16:00, Room 014

Pieter-Augustijn Van Malleghem

KU Leuven's Institute for European Union Law & Harvard Law School

“Proportionality and the Erosion of Formalism”

My doctoral research argues that proportionality reasoning in the legal orders of the European Union and the European Convention of Human Rights can plausibly be suspected to be a continuation of political debate by other means. Proportionality symbolizes the erosion of a formalist, apolitical understanding of legal reasoning. My research seeks to vindicate the common intuition that proportionality reasoning is so “vague” and “indeterminate” as to suggest that it is “really” driven by political motives. Proportionality has been the object of intense controversy, some authors attacking it as “decisionist” and “irrationalist” while others have defended it for its “rational” characteristics or even as the “ultimate rule of law.”

I hope to contribute to this debate by extending the skeptical legal techniques developed at the turn of the 20th century. I deepen these techniques into a rhetorical approach to legal argument, which sheds a critical light on justifications that can be advanced for contemporary proportionality argument in Luxembourg and Strasbourg. I defend this view on the basis of a reading of recent case-law of these European courts. The rhetorical vulnerability of proportionality argument is problematic because it is a site of the interpenetration of legal and political discourse. Familiar political arguments transparently find their way into proportionality analysis. I conclude that lawyers and legal academics, in particular, should self-consciously embrace this politicization of legal argument, by openly debating legal issues on the terms of underlying political questions and by laying bare the political dynamics of legal reasoning and decision-making to the broader, non-specialized citizenry.

Pieter-Augustijn Van Malleghem holds a Bachelor in Philosophy from the Facultés Universitaires Notre Dame de la Paix, a Masters of Law and a Masters of Economic Policy from the KU Leuven and a M.Sc. in Economics from the Barcelona Graduate School of Economics/Universitat Pompeu Fabra. He waived his LL.M. degree from Harvard Law School. Pieter-Augustijn is currently a Ph.D. researcher affiliated with the KU Leuven's Institute for European Union Law as a Fellow of the Research Foundation Flanders, and an S.J.D. candidate at Harvard Law School.

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