Balancing Privacy and the Public Interest: The Application of the 'General Measures' Doctrine in *L.B.* v *Hungary* in the Absence of Any Substantive Proportionality Assessment

ECtHR 9 March 2023, No. 36345/14, *L.B.* v *Hungary*

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INTRODUCTION

On 9 March 2023, the Grand Chamber of the European Court of Human Rights (the Court) delivered its judgment in *L.B.* v *Hungary*.[1] The case concerned the Hungarian legislative policy of publishing on the tax authority's website the personal data of taxpayers who were in debt. The applicant claimed that the publication of his name and home address on a list of 'major tax debtors' was a violation of his right to private life under Article 8 of the European Convention on Human Rights (the Convention; the ECHR).

Finding in favour of the applicant, the Court criticised the quality of the Hungarian parliament's review of the impugned measure. The Grand Chamber's approach can be seen as an application and extension of the already controversial 'general measures' doctrine developed in *Animal Defenders International* v *the United Kingdom*.[2] Previously, in *Animal Defenders*, the quality of parliamentary review had been judged favourably, prompting the Court to extend significant

[1]ECtHR 9 March 2023, No. 36345/14, *L.B.* v *Hungary* (GC).
[2]ECtHR 22 April 2013, No. 48876/08, *Animal Defenders International* v *the United Kingdom* (GC).

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deference to domestic authorities in reviewing the proportionality of the measure. In *L.B.* v *Hungary*, however, this approach was expanded and applied in reverse: dispensing with any assessment of the substantive impact of the measure on the applicant, the Grand Chamber found that Article 8 had been violated due to the inadequate domestic review thereof.

The approach adopted by the Court was a controversial one, criticised by Judge Kūris in his concurring opinion and by Judges Wojtyczek and Paczolay in their joint dissenting opinion. In this case note, I will first set out the factual background of the case before explaining how it was dealt with by the Chamber and the Grand Chamber. I will strive to contextualise the decision within the broader context of the 'procedural turn'[3] detected in the Court's jurisprudence in recent years and compare the approach applied here to the Court's ruling in *Animal Defenders*. Finally, I will reflect on the potential implications of the development and argue in favour of the finding of a violation based on an alternate or amended approach.

Factual background

Under national legislation, the Hungarian Tax Authority was required to publish the personal data of individuals whose tax arrears exceeded 10 million Hungarian forints (approximately €26,000) on a list of tax defaulters on its website.[4] In 2006, the legislation was amended to include tax debtors in the publication scheme. In particular, the Tax Authority was required to publish a list of 'major tax debtors', which included the personal data of those whose tax debts exceeded 10 million Hungarian forints for over 180 days.[5] The expansion of the publication scheme was considered necessary to whiten the economy[6] and the broadening of the categories of taxpayers whose data was subject to publication was justified on the basis that unpaid taxes were not just a matter of arrears but could also be a result of conduct in breach of payment obligations.

Following a tax inspection in 2013, the Hungarian Tax Authority found that the applicant had tax arrears of approximately €625,000. In 2014, his personal data was published on a list of tax defaulters on the Tax Authority's website and in January 2016, he appeared on the list of 'major tax debtors'. The information published included his name, home address, tax identification number and the amount of unpaid tax which he owed. Shortly after, an online media outlet published an interactive map called 'the national map of tax debtors', depicting

[3]O.M. Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance', 15(1) *International Journal of Constitutional Law* (2017) p. 9.

[4]*L.B.* v *Hungary* (GC), *supra* n. 1, paras. 10-13.

[5]Ibid., para. 14.

[6]Ibid., para. 15.

the home addresses of those listed on the Tax Authority's website (including that of the applicant). The applicant's data was removed from the list of 'major tax debtors' when his tax arrears became time-barred in 2019.[7]

The applicant alleged that the publication of his name and personal data for his failure to comply with his tax obligation violated Article 8 ECHR. He argued that the purpose of the Hungarian legislative policy of making this type of data available had been to shame him and had, thus, amounted to an attack on his reputation. The scope of the case is limited to the publication of his data on the Tax Authority's website – the issue of the interactive map is excluded from consideration.

Chamber judgment

Accepting that Article 8 was applicable, the Chamber majority found that the publication of the applicant's data had been in accordance with the law and in pursuit of a legitimate aim, namely the improvement of tax payment discipline in the interest of the economic well-being of the country. It also aimed to secure the rights and freedoms of others by providing them with information about tax debtors.[8]

The Chamber found that the disclosure of the applicant's private data had not placed a substantially greater burden on the applicant than was necessary in light of the legitimate aim pursued. The Chamber found it relevant that the impugned measure was implemented as part of the state's general tax policy, that the publication was limited to the taxpayers whose conduct was most detrimental to revenue, that it was restricted in time and that the dissemination of the name and home address of the taxpayers ensured they could be accurately identified. Furthermore, the publication of the data on a website dedicated to tax matters ensured that such information was distributed in a manner calculated to reach those with a particular interest in it. Furthermore, the applicant had not indicated that the publication had any concrete repercussions on his private life.[9]

In a dissenting opinion, Judges Ravarani and Schukking argued that Article 8 had been violated due to the scope of the personal data published and the manner of its publication. They first stated that they 'have serious reservations as to the legitimacy of one of the aims of the publication, namely . . . to deter people from defaulting on their tax obligations by means of public scrutiny,' something which they considered to be 'a kind of modern pillory'.[10] The dissenters disagreed that the publication of the applicant's home address was necessary to identify him and

[7]Ibid., paras. 25-27.
[8]ECtHR 12 January 2021, No. 36345/16, *L.B.* v *Hungary*, paras. 42-26.
[9]Ibid., paras. 51-72.
[10]*L.B.* v *Hungary*, *supra* n. 8, dissenting opinion of Judges Ravarani and Schukking, para. 2.

achieve the objective of the law. What ultimately triggered their dissent however, was the fact that this information had been published on the internet, something which could carry serious consequences: 'if the home addresses of tax defaulters are made public ... one does not need an overactive imagination to suppose that those who appear on this list will be considered wealthy and will run an increased risk of being the victims of burglary'.[11]

The dissenters further noted that it was 'sanctimonious' to state that the applicant had not demonstrated 'concrete repercussions on his private life'.[12] It would be very difficult to provide evidence proving this as it usually remains in the moral sphere. The impossibility of showing the concrete measure of the impact could have been dealt with via the amount of compensation awarded.[13]

Grand Chamber judgment

The Grand Chamber judgment also focused on the proportionality of the measure and whether a correct balance had been struck between public and private interests. The Grand Chamber majority approached the question from a different angle and reached a different conclusion than the Chamber majority – namely, that a violation of Article 8 had occurred on account of inadequacies in the domestic parliamentary review of the measure.[14] Given that the disputed publication was not a matter of an individual decision by the Tax Authority, but part of a legislative scheme providing for the indiscriminate and systematic publication of tax debtors' data, the Grand Chamber examined the measure *in abstracto* and assessed whether the scheme as a whole remained within the state's margin of appreciation in light of the competing interests at stake.

The Grand Chamber first assessed the scope and operation of the margin of appreciation available to Hungary. It highlighted the importance of the protection of personal data, the need for appropriate safeguards in domestic law[15] and the presence/absence of consensus at national and European levels.[16] In line with the principle of subsidiarity '[t]hrough their democratic legitimation, the national authorities are ... in principle better placed than an international court to evaluate local needs and conditions'.[17] When the state opts for a general measure, it falls to the Court to 'examine carefully the arguments taken into consideration

[11]Ibid., para. 15.
[12]Ibid., para. 13.
[13]Ibid., para. 13.
[14]*L.B.* v *Hungary* (GC), *supra* n. 1, paras. 139-140.
[15]Ibid., para. 122.
[16]Ibid., para. 127.
[17]Ibid., para. 124.

during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the state or the public generally and those directly affected by the legislative choices'.[18] The Grand Chamber concluded that the state enjoyed a wide margin of appreciation when assessing the need to establish a publication scheme such as the one in question. However, to remain within this margin, the competent domestic authorities must have conducted a proper balancing exercise between the competing interests, having regard to:

(1) the public interest in the dissemination of the information in question;
(2) the nature of the disclosed information;
(3) the repercussions on and risk of harm to the enjoyment of the private life of the persons concerned;
(4) the potential reach of the medium used for the dissemination of the information;
(5) basic data protection principles.

The existence of procedural safeguards is also relevant in the balance.[19]

Applying these principles to the particular circumstances of the present case, the Grand Chamber first noted that the choice of a mandatory publication scheme that required neither a weighing up of competing public and private interests nor an individualised proportionality assessment was not problematic in itself. Neither was the publication of taxpayer data as such. However, the Court needed to assess the legislative choices lying behind the impugned interference and whether the legislature had weighed up the competing interests at stake.[20] As previously held in *Animal Defenders* v *the United Kingdom*, when it comes to general measures, 'the quality of the parliamentary review of the necessity of the interference is of central importance in assessing the proportionality of a general measure'.[21] The central question 'is not whether less restrictive rules should have been adopted, but whether the legislature acted within the margin of appreciation afforded to it in adopting the general measure and striking the balance it did'.[22]

The Grand Chamber considered the relevant factors to assess whether the state had remained within its margin of appreciation. In relation to the public interest in the dissemination of the data, it found that the preparatory works to the 2006 amendment (requiring the publication of a list of major tax debtors) did not assess the previous schemes and their likely effects on taxpayer behaviour or examine the

[18]Ibid., para. 125.
[19]Ibid., para. 128.
[20]Ibid., para. 129.
[21]Ibid., para. 130.
[22]Ibid., para. 126.

added value of the amendment and why the previous measures had been insufficient.[23] Furthermore, there was no evidence that Parliament considered the impact of the amendment on the taxpayer's right to privacy or the potential risk of misuse of the tax debtor's home address by other members of the public.[24] They seemed to disregard the potential reach of the medium used for the dissemination of the information[25] and, despite the sensitive nature of the information, data protection considerations seemed to have featured very little (if at all) in the preparation of the amendment.[26] Thus, while the Grand Chamber accepted that the legislature's intention was to enhance tax compliance and that adding the taxpayer's home address ensured the accuracy of the information being published, from its examination of the legislative history of the original 2003 Tax Administration Act and the 2006 amendment, it was not convinced that the legislature 'contemplated taking measures to devise appropriately tailored responses in light of the principles of data minimisation'.[27] Thus, the majority found a violation of Article 8 (just satisfaction) based on its negative assessment of the quality of parliamentary review conducted.

Separate opinions

In his concurring opinion, Judge Kūris fully agreed that a violation had occurred but was highly critical of the approach taken by the Grand Chamber, deeming their reasoning 'methodologically unsustainable'.[28] He criticised the majority for not invalidating the general measure based not on an analysis of its merits (which were faulty in themselves) but due to the domestic review thereof. Judge Kūris referred to the Court's previous ruling in *Animal Defenders* v *the United Kingdom*, where it found in favour of the respondent state largely due to the 'exacting and pertinent reviews, by both parliamentary and judicial bodies' of the regime in place and their belief that a general measure was necessary in light of the aim pursued.[29] He argued that, in dispensing with the review of the substantive proportionality of the measure and its impact on the individual applicant, the Grand Chamber had invoked and applied *Animal Defenders* in reverse, with potential adverse consequences.[30]

[23]Ibid., para. 132.
[24]Ibid., para. 134.
[25]Ibid., para. 135.
[26]Ibid., para. 136.
[27]Ibid., para. 137.
[28]*L.B.* v *Hungary* (GC), *supra* n. 1, concurring opinion of Judge Kūris paras. 1, 8, and 12.
[29]*Animal Defenders International* v *the United Kingdom* (*GC*), *supra* n. 2, para. 116.
[30]*L.B.* v *Hungary* (GC), *supra* n. 1, concurring opinion of Judge Kūris, para. 16.

In his partly concurring and partly dissenting opinion, Judge Serghides agreed that a violation had taken place due to the absolute lack of proportionality test *stricto sensu* at the domestic level. However, he disagreed that the finding of a violation could in itself constitute just satisfaction.[31]

Meanwhile, Judges Wojtyczek and Paczolay disagreed with both the approach adopted and the outcome of the case.[32] They found 'serious procedural problems' with the fact that the Grand Chamber focused on the general measure and the quality of the parliamentary review.[33] First, this was not what had been requested by the applicant; and second, it had not been communicated to the parties, who thus had no chance to properly formulate a response to it. They described the ruling as a 'surprise judgment' which violated the requirements of a fair trial.[34] The dissenters echoed the Chamber majority in finding that the disclosure of the applicant's personal data did not place a disproportionate burden on him. In support of this, they highlighted the suitability of a general measure to pursue the legitimate aim in question, the fact that the disclosure of tax information was structured as an exception to the general rule of tax confidentiality, the safeguards put in place by Parliament to restrict disclosure,[35] and the fact that the taxpayer's personal data would be removed once they had paid their tax or the limitation period had expired. Finally, they argued that there is a public aspect to tax collection and that a taxpayer cannot reasonably expect that their non-payment would remain a purely private matter – in particular, in a field so much in the public eye as tax evasion.[36]

[31]Ibid., partly concurring and partly dissenting opinion of Judge Serghides, paras. 1-3.

[32]*L.B.* v *Hungary* (GC), *supra* n. 1, dissenting opinion of Judges Wojtyczek and Paczolay, para. 1.

[33]Ibid., dissenting opinion of Judges Wojtyczek and Paczolay, para. 6.

[34]Ibid.

[35]Ibid., dissenting opinion of Judges Wojtyczek and Paczolay, para. 28: 'Furthermore, Parliament itself put in place safeguards to tightly restrict disclosure, tailoring the provisions of the 2003 Tax Administration Act to the risk posed by the tax debtor to public revenue and to potential business partners. Firstly, only those individual tax debtors whose tax debts exceeded HUF 10 million (€28,000) came within the sweep of the publication requirement. Secondly, an additional precondition for publication on the list of major tax debtors was that the taxpayer had failed to fulfil his or her payment obligations for 180 days. We find these thresholds material to the assessment of the proportionality of the measure here in issue. We thus consider that the legislature made the necessary distinction between different types of taxpayers subject to disclosure, limiting the interference with private life to those whose conduct presented a considerable risk to public revenue or to potential business interests.'

[36]Ibid., dissenting opinion of Judges Wojtyczek and Paczolay, para. 31.

Commentary

In line with the Court's previous finding that Article 8 encompasses 'the right to live privately away from unwanted attention'[37] and provides protection against the publication of personal data, including one's home address,[38] on first sight, we may instinctively be relieved to see the Chamber finding of no violation being reversed. In addition to the risk that the publication of the home addresses of 'wealthy' tax defaulters will leave them vulnerable to burglary,[39] as noted by Xavier Tracol, the publication of the relevant personal data more generally carries potentially serious implications for data subjects, becoming available to all for inclusion in sets of big data[40] which may then be used be used for algorithmic decision-making by for insurance companies and banks.[41] However, even if the outcome of the case is to be welcomed, the Grand Chamber's approach raises certain questions. In the discussion below, I will first contextualise this judgment within the broader case law of the Court. In doing so I will reflect on the subsidiary role of the European Court of Human Rights within the Convention system, the 'procedural turn'[42] identified in its jurisprudence and its prior ruling in *Animal Defenders International v the United Kingdom.* The focus of the discussion will then turn back to the case at hand.

The procedural turn at the European Court of Human Rights

Dubbed the 'crown jewel of one of the world's most advanced systems for the protection of civil and political liberties'[43] and heralded by its former President, Luzius Wildhaber, as 'the ultimate expression of the capacity ... for democracy and the rule of law to transcend frontiers',[44] the role of the European Court of Human Rights in the protection and promotion of human rights in Europe should not be underestimated. In recent decades, however, the Court has faced

[37]ECtHR, 24 July 2003, No. 46133/99, *Smirnova* v *Russia*, para. 95.

[38]ECtHR, 9 October 2012, No. 42811/06, *Alkaya* v *Turkey*, para. 30.

[39]*L.B.* v *Hungary*, *supra* n. 8, dissenting opinion of Judges Ravarani and Schukking, para. 15.

[40]X. Rudd, 'Public Disclosure of Personal Data before the European Court of Human Rights and the General Court of the European Union', *ERA Forum* (3 July 2023) https://doi.org/10.1007/s12027-023-00755-8, visited 5 February 2024.

[41]Ibid., para. 2.5.3.

[42]Arnardóttir, *supra* n. 3.

[43]L.R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *European Journal of International Law* (2008) p. 159.

[44]ECtHR, 'Dialogue between Judges', European Court of Human Rights, Council of Europe (2006) p. 35 https://www.echr.coe.int/documents/d/echr/Dialogue_2006_ENG, visited 5 February 2024.

new and unprecedented challenges. Following its geographic and judicial expansion during the 1990s, the Court's caseload expanded exponentially[45] and it became something of a 'victim of its own success'.[46] Furthermore, as its jurisprudence extended into new areas in line with the living instrument doctrine, the Court began to face a pushback from traditionally 'good-faith' contracting states with well-established democracies and human rights traditions. These states complained that it had overstepped its subsidiary role within the Convention system through its efforts to micromanage domestic courts in their adjudication of human rights cases.[47]

Within this context, scholars have detected an increase in the use of procedural review in the Court's jurisprudence. This 'procedural turn' can be linked to several aspects of the Court's review but can generally be understood to refer to its shifting focus from the substantive to the procedural elements of rights protection in its rulings.[48] This shift in focus can take different forms: on the one hand, the Court can read additional self-standing procedural obligations into the scope of substantive Convention rights; on the other, it can have regard for procedural elements in its assessment of the proportionality of an interference.[49] One particularly novel facet of the procedural turn is the 'general measures doctrine', whereby the Court focuses on the procedural factors surrounding the adoption of a measure by a parliament rather than its substantive impact on the individual when assessing its proportionality.[50] When the state can demonstrate that the measure in question was adopted following a proper debate and a review of its proportionality by the legislature, the Court will grant significant deference to the state in assessing the measure's compliance with the Convention.

[45]S. Greer and L. Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights', 12 *Human Rights Law Review* (2013) p. 656.

[46]Helfer, *supra* n. 43.

[47]O. Stiansen and E. Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights', 64 *International Studies Quarterly* (2020) p. 770 at p. 771. Note that other less traditionally Convention-compliant states were also involved in the push for greater subsidiarity, but in general when we speak about the procedural turn, the focus is on traditionally Convention-compliant states who argued for greater subsidiarity on the basis that the Convention values had been substantially embedded into their domestic systems.

[48]J. Gerards, 'Procedural Review by the ECtHR – A Typology', in J. Gerards and E. Brems (eds.), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) p. 127.

[49]Ibid.

[50]P. Popelier, 'Procedural Rationality Review after *Animal Defenders International*: A Constructively Critical Approach', 15 *EuConst* (2019) p. 272.

Animal Defenders International and the general measures doctrine

This approach was first seen in *Animal Defenders*, where the Court held that in order to assess the proportionality of a general measure it:

> must primarily assess the legislative choices underlying it . . . The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation . . . It follows that the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case.[51]

The adoption of this approach led the Court to find that the state's refusal to grant permission to a non-governmental organisation to place a television advert due to a statutory provision on political advertising did not violate the right to freedom of expression under Article 10 ECHR. In reaching this conclusion, the Court attached 'considerable weight to the exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom' and their view as to the necessity of the measure.[52] Nonetheless, in *Animal Defenders*, having determined the adequacy of the domestic procedures, the Court still considered the impact of the measure on the applicant, ultimately finding that it did not outweigh the justifications for the ban advanced by the state.[53]

The Court's ruling in *Animal Defenders* was very controversial. The bench was divided, with eight out of seventeen judges voting against the majority. With respect to the 'general measures' doctrine, the opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano is particularly interesting.[54] These judges expressed concern about the Court's approach and the application of the proportionality principle. They argued that nothing in the case justified a departure from the well-established methodology of proportionality which begins with an analysis of the nature of the right. To them, an assumption of the public interest underlying the measure does not necessarily mean that a pressing social need justifying the restriction of freedom of expression has been established.[55] The (repeated) debate of a measure by the legislature does not *necessarily* mean that the conclusion reached will be Convention compliant, nor alter the margin of appreciation available to the state. Thorough parliamentary debate might help the Court to understand the pressing social need for

[51] *Animal Defenders International v the United Kingdom* (GC), *supra* n. 2, paras. 108-109.
[52] Ibid., para. 116.
[53] Ibid., para. 124.
[54] Ibid., dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano.
[55] Ibid., dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para. 3.

the interference, however. While the dissenters acknowledged that, in the spirit of subsidiarity, such an explanation is a matter for honest consideration, they felt that excessive importance was given to it by the majority.[56] This led to the overruling – at least in substance – of *Verein gegen Tierfabriken Schweiz (VgT)* v *Switzerland*,[57] a judgment which had inspired a number of member states to repeal similar bans to the one at issue in *Animal Defenders.*[58]

The dissenters cautioned that the adoption of an approach focusing on the process by which a measure was adopted rather than its impact could lead to an unacceptable double standard of human rights protection based on the origin of the interference.[59] They warned that, if taken to an extreme, this approach could undermine the protection provided by the ECHR, 're-asserting the absolute sovereignty of Parliament'.[60]

The general measures doctrine in L.B. v Hungary

It is possible to understand the general measures doctrine as applied in *Animal Defenders* as a two-stage test. First, the Court assesses the general measure in the abstract, focusing on the general justifications for its adoption and the parliamentary review thereof. If its conclusion is favourable, it will grant significant deference to the domestic authorities in the second stage of its analysis, where it examines the substantive proportionality of the measure and its impact on the individual. If domestic review is deemed inadequate at the first stage of analysis, the Court's substantive review at the second stage will be stricter. However, in *L.B.* v *Hungary,* we can see the Grand Chamber deviating from this approach somewhat. Having reviewed the measure *in abstracto* and finding that it had not been properly debated by the legislator, rather than conducting a strict review of its substantive proportionality, the Grand Chamber immediately found a violation and dispensed with the second stage of its assessment entirely. In the discussion that follows I will reflect on the implications of this altered approach.

In principle, this Grand Chamber approach implies that it would be completely acceptable for Hungary to reintroduce the impugned general measure – provided it was accompanied by 'better' legislative debate. As explained by Judge Kūris, the Grand Chamber's finding that a violation had occurred due to the state's failure to demonstrate that the legislature had sought to strike a fair balance between competing

[56]Ibid., dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para. 9.

[57]ECtHR 20 September 2011, No. 48703/08, *Verein gegen Tierfabriken Schweiz (VgT)* v *Switzerland.*

[58]*Animal Defenders International* v *the United Kingdom* (GC), *supra* n. 2, dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para. 9.

[59]Ibid., dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para. 10.

[60]Ibid.

interests at stake could mean one of two things: either that the legislature had really made no effort to do so, or that the government's representatives had simply failed to convince the Court that it had. Neither of these explanations puts the blame on the impugned publication scheme itself. By framing its decision in this way, the Court avoids making any determination as to the substantive compatibility of the measure with Article 8. Arguably, by sidestepping any assessment of the impact of the measure on the individual, the Court did the applicant a disservice. A finding that a measure is not 'in itself problematic'[61] cannot be equated to a finding that it is not problematic when applied to the specific circumstances of the case at hand. This ruling suggests that the systematic publication of taxpayer's personal data is in principle permitted under the Convention, provided that the necessity and the proportionality of the scheme is properly debated by the legislature and the competing interests weighed up. By framing its judgment in this way, the Court gives the impression that the 'discussion of the decision matters more than the decision itself'.[62] Based on this ruling, although a violation was found, to render the publication scheme in its entirely completely Convention compliant, it would simply need to be re-enacted pursuant to a more thorough parliamentary debate. Its impact on the individual appears to be irrelevant and is not assessed. This 'sidestepping' is somewhat difficult to reconcile with the role of the Court as the ultimate authority for interpreting and applying the Convention and the final recourse for individuals whose rights have (allegedly) been denied.

Was this the message the Court wished to send? If so, it is to be acknowledged that it has sent a very strong signal to domestic authorities as to the importance of a proper parliamentary review process. Independent of any subsidiarity-based arguments in favour of procedural review, there are other additional reasons why the Court may take an interest in the quality of the domestic process.[63] From a human rights perspective, key amongst these is the concept of process-efficacy – the idea that good processes render good results. A 'good result' at the level of the European Court of Human Rights is one which ensures the protection of human rights – this result can also be achieved when rights are properly safeguarded at the domestic level. According to Eva Brems, when the Court surveys the quality of a parliamentary process, 'there can be little doubt that the process efficacy rationale applies' as 'the concept of parliamentary democracy relies on certain premises of process efficacy, i.e. the idea that certain procedural features such as broad representation and checks and balances improve the quality of outcomes'.[64]

[61] *L.B.* v *Hungary* (GC), *supra* n. 1, para. 130.

[62] Ibid., concurring opinion of Judge Kūris, para. 5.

[63] *See* E. Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights', in Gerards and Brems, *supra* n. 48, p. 17.

[64] Ibid., p. 20.

However, with this approach, the Court is also entering into difficult territory – as highlighted by the dissenting opinion of Judges Wojtyczek and Paczolay. In their dissent, these judges express their scepticism about the possibility of an objective assessment of the quality of parliamentary work, as:

> [p]aradoxially, the more controversial the issue, the more debates and expert documents there are, suggesting prima facie a higher quality of review, while the greater the agreement among parliamentarians about the necessity of an interference, the fewer debates and expert documents there are, suggesting prima facie a lower quality of review.[65]

Indeed, it is notable that Judges Wojtyczek (the national judge) and Paczolay disagree with the majority's assessment of the facts – among other things, they argue that 'measures to devise appropriately tailored responses in the light of the principle of data minimisation' were indeed contemplated in the various organs of the respondent state, but much earlier when the 'general scheme' was first considered and introduced in the 1990s.[66] Does the possibility not just to justify but to invalidate a measure based on the quality of the parliamentary review to which it was subject, intimate a requirement that all proposed legislative measures must be subject to extensive debate – even if such debate is artificial or contrived just to fulfil the Court's requirements? If so, parliamentary majorities may be incited to expend valuable resources commissioning accommodating expert opinions to justify uncontroversial interferences. Furthermore, through such debate disproportionate attention and import may be attached to fringe perspectives which lack any real support.

Even disregarding the concerns expressed by Judges Wojtyczek and Paczolay, the granting of decisive weight to the quality of parliamentary review, however effectively this is assessed, merits caution. Judge Kūris suggests that the 'general measures' doctrine has its limits. Caution should be exercised in its application to ensure these are not transgressed. An examination of the general measure in the abstract, based on the quality of the parliamentary review, should not become a substitute for an examination of the issue raised by the applicant.[67] The 'fine line' between these two approaches is not overstepped when the 'quality of review' criterion is invoked alongside other criteria to help determine 'the Convention compliance of the application of a contested measure'.[68] An unacceptable substitution occurs, however, when it becomes the sole criterion upon which the Court's assessment is based, as sight is lost of how it might affect the individual

[65] *L.B.* v *Hungary* (GC), *supra* n. 1, dissenting opinion of Judges Wojtyczek and Paczolay, para. 19.
[66] Ibid., dissenting opinion of Judges Wojtyczek and Paczolay, paras. 7-13.
[67] Ibid., concurring opinion of Judge Kūris, para. 7.
[68] Ibid.

applicant's concrete situation.[69] Thus, while Judge Kūris does not object to an abstract assessment of the general measure *per se*, he takes issue with the approach as applied in *L.B.* v *Hungary*, where the Court, 'having assessed the procedure leading to the adoption of the impugned measure, halts and undertakes no individual assessment of the particular applicant's situation'.[70] As explained previously, the Court's exclusive reliance on a review of the legislative process to find a violation in this case means that the scheme was never invalidated in substance. While the Grand Chamber's dispensation of any substantive proportionality assessment is already suspect when negative inferences are drawn from a review of the legislative process, it is categorically unacceptable when it comes to positive inferences. Such an approach could lead to the acceptance of an otherwise unjustifiable general measure in a future case. Although this is not what happened here, the expansion of the general measures doctrine in this direction is concerning.

As a final comment, given the rationale behind the 'procedural turn,' it is notable that the review of the quality of domestic processes served to invalidate rather than justify the publication scheme in this case. From a pragmatic perspective, in light of the push for greater subsidiarity and the criticism levelled at the 'interventionist' Court in recent years, the temptation to grant greater deference to parliaments who can demonstrate their compliance with procedural standards before their adoption of a measure is understandable – especially in light of the particular role of parliament within the democratic system. However, is it any less interventionist or prescriptive to review and assess the parliamentary review process than its outcome? According to former European Court of Human Rights judge, Angelika Nussberger,[71] the Court's explicit critique of the lack of a 'substantive debate' by the members of the legislature on the continued justification of the general restriction of prisoners' voting rights in light of modern-day penal policy and current human rights standards, was central to the backlash against *Hirst* v *the United Kingdom (No. 2)*[72] in the UK – something which played a key role in effectuating the procedural turn.[73] Arguably, when the Court reviews the decision-making process of domestic parliaments, as it did in *L.B.* v *Hungary*, it runs a risk of assuming a 'primary rather than a secondary role in the determination of what parliamentary processes should look like'.[74] Whether this is something the Court should avoid depends on one's conception of its proper role – but if the aim is greater subsidiarity, it is perhaps something to keep in mind.

[69]Ibid.

[70]Ibid., concurring opinion of Judge Kūris, para. 8.

[71]A. Nussberger, 'Procedural Review by the European Court of Human Rights – View from the Court', in Gerards and Brems, *supra* n. 48, p. 161.

[72]ECtHR 6 October 2005, *Hirst* v *the United Kingdom (No. 2)*.

[73]*See* B. Çali, 'Coping with Crisis: Whither the Variable Geometry in the European Court of Human Rights', 35(2) *Wisconsin International Law Journal* (2018) p. 237.

[74]Nussberger, *supra* n. 71, p. 163.

Alternate avenues towards a violation

In his concurring opinion, Judge Kūris suggests that the *Animal Defenders*' line of reasoning has become a 'lifebelt' for the Court in some cases where it feels that the application of the general measure has gone beyond what is permitted by the Convention – but where it is not ready to harshly criticise the measure itself or where it believes that the applicant may have deserved some negative treatment because of their non-law-abiding conduct.[75] Given that both of these conditions were met in this case, perhaps we should not be surprised that this approach was adopted. Judge Kūris notes that, even while relying on domestic procedural inadequacies to invalidate the measure, it was 'all too visible' that the majority were somewhat uncomfortable with the scope of the personal data which was published – in particular the home addresses of the tax defaulters.[76] In light of this, it is peculiar that their final ruling suggests that the measure in question would be completely acceptable provided procedural requirements were met. Had the majority engaged with the substantive issues more effectively, there are two clear avenues by which a violation could (and arguably should) have been found. First, the Grand Chamber could have endorsed and adopted the approach taken by the dissenting Chamber judges. Even in the absence of evidence as to the concrete impact of the publication of the scheme on the individual, these judges felt that the scope of the personal data published – and the fact that it was published on the internet – amounted to a violation of Article 8.[77] In this, Judge Kūris was in agreement: the publication of a tax debtor's home address affects not just his reputation but also his and his family's security, thus the choice of such a general scheme is in itself problematic, 'that alone should have sufficed for a finding of a violation of Article 8'.[78]

Alternatively, if the Grand Chamber was truly convinced that the scope and manner of the data published fell within the margin of appreciation of the respondent state and wanted to focus its review on procedural elements, it could have done so without granting such decisive weight to the quality of parliamentary debate. Rather, in its analysis the Grand Chamber could have highlighted the absence of procedural safeguards built into the measure itself and found that the measure was disproportionate and that a violation had occurred based on their absence – as argued by the applicant himself.[79] This is something which it has done in other cases, such as *Big Brother Watch and Others* v *the United Kingdom*,[80] a case

[75] *L.B.* v *Hungary* (GC), *supra* n. 1, concurring opinion of Judge Kūris, para. 17.
[76] Ibid., concurring opinion of Judge Kūris, para. 11.
[77] *L.B.* v *Hungary*, *supra* n. 8, dissenting opinion of Judges Ravarani and Schukking.
[78] *L.B.* v *Hungary* (GC), *supra* n. 1, concurring opinion of Judge Kūris, para. 27.
[79] Ibid., para. 89.
[80] ECtHR 25 May 2021, Nos. 58170/13, 62322/14, 24960/15, *Big Brother Watch and others* v *the United Kingdom*.

relating to the compatibility of the regime governing the receipt of intercept material from foreign intelligence serves in the UK with Article 10 of the ECHR, where the Court held that 'any interference with the right to protection of journalistic sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake'.[81] Indeed, in the context of Article 8 more specifically, it has become well-established in the Court's case law that 'whilst Article 8 contains no explicit procedural requirements, the decision-making process involving measures of interference must be fair and ensure due respect for the interests safeguarded' by the provision.[82] The impugned publication scheme in *L.B.* v *Hungary* allowed for no individual assessment of the tax defaulter's situation but provided for the automatic publication of their personal data on the tax authority's website. Rather than examining the discussions surrounding its adoption, the Court could have highlighted its indiscriminate nature, recognising that not all tax defaulters are malevolent tax evaders and that the publication of their personal data may not always be strictly necessary. Such an approach would have allowed the Court to invalidate the approach on the basis of procedural factors without explicitly ruling out the introduction of any type of publication scheme or suggesting that the self-same one could be introduced provided it was preceded by 'proper' parliamentary debate.

Conclusion

In *L.B.* v *Hungary*, the Grand Chamber deviated from the Chamber majority in both the approach it took to, and the conclusion it reached regarding, the compatibility of the impugned publication scheme with the ECHR. The judgment raises important questions about the future application of the general measures doctrine and procedural review of parliamentary decisions. The Grand Chamber's decision suggests that the systematic publication of the taxpayer's personal data under the Hungarian legislative scheme is, in principle, permissible under the Convention provided it is accompanied by a thorough parliamentary debate as to the necessity and proportionality. By focusing entirely on procedural elements, the Grand Chamber avoids making a determination as to the substantive compatibility of the publication scheme with Article 8 of the Convention. We are left with the impression that the discussion of the decision matters more than the decision itself.

The 'general measures' doctrine and the type of procedural proportionality review of parliamentary decisions which it calls for form part of a broader procedural turn in the Court's jurisprudence in recent decades. A key factor in the

[81]Ibid., para. 444.
[82]ECtHR 12 June 2014, No. 56030/07, *Fernandez Martinez* v *Spain*, para 147.

emergence of this development was the push for greater subsidiarity from traditionally Convention-compliant member states, who felt that the Court was overstepping its mandate. Previously, the application of the 'general measures' doctrine was associated with the extension of a more deferential style of review to states, based on a favourable review of the parliamentary process. Here, however, the opposite occurred. A question can be asked about whether the Grand Chamber's finding of a violation through an exacting review of the quality of domestic process was any less interventionist than it would have been had a traditional proportionality-based assessment been conducted.

Arguably, assessing the quality of parliamentary process poses challenges for the Court. The level of debate and the number of expert documents commissioned may not always reflect the true quality of the review. Moreover, granting decisive weight to parliamentary review may create an implicit requirement that every measure be subject to the same intensity of debate – regardless of how widely accepted it is. The Court should be careful that the quality of parliamentary review does not become the sole criterion for assessing the compatibility of a general measure with the ECHR, neglecting to examine its impact on the individual applicant. The general measures doctrine should not substitute for an examination of the specific circumstances of each case. It is unacceptable for decisive positive inferences to be drawn solely from a favourable review of the legislative process. The approach taken by the Grand Chamber raises some concerns about the potential acceptance of otherwise unjustifiable general measures in the future. Caution is necessary to ensure that this does not occur in the future.

In any event, a review of the parliamentary process is not the only approach which would have led to the finding of a violation in this case. The Grand Chamber could also have endorsed and adopted the approach of the Chamber minority and found a violation due to the scope and manner of the publication. Alternatively, in reviewing the 'general measure' it could have zoned in on the absence of built-in procedural safeguards and found a violation on this basis. Both of these approaches would have avoided a situation where a ruling was produced that sidesteps entirely the question of the substantive compatibility of the scheme with Article 8 and theoretically allows for its re-application pursuant to a more robust legislative debate.

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