# 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

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*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 the 9th of March 2023, the Grand Chamber of the European Court of Human Rights (the Court; the ECtHR) delivered its judgment in *L.B. v Hungary.*[2] The case concerned the Hungarian legislative policy of publishing the personal data of taxpayers who were in debt on the tax authority's website. The applicant claimed that the publication of his name and home address on a list of 'major tax debtors' violated his right to private life under Article 8 of the European Convention of 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 'general measures' doctrine developed in *Animal Defenders International v the United Kingdom.*[3] Previously, in *Animal Defenders,* the quality of parliamentary review had been judged favourably, prompting the Court to extend significant deference to the 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, the factual background of the case is set out and the Chamber and Grand Chamber judgments are briefly explained. The Grand Chamber ruling is then contextualised within the broader context of the 'procedural turn'[4] detected in the Court's jurisprudence in recent years and the approach applied in *L.B. v Hungary* is compared to that seen in *Animal Defenders.* Some potential implications of the decision are considered and it is argued that while a violation should have been found, there were alternative avenues by which this could have been achieved.

## Factual Background

Since 1996, the Hungarian tax administration system has allowed limits to be placed on taxpayer confidentiality in the public interest, requiring the Tax Authority to publish data which would otherwise be subject to taxpayer confidentiality. Pursuant to legislation passed in 2003, the Tax Authority was obliged to publish the personal data of individuals whose tax arrears exceeded 10 million Hungarian forints (HUF), approximately €28,000, on a list of tax defaulters on its website.[5] 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 HUF for over 180 days.[6] The expansion of the



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[2] ECtHR 9 March 2023, No. 36345/14, *L.B. v Hungary [GC].*

[3] ECtHR 22 April 2013, No. 48876/08, *Animal Defenders International v. the United Kingdom [GC].*

[4] 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.

[5] *L.B. v Hungary [GC], supra* n. 2, paras 10-13.

[6] Ibid, para 14.

publication scheme was considered necessary to whiten the economy[7] 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 result from conduct in breach of payment obligations.[8]

In 2013, the Tax Authority carried out a tax inspection in respect of the applicant. In July 2013, it found that he had a tax deficit of €800,000 which was classified as tax arrears. The Tax Authority fined him €603,000 and ordered him to pay €185,000 in interest. On appeal, the second-instance Tax Authority found that his arrears amounted to €625,000 and reduced the fine to €490,000 and the interest payable to €145,000.[9] The applicant sought judicial review of the second-instance decision. In October 2014, the Budapest Surroundings Administrative and Labour Court dismissed his action and found that the evidence he had submitted was fabricated. The applicant appealed to the *Kúria,* which endorsed the reasoning of the administrative authorities and the first instance court. He then submitted a constitutional complaint alleging a violation of the right to fair trial, the right to equal treatment and the principle of rule of law. This was deemed inadmissible.[10]

In 2014, the applicant's personal data was published on the 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 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.[11]

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

## Chamber Judgment

Accepting that Article 8 was applicable, the Chamber majority (five votes to two) found that the publication of the applicant's data had been in accordance with the law and in pursuit of a legitimate aim: 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.[12]

The Chamber held that the disclosure of the applicant's private data had not placed a substantially greater burden on him 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 taxpayers' names and home addresses

[7] Ibid*,* para 15.

[8] Ibid, para 14.

[9] Note that the figures referred to here are approximate, they have been converted to euros from HUF.

[10] *L.B. v Hungary [GC], supra* n. 2, paras 20-24.

[11] Ibid, paras 25-27.

[12] ECtHR 12 January 2021, No. 36345/16, *L.B. v Hungary*, paras 42-26.

ensured that they could be accurately identified. 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 and the applicant had not indicated that the publication had any concrete repercussions on his private life.[13]

In a joint 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 'a kind of modern pillory.'[14] The dissenters disagreed with the argument that the publication of the applicant's home address was necessary to identify him and 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.'[15]

The dissenters further noted that it was 'sanctimonious' to state that the applicant had not demonstrated that the publication scheme had 'concrete repercussions on his private life.'[16] They argued that it was impossible to measure such repercussions objectively and that evidence thereof is extremely difficult to adduce.[17] This should not have precluded the finding of a violation, however, and could have been dealt with via the amount of compensation awarded.[18]

## 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 due to inadequacies in the domestic parliamentary review of the measure.[19] 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[20] and the presence or absence of consensus at the national and European levels.[21] In line with the principle of subsidiarity, the Grand Chamber recognised that '[t]hrough their democratic legitimation, the national authorities are…in principle better placed than an international court to evaluate local needs and conditions.'[22] When the State opts for a general measure, it falls to

[13] Ibid, paras 51-72.

[14] *L.B. v Hungary*, *supra n.* 12, dissenting opinion of Judges Ravarani and Schukking, para 2.

[15] Ibid, para 15

[16] Ibid, para 13.

[17] Ibid.

[18] Ibid.

[19] *L.B. v Hungary [GC], supra n.* 2, paras 139-140.

[20] Ibid, para 122.

[21] Ibid, para 127.

the Court to '*examine carefully the arguments taken into consideration 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*.'[23] 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 conduct 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.[24]

In applying these principles to the particular circumstances of the present case, the Grand Chamber noted that the choice of a mandatory publication scheme that did not require 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 in choosing to adopt such a scheme.[25] 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.'[26] 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.'[27]

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 added value of the amendment and why the previous measures had been insufficient.[28] Furthermore, there was no evidence that Parliament considered the impact of amendment would have on the taxpayer's right to privacy and the risk that the tax debtor's home address could be misused by other members of the public.[29] The legislature appeared to have disregarded the potential reach of the medium used for the dissemination of the information,[30] and despite the sensitive nature of the data published, data protection considerations seemed to have featured very little (if at all) in the preparation of the 2006 Amendment.[31]

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[22] Ibid, para 124.
[23] Ibid, para 125.
[24] Ibid, para 128.
[25] Ibid, para 129.
[26] Ibid, para 130.
[27] Ibid, para 126.
[28] Ibid, para 132.
[29] Ibid, para 134.
[30] Ibid, para 135.
[31] Ibid, para 136.

The Grand Chamber accepted that the legislature's intention had been to enhance tax compliance and that the inclusion of the taxpayer's home address ensured the accuracy of the information being published. However, based on 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.'[32] 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.'[33] He criticised the majority for basing their invalidation of the measure on the inadequacy of the domestic review thereof, rather than on an analysis of its merits – which were faulty in themselves. Judge Kūris referred to the Court's ruling in *Animal Defenders* 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 and their belief that a general measure was necessary in light of the aim pursued.[34] 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 potentially adverse consequences.[35]

In his partly concurring and partly dissenting opinion, Judge Serghides agreed that a violation had taken place due to the absolute lack of a proportionality test *stricto sensu* at the domestic level. However, he disagreed that the finding of a violation could in itself constitute just satisfaction.[36] Meanwhile, Judges Wojtyczek and Paczolay disagreed with both the approach adopted and the outcome of the case.[37] They found 'serious procedural problems' with the fact that the Grand Chamber focused on the general measure and the quality of the parliamentary review.[38] Firstly, this was not what had been requested by the applicant and secondly, 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.[39] 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,[40] and the fact that the taxpayer's personal data would be removed

[32] Ibid, para 137.

[33] *L.B. v Hungary [GC], supra* n. 2, concurring opinion of Judge Kūris paras 1, 8, and 12.

[34] *Animal Defenders International v the United Kingdom [GC], supra* n. 3, para 116.

[35] Ibid, concurring opinion of Judge Kūris, para 16.

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

[37] Ibid. dissenting opinion of Judges Wojtyczek and Paczolay, para 1.

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

[39] Ibid.

[40] 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 (EUR 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

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 such as tax evasion which is very much in the public eye.[41]

## Commentary

In line with the Court's previous finding that Article 8 encompasses 'the right to live privately away from unwanted attention'[42] and provides protection against the publication of personal data, including one's home address,[43] at first sight, we may instinctively be relieved to see the Chamber finding of no violation being reversed. However, even if the outcome of the case is to be welcomed, the Grand Chamber's approach raises certain questions. In the discussion *infra,* this judgment is contextualised within the broader caselaw of the Court. In doing so, I reflect on the subsidiary role of the ECtHR within the Convention system, the 'procedural turn'[44] identified in its jurisprudence and the development and application of the 'general measures doctrine' in *Animal Defenders.* I consider how this doctrine was applied in *L.B. v Hungary* and reflect on some alternative avenues by which a violation could have been found.

### *a) The Procedural Turn at the ECtHR*

Following the geographic and judicial expansion of the ECtHR during the 1990s, its caseload increased to such an extent that it threatened to overwhelm the Court.[45] Furthermore, as its jurisprudence extended into new areas, in line with the living instrument doctrine, the Court began to face a pushback against some of its more interventionist rulings from traditionally 'good-faith' Contracting States, with well-established democracies and human rights traditions, such as the United Kingdom.[46]

In light of the challenges facing the Court, an 'ambitious reform process' was initiated in 2010.[47] Known as the Interlaken Reform Process, it introduced numerous practical reforms to streamline Court processes and was characterised by a focus on the principle of subsidiary, culminating in the adoption of Protocol 15 in 2013.[48] This brought an explicit reference to subsidiarity and the margin of appreciation into the text of the ECHR for the first time.[49]

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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.'

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

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

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

[44] Arnardóttir, *supra n.* 4.

[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] Başak Çalı, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) 35 Wisconsin International Law Journal, pp 237-276; Başak Çalı, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights', *Shifting Centres of Gravity in Human Rights Protection* (1st edn, Routledge 2016).

[47] Mikael Rask Madsen, '"Unity in Diversity" Reloaded: The European Court of Human Rights' Turn to Subsidiarity and Its Consequences' (2021) iCourts Working Paper Series, no. 244, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3826975 (accessed 26.07.2022), p 6.

[48] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 19 January 2013, entered into force 1 August 2021) CETS 213.

[49] Note, Protocol 15 entered into force in 2021.

Against this backdrop, scholars have detected the emergence of a 'procedural turn' in the Court's jurisprudence.[50] A key feature thereof is the Court's increasing tendency towards procedural or process-based review in its adjudication of substantive rights cases.[51] Leonie Huijbers defines this type of review as 'judicial reasoning that assesses the public authorities' decision-making processes in light of procedural standards.'[52] According to a typology developed by Janneke Gerards, two types of procedural review are apparent in the Court's jurisprudence: the first, when it reads additional self-standing procedural obligations into the scope of substantive Convention rights and the second, when it relies on procedural factors in assessing the proportionality of an interference.[53] Various terms have been used to describe the type of review applied in the latter category of cases including 'procedural review *stricto sensu,'*[54] 'procedural proportionality review'[55] and 'procedural rationality review.'[56] One particularly controversial facet of the procedural turn involves the application of procedural review *stricto sensu* to decisions made by domestic parliaments under the 'general measures doctrine,'[57] developed by the Court in *Animal Defenders.*

a) *Animal Defenders International & The General Measures Doctrine*

*Animal Defenders* concerned a ban on paid political advertising. In its ruling, the Court held that 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.'[58] The adoption of this approach led the Court to find that the State's refusal to grant permission to an NGO 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.[59] 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.[60] The limited scope of the measure and the fact that a range of alternative media options were available to the applicant was key in this regard.[61]

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[50] Arnardóttir, *supra n.* 4.

[51] 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.

[52] Leonie Huijbers, *Process-Based Fundamental Rights Review: Practice, Concept, and Theory* (Intersentia, Cambridge 2021), p 100.

[53] Gerards, *supra* n. 51.

[54] Oddný Mjöll Arnardóttir, 'Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation', *European Society of International Law (ESIL) 2015 Annual Conference* (2015); Arnardóttir, *supra* n. 4.

[55] Tor-inge Harbo, 'Introducing Procedural Proportionality Review in European Law,' *Leiden Journal of International Law* 30(1) 13.12.2016, pp 25-47.

[56] Patricia Popelier, 'Procedural Rationality Review after Animal Defenders International: A Constructively Critical Approach' (2019) 15 European Constitutional Law Review, pp 127-160.

[57] Ibid.

[58] *Animal Defenders International v the United Kingdom [GC], supra* n. 3, paras 108-109.

[59] Ibid, para 116.

[60] Ibid, para 124.

[61] Ibid, para 117.

The Court's ruling in *Animal Defenders* was very controversial. According to Patricia Popelier it 'came as a surprise' in light of the Court's previous caselaw emphasising the importance of political speech[62] and within Court itself the bench was divided, with eight out of seventeen judges voting against the majority. In respect of the 'general measures' doctrine, the opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano is particularly interesting.[63] 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.[64] 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.[65] Thorough parliamentary debate might help the Court to understand the pressing social need for 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.[66] This led to the overruling – at least in substance - of *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland,*[67] a judgment which had inspired a number of member states to repeal similar bans as the one at issue in *Animal Defenders.*[68] The criticisms voiced by dissenting judges were underlined in the literature with scholars such as Tom Lewis arguing that the perspective of the rights holder, 'it is difficult to see why the quality and quantity of the debate should have a determinative impact on whether there has been a violation of [their] rights.'[69]

Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano 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.[70] 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.'[71] Since then, within the literature fears have been voiced this approach 'rather than enabling supranational oversight where wide discretion has been granted to national authorities, is used to avoid fundamental rights protection even where the margin of appreciation for the national authorities is narrow, and that the inconsistency in the use of this review leads to double standards.'[72]

b) The General Measures Doctrine in *L.B. v Hungary*

In *L.B. v Hungary* the Court's application of the 'general measures doctrine' deviated somewhat from what had been seen previously. While in *Animal Defenders,* the adoption of a procedural approach caused the starting point and focus of the Court's analysis to shift to the general justification for the

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[62] Popelier, *supra* n. 58, p

[63] *Animal Defenders International v the United Kingdom [GC], supra* n. 3, dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano.

[64] Ibid, dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para 3.

[65] Ibid.

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

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

[68] *Animal Defenders International v the United Kingdom [GC], supra n.* 3, dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para 9.

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

[71] Ibid.

[72] Lewis, supra n. 7, p. 468; T. Lewis, 'Reasserting the Primacy of Broadcast Political Speech after Animals Defenders International? – Rogaland Pensioners Party v Norway', 1 Journal of Media Law (2009) p. 48

adoption of the measure and the adequacy of the parliamentary review of, it did not lead the Court to dispense entirely with its substantive proportionality analysis. Rather, this element was relegated to a secondary role and significant deference was accorded to domestic authorities. In other words, the Court first reviewed the procedural propriety of the measure and then continued to conduct a very light-touch assessment of its impact on the applicant.[73] This was not the case in *L.B. v Hungary,* where no substantive assessment was conducted at all – having reviewed the measure *in abstracto* and finding that it had not been properly debated by the legislature, the Court held that Article 8 had been violated. The actual impact of the measure on the applicant was never addressed at all. Admittedly, there is an argument to be made that if procedural review of a general measure leads to the conclusion that the manner by which the measure was adopted amounted to a violation of the ECHR, then it is superfluous to examine whether the measure itself violated the Convention. But is this really the case?

The Grand Chamber judgment in *L.B. v Hungary* implies that, in principle, it would be acceptable for Hungary to reintroduce the impugned general measure provided it was preceded by 'better' legislative debate. As explained by Judge Kūris, the 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 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 failed to convince the Court that it had.[74] Neither of these explanations puts the blame on the 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 side-stepping 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'[75] cannot be equated to a finding that it is not problematic when applied in the specific circumstances of the case at hand.

This ruling then suggests that the systematic publication of taxpayer's personal data may be 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. 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. 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. Of course, were such a situation to arise, there would be nothing preventing a 'new case' based on the re-enacted measure from being taken to Strasbourg. However, given the backlog of cases already being dealt with by the Court, the need to first exhaust domestic remedies, the long waiting times before many rulings are delivered and the additional effort required for the submission of a new application, this hardly seems like the optimal solution from the perspective of institutional efficiency or rights protection.

The manner in which the Court framed its judgment gives the impression that the 'discussion of the decision matters more than the decision itself.'[76] Was this the message it 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

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[73] Paras (?)

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[75] *L.B. v Hungary [GC], supra* n 2, para 130.

[76] Ibid, concurring opinion Judge Kūris, para 5.

quality of the domestic process.[77] 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 ECtHR 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.'[78]

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, for '[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.'[79] 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.[80] 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 within broader society.

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.[81] 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.'[82] 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 applicant's concrete situation.[83] 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

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[77] See E. Brems, 'The 'Logics' of Procedural-Type Review by the European Court of Human Rights' in J. Gerards and E. Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017), p 17.

[78] Ibid, p 20.

[79] *L.B. v Hungary, supra* n 2, dissenting opinion Judges Wojtyczek and Paczolay, para 19.

[80] Ibid, dissenting opinion Judges Wojtyczek and Paczolay, para 7 -13.

[81] Ibid, concurring opinion of Judge Kūris, para 7.

[82] Ibid.

[83] Ibid.

leading to the adoption of the impugned measure, halts and undertakes no individual assessment of the particular applicant's situation.'[84] 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 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 the 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 ECtHR judge, Angelika Nussberger,[85] 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)*[86] in the UK – something which played a key role in effectuating the procedural turn.[87] 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.'[88] Whether this is something the Court should avoid depends on your conception of its proper role - but if the aim is greater subsidiarity, it is perhaps something to keep in mind.

## Alternative 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.[89] 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.[90] In light of this, it is peculiar that their final ruling suggests that the measure in question may have been acceptable

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

[85] A. Nussberger 'Procedural Review by the European Court of Human Rights – View from the Court' in J. Gerards and E. Brems (eds.), *Procedural Review in European Fundamental Rights Cases*, Cambridge University Press, Cambridge 2017, p 161.

[86] ECtHR, 06 October 2005, *Hirst v the United Kingdom (no. 2)*.

[87] 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.

[88] A. Nussberger, 'A View from the Court,' *supra* n. 72, p. 163.

[89] *L.B. v Hungary [GC], supra* n. 2, concurring opinion Judge Kūris, para 17.

[90] Ibid, concurring opinion Judge Kūris, para 11.

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. Firstly, 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.[91] 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.'[92]

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.[93] This is something which it has done in other cases, such as *Big Brother Watch and others v. the United Kingdom,*[94] a case relating to the compatibility of the regime governing the receipt of intercept material from foreign intelligence services in the UK with Article 10 of the Convention 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.'[95] 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.[96] 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 or 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 and the conclusion it reached regarding the compatibility of the impugned publication scheme with the ECHR. In doing so, it appears to apply the 'general measures' doctrine in reverse while doing away with even the type of secondary substantive assessment seen in *Animal Defenders.* By doing so, the it avoided making a determination as to the substantive compatibility of the publication scheme with Article 8 of the Convention, suggesting that in principle the systematic publication of taxpayers personal data under such a scheme would be acceptable provided the adoption of the scheme in

[91] *L.B. v Hungary*, *supra n.* 9, dissenting opinion of Judges Ravarani and Schukking.

[92] *L.B. v Hungary [GC], supra* n 2, concurring opinion, Judge Kūris, para 27.

[93] *L.B. v Hungary [GC], supra* n 2, para 89.

[94] ECtHR 25 May 2021, No. 58170/13 62322/14 24960/15, *Big Brother Watch and others v. the United Kingdom.*

[95] Ibid, para 444.

[96] ECtHR, 12 June 2014, No. 56030/07, *Fernandez Martinez v Spain,* para 147.

question had been subject to adequate parliamentary review. This is a problematic conclusion and creates the impression that the discussion of the decision matter more than the impact of the decision itself.

It is submitted that while the Court's conclusion that Article 8 was violated is to be welcomed, there were other avenues by which such a conclusion could have been reached. 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.