L.B. v Hungary: ‘Where is the proportionality of the measure? It is not there. Animal Defenders has been invoked and applied in reverse.’

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Harriet Ní Chinnéide

In *L.B. v Hungary*, the Grand Chamber of the European Court of Human Rights (the Court) applied the general measures doctrine developed in *Animal Defenders International v. UK* to find that the Hungarian legislative policy of publishing the personal data of taxpayers who were in debt violated Article 8 of the European Convention on Human Rights (ECHR). The Court criticised the quality of the parliamentary review conducted at the domestic level and the balance struck by national authorities between the competing individual and public interests.

The majority ruling was in turn criticised by Judge Kūris in a concurring opinion; Judge Serghides in a partly concurring and partly dissenting opinion; and Judges Wojtyczek and Paczolay in a dissenting opinion. While interesting arguments were raised by all of the judges, this post will focus on those advanced by Judge Kūris, who strongly disagreed with the approach taken by the Court.

Facts

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, in accordance with the relevant provisions of the domestic law in respect of individuals whose tax arrears exceeded 10 million Hungarian forints (€30,000) for the previous quarter.

In January 2016, he appeared on a list of ‘major tax debtors’ whose tax arrears and debts exceeded 10 million Hungarian forints for a period longer than 180 days. This second list was created pursuant to a 2006 amendment, which the legislature considered necessary to “whiten the economy (para 15).

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 the applicant).

His data was removed from the list of “major tax debtors” when his tax arrears became time-barred in 2019.

Judgment

The Court limited its examination of the applicant's complaints to the publication of his personal data on the list of major tax debtors under the 2006 Amendment. It fell to the Court to determine the proportionality of the interference and assess whether the correct balance had been struck between public and private interests. Given that the disputed publication was not a matter of an individual decision by the Tax Authority, but an indiscriminate measure pursuant to a legislative scheme, the Court examined whether the scheme remained within the State's margin of appreciation in light of the competing interests at stakes.

The Court emphasised the wide margin of appreciation enjoyed by Contracting States when assessing the need to establish such a scheme for taxpayers who fail to comply with their obligations. This is particularly so due to the lack of consensus in Europe as to how to regulate tax evasion (para 127). However, their discretion is not unlimited. The Court must be satisfied that the authorities properly balanced competing interests, with due regard to appropriate procedural safeguards.

The Court first noted that the choice of a mandatory publication scheme that did not require a weighing up of the competing individual and public interests or an individualised proportionality assessment by the tax authority was not in itself problematic. 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 (para 129). As previously held in *Animal Defenders,* 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' (para 130). 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' (para 126).

The Court noted 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 (para 132). There was no evidence that Parliament considered the impact of the amendment on the taxpayer's right to privacy and the potential risk of misuse of the tax debtor's home address by other members of the public (para 134). They seemed to disregard the potential reach of the medium used for the dissemination of the information (para 135), 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 (para 136).

Thus, while the Court accepted that the legislature's intention was to enhance tax compliance, the State had not demonstrated that it had sought to strike a fair balance between the relevant competing interests with a view to ensuring the proportionality of the interference (para 138). The Court found a violation of Article 8 (just satisfaction).

In his concurring opinion, Judge Kūris was highly critical of the approach taken by the Grand Chamber, who invalidated the measure based not on an analysis of its merits, but because it had not been preceded by proper parliamentary debate. 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. Meanwhile, Judges Wojtyczek and Paczolay disagreed with both the Court's approach and the outcome of the case, deploring that a violation was found based on alleged shortcomings in the Hungarian Parliament's review of the measure.

Comment

In line with the Court's previous findings that Article 8 encompasses 'the right to live privately, away from unwanted attention' (*Smirnova v Russia, para 95*) and provides protection against the publication of personal data, including a home address (*Alkaya v Turkey para 30*), we may instinctively be relieved to see the Chamber finding of no violation being reversed. The basis on which this was done raises some questions however – and not least because of the dissenting judges' assertion that the majority's criticisms of the parliamentary review were unfounded!

In his concurring opinion, Judge Kūris argued that the majority'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 interests, could mean two things: that Parliament did not even try to do so when debating the measure, or that the government's representatives did not succeed in convincing the Court that they had done so. Notably, neither of these explanations puts the blame on the impugned measure itself. Based on this ruling, it would be completely acceptable for Hungary to reintroduce the exact same legislation provided it was accompanied by proper legislative debate. Per Judge Kūris, '*it looks as though discussion of the decision matters more than the decision itself'* (para 5).

The inclusion of the quality of parliamentary review as a determinative factor in deciding whether the Convention has been violated is not novel in the Court's jurisprudence. Indeed, it forms the basis for the general measures doctrine developed in *Animal Defenders,* where the Court held that in examining the proportionality of a general measure, the Court would primarily assess the legislative choices underlying it (para 108) and that the more convincing the general justifications for the general measure, the less importance it would attach to its impact in the particular case (para 109). Dubbed 'procedural rationality review', this approach has since gained a foothold in the Court's caselaw. Thus, the Grand Chamber's approach in *L.B. v Hungary,* while a clear deviation from that seen in the Chamber judgment where the absence of any measurable concrete impact of the measure on the applicant's life was a decisive factor in reaching a finding of no violation, is not entirely unprecedented. However, this approach has its limits as observed by Judge Kūris:

> One of the reasons underlying the limited appropriateness of the said approach is that there is a risk of overstepping the fine line beyond which the use of the "quality of the parliamentary review" yardstick becomes a tool for *substituting* the examination of a general measure for the examination of the issue raised by the applicant. That fine line is not overstepped where the "quality of the parliamentary review" is invoked alongside other criteria for determining the Convention compliance of the application of a contested measure. But substitution occurs where the yardstick of the "quality of the parliamentary review" is used as the *sole* criterion for the said determination, because an individual assessment of the applicant's situation is replaced by a general assessment, that is to say, the Court assesses not the impugned measure as *applied* to the applicant, but its *applicability* to that person and other persons in a similar situation.
>
> *(para 7)*

The issue then is not the general measures doctrine as such, but rather the Grand Chamber's absolute reliance on procedural review to the exclusion of any substantive, individual assessment of the applicant's situation. This latter element should not be dispensed of readily, even when the general measure complained of is 'not in itself problematic' as it may become so when applied to the individual. And yet this is exactly what the majority did in *L.B. v Hungary*.

While Judge Kūris observes that the methodology employed here has been 'uncritically copy-pasted' from *Animal Defenders* – a ruling which was in itself quite controversial – arguably, here the Court actually goes one step further. In *Animal Defenders*, the quality of parliamentary and judicial review served not as a principal but as an additional argument in favour of a finding of no violation, while in *L.B. v Hungary* it became the decisive factor. Furthermore, in *Animal Defenders,* having established the quality of the parliamentary review*,* the Court continued to at least consider the proportionality of the measure. The absence of such an additional assessment in *L.B. v Hungary* is striking. To quote Judge Kūris once again: 'Where is the Court's own assessment of the proportionality of the measure, as applied to the applicant? It is not there. *Animal Defenders International* has been invoked and applied in reverse – distortedly, contrary to its logic and sequence of reasoning.' A scathing assessment indeed!

Judge Kūris' arguments are convincing. In recent decades, scholars have noted an increasing focus on procedural considerations in the Court's jurisprudence – both as factors affecting the Court's proportionality assessment and as standalone elements read-into the scope of existing substantive Convention rights. While the value of procedural factors to bolster the position of the applicant by adding to the array of protections available to them under the Convention and placing additional obligations on national authorities to ensure proper domestic processes is not to be disregarded, the way in which procedural factors were invoked in this ruling seems rather ill-considered.

The potential implications of the precedent set by this case, namely, that the *Animal Defenders* line of reasoning can be invoked not only to justify but also to invalidate a general measure, are rather peculiar. Essentially, such an approach implies that an otherwise justifiable general measure could be disallowed solely because it was introduced without any extensive debate – which is likely to be the case anyway if a measure is uncontroversial at the domestic level. Does *L.B. v Hungary* then intimate a requirement that all measures be subject to intensive debate – even if such debate is artificial and contrived simply to fulfil satisfy the exacting Court? Moreover, if the presence or absence of a proper parliamentary debate is to become a decisive factor in other cases, could this lead to the acceptance of otherwise unjustifiable measures?

While such criticisms are likely to be dismissed by proponents of *L.B. v Hungary* on the grounds that this approach is only to be applied to borderline general measures (see for example, *Macaté v Lithuania*, where extensive parliamentary debate could not serve to justify the impugned measure). However, the prudence of the expansion of the *Animal Defenders* approach to invalidate a general measure in this way nonetheless merits consideration, particularly as there were other avenues available to the Court to find a violation. Firstly, the Court could have endorsed and adopted the approach taken by the dissenting Chamber judges who disagreed with the scope of the personal data published and the manner of publication. Even in the absence of evidence as to the concrete impact of the measure on the individual, the dissenters felt that this merited a finding of a violation. In this Judge Kūris was in agreement – the publication of a tax debtors home address affects not just his reputation but also his and his family's security, for what is to stop potential uninvited visitors to pass by to assess his financial situation or perhaps even to enforce their own claims (Judge Kūris, para 26-27).

Secondly, the Court could have focused on the absence of procedural safeguards surrounding the measure and found a violation on this basis. Per Judge Kūris, the automatic publication of every major tax defaulter's name in the absence of an individualised assessment means that the impugned measure is faulty on its own merits. 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. It has become well-established within the Court's jurisprudence that 'while 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 Article 8' (*Fernandez Martinez v Spain,* para 147). Arguably it would not be a stretch to invalidate this measure simply because in the absence of the possibility for any individualised assessment, it is not accompanied by adequate procedural safeguards, regardless of the quality of parliamentary debate.

Such an approach would also allow the Court to find a violation without the need for evidence illustrating the particular impact of the measure on the individual – the absence of which led the Chamber to reach a finding of no violation. In line with the Court's

subsidiary role, it would be for the domestic authorities to assess the individual situation of the tax debtor; the Court would merely be ensuring that such a system was in fact in place.

Conclusion

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-abiding conduct. Given that both of these conditions were met in this case, perhaps we should not be surprised that this approach was adopted. It is to be hoped, however, that the *Animal Defenders* approach will not be extended further or applied to measures that are less borderline in future cases.