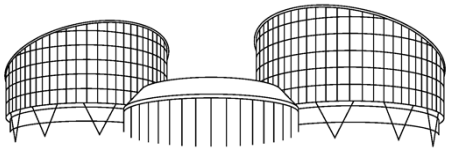

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF BEIZARAS AND LEVICKAS v. LITHUANIA

(Application no. 41288/15)

JUDGMENT

Art 14 + 8 • Respect for private life • Discrimination on the basis of sexual orientation • Refusal to prosecute authors of serious homophobic comments on Facebook including undisguised calls for violence • Positive obligations • Authorities' failure to investigate effectively whether impugned comments constituted incitement to hatred and violence
Art 13 • Effective remedy • Discriminatory attitudes impacting on the effectiveness of remedies in the application of domestic law
Art 35 § 1 • Exhaustion of domestic remedies • Exhaustion requirement complied with • NGO pursuing criminal complaints on the applicants' behalf • Applicants not required to use civil-law remedies

STRASBOURG

14 January 2020

FINAL

14/05/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Beizaras and Levickas v. Lithuania,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Robert Spano, *President,*
Marko Bošnjak,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Darian Pavli,
Saadet Yüksel, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 22 October 2019 and 26 November 2019,

Delivers the following judgment, which was adopted on the last date:

PROCEDURE

1. The case originated in an application (no. 41288/15) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Lithuanian nationals, Mr Pijus Beizaras ("the first applicant") and Mr Mangirdas Levickas ("the second applicant"), on 13 August 2015.

2. The applicants, who had been granted legal aid, were represented by Mr R.W. Wintemute (a lawyer practising in London) and Mr T.V. Raskevičius (a representative of a non-governmental organisation – the National Lesbian, Gay, Bisexual and Transgender (LGBT) Rights Association (*Nacionalinė LGBT teisių organizacija*), hereinafter "the LGL Association", see also paragraphs 7, 29 and 55 below). The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė-Širmenė.

3. The applicants alleged, in particular, that they had been discriminated against on the grounds of sexual orientation, in breach of Article 14 of the Convention, taken in conjunction with Article 8, on account of the public authorities' refusal to launch a pre-trial investigation into hateful comments left on the first applicant's Facebook page.

They also argued that the authorities' refusal to launch a pre-trial investigation had left them without the possibility of legal redress, in breach of Article 13 of the Convention.

4. On 16 June 2017 notice of the application was given to the Government.

5. In addition to written observations submitted by the applicants and the Government, third-party comments were received jointly from the AIRE Centre (Advice on Individual Rights in Europe), the European branch of the Lesbian, Gay, Bisexual, Trans and Intersex Association ("ILGA-Europe"), the International Commission of Jurists (ICJ) and the Human Rights Monitoring Institute ("the HRMI"), which had collectively been granted leave by the President of the Section to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The first applicant was born in 1996 and lives in Kaunas. The second applicant was born in 1995 and lives in Panevėžys.

7. At the time that the application was lodged with the Court, the first applicant was a secondary-school student at the Kaunas School of Applied Arts. He graduated from that school in June 2017. He is an openly gay man in a same-sex relationship with the second applicant.

At the time of the lodging of the application with the Court, the second applicant was a theology student at the Vytautas Magnus University in Kaunas. In August 2015 he discontinued his theology studies and instead began studying psychology at the same university.

Both applicants are members of the LGL Association.

8. As can be seen from the material provided and relied on by the Government – namely, copies of public posts on the Facebook pages of the first and the second applicants – on 31 December 2013 the second applicant publicly posted on Facebook that on that day he had "met for the first time" the first applicant. On 26 March 2014 the first applicant publicly posted on his Facebook account, asking: "Do I have any homophobic 'friends' who are against LGBT people?" On 17 May 2014 the first applicant publicly posted a summary of the main arguments cited by homophobic commenters (such as the assertion that homosexuality was a disease and a perversion that was against the laws of nature). On 30 May 2014 the first applicant stated in a public post that he had excluded homophobic persons from his Facebook "friends". On 4 July 2014 the first applicant announced in a public post that he was "in a relationship" with the second applicant.

1. The photograph in question, the comments and reaction that followed

9. On 8 December 2014 the first applicant posted a photograph on his Facebook page depicting a same-sex kiss between him and the second

applicant. The picture was accessible not only to his Facebook "friends", but also to the general public.

As stated by the applicants in their application to the Court, the intention of posting the picture publicly was to announce the beginning of the applicants' relationship.

10. According to the applicants, "the picture went viral online and it received more than 2,400 'likes' and more than 800 comments". They also submitted that the majority of online comments had been aimed at inciting hatred and violence against LGBT people in general, while numerous comments had directly threatened the applicants personally. The posted comments, of which the Lithuanian law-enforcement authorities were notified afterwards, included the following (Lithuanian language has not been corrected):

> "I'm going to throw up – they should be castrated or burnt; cure yourselves, jackasses – just saying" (*Vimtelsiu, kastruot ar degint tokius, pasigydykit asilai, tik sakau*)
>
> "If you were born perverts and have this disorder, then go and hide in basements and do whatever you like there, faggots. But you will not ruin our beautiful society, which was brought up by my mum and dad, where men kiss women and do not prick their skewers together. I genuinely hope that while you are walking down the street, one of you will get your head smashed in and your brain shaken up" (*Jei jau gimet isgamom ir turit liga, eikit pasislepe rusiuose ka norit ir darykit pyderastai. Bet musu grazios visuomenes, kuria uzaugino mama ir tetis ir vyrai buciuoja moteris, o ne badosi spagom tarpusavyje – nesugadinsit. As labai nuosirdziai tikiuosi kad kazkuriam is jusu einant gatve atitrenks galva kazkas ir atpurtys smegeneles*)
>
> "These faggots fucked up my lunch; if I was allowed to, I would shoot every single one of them" (*Supisti pietai per siuos pyderastus, leistu visus iki vieno issaudyciau*)
>
> "Scum!!!!!! Into the gas chamber with the pair of them" (*Urodai!!!!!! I duju kameras abu*)
>
> "Hey fags – I'll buy you a free honeymoon trip to the crematorium." (*Ei pyderai medaus menesio kelione nupirksiu nasaram y krematoriuma*)
>
> "Fucking faggots – burn in hell, garbage" (*Kurwa pydarai blt, dekit pragare siuksles*)
>
> "Into the bonfire with those faggots ..." (*Pydarastus and lauzo ...*)
>
> "For fuck's sake ... You fucking gays – you should be exterminated FU" (*Eik tu nahui... Gėjai jūs supisti, jus naikint nx*)
>
> "Because you're faggots, and children can see photos such as these, it's not only the Jews that Hitler should have burned" (*Tuom kad jus pydarasai esat ir vaikai mato tokias ft issigimeli, galėjo Hitleris netik žydus deginti*)
>
> "Burn the faggots, damn it" (*Sudeginti piderastus ku*va*)
>
> "Fags! Into the bonfire those bitches!" (*Gaidžiai! Ant laužo kurvas!*)
>
> "Fuck you – damn it, kill yourselves, faggots" (*Eik to nahui krw nusizudykit piderai*)
>
> "Satan, please allow me to smash their heads into a wall" (*Šetone prašau duok man leidimą daužys tokiem galvas į sienas*)

"Oh for fuck's sake – get the fuck out of Lithuania and don't shame us, you fucking capon; we should put your head under a car and into the noose, you fucking faggot" (*Oj kurwa pidaras pusk is lt nedares gedos wisgaidy tu krw jabanas galwa po masina pakist ir sniurais suka tu kwr jabanas*)

"Kill ..." (*Zudyt ...*)

11. On 9 December 2014 the photograph was re-posted by LGBT-friendly Vilnius (an organisation upholding the rights of LGBT people) on its public Facebook page with the following comment:

"Two young men, who live in Kaunas – Pijus and Mangirdas – today caused a big commotion on Lithuanian Facebook pages, provoking a huge number of 'likes', 'shares'; and hateful comments ... Why? The reason is simple: a kiss. Nothing more, nothing less.

We asked them what prompted their choice to make this nice photograph public.

Here is Pijus' wise reply: 'We hope that maybe some lonely person, who is being condemned by others, will see this photograph and will no longer feel lonely. Maybe, [standing] on the roof of some house, or on the edge of a window sill or balcony, he or she will move to a safer spot, where nothing will threaten him or her and his or her life will not be just a statistic.'

Thank you Pijus, and thank you, Mangirdas! Your courage inspires and gives hope.

Let's express our support by sharing [the link to the post carrying the photograph] and expressing our opinion".

12. On 10 December 2014 the LGL Association on its Facebook page shared the photograph and publicly posted the following:

"We are happy about the bravery of these young men. Now they need support – more than ever – here on Facebook, and also in their everyday life. So, is it just a kiss? What is the reaction of Lithuanians who avoid being labeled as homophobes? Please pay attention to their opinions expressed in the comments."

13. Later on, on 12 December 2014, the LGL Association stated in a public post on its Facebook page:

"Homophobia seeps through not only anonymous comments on Internet portals but also on Facebook, where people post under their true names. We did as we said we would: the meanest comments and their authors have already been denounced to the law-enforcement institutions. Do express your opinion respectfully and responsibly ...

There are thousands of comments and thousands of people making them. You cannot catch them all, but this is not our purpose. It is more important to show society that [making such hateful comments] is against the law and that hatred cannot be tolerated."

14. In that context, the Government also provided a screenshot of the first applicant's Facebook page from December 2016, where he had written "Two years ago we were causing a commotion" and provided a link to the photograph in question.

15. In June 2016 LGBT-friendly Vilnius on its Facebook page shared both applicants' impressions of the Baltic Pride event. The applicants

expressed their satisfaction that the parade had gone well and had passed off without incidents such as the throwing of eggs or disruptions staged by "supporters of traditional values". The two applicants had marched at the forefront of the parade, carrying the Lithuanian flag.

2. The attempts to have criminal proceedings opened

16. On 10 December 2014 both applicants lodged a written request with the LGL Association, of which they were both members (see paragraph 7 above), asking it to notify, in its own name, the Prosecutor General's Office of the hateful comments left under the photograph posted on the first applicant's Facebook page. They submitted that those comments were not only degrading, detrimental to their dignity and incited discrimination, but also "incited violence and physically violent treatment". The comments were therefore frightening both to homosexual people in general and to the applicants in particular. The applicants considered that such actions were criminal and merited pre-trial investigation. They reasoned in their request that their wish for the LGL Association, as a non-governmental organisation that defended the public interest, to act on their behalf was based on the applicants' view that the Lithuanian legal system did not provide any additional procedural guarantees for alleged victims of homophobic hate crimes. The applicants also wrote that they feared retaliation by the authors of the online comments should they personally lodge such a complaint with the prosecutor. They also believed that were they to lodge a personal complaint it would not be treated seriously by law-enforcement officials.

17. On 12 December 2014 the LGL Association lodged a complaint with the Prosecutor General's Office, asking that criminal proceedings be initiated regarding thirty-one comments posted on the first applicant's public Facebook page (see paragraph 10 above). The complaint was lodged on the basis of Article 170 §§ 2 and 3 of the Criminal Code ("Incitement against any national, racial, ethnic, religious or other group of people" – see paragraph 30 below) and Article 19 § 1 (3) of the Law on the Provision of Information to the Public, which prohibits publishing in the media information that incites hatred or violence against a group of people because of their sexual orientation (see paragraph 33 below). It was indicated in the complaint that the comments in question had ridiculed and expressed contempt for individuals of homosexual orientation, as well as incited discrimination, hatred and violence against them. The LGL Association also added a hard copy of the photograph in question and the comments posted below it.

18. On 30 December 2014 a prosecutor at the Klaipėda district prosecutor's office took the decision not to initiate a pre-trial investigation regarding the LGL Association's complaint. Having examined the thirty-one comments referred to by the LGL Association, the prosecutor noted that of those thirty-one comments, twenty-seven people had written one

comment each, and two people had written two comments each. For the prosecutor, this was easy to establish, since the commenters had placed those comments under their personal profiles. The prosecutor held that in order to assess whether the comments in question were of a criminal nature, it was necessary to take into account not only the comments as such, but also the context in which those comments had been written. Given that the comments had been written by different people, each comment had to be assessed individually, and not collectively. It was also essential to establish whether those comments constituted an active attempt (*aktyvus siekis*) to incite other people to disseminate degrading comments and to incite them to commit violence. The prosecutor then considered that active attempts required "systematic action". In the applicants' case, however, such a criterion had not been met because various individuals had written only one or two comments, which was not enough to be considered as constituting a systematic attempt to incite hatred or violence against people distinguishable by their sexual orientation. From this it followed that the objective element of a crime, as established under Article 170 §§ 2 and 3 of the Criminal Code, was absent. Furthermore, the fact that the "expression of opinion" in question had been non-systematic and isolated meant that there had been no subjective element – namely, that of direct intent – in the crime in question, because by posting the comments the authors thereof had been merely "expressing their opinion", instead of seeking to incite hatred or violence against individuals who were distinguishable by their sexual orientation. Even though the authors of the comments had reacted "unethically" in respect of the image portrayed in the photograph of the two applicants, such "immoral behaviour" did not constitute an element of a crime under Article 170 §§ 2 and 3 of the Criminal Code. The prosecutor lastly considered that the Supreme Court was of a similar view, in view of the fact that by a ruling of 18 December 2012 in case no. 2K-677/2012 it had acquitted a person who had posted a comment stating that gay people were "perverts" and "belonged in a psychiatric hospital". In that case the Supreme Court had considered that such a comment, even though unethical, had not actively incited hatred or discrimination against homosexual people (for a more detailed description see paragraphs 39-41 below). The prosecutor thus saw that his conclusion was in line with the Supreme Court's practice in such cases – that is to say, that comments of such a tenor were unethical but not criminal.

19. On 9 January 2015 the LGL Association lodged an appeal against the prosecutor's decision with the Klaipėda City District Court. The LGL Association pointed out that the prosecutor had taken the decision not to prosecute on two grounds: firstly, that the actions of the people who had commented on the above-mentioned Facebook post had not been systematic in nature, and secondly, that in respect of cases concerning similar situations (that is to say comments of a similar nature) the authorities routinely

considered that no crime had been committed. The LGL Association noted that in more than 90% of cases in Lithuania, hatred was promoted through the electronic sphere – for example, by the creation of hatred-promoting groups on the Facebook social network or on Internet forums. The LGL Association also relied on Lithuanian court decisions of 2014 at district court (that is to say, first-instance) level which had found that a single comment had been sufficient to find the author thereof guilty of a crime under Article 170 § 2 of the Criminal Code (see paragraphs 50 and 51 below). The LGL Association thus disputed the prosecutor's conclusion that such actions had to be systematic in nature in order for criminal liability to arise. The LGL Association argued that the question of whether or not comments could be deemed to be systematic in nature could be taken into account when assessing the gravity of a crime and imposing a punishment on the author of such comments, but it did not amount to a constitutive element of that crime. As to the applicants' case in particular, it also argued, *inter alia*, that several terms contained in the comments had promoted the infliction of physical harm and even the killing of members of the group in question (for example, advocating burning and extermination), which had indicated their authors' "particular attitude" (*ypatingą nusiteikimą*) towards people of non-traditional sexual orientation and had clearly intentionally articulated a call for violence. On this point the LGL Association relied on the Court's judgment in *Vejdeland v. Sweden* (no. 1813/07, §§ 54 and 55, 9 February 2012), in which it had held that Sweden had not breached the rights of the applicants in that case by prosecuting them, even if their statements had not called for violence. Lastly, the LGL Association argued that if the comments under the photograph of the applicants on Facebook had been only "expressing [the authors'] opinion", it was totally unclear what could be considered to constitute "publicly ridiculing, expressing contempt, urging hatred or inciting discrimination" within the meaning of Article 170 § 2 of the Criminal Code. That norm of criminal law was destined to become a "dead letter", which the law-enforcement authorities chose not to apply "by giving unjustified preference to freedom of expression, or perhaps owing to other motives which, although not related to law, had an influence on law".

20. By a ruling of 23 January 2015 the Klaipėda City District Court dismissed the LGL Association's appeal. The court shared the prosecutor's view that the authors of the impugned comments "had chosen improper words" (*pavartojo netinkamus žodžius*) to express their disapproval of homosexual people. Even so, the "mere use of obscenities" (*tik necenzūrinių žodžių pavartojimas*) was not enough to incur criminal liability under Article 170 § 2 of the Criminal Code. The court considered that in making such comments their authors had not been inciting others to discriminate against or hate homosexuals.

21. The district court also pointed out that the first applicant's Facebook page, where the picture of the two men kissing had been posted, had been public, visible and accessible not only to his acquaintances and friends, but also to individuals who were completely unknown to him. Therefore, a person who posted in the public space (*viešoje erdvėje*) a picture "of two men kissing" should and must have foreseen that such "eccentric behaviour really did not contribute to the cohesion of those within society who had different views or to the promotion of tolerance" (*ekscentriškas elgesys tikrai neprisideda prie visuomenėje kitokias pažiūras turinčių asmenų tarpusavio supratimo bei tolerancijos ugdymo*). The owner of a social network profile on which such an image was posted, by exercising his freedom to express his convictions and freedom to promote tolerance, had to take into account the fact that that freedom was inseparable from the obligation to respect the views and traditions of others. According to the court, "the majority of Lithuanian society very much appreciate[d] traditional family values" (*itin vertina tradicinės šeimos vertybes*). Indeed, that view was enshrined in Article 38 of the Constitution, which read that the family should be the basis of society and the State, and that marriage should be undertaken on the basis of the free mutual consent of a man and a woman. The district court also referred to a passage from the Constitutional Court's ruling of 28 September 2011 (see paragraph 34 below), and from that ruling inferred that "the family, as a constitutional value, is a union between a man and a woman". Lastly, the court stated that criminal proceedings were an *ultima ratio* measure and that they should therefore be initiated only when serious grounds and all elements of a crime existed. This was not the situation in the case at hand. The decision not to prosecute the authors of the comments had been reasonable.

22. The LGL Association lodged an appeal on 29 January 2015. It pleaded that certain comments had been clearly meant to incite violence, thus directly constituting an objective element of a crime under Article 170 §§ 2 and 3 of the Criminal Code. The LGL Association noted that even milder public comments, although concerning racial or ethnic discrimination, had been considered by the Lithuanian courts to constitute a crime. The LGL Association also argued that the subjective element of a crime, that is to say direct intent, should be assessed only after the identification of the alleged perpetrators and during subsequent criminal proceedings, not at the time that a procedural decision was taken regarding whether to start a pre-trial investigation or not. Responding to the district court's statement that the majority of Lithuanian society very much appreciated "traditional family values", the LGL Association underlined that a criminal offence could not be justified by the views and traditions of either an individual or the majority of society. In that connection the LGL Association also relied on the Court's case-law, which held that freedom of expression was applicable not only to "information" or "ideas" that were

favourably received or regarded as inoffensive or as a matter of indifference, but also those that offended, shocked or disturbed. The LGL Association lastly referred to the Court's judgment in *Balsytė-Lideikienė v. Lithuania* (no. 72596/01, § 82, 4 November 2008) to the effect that one right, such as the freedom of speech of the authors of the comments, could be restricted if such a restriction was necessary because that speech was offensive.

23. By a final ruling of 18 February 2015 the Klaipėda Regional Court dismissed the LGL Association's appeal, upholding the prosecutor's and the district court's reasoning, including that court's arguments regarding the applicants' "eccentric behaviour". The regional court also underlined the fact that the first applicant had posted the photograph in question publicly and had not restricted it to his friends or "like-minded people" (*bendraminčiams*), even though the Facebook social network allowed such a possibility. Such an action could therefore be interpreted as constituting "an attempt to deliberately tease or shock individuals with different views or to encourage the posting of negative comments". The regional court also considered that, in the absence of objective and subjective elements of a crime under Article 170 of the Criminal Code, it would constitute a "waste of time and resources", or even an unlawful restriction of the rights of others [that is to say Internet commenters'] to open criminal proceedings. Lastly, criminal proceedings constituted an *ultima ratio* measure, and not all actions merited them.

3. Subsequent developments, as presented by the parties

24. In their application to the Court the applicants stated that the proceedings before the domestic courts had generated a lot of interest in both the local and international media. As a result, they had experienced an increased level of attention and hostility both in the private and in the public space. The first applicant had been summoned by his secondary-school headmaster, who had requested him "not to disseminate his ideas". The second applicant had been summoned by the dean of the university theology faculty, who had requested him to change his course of study because his "lifestyle did not correspond with the faculty's values". On several occasions the applicants had been verbally harassed in public places. They had also received a number of threatening private messages in their social network mailboxes. None of those incidents had been reported to the police, because the applicants had been steadily losing their faith in the effectiveness of the law-enforcement system in Lithuania in the light of their unsuccessful attempts to launch a pre-trial investigation in connection with the initial hateful comments.

25. For their part, the Government referred to a number of educational programmes at the first applicant's secondary school aimed at raising children's understanding of such issues as respect, solidarity and non-

discrimination. They also could not speculate on the reasons for the second applicant changing his course of study. The Government lastly pointed out that the applicants themselves had never attempted to persuade the domestic authorities to initiate any kind of pre-trial investigation regarding any alleged subsequent discriminatory acts.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution, laws and other acts

26. The Constitution reads:

Article 21

"... Human dignity shall be protected by law.

It shall be prohibited to torture or injure a human being, degrade his dignity, subject him to cruel treatment, or to establish such punishments..."

Article 22

"Private life shall be inviolable.

...

The law and courts shall protect everyone from arbitrary or unlawful interference with his private and family life, as well as from encroachment upon his honour and dignity."

Article 25

"Everyone shall have the right to have his own convictions and freely express them.

No one must be hindered from seeking, receiving, or imparting information and ideas.

The freedom to express convictions, as well as to receive and impart information, may not be limited otherwise than by law when this is necessary to protect human health, honour or dignity, private life, or morals, or to defend the constitutional order.

The freedom to express convictions and to impart information shall be incompatible with criminal actions – incitement to national, racial, religious, or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation ..."

Article 29

"All persons shall be equal before the law, courts, and other State institutions and officials.

Human rights may not be restricted; no one may be granted any privileges on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views."

Article 38

"The family shall be the basis of society and the State.

Family, motherhood, fatherhood and childhood shall be under the protection and care of the State.

Marriage shall be concluded upon the free mutual consent of man and woman ..."

Article 43

"...

There shall be no State religion in Lithuania."

27. Civil Code reads:

Article 3.7. Concept of marriage

"1. Marriage is a voluntary agreement between a man and a woman to create legal family relations executed in the procedure provided for by law.

2. A man and a woman who have registered their marriage in the procedure provided for in law shall be deemed to be spouses."

In Lithuania, there is no legislation in force that would regulate partnership between a man and a woman, or between two persons of the same sex. Attempts to pass such legislation have been unsuccessful. In particular, as early as in 2000 the Law on the Approval, Entry into Force and Implementation of the Civil Code provided that the norms of the Civil Code, regarding partnership – common life between a man and a woman before entering into marriage – would enter into force once the Law on Partnership would be adopted. No such law had been passed to this day.

28. The old Criminal Code of 1961 provided that sexual intercourse between two men was criminal (Article 122). The criminal liability for such conduct was lifted in 1993, Lithuania having regained independence in 1990.

29. The Law on Associations at the relevant time read:

Article 2. Concept of an Association

"1. An association shall be a public legal person of limited civil liability who has its name and whose purpose is to coordinate activities of the association members, to represent interests of the association members and to defend them or to meet other public interests."

30. The Criminal Code, at the relevant time, between 2007 and 2017, read:

Article 170. Incitement against Any National, Racial, Ethnic, Religious or Other Group of People

"...

2. A person who publicly ridicules, expresses contempt for, urges hatred of or incites discrimination against a group of people or a person belonging thereto on the

grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views

shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to two years.

3. A person who publicly incites violence or the physically violent treatment of a group of people or a person belonging thereto on the grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views or finances, or who otherwise supports such activities

shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to three years ..."

31. Methodological recommendation no. 12.14-40 of 23 December 2009 issued by the Prosecutor General's Office to the heads of regional and district prosecutors' offices and the police "On the organisation, supervision and specifics of the conduct of the pre-trial investigation with regard to criminal acts that are committed on the grounds of race, nationality, xenophobia, homophobia or other [forms of] discrimination" reads:

"33. ... the launch of a pre-trial investigation by the pre-trial investigation bodies and prosecutors' offices should not be formalistic. A person who has provided information about an alleged criminal act in a non-standard ... way (e.g. orally, by telephone or by other electronic means) should not be requested to lodge a written complaint, if that person evidently does not wish to do so or refuses to do so because he/she does not wish to disclose his/her identity or for other reasons. Information about hate-related incidents (or allegedly committed criminal acts of such a nature) that is provided in such manner cannot be left without procedural evaluation. ... Information regarding an allegedly committed criminal act should be evaluated as factual grounds for the pre-trial investigation officer or prosecutor while they themselves establish the elements of the criminal act [in question]. ... In the event that an anonymous application (submitted in whatever form) is received, the same procedure indicated in this paragraph is applicable.

34. [C]riminal acts that are committed on the grounds of racial, national, xenophobic, homophobic [or] religious hatred or on other grounds of a discriminatory nature ... usually attract quite a high degree of public awareness, both within society and in the domestic and foreign media ... [They] [i] can do harm to the international reputation of the State, [ii] can make the [courts] the object of criticism by society and endanger the security of society. Therefore expeditious and serious reaction on the part of the pre-trial investigation officials or the prosecutors to a written application received ... or any oral or written information submitted in any ... way about criminal acts that are allegedly committed on the grounds of ... homophobia ... or other reasons of a discriminatory nature, and the expeditious, qualified and immediate evaluation of the facts ... by adopting without delay the relevant procedural decisions ... leads to the stabilisation of the situation in society, suppression of anxiety, which was raised by the public incidents or attacks of an extremist nature in all society or in its most vulnerable members, and prevents the deterioration of the international reputation of the State."

32. The Code of Criminal Procedure, as worded at the relevant time, provided that when elements of a crime are discovered, a prosecutor or the investigating authorities must, within the limits of their authority, undertake

all measures provided by law to institute criminal proceedings in order to establish that a criminal act has been committed and ensure that the guilty parties are punished (Article 3 of the Code). A prosecutor must employ all measures available under the law in order to eliminate any violations of laws (Article 24).

33. The Law on the Provision of Information to the Public (*Visuomenės informavimo įstatymas*), in so far as relevant, reads:

Article 19. Information which should not be made public

"1. It shall be prohibited to make public in the media information that:

...

3) instigates war or hatred, ridicule, humiliation, ... discrimination, violence, or the physically violent treatment of a group of people or a person belonging to that group because of age, sex, sexual orientation, ethnic origin, race, nationality, citizenship, language, origin, social status, belief, convictions, views or religion ..."

Article 49. The Inspector of Journalistic Ethics

"1. The Inspector of Journalistic Ethics (hereinafter – "the Inspector") is a State official who oversees how the principles of this Law are implemented ..."

Article 50. The duties of the Inspector

"1. The Inspector performs the following functions:

1) examines complaints (applications) [lodged by] persons regarding a violation of their honour and dignity in the media;

2) examines complaints (applications) [lodged by] persons regarding a violation of their right to private life;

...

8) on the basis of the conclusions by the groups of experts ... establishes whether information made public in the media incites discord [*skatina nesantaiką*] on the grounds of gender, sexual orientation, race, nationality, language, descent, social status, convictions or views ..."

B. The courts' practice

1. The Constitutional Court

(a) Regarding the concept of "family" and the State's obligation to protect human dignity

34. By a ruling of 28 September 2011 in a case regarding the compliance with the Constitution of the Seimas' resolution "On the Approval of the State Family Policy Concept" which was related to the question whether only married persons and children born in such a union could be considered to constitute a family, the Constitutional Court held:

"15.1. In the context of the constitutional ... case at issue it needs to be noted that the constitutional concept of family may not be derived solely from the institution of marriage, which is entrenched in the provisions of paragraph 3 of Article 38 of the Constitution. The fact that the institutions of marriage and family are entrenched in the same Article 38 of the Constitution indicates an inseparable and unquestionable relationship between marriage and family. Marriage is one of the foundations of the constitutional institution of the family [and serves] the [purpose of] the creation of family relations. It is a historically established family model that undoubtedly has exceptional value in the life of society and which ensures the viability of the nation and the State, as well as their historical survival.

However, this does not mean that the Constitution – *inter alia*, the provisions of Paragraph 1 of Article 38 thereof – does not protect and defend families other than those founded on the basis of marriage – *inter alia*, the relationship between a man and a woman living together without having concluded a marriage, which is based on the permanent bonds of emotional affection, reciprocal understanding, responsibility, respect, shared upbringing of children and similar bonds, as well as on the voluntary determination to take on certain rights and responsibilities, which form a basis for the constitutional institutions of motherhood, fatherhood and childhood.

Thus, the constitutional concept of family is based on mutual responsibility between family members, understanding, emotional affection, assistance and similar relations, as well as on the voluntary determination to take on certain rights and responsibilities – that is to say the content of the relationship – whereas the form of expression of such relationships has no essential significance for the constitutional concept of family."

35. More recently, by a ruling of 11 January 2019 in a case concerning the issuance of a temporary residence permit in Lithuania to a foreign national in the event of family reunification, and in response to a request for interpretation lodged by the Supreme Administrative Court regarding the constitutionality of the Law on the Legal Status of Aliens, the Constitutional Court held that a refusal to issue such a permit may not be based solely on the gender identity and/or sexual orientation of a foreign national.

As to the State's obligation to protect human dignity, it held:

"29. ... Under paragraph 2 of Article 21 of the Constitution, human dignity is protected by law; paragraph 3 of the same Article establishes a prohibition, *inter alia*, on degrading human dignity.

When interpreting those constitutional provisions, the Constitutional Court has held that dignity is an inalienable characteristic of a human, being of the greatest social value; every member of society has innate dignity; all people by nature are to be deemed equal in their dignity and rights. Human dignity should be regarded as constituting a special constitutional value. Dignity is characteristic of every human being, irrespective of how he/she assesses himself/herself or other people assess him/her.

The Constitution establishes the State's duty to ensure the protection and defence of human dignity. State institutions and officials have the duty to respect human dignity as a special value ...

...

30.1. The Constitutional Court has held that private life is the personal life of an individual: his or her way of life, marital status, ... relationships with other people, views, convictions, or habits ..., his/her physical or psychological state, health, honour, dignity, etc. The inviolability of private life, which is enshrined in the Constitution, gives rise to the right of a person to privacy, which includes ... the physical and psychological inviolability of a person, his/her honour and reputation ...

The provision of Paragraph 4 of Article 22 of the Constitution is one of the most important guarantees of the inviolability of an individual's private life: the private life of an individual is protected from unlawful interference by the State, other institutions, their officials, and other persons; this provision enshrines one of the aspects of the family concept confirming the constitutional significance of the family as a protected and fostered constitutional value.

If the private life of an individual is interfered with in an arbitrary and unlawful manner, then, at the same time, his/her honour and dignity are encroached upon; the protection of human dignity is inseparable from the protection of the private life of a person.

...

31.2. The Constitutional Court has held that discrimination is most often understood as a restriction of the rights of an individual on the basis of gender, race, nationality, language, origin, social status, belief, convictions, views, or other characteristics...

... It should be noted that one of the forms of discrimination prohibited under Article 29 of the Constitution is the restriction of the rights of a person on the grounds of his/her gender identity and/or sexual orientation; such a restriction should also be regarded as degrading human dignity.

31.3. [O]nly ... a State that has respect for the dignity of every human being can be considered to be truly democratic. It should be emphasised that, as noted by the Constitutional Court, the Constitution is an anti-majoritarian act, which protects an individual.

In view of this fact, ... it should be noted that, in a democratic state [operating] under the rule of law, the attitudes or stereotypes prevailing over a certain period of time among the majority of members of society may not, on the basis of the constitutionally important objectives, *inter alia*, ensuring public order ... or public policy, serve as constitutionally justifiable grounds for discriminating against persons solely on the basis of their gender identity and/or sexual orientation [or] for limiting the right, as guaranteed under Paragraphs 1 and 4 of Article 22 of the Constitution, to the protection of private and family life [or] the protection of relationships with other family members.

31.4. The Constitutional Court has noted on more than one occasion that the constitutional principle of the equality of persons, which is enshrined in Article 29 of the Constitution, should be followed both in passing and applying laws."

36. Regarding the concepts of family and marriage, the Constitutional Court extrapolated:

"32.3. In its ruling of 28 September 2011, the Constitutional Court held that the constitutional concept of the family may not be derived solely from the institution of marriage, as enshrined in Paragraph 3 of Article 38 of the Constitution [see also paragraph 34 above];

...

the duty, stemming from Paragraph 1 of Article 38 of the Constitution, for the State to establish, by means of laws and other legal acts, a legal regulation that would ensure the protection of the family as a constitutional value implies the obligation of the State not only to establish such a legal regulation that, *inter alia*, would create the preconditions for the proper functioning of families, strengthen family relationships, and defend the rights and legitimate interests of family members, but also to regulate, by means of laws and other legal acts, family relationships in such a way that no preconditions would be created in respect of discrimination against certain participants in family relationships (such as against a man and a woman who live together without having registered their union as a marriage, their children/adopted children, or single parents raising their child/adopted child).

32.4. In this context, it should be noted that Paragraph 3 of Article 38 of the Constitution enshrines the constitutional concept of marriage concluded by the free mutual consent of a man and a woman. It should be emphasised that a different concept of marriage may not be enshrined under the laws of the Republic of Lithuania unless Paragraph 3 of Article 38 of the Constitution is amended accordingly.

The Constitutional Court has noted that marriage is one of the grounds for the constitutional institution of the family for the [purpose of the] creation of family relationships; it is a historically established family model that has undoubtedly been of exceptional value in the life of society and ensures the viability of the nation and the State, as well as their historical survival.

32.5. ... It should be noted that, unlike the constitutional concept of marriage, the constitutional concept of the family, among other things, is neutral in terms of gender. Under Paragraphs 1 and 2 of Article 38 of the Constitution – interpreted in conjunction with the principle of the equality of persons and the prohibition of discrimination, as established in Article 29 of the Constitution – the Constitution protects and defends all families that meet the constitutional concept of the family, which is based on ... permanent or long-lasting relationships between family members (i.e. reciprocal understanding and responsibility, emotional affection, and help and similar bonds, as well as on the voluntary determination to take on certain rights and duties).” (References to earlier rulings of the Constitutional Court omitted.)

37. In this ruling the Constitutional Court made numerous references to the case-law of the Court of Justice of the European Union (hereinafter referred to as the CJEU), including the 5 June 2018 judgment in case C-673/16 (also see paragraph 66 below). The Constitutional Court also extensively relied on the case-law of the Court.

(b) Regarding Lithuania as a secular State

38. On 13 June 2000 the Constitutional Court examined the compliance of certain provisions of the Law on Education with the Constitution. It held:

“5. ...

The freedom of convictions and their expression establishes ideological, cultural and political pluralism. No views or ideology may be declared mandatory and thrust on an individual, i.e. the person who freely forms and expresses his own views and who is a member of an open, democratic, and civil society. This is an innate human freedom. The State must be neutral in matters of convictions, it does not have any right to establish a mandatory system of views.

7. Paragraph 7 of Article 43 of the Constitution establishes the principle of the absence of a State religion in Lithuania. This constitutional norm and the norm providing that there are traditional churches and religious organisations in Lithuania, mean that the tradition of religion should not be identified with its belonging to the State system: churches and religious organisations do not interfere with the activity of the State, its institutions and that of its officials, they do not form State policy, while the State does not interfere with the internal affairs of churches and religious organisations; they function freely according to their canons and statutes...

Construing the norm set down in Paragraph 7 of Article 43 of the Constitution that there shall not be a State religion in Lithuania, that of Paragraph 4 of the same article that churches and religious organisations shall function freely according to their canons and statutes, that of Paragraph 1 of Article 40 that State and municipal establishments of teaching and education shall be secular, as well as other constitutional provisions in a systemic manner, the conclusion should be drawn that the principle of the separateness of the State and the church is established in the Constitution. The principle of the separateness of the State and the church is the basis of the secularity of the State of Lithuania, its institutions and their activities. This principle, along with the freedom of convictions, thought, religion and conscience which is established in the Constitution, together with the constitutional principle of equality of all persons and the other constitutional provisions, determine neutrality of the State in matters of world view and religion."

2. Criminal courts' case-law referred to by one or both parties in their submissions to the Court or during the domestic proceedings

(a) The Supreme Court

(i) The cases that ended in acquittal

(α) The ruling of 18 December 2012

39. On 18 December 2012 the Supreme Court delivered a ruling in criminal case no. 2K-677/2012. The proceedings concerned the conviction of J.J. under Article 170 § 2 of the Criminal Code and her acquittal under Article 170 § 3. Those verdicts had been reached by trial and appellate courts. J.J. was found guilty of having posted on the Internet site of a daily newspaper underneath an article entitled "Young people protesting in front of the Seimas have not captured parliamentarians' attention" (*Prie Seimo protestuojantys jaunuoliai nesulaukė parlamentarų dėmesio*) the following comment:

"[S]ome people who empathise with ... such fags showing off are themselves the same [kind of] perverts and mentally ill people. Comments are being posted here also by participants in that public assembly of perverts. Shame on the organisers and participants of that assembly. There is a word – REPROBATE [*PASILEIDĖLIS*] – that characterises the person who cannot control his or her urges. Accordingly – reprobates are in front of our eyes. And not ordinary [reprobates], but reprobates of a special kind – these are PERVERTS [*IŠKRYPĖLIAI*]. They should be urgently sent to a psychiatric hospital. Their place is THERE."

40. The Supreme Court firstly noted that, under Article 25 of the Constitution, everyone had the right to have his own convictions and to freely express them, but that that freedom was incompatible with criminal actions, including incitement to hatred, violence and discrimination. That principle was specified in more detail by Article 170 of the Criminal Code, which mainly aimed at protecting the equality of persons but also at protecting their honour and dignity. The Supreme Court also pointed out that for criminal liability under Article 170 § 2 to arise, it was sufficient for the person concerned to publicly make "negative, degrading or demeaning" (*neigiami, niekinantys ar žeminantys*) statements towards one of the groups of persons defined in that provision, or by "inciting and urging" (*skatindamas ir kurstydamas*) negative feelings, hatred or discrimination in others in respect of that group of persons, or a member thereof. In that connection, the crime was considered to have been committed once such statements were made (*nusikaltimo sudėtis formalioji*), and it was not relevant whether any consequences arose because of such statements (*pasekmių atsiradimas nėra svarbus*). As to the manner in which such a crime was committed – a necessary constitutive element of such a criminal act – the actions (or statement) in question had to be made publicly. In addition, the subjective element of a crime was that of direct intent (*tiesioginė tyčia*).

41. Regarding the facts of that particular case, the Supreme Court considered that the trial and appellate courts had failed to take into account the "context of the events" which had prompted the comment in question. Namely, they had overlooked the fact J.J. had been referring to an unauthorised event (*nesankcionuotas renginys*) that had taken place near the Seimas. Accordingly, for the Supreme Court, "the convicted person's negative reaction towards the unlawful event as such had [constituted] her natural civic position (*natūrali pilietiška pozicija*)". In that connection one also had to bear in mind the "provocative aspect" of the event and the unlawful manner, that is to say in the course of an unsanctioned public gathering, in which the participants of that event had chosen to express their views (*pažiūros*) and ideas. The Supreme Court held:

> "The unauthorised event near the house of the Seimas [and] the eccentric behaviour of the participants truly did not contribute towards ... an understanding of others who had other points of view or towards building tolerance. The participants in that event, when using their right to freely express their beliefs and promote tolerance, should have had regard to the fact that that freedom is inseparable from the obligation to respect the views and traditions (*pažiūros ir tradicijos*) of others. This has a basis in Article 38 of the Constitution, [which states that] the family shall be the basis of society and the State ... and marriage shall be concluded upon the free mutual consent of a man and a woman. ... Under the legal regulation that today is in force in Lithuania, and the values protected by the Constitution, family – as a value protected by the Constitution – is a union between a man and a woman ..."

42. The Supreme Court furthermore noted that J.J. had been found guilty under Article 170 § 2 of the Criminal Code of having publicly ridiculed (*viešai niekino*) "persons of homosexual orientation" by using the words "perverts" and "reprobates". The Supreme Court then pointed out that according to both the Lithuanian Language Dictionary (*Lietuvių kalbos žodynas*) and the Contemporary Lithuanian Language Dictionary (*Dabartinės lietuvių kalbos žodynas*), a "pervert" was one who has a perversion, was a "degenerate" (*išsigimėlis*), or "a person who did not have a proper lifestyle" (*netvarkingai gyvenąs žmogus*). A "reprobate" was a person who was "naughty" (*išdykęs*), "fidgety" (*nenuorama*), "debauched" (*palaidūnas*) or "profligate" (*ištvirkėlis*). The Supreme Court thus concluded that even though those words had "negative and demeaning" (*neigiama ir niekinama*) connotations in the Lithuanian language, the mere use of those words in the impugned comment, without any concrete and direct statement inciting hatred or discrimination towards this group of persons, meant that there were no objective elements of a crime, as listed in Article 170 § 2 of the Criminal Code.

43. The Supreme Court likewise considered that although J.J.'s use of the terms "pervert" and "reprobate" to express her opinion of an unsanctioned public gathering of homosexual persons had not been ethical, they had not been dangerous enough to render her criminally liable under Article 170 § 2 of the Criminal Code. Lastly, the use of only two such unethical terms in the public space was not sufficient to establish the subjective element of a crime – namely that of the direct intent to incite hatred or discrimination in Internet users reading J.J.'s comment against homosexual persons.

(β) The ruling of 1 March 2016

44. On 1 March 2016 the Supreme Court delivered a ruling in criminal case no. 2K-86-648/2016, which concerned V.G.'s conviction under Article 170 §§ 2 and 3 of the Criminal Code by the trial court and his acquittal by the appellate court. Although the prosecutor lodged an appeal on points of law, arguing that V.G.'s comment "Such broken-asses should be given some trimming" (*Duot į kailį tokiems išdraskytašikniams*) underneath an article about gay persons' rights posted on the Internet portal of a major daily news website merited criminal liability, the Supreme Court did not share that view. It admitted that discrimination on the basis of sexual orientation was just as perilous as discrimination on the basis of race or colour of skin. Moreover, comments on the Internet, in the event that they instigated hatred or violence, were dangerous, given the fact that persons could be inclined to write such comments because of the protection that anonymity afforded them and the fact that because of the nature of the Internet such comments could be read by a large number of persons, especially when such comments were published on one of the most popular

websites, as was the situation in that case. The Supreme Court also pointed out that "the topic of sexual minorities' rights in Lithuania was pertinent (*tema aktuali*) and was surrounded by a certain social tension that was linked, among other things, to a rather conservative (or negative) attitude on the part of part of society towards sexual minorities".

45. That being so, the comment at issue in those criminal proceedings was not such as to merit limitations on freedom of expression and the application of the criminal law as an *ultima ratio* measure. The Supreme Court acknowledged that V.G.'s comment had been of a negative and demeaning nature and directed against homosexuals. Nevertheless, even if the author of that comment had used his right to freedom of expression inappropriately, such a comment could not have posed a real danger to the values protected by Article 170 of the Criminal Code, that is to say it could not have breached homosexuals' right of equality, collectively or individually, or their dignity. The comment also could not have genuinely incited readers of the Internet portal in question to commit violence against that group or individuals belonging to that group. For the Supreme Court, that conclusion stemmed from the fact that the comment in question had been "laconic" rather than specific (that is to say the author had not further elaborated on his views in order to incite others against the group of persons in question); and "violence had been discussed only in an abstract manner and through the means of idiom". The Supreme Court thus concluded that V.G.'s actions had lacked both the objective and subjective elements of a crime and that he had therefore been correctly acquitted.

(ii) Cases that ended in conviction

(α) The ruling of 2 March 2010

46. On 2 March 2010 the Supreme Court delivered a ruling in criminal case no. 2K-91/2010, which concerned V.I.'s conviction for having used the expression "fucking nigger" in respect of a person of colour. The court noted that V.I. had used that term on one occasion in a public space – on the street in Vilnius. In an appeal on points of law V.I. had pleaded that she had used the term "negro". The Supreme Court considered that the latter term, if used in Lithuania – which had no history of slave labour, segregation or social conflict on the basis of certain people belonging to another race and where the word "negro" therefore did not have a demeaning connotation – could not have been considered as discriminatory on the basis of race. This also stemmed from the fact that "[historically], there were practically no persons of non-Caucasian race living in Lithuania". The image of a "negro" in Lithuanian culture was linked to that of a person who had been exploited and was hard-working, and who therefore deserved compassion. However, the word "nigger", which came from the English language, had a demeaning and vulgar connotation, especially when used together with word "fucking".

Accordingly, V.I. had been correctly convicted under Article 170 § 2 of the Criminal Code.

(β) The ruling of 3 October 2017

47. On 3 October 2017 the Supreme Court delivered a ruling in criminal case no. 2K-206-693/2017 upholding R.P.'s conviction under Article 170 §§ 2 and 3 of the Criminal Code for having posted a number of offensive and discriminatory comments in respect of persons of Russian ethnicity underneath articles posted on a major Internet news portal. The Supreme Court referred to the Court's judgments in *Mižigárová v. Slovakia* (no. 74832/01, § 114, 14 December 2010) and *Nachova and Others v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII) to the effect that discrimination on account of, *inter alia*, a person's ethnic origin was a form of racial discrimination – a particularly invidious kind of discrimination that, in view of its perilous consequences, required from the authorities special vigilance and a vigorous reaction.

(b) Lower courts

(i) A case that ended in acquittal

48. On 14 January 2011, in criminal case no. 1A-111/2011, the Vilnius Regional Court upheld the acquittal of Ž.R., who had been on trial under Article 170 § 1 of the Criminal Code for having once shouted: "These bastards ... should go back to their homeland, to Israel" during a public demonstration in Vilnius. Although the prosecutor argued that that statement had been discriminatory towards the Jewish people, the appellate court found that the Jewish nation had not been explicitly mentioned in that statement. In the view of the court, Israel was the homeland not only of the Jews, but also of persons of other nationalities, such as Arabs. Furthermore, a large number of Jewish people lived in the United States of America, and those people considered that country to be their homeland.

(ii) Cases that ended in conviction

49. On 26 May 2011 the Klaipėda Regional Court, in case no. 1A-411-107/2011, found V.M. guilty under Article 170 § 2 of the Criminal Code and gave him a fine. The case concerned a comment posted by V.M. on the Internet: "Children should be educated not to become faggots. And should they wish to become such, they should be thrown out of home like trash" (*Vaikus reikia auklėti, kad netaptų pederastais. O jei užsimano juo būti, reikia iš namų išmesti, kaip kokią šiukšlę*). The court considered that although the comment had not called for violence against homosexuals, it had clearly been degrading and discriminatory. The court also emphasised that the comment posted on the Internet had been public and accessible to a large number of people, not only to one or several persons participating in a

discussion on the Internet. Moreover, by placing such a comment in a public space (*viešojoje erdvėje*) the author had aimed at his opinion becoming known to other Internet users, and this was the manner in which his intent to commit the crime manifested itself.

50. In the appeal (see paragraph 19 above), the LGL Association relied on the following decisions of 5 June 2014 and 27 June 2014.

By a final decision of 5 June 2014 in criminal case no. 1-900-560/2014, the Kaunas District Court found T.K. guilty under Article 170 § 3 of the Criminal Code for having posted underneath an article on the Internet site of a major newspaper the comment "Fucking faggots, they should all be hanged without mercy, they should all be exterminated". T.K. had confessed in full and had expressed regret for having posted such a comment. The criminal proceedings in that case had been brought by a non-governmental organisation, the Human Rights Monitoring Institute.

51. By a final decision of 27 June 2014 in criminal case no. 1-1048-288/2014 the Kaunas District Court convicted but released on parole T.M., who had placed the comment "I would categorise homosexual people as handicapped" underneath an article on an Internet news portal. The court delivered that decision having established that although the comment had been correctly deemed to fall under Article 170 § 2 of the Criminal Code, T.M. had fully confessed and regretted his actions. In that case T.M.'s identity had been established through his computer's IP address, which had been provided by his Internet service provider, and criminal proceedings had been opened on the basis of a complaint lodged by a non-governmental organisation, the Tolerant Youth Association (*Tolerantiško jaunimo asociacija*). The court also cited the conclusion reached by the Inspector to the effect that the comment at issue had been intended to ridicule homosexuals.

52. On 24 May 2016, in criminal case no. 1A-335-209/2016, the Vilnius Regional Court found D.B.-L. guilty of inciting hatred against Jews. The court noted that D.B.-L., having received a university education, and being mentally healthy, understood the meaning of words such as "*Juden RAUS!*", "Lithuania for Lithuanians, and Jews to the oven", that she had posted in the comments sections underneath a number of articles on the Internet website of a major daily newspaper. The court confirmed that the crimes set out in Article 170 §§ 2 and 3 were committed once the expression containing a hateful comment had been made. The court also underlined that D.B.-L. had "posted her so-called comments twelve times! Such acts cannot be seen as accidental or imprudent (*atsitiktinės ar neapgalvotos*)". That being so, the court held that the statements that D.B.-L. had made had not incited violence and that her actions therefore fell under Article 170 § 2 of the Criminal Code, instead of the third paragraph of that provision.

53. On 7 July 2017 in criminal case no. 1A-151-360/2017 the Klaipėda Regional Court upheld V.L.'s conviction under Article 170 § 2 of the

Criminal Code. It established that on an unidentified social media profile V.L. had posted numerous anti-Semitic and anti-homosexual comments, as well as comments praising Lithuania's occupation by the USSR. The appellate court pointed out that V.L.'s actions had not been accidental; they had been undertaken systematically and with the aim of stirring up discord in society (*sukiršinti visuomenę*).

54. By court order (*baudžiamasis įsakymas*) of the Kaunas District Court in case no. 1-2500-738/2014 P.Š. had been found guilty under Article 170 § 3 of the Criminal Code for having made a single anti-homosexual comment "One should call Breivik to come to the [gay parade in Kaunas]" on Facebook page. P.Š. had confessed of the crime and been given a fine.

On 27 August 2014 the Kaunas District Court in case no. 1-2540-311/2014 found R.P. guilty under Article 170 § 2 of the Criminal Code for having made a single comment on the Internet site of a major daily "better don't go to the streets faggots, because there will be much blood". R.P. had also fully confessed of the crime and been given a fine.

On 17 April 2015 the Trakai District Court found L.B. guilty under Article 170 § 2 of the Criminal Code and sentenced him to six months of deprivation of liberty, for having thrown eggs during a concert at a singer of homosexual orientation.

C. Other relevant acts

55. According to the information on the Internet site of the LGL Association, it is the only non-governmental organisation in Lithuania exclusively representing the interests of the local LGBT community. It is one of the most stable and mature organisations within the civic sector in the country, founded in December 1993. It aims at attaining effective social inclusion and integration of the local LGBT community in Lithuania and strives for consistent progress in the field of human rights for LGBT people.

The statutes of the LGL Association, approved in 2015, provide that one of its main tasks is that of promoting measures to prevent homophobic hate crimes (point 10.1) and assisting people who have suffered discrimination to realise their right to a defence, as well as representing such persons before pre-trial and other institutions and before courts at all instances (point 10.3).

III. RELEVANT INTERNATIONAL MATERIALS

A. Report by the European Commission against Racism and Intolerance

56. The European Commission against Racism and Intolerance (hereinafter – "the ECRI") on 7 June 2016 published a report on Lithuania. The report noted that in addition to incidents of racist hate speech and violence, which were mainly directed at historical minorities, Lithuania was experiencing a problem involving the widespread incitement of homophobic/transphobic hatred and acts of violence against LGBT people. The growing level of intolerance against sexual minorities had remained largely unchecked. Furthermore, discrimination against LGBT people persisted in many areas of social life.

57. As to homophobic/transphobic hate speech, including that posted on the Internet, the ECRI report specifically noted:

> **Homo-/transphobic hate speech**
>
> "22. In 2012, out of the 263 recorded incidents of hate speech, 47 were of a homo-/transphobic nature. In 2011, there had been 208 such incidents. According to human rights organisations met by ECRI's delegation, homo- and transphobic hate speech, verbal harassment and inappropriate comments are common amongst the general public, as well as in the media and political discourse, resulting in LGBT persons feeling constantly discriminated against and excluded in day-to-day life. LGBT NGOs report a general atmosphere of intimidation, which results in LGBT persons not feeling confident to be open about their identity. Homo-/transphobic hate speech has also been described by civil society organisations as creating an atmosphere in which violence against LGBT persons becomes increasingly accepted. ..."
>
> **Hate speech on the Internet**
>
> "25. In Lithuania, hatred is often incited in cyberspace through online comments, blogs, social networks and other fora. Some 90% of reported hate speech cases ... are occurring in this sphere. Human rights activists monitoring hate speech in Lithuania noticed a trend towards creating web-pages hosted on US servers to post hate speech and attempt to circumvent Lithuanian anti-hate speech legislation. The sites are usually not restricted or shut down and remain available to be viewed also by Lithuanian Internet users.
>
> 26. Homo- and transphobic hate speech is widespread on the Internet, in particular in online fora and in comments sections of news portals, rather than the articles themselves. Online hate speech goes largely unchecked and unpunished...
>
> 27. The Internet is also used to make threats of violence. There have been several cases of threats against members of minorities, such as Poles and Jews. On numerous occasions, threats of violence were also made against LGBT persons or groups, especially through social networks".

58. As to measures taken by the Lithuanian authorities, the ECRI report noted:

"**Measures taken by the authorities**

"28. ECRI considers hate speech particularly worrying because it is often a first step in the process towards actual violence. Appropriate responses to hate speech include law enforcement channels (criminal and administrative law sanctions, civil law remedies) but also other mechanisms to counter its harmful effects, such as self-regulation, prevention and counter speech. The Lithuanian authorities have taken various measures to combat hate speech, but more needs to be done.

- *Criminal law, administrative law and civil law responses*

29. The Prosecutor General's Office reported that out of the thirty six pre-trial investigations under Article 170 of the Criminal Code on incitement against a national, racial, religious or other group carried out in 2010, 23 cases were transferred to the courts. 13 persons were found guilty and sentenced. In 2014, out of 106 cases reported to the law enforcement authorities, 43 resulted in prosecution.

...

31. ... The woman, who in 2009 had posted homophobic comments on a news website ... was convicted by the Kaunas District Court on 9 March 2012 of incitement to hatred under Article 170 § 2 of the Criminal Code. However, on 18 December 2012, the Supreme Court overturned the verdict and found that her words had been merely inappropriate, but did not constitute incitement to hatred. The Supreme Court was also of the opinion that the woman's homophobic comments were provoked by the nature of the pro-LGBT event in front of the Seimas and the "eccentric conduct" of the protesters which violated the constitutionally protected traditional family values. Moreover, the Supreme Court emphasised that, in its view, criminal prosecution of homophobic hate speech should only be a measure of last resort [see paragraphs 39-43 above]. In spite of the Supreme Court judgement mentioned above, a Vilnius district court, in January 2013, found a person guilty of encouraging mockery, defiance, discrimination and physical violence against a group of people because of their sexual orientation and ordered him to pay a fine ... for having posted on Facebook: "What we need is another Hitler to exterminate those fags because there's just too many of them multiplying."

32. ECRI would like to point out to the Lithuanian authorities that in a general climate of homo-/transphobia, firm, proportionate and appropriate actions, including criminal prosecutions, need to be taken to combat hate speech.

33. A number of threats of violent attacks have been investigated by the prosecutorial authorities, but human rights defenders met by ECRI's delegation criticise that some cases were dismissed by the courts on the basis that the threats did not appear sufficiently likely to be carried out.

...

Training of law enforcement officials and members of the judiciary

35. In 2012, 37 judges and 15 prosecutors were trained on legal and social aspects in the fight against discrimination. Furthermore, the Lithuanian authorities trained a total of 350 police officers on the fight against racism and on promoting tolerance in general, but have not yet carried out planned trainings for them on relevant provisions of the Criminal Code, notably [Article 170], which had been part of one of ECRI's priority recommendations ... However, the authorities informed ECRI that an agreement between the Ministry of Interior and the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE to provide assistance for such trainings, was concluded.

36. ECRI recommends that the authorities fully investigate racist and/or homo-/transphobic threats and ensure that a lack of probability does not constitute an obstacle for convicting a perpetrator. Furthermore, the training programme for police officers on the fight against racism and promotion of tolerance should be expanded and the planned training sessions on relevant provisions of the Criminal Code be conducted. ECRI also recommends that the authorities carry out an evaluation of the impact the trainings had with a view to ensuring that further elements necessary to enable law enforcement officials and members of the judiciary to fight racist and homo-/transphobic hate speech, including threats, more effectively are identified and included in future training programmes.

Monitoring and combatting online hate speech

37. The previously existing Special Investigation Division within the Prosecutor General's Office, which also dealt with hate crime, was dissolved in 2010, mainly due to lack of finance. The functions of this division have been allocated to two specialised prosecutors in the Prosecutor General's Office and some 20 prosecutors at district level. The authorities also informed ECRI's delegation that cybercrime investigation units have been established at 10 district police headquarters. These units are tasked to investigate criminal offences committed on the Internet, including racist and homophobic hate speech. Furthermore, the Cybercrime Law came into effect on 1 January 2015 and is the new legal basis for being able to close websites and Internet fora in cases where criminal content is discovered.

38. Lithuania also participated in the EU programme Safer Internet, under which the Inspector for Journalist Ethics monitors online content. In 2014, 102 texts were reviewed and in 48 cases, expert advice was sought. Most of the investigated texts were not found in the news sections themselves, but in the readers' comments sections. The largest group concerned racist hate speech, followed by anti-LGBT hate speech. The Inspector also organised eight training sessions for journalists in 2014."

59. The ECRI report then specifically tackled the issue of homophobic/transphobic violence:

"**Homo-/transphobic violence**

53. All LGBT and human rights activists met by the ECRI delegation agreed that homo- and transphobic violence is a growing problem in Lithuania. There is, however, no full official data on such acts. According to LGBT representatives, this is mainly due to a fear of revealing one's LGBT identity and lack of trust in the willingness of the police to investigate such crimes. According to the 2013 EU LGBT Survey, 39% of the 821 respondents in Lithuania said they were physically/sexually attacked or threatened with violence, but only 16% reported incidents of hate-motivated violence to the police. A monitoring report prepared by a local NGO reveals nine instances of violence against LGBT persons that occurred between January and November 2013, including one case of extreme physical violence, four cases of assault, and four cases of damage against property. The authorities, on the other hand, did not record any cases for 2013.

54. The scale of the problem is also underestimated because of lack of awareness among police officers of the importance to register homo-/transphobic motivations as such. An example is the case of a young man who was beaten up in a bar in Vilnius, after having been approached by the perpetrator with the words 'Are you gay?' When he reported the case, the police were unwilling to record it as a homophobic attack and in the course of collecting testimony from the victim an investigator allegedly implied

that he had been attacked because he provoked the perpetrator with unwanted advances of a sexual nature.

55. Fear of living openly with one's LGBT identity increases further as a result of violent attacks against public figures who do so, in particular if the bias-motivation is not formally acknowledged and the perpetrators are not apprehended and convicted. On 24 July 2014, for example, an explosive device was thrown at the openly homosexual singer R.K. during a concert in the village of Linksmakalnis. This was not the first attack against the singer. In February 2013, eggs were thrown at him during a concert, hitting him in the face [see also § 54 *in fine* above]. In early July 2014, the partner of a transsexual artist was severely beaten by two attackers who also burned his face. They used homophobic insults prior to the attack."

60. As to measures taken by the Lithuanian authorities to combat hate crimes, the ECRI report specifically noted:

"**Measures taken by the authorities**

56. According to the OSCE/ODHIR hate crime statistics, two cases were prosecuted per year in 2011, 2012 and 2013. These six court cases, with five convictions achieved, cover 40% of the 15 cases recorded by the police during this period.

57. The authorities report that within the framework of the Inter-Institutional Action Plan on the Promotion of Anti-discrimination for 2012-2014, training courses were organised for police officers, prosecutors and judges on racist and homo-/transphobic violence. Although an evaluation of these trainings is not available, there seems to be a growing trend to investigate incidents of racist violence more effectively, including attacks against property. In a case of vandalism against a synagogue, for example, the perpetrator was speedily identified, prosecuted and sentenced to payment of a fine. The same cannot be said, however, for homo-/transphobic acts of violence...

58. The police service has an internal complaints mechanism, which also deals with complaints made by persons alleging to be victims of acts of racist and/or homo-/transphobic violence by police officers. There is, however, no independent specialised police complaints mechanism, which could be approached by individuals whose lack of trust in the police service prevents them from lodging a complaint.

59. ECRI recommends further training for police officers, prosecutors and judges on how to deal with racist, and in particular homo-/transphobic acts of violence. This should include improved procedures for recognising bias-motivations, as well as confidence-building measures between the police and minority representatives and LGBT groups. ECRI also recommends the creation of an independent police complaints service that will be tasked to investigate, *inter alia*, allegations of racist and/or homo-/transphobic violence committed by law enforcement officials."

61. As to other topics specific to Lithuania, including legislation on the protection of minors against harmful impact and the position taken by the Inspector, the ECRI report also noted:

"**Legislation: Restrictions of public information and awareness-raising**

90. Current legislation limits some types of public activities of LGBT persons. [The] Law on the Protection of Minors against the Detrimental Effect of Public Information ... bans 'public defiance of family values', which includes public information which 'expresses contempt for family values, (or) encourages the concept of entry into a marriage and creation of a family other than that stipulated in the Constitution of the

Republic of Lithuania and the Civil Code of the Republic of Lithuania', which defines marriage as between a man and a woman.

91. This law has been applied on several occasions recently. In May 2014, following complaints from the Lithuanian Parents' Forum and a group of conservative MPs to the Ministry of Culture and the Lithuanian University of Educational Sciences (LEU), the children's book *Gintarinė širdis* (Amber Heart) by author [N.D.], which had been published six months previously by the LEU, was withdrawn from bookshops. The book contains fairy tales featuring members of socially vulnerable groups, such as same-sex couples, Roma, and disabled people, and aims at promoting tolerance and respect for diversity among children. Following the complaints, the LEU explained the withdrawal of the book by suddenly describing it as 'harmful, primitive and biased homosexual propaganda'. Furthermore, the Office of the Inspector of Journalistic Ethics concluded that two fairy tales that promote tolerance for same-sex couples are harmful to minors. The Inspectorate's experts deemed the stories in violation of the Law on the Protection of Minors because they encourage 'the concept of entry into a marriage and creation of a family other than stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania'. The experts also considered the stories to be 'harmful, invasive, direct and manipulative'.

92. In September 2014, fearing a potential violation of the Law on Protection of Minors, Lithuanian TV stations refused to broadcast a TV spot promoting tolerance towards LGBT people which had been prepared by an NGO for the campaign Change It. Subsequently, this decision was confirmed by the Inspector of Journalistic Ethics on the grounds that the TV spot seemed to portray a same-sex family model in a positive light, which the Inspectorate considered to have a negative impact on minors and to be in violation of the law."

62. Most recently, on 6 June 2019 the ECRI published conclusions on the implementation of the recommendations in respect of Lithuania, subject to interim follow-up:

"2.) In its report on Lithuania (fifth monitoring cycle), ECRI recommended that the Lithuanian authorities, as part of the Inter-Institutional Action Plan for 2015-2020 on Non-Discrimination, set up an inter-institutional working group to develop a comprehensive strategy to tackle effectively the problem of racist and homo-/transphobic hate speech. This group should include the relevant authorities, as well as civil society organisations, including, amongst others, representatives of the LGBT community.

In November 2016, the Lithuanian Ministry of Interior created a working group on hate crime monitoring, analysis and evaluation. ECRI has been informed by the authorities that this working group consists of experts from the Ministry of Interior, including the Ministry's Information Technology and Communications Department, the Police Department, the Criminal Police Bureau, the Prosecutor's Office, the Government Department for National Minorities, the Law Institute and civil society organisations, including the Human Rights Monitoring Institute, the Lithuanian Centre for Human Rights and representatives of the Jewish community and the LGBT community. The group met twice in 2016 and 2017. No meetings took place in 2018 and uncertainties remain as to the agreed tasks of the working group. Some activities, however, continued. On 8 March 2018, a seminar took place organised by the OSCE/ODIHR and the EU-FRA, jointly with the Ministry of Interior, for civil society members of the working group on improving monitoring of hate crime and the collection of related data in Lithuania in line with international standards.

ECRI was also informed that the Prosecutor's Office, the Office of the Inspector for Journalist Ethics and the Ministry of Interior started the implementation of a joint 20-months project entitled 'Strengthening responses to hate crimes and hate speech in Lithuania'. The project aims to ensure effective investigations, prosecutions and adequate sentencing in hate crime cases; raise awareness among national authorities about the impact of hate crime and hate speech; understand the needs of vulnerable communities; address the problem of under-reporting and intensify efforts to counter on-line hate speech.

Furthermore, in 2017, 12 police officers took part in the OSCE/ODIHR's 'Training against Hate Crimes for Law Enforcement (TAHCLE)' programme and in 2018 the Police Commissioner General ordered the training of some 200 law enforcement officers on hate crime issues at the Lithuanian Police School and its partner institutions. Such training for police officers is implementing measures foreseen in the Action Plan for the Promotion of Non-discrimination (2017-2019). While ECRI recognises the positive intentions contained in the Action Plan, its overall level of coordination does not appear to be well developed, which is also highlighted by the fact that the Action Plan was adopted by only one Ministry, namely the Ministry of Social Security and Labour, and shows no evidence of being based on an integrated interagency strategy.

In spite of some useful steps taken by the authorities, ECRI concludes that the various measures do not yet constitute a comprehensive strategic approach to effectively tackle the problem of racist and homo-/transphobic hate speech. The inter-institutional working group has also not arrived at developing such a strategy. ECRI encourages the Lithuanian authorities to continue and scale up its efforts to prevent and combat hate speech and hate crime and to overcome fragmentation by making effective use of the existing working group.

ECRI considers that this recommendation has been partially implemented."

B. Surveys by the European Union Fundamental Rights Agency and the Eurobarometer

63. On 2 April 2012 the European Union Fundamental Rights Agency launched, online, a study entitled the "European Union survey of discrimination and victimisation of lesbian, gay, bisexual and transgender persons". The results showed that in Lithuania 61% of Lithuanian LGBT respondents had felt discriminated against or harassed on the grounds of their sexual orientation within the previous twelve months – the highest proportion in the EU, where the overall average stood at 47%. Furthermore, 27% of Lithuanian respondents had felt discriminated against while at work within the previous twelve months – the second highest number in the EU, where the overall average stood at 19%. The average number of violent incidents against LGBT people in Lithuania was 525 per 1,000 respondents – again, the highest proportion in the EU.

64. On the 1 October, 2015 the European Commission (EC) published the results of the Eurobarometer survey "Discrimination in the EU in 2015". 27,718 respondents from the European Union (EU) (including 1,004 respondents from Lithuania) took part in the survey that was conducted

from 30 May to 8 June, 2015. Lithuanian respondents indicated that the most widespread forms of discrimination are on the grounds of sexual orientation (57%), age (50%), and gender identity (46%).

50% of all Lithuanian respondents stated that gay, lesbian and bisexual people should not necessarily have the same rights as heterosexual people (EU average was 23%). 71% of Lithuanians who participated in the study would not support same-sex marriages being legalized throughout Europe (EU average was 33%). 59% would feel uncomfortable about having an LGB person in the highest elected political position (EU average was 21%); 44% of Lithuanians would feel uncomfortable about having an LGB person as one of their colleagues at work (EU average was 13%); 66% disapproved of sexual relationships between two persons of the same sex (EU average was 27%); 47% of Lithuanians do not agree that curriculum and material at school should include information about diversity in terms of sexual orientation (EU average was 27%).

C. The case-law of the Court of Justice of the European Union

65. On 7 November 2013, in Joined Cases C‑199/12 to C‑201/12, the Court of Justice of the European Union (hereinafter – the CJEU), when interpreting Directive 2004/83EC in connection with questions concerning minimum standards relating to the conditions for the granting of refugee status or subsidiary protection status, including membership of a particular social group, held:

> "When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation."

66. On 5 June 2018, in Case C-673/16, the Grand Chamber of the CJEU delivered a preliminary ruling, holding that in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) of the Treaty on the Functioning of the European Union, providing the Union citizens' right to move and reside freely within the territory of the Member States, must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 8

67. The applicants complained that they had been discriminated against on account of their status, which had been the reason underlying the domestic authorities' refusal to open a pre-trial investigation regarding hateful comments posted on the first applicant's social network page. They claimed a breach of Article 14 of the Convention, taken in conjunction with Article 8, which, in so far as relevant, read as follows:

Article 8

"1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... other status."

A. Admissibility

1. The parties' submissions

(a) The Government

68. The Government firstly stressed that the applicants themselves had never lodged an application for the opening of criminal proceedings with a prosecutor's office or any other relevant domestic institution in respect of the negative comments at issue. According to the Government, the criminal case file did not contain the applicants' letter of 10 December 2014 to the LGL Association asking the latter to pursue criminal proceedings (see paragraph 16 above). The Government asserted that the applicants had only submitted that letter to the Court; it contained no stamp or any other sign confirming its receipt by the LGL Association. In any case, in that letter the applicants had asked the LGL Association to act in its own name, not on behalf of the applicants. The Government thus asserted that the opening of the pre-trial investigation had been the intention, exclusively, of the LGL Association, which saw the proceedings as strategic litigation, since the applicants themselves had never wished to institute such proceedings. Even so, the Government acknowledged that, under the domestic law, any person

could inform the relevant domestic institutions of the alleged commission of a criminal act (see paragraph 32 above).

69. In that connection, the Government also disputed the applicants' argument that they had feared retaliation by the authors of online comments should they lodge such a complaint themselves (see paragraph 72 below). In fact, Lithuanian law provided additional procedural guarantees in respect of alleged victims of homophobic hate crimes, including a special procedure that permitted the authorities not to reveal the identity of a person who had submitted an application (see paragraph 31 above). Certainly, the applicants' fear of retaliation by the authors of those comments had not stopped them from lodging an application with the Court. The Government likewise saw no grounds for the applicants' statement that their personal complaint would have been treated less seriously by law-enforcement officials than a complaint lodged by a non-governmental organisation.

70. The Government furthermore stated that the comments at issue, although deplorable for being "offensive and vulgar", in this particular case had not given rise to any criminal responsibility owing to the lack of the required elements of a criminal act under Article 170 of the Criminal Code. Other domestic remedies were therefore available to the applicants, such as lodging a civil claim for damages in respect of an attack on their honour or dignity, or lodging a request with the Office of the Inspector, asking it to help them to delete those comments once they were posted. However, the applicants had done no such thing.

71. Lastly, given the lack of any constitutive elements of a crime, the domestic authorities' decision to refuse to initiate a pre-trial investigation concerning the comments on the first applicant's Facebook page was reasonable and the applicants' complaint under Article 14 of the Convention, taken in conjunction with its Article 8, was manifestly ill-founded.

(b) The applicants

72. The applicants saw as speculative the Government's argument that it was the LGL Association and not the applicants that had wished to pursue criminal proceedings in Lithuania. While the LGL Association had in fact initiated those proceedings, it had acted with the applicants' knowledge and consent, as proven by their request of 10 December 2014 (see paragraph 16 above). The applicants had had weighty reasons for trusting the LGL Association to initiate the domestic proceedings on their behalf, including a fear of retaliation by the authors of the hostile online comments and a fear that their complaints would not be taken seriously by law-enforcement officials.

73. Furthermore, the validity of the reasons behind the applicants' decision not to initiate the domestic proceedings themselves, but rather to trust the LGL Association to do that on their behalf, was not and should not

be a matter of dispute in the instant case. As correctly pointed out by the Government, under domestic law any person could inform the relevant domestic institutions of an alleged criminal act (see paragraph 68 *in fine* above). Moreover, the Government had failed to explain what difference it would have made if the applicants had initiated the domestic proceedings themselves. It also had to be born in mind that the LGL Association was the sole civil-society organisation in Lithuania representing the interests of the LGBT community and seeking to improve their situation. In fact, its statutes read that it sought to "promote measures to prevent homophobic ... hate crimes" (see paragraph 55 above). Accordingly, it seemed that the Government were challenging the very fact that a civil-society organisation might also have a legitimate interest in the outcome of the applicants' case, and thus questioning the fundamental role of non-governmental organisations in performing a "public watchdog" function in a pluralist, democratic society. Lastly, the fact that the LGL Association had acted with the full knowledge and consent of the applicants when initiating the domestic proceedings was further confirmed by the fact that it was the applicants themselves who were complaining before the Court as "victims", within the meaning of Article 34 of the Convention. It was very difficult to imagine that the applicants would have lodged the application with the Court if the application had not represented their genuine wishes or intentions.

74. The applicants did not comment regarding the Government's suggestion that they should have pursued civil proceedings for damages.

2. The Court's assessment

(a) General principles

75. The Court has consistently held in its case-law that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention. Accordingly, in order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he was "directly affected" by the measure complained of. This is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015, and the case-law cited therein).

76. In this connection, the Court reiterates that according to the Convention organs' constant approach, the word "victim" of a breach of rights or freedoms denotes the person directly affected by the act or omission which is in issue (see *Marckx v. Belgium*, judgment of 13 June

1979, Series A no. 31, § 27; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, § 41; and *Bączkowski and Others v. Poland*, no. 1543/06, § 65, 3 May 2007).

77. The Court also points out that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant only to remedies that relate to the breaches alleged and at the same time are available and sufficient. The application of this rule must make due allowance for the context. Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. The rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (see *Identoba and Others v. Georgia*, no. 73235/12, § 85, 12 May 2015).

(b) Application of the general principles to the instant case

78. The Court reiterates that, following the posting of the above-mentioned comments on the first applicant's Facebook page, the LGL Association requested the Prosecutor General's Office to open criminal proceedings against the authors of those comments that the LGL Association considered to be of a criminal nature (see paragraph 17 above). Afterwards, the LGL Association consistently appealed against the prosecutor's and the court's rulings that those comments had been merely unethical and lacked the constitutive elements of a crime (see paragraphs 19 and 22 above). The Court attaches considerable significance to the fact that the LGL Association's capacity to represent the applicants' interests before the prosecutors and the courts at two instances has never been questioned or challenged in any way. As a matter of fact – and irrespective of whether the applicants' complaint to the LGL Association and their request for criminal proceedings to be initiated in respect of the comments on the first applicant's Facebook page were submitted to the prosecutor and included in the criminal case file – those authorities dealt with the application and appeals submitted to them without any objections as to standing, regardless of those authorities' conclusion as to the merits of the complaint (see paragraphs 18, 20, 21 and 23 above; also see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 110, ECHR 2014).

79. Furthermore, the Court cannot but note that, under Lithuanian law, any person can notify the law-enforcement authorities that a crime may have been committed, and the authorities are then under an obligation to investigate such contentions (see paragraph 32 above; also see *Česnulevičius v. Lithuania*, no. 13462/06, § 49, 10 January 2012). The Government have not demonstrated that such a complaint could not be lodged by a non-governmental organisation, such entities being created

precisely for the purpose of representing and defending their members' interests (see paragraph 29 above; see also paragraph 140 below). In the present case, where the issue of violence inciting hate speech against persons belonging to the homosexual minority was brought by the LGL Association to the Lithuanian authorities' attention, the Court is even more inclined to hold that, once they had been notified of such issues – no matter by whom – the prosecutors were under an obligation to investigate those comments. Such conclusion also stems from the Government's own admission, based on the methodological guidelines issued by the Lithuanian Prosecutor General's Office, that in respect of homophobic crimes, the launching of a pre-trial investigation should not be too formal and that prosecutors should be conscious of the vulnerability of such crimes' victims. Likewise, prosecutors are under an obligation to act, even if an anonymous application is received (see paragraph 31 above). The fact that persons guilty of homophobic speech can be prosecuted on the basis of applications lodged by non-governmental organisations is also supported by the practice of the domestic courts (see paragraphs 50 and 51 above).

80. Although the Government argued that this case had been taken up by the LGL Association by way of strategic litigation, the Court finds that, even if there might have been an element of strategic litigation in the LGL Association lodging the complaint on the applicants' behalf, this is irrelevant for the admissibility of the applicants' complaint. It suffices to note that the legal action brought by the LGL Association was not an *actio popularis*, since it acted not on the basis of any abstract situation, be it a provision of domestic law or practice, affecting LGBT persons in Lithuania, but in response to specific facts affecting the rights of two applicants – members of that association – under the Convention; moreover, these facts were supported by the evidence which it furnished the authorities (see paragraph 17 above; see also *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 110, ECHR 2014).

81. Against the above background, the Court is satisfied that given the circumstances of this case and bearing in mind the serious nature of the allegations, it should have been open to the LGL Association, whose members the applicants were (see paragraph 7 above), and which is a non-governmental organisation set up for the purpose of assisting people who have suffered discrimination to realise their right to a defence, including in court, to act as a representative of the applicants' "interests" within the domestic criminal proceedings (see paragraphs 29 and 55 above). To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at the national level. Indeed, the Court has held that in modern-day societies recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to the citizens whereby they can defend their particular interests effectively. Moreover, the standing of

associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, §§ 37-39, ECHR 2004-III, see also, *mutatis mutandis*, *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 101, 103 and 112, ECHR 2014, and the case-law cited therein). Any other, excessively formalistic, conclusion would make protection of the rights guaranteed by the Convention ineffectual and illusory. In that context, and also in the light of the findings by the ECRI (see points 33 and 58 of the report cited in, respectively, paragraphs 58 and 59 above), the Court is also not ready to disregard the applicants' statement that they preferred that the LGL Association initiate the criminal proceedings on their behalf, for fear that the Internet commenters would retaliate should the applicants launch such proceedings themselves. Lastly, the Court observes that the present application was lodged by the applicants, acting for themselves, after the domestic courts had adopted decisions in the case that dealt with their particular situation.

82. Turning to the Government's objection that, given what they saw as the lack of the constitutive elements of a crime in the comments at issue (see paragraph 70 above), other remedies – such as lodging a civil claim for damages or lodging a complaint with the Inspector – should first have been exhausted, the Court finds that this question is intrinsically linked to the merits of the applicants' complaint and must therefore be joined to the merits.

83. The Court further notes that the complaints under this heading are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

84. The applicants maintained that they had been treated differently by the Lithuanian authorities because of their sexual orientation. The difference in treatment had manifested itself in the prosecutor's and the courts' refusal to enforce the Lithuanian criminal legislation, notwithstanding the fact that the applicants had been subjected to extreme homophobic online hate speech. The content of the domestic authorities' decisions had also made it clear that it had been the applicants' sexual orientation, as demonstrated in the photograph posted on the first applicant's social network page, that had justified the decision not to start a pre-trial investigation. Accordingly, one could not follow the Government's argument that in the present case the [applicants'] homosexuality itself was never a ground for refusing to start a

pre-trial investigation (see paragraph 93 below). In fact, as pointed out by the regional court, it was precisely the public display of their sexual orientation that had been identified by that court as "an attempt to deliberately tease or shock individuals with different views or to encourage the posting of negative comments" (see paragraph 23 above).

85. The fact that they had been treated differently by the public authorities exclusively owing to their sexual orientation could be illustrated by a hypothetical comparison with other individuals in a similar situation, such as a comparison between the applicants and a hypothetical unmarried opposite-sex couple who had posted a picture of themselves kissing on their public social media profile. Applying the reasoning of the domestic courts, an opposite-sex kiss would have been in line with "traditional family values". Moreover, as such an opposite-sex kiss (that is to say "non-eccentric behaviour") would not have been aimed at provoking people into posting negative comments, the prosecutors would certainly have launched a pre-trial investigation if comments had been posted encouraging Facebook users to "kill" or "burn" an opposite-sex couple. The applicants were likewise convinced that the outcome of the domestic proceedings – that is to say the decision not to prosecute – would not have been taken if the picture had depicted any other social or ethnic group within Lithuanian society, such as the Lithuanian Jewish community, and analogous comments, such as "throw [them] into the gas chambers" and "exterminate them", had been posted. The applicants thus asserted that in their own particular case the refusal by the public authorities to open a pre-trial investigation had been partially or entirely motivated by an unmerited distinction on the grounds of their sexual orientation.

86. The applicants also disagreed that the expression of their affection (that is to say their same-sex kiss) should have been considered as constituting "eccentric" or "provocative" conduct, for they had not violated any of the rights of others by posting that particular picture on the first applicant's Facebook page. They therefore maintained that their different treatment on the grounds of their sexual orientation had lacked any objective and reasonable justification. The position of the domestic courts and the Government (see paragraphs 21 and 23 above and paragraph 94 below) had seemed to suggest that the applicants had no right to kiss in public, be that on the first applicant's Facebook page or on the street, since this amounted to "eccentric behaviour" owing to the applicants' sexual orientation. The Government's position also seemed to suggest that if the sight of two men kissing had triggered threats of violence, in strict contravention of Article 170 of the Criminal Code, then that had been the fault of the applicants, and the courts had thus been correct in refusing to enforce the relevant Lithuanian legislation aimed at protecting same-sex couples such as the applicants. Such a position of the Government amounted to accepting as justified the private prejudices of the members of

the public who had written those threatening comments, rather than using Lithuanian legislation to challenge those prejudices. This was clearly incompatible with Articles 14 and 8 of the Convention and the Court's case-law on the subject (the applicants relied on *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999-VI, and *Alekseyev v. Russia*, nos. 4916/07 and 2 others, § 81, 21 October 2010).

87. The applicants further submitted that the domestic authorities had failed to strike a fair balance between competing interests – the right to freedom of expression on the part of the Internet commenters and the applicants' right to respect for their private life. They also relied on the Court's judgment in *Delfi AS v. Estonia* ([GC], no. 64569/09, §§ 110 and 117, ECHR 2015) to the effect that while important benefits could be derived from the Internet in respect of the exercise of freedom of expression, liability for defamatory or other types of unlawful speech had, in principle, to be retained and constituted an effective remedy in respect of violations of personality rights. The Court also held that the unlawful nature of online comments in certain instances did not require any further linguistic or legal analysis if those remarks were on the face of it unlawful. For the applicants, it was difficult to understand how comments such as "Burn the faggots", "Into the gas chamber with a pair of them", "You are fucking gays – you should be exterminated" and "Kill" in their case did not amount to punishable criminal hate speech in respect of sexual orientation under Article 170 of the Criminal Code. If those comments had merely constituted "unethical" expressions of opinion then it was unclear what statements would be "sufficient" to qualify as "publicly ridiculing, expressing contempt, urging hatred or inciting discrimination".

88. The applicants also criticised that the domestic authorities considered that a crime under Article 170 §§ 2 and 3 had to have been committed by means of systematic actions, even though neither the wording of that provision nor its interpretation by the domestic courts in other hate-speech cases mandated this criterion. In fact, according to the domestic courts' case-law, one single expression of public ridicule or contempt – or one single instance of hatred or discrimination against a certain group of people – amounted to the criminal offence of incitement of hatred. It followed that by introducing the additional element of *actus reus* the prosecutor and the domestic courts had relied on a flawed interpretation of the law and had violated the fundamental principle of legal certainty.

89. Likewise, the prosecutor and the courts had attached significant weight to the fact that the alleged crime against the applicants had lacked direct intent, concluding that there was therefore no "subjective element" or *mens rea* in respect of the crime. However, both the prosecutor and the appellate courts had reached this conclusion without approaching and conducting interviews with the alleged perpetrators, notwithstanding the

LGL Association's request that such investigative steps be taken (see paragraph 22 above).

90. Although the Government had placed great emphasis on what to them appeared to be a cross woven into the second applicant's jumper (see paragraph 94 below; see also paragraphs 99 and 118 below), none of the thirty-one online comments brought to the prosecutors' attention had made reference to any offended religious feelings on the part of the authors of those comments. Furthermore, out of more than 800 comments posted under the photograph in question, the Government had been able to identify only one that referred to the presence of the image of a cross in that picture. That was not surprising, because the position of the second applicant's left arm had made it impossible to determine whether there was indeed a cross on his jumper, or some other shape. Additionally, the presence of a cross shape had never been addressed as part of any factual and/or legal assessment undertaken by the prosecutor's office or the domestic courts when deciding on the applicants' case. The Government's attempt to introduce an "additional" – and "distracting" – reason for the hostile comments thus had no basis in facts.

91. Lastly, the applicants acknowledged that one of their aims in posting the photograph in question had been to test the level of tolerance among the Lithuanian population, and it had been their fundamental right to do so under Article 10 of the Convention. In fact, on multiple occasions the Court had reiterated that freedom of expression was applicable not only to "information" or "ideas" that were favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offended, shocked or disturbed the State or any sector of the population. Accordingly, the Government's suggestion that the applicants could have concealed their sexual orientation, or exercised reserve in expressing their sexual orientation by not kissing in the photograph, or deleted the negative comments once they had been posted (see paragraph 101 below) was irrelevant, because it once again sought to shift the responsibility for hateful comments being written by perpetrators onto the applicants. The Government had thus seemed to engage in "victim shaming" and "victim blaming". In a case of gender-based violence, the equivalent statement would be that a woman had been raped because she had been wearing "provocative" or "eccentric" clothing. In that context the applicants also referred to the CJEU's findings (see paragraph 65 above), which they saw as *a fortiori* applying to the expression of sexual orientation in the European Union and the Council of Europe Member States.

(b) The Government

92. The Government firstly submitted that the applicants' intention had not been to announce the beginning of their relationship, as they were trying to represent to the Court, but instead to start a public discussion about the

rights of LGBT persons in Lithuania. The applicants had foreseen the negative reaction of third persons to their action and had even been looking forward to it (see paragraph 11 above).

93. According to the Government, in the present case none of the domestic authorities had had a predisposed bias against the homosexual minority. The applicants' homosexuality had never been a ground in itself for the refusal to start a pre-trial investigation (the Government contrasted the applicants' situation to that of the applicants in *Smith and Grady*, cited above, § 121). The applicants' conduct had been assessed by the domestic authorities in order to establish the context in which the comments had been made and to establish the intent of the commenters. In that respect the Government also wished to emphasise certain aspects of the domestic courts' conclusion that the applicants had attempted to deliberately tease or shock individuals holding different views or to encourage the posting of negative comments.

94. The Government accordingly submitted that, firstly, "the photograph itself was already rather provocative on account of the kiss between two gays", taken together with the image of a big cross across the second applicant's jumper. The applicants' conduct, that is to say their non-verbal means of expression – wearing a jumper with a cross, which was the principal symbol of the Christian religion – could be regarded as a way of expressing the applicants' views as regards the compatibility of homosexuality with the Christian religion (the Government referred to *Donaldson v the United Kingdom* (dec.), no. 56975/09, § 29, 25 January 2011). In the Government's view, the public display of such a photograph together with the image of a cross "could have sparked conflict with people of a different cultural and religious background". This was illustrated by one comment under the photograph, which read as follows: "Very beautiful composition. In particular, the cross on the jumper. In place". The Government thus considered that in such cases "the Contracting States had a wide margin of appreciation in assessing which emblems could potentially inflame existing tensions if displayed publicly" (ibid., § 28).

95. Secondly, the comments in dispute had been made during an intense and heated discussion on Facebook, in which the applicants had also participated. Some persons had strongly supported the act of posting the photograph, some had been strongly opposed to homosexuality as such, and others had not been against homosexuality but had nevertheless not approved of the posting of the photograph in question. Thirdly, the provocative nature of the applicants' behaviour had been recognised by their supporters themselves. Indeed, LGBT-friendly Vilnius in a public post of 9 December 2014 – that is to say only one day after the posting of the photograph of the applicants – specifically used the verb "provoked" (see paragraph 11 above); subsequently the first applicant implied much the same thing (see paragraph 14 above).

96. The Government considered that the domestic authorities' referral to "traditional values" (see paragraph 21 above) did not mean that homosexuals were not tolerated in Lithuanian society. Rather, the domestic courts had been referring to the applicants themselves, who had deliberately demonstrated their opposition to such values. In other words, the domestic authorities' decision not to start a pre-trial investigation had had nothing to do with so-called "traditional" and "non-traditional" values as such.

97. Furthermore, the so-called "eccentric behaviour" of the applicants had not been the sole factor prompting the domestic institutions to decide not to start a pre-trial investigation, given that the constitutive elements of a crime had not been established by the domestic authorities in the present case. The Government considered that the situation in the present case differed from a situation involving intense fear and anxiety, as described in the judgment of *Identoba and Others* (cited above, §§ 70 and 71). Contrary to the facts in that case, the people who had commented negatively on the Facebook page of the first applicant had not outnumbered the applicants and their supporters, and no physical assaults had ever taken place against them. In that context it was noteworthy that almost since the re-establishment of Lithuania's independence in 1990 numerous actions had been taken to protect LGBT rights in the country. Baltic Pride, an annual LGBT pride parade, had taken place in Lithuania in 2010, 2013 and 2016. The applicants had taken part in that parade in 2016, and the first applicant had been happy when there had been no protests against that event (see paragraph 15 above).

98. The Government also pointed to the nature and structure of the Facebook page on which the impugned comments had been made. Under Article 170 of the Criminal Code it was a criminal offence to make public statements directed at a wide and unlimited group of people seeking to incite them against a group of other persons belonging to a distinct group owing to their sexual orientation (see paragraphs 44 and 45 above). The Court had likewise recognised that the "potential impact of the medium concerned was an important factor" (the Government referred to *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 56, 2 February 2016). In the present case, however, the comments had been made on a social network page and not, for example, on an Internet news portal, which could have attracted a large number of comments. Moreover, the comments had been made within the context of a discussion started intentionally by the first applicant and had been made on a social network, an action that had been unlikely to attract much attention.

99. The Government also noted that the crimes listed in Article 170 §§ 2 and 3 of the Criminal Code required direct intent, an element that had been absent in the instant case. In their view, the Facebook users had posted their comments "on the spot", not in a premeditated fashion, after they had come across that photograph together with the comments posted by other

Facebook users, including by the applicants themselves and their supporters. In the same vein, those commenters, although they had used improper words, had been trying to show that, contrary to what had been suggested by the applicants and their supporters, homosexuality was negative in itself and had a negative impact on children, and that the applicants' conduct by depicting a cross in their photograph had been incompatible with the Catholic religion. One had to bear in mind that the domestic authorities had considered that the comments had not been systematic, and that was one of the factors that could also indicate that there had no been direct intent on the part of the perpetrators, and that posting such comments had therefore not reached the threshold required by Article 170 §§ 2 and 3 of the Criminal Code (see paragraphs 52 and 53 above). The fact that most of the comments had been one-off (*pavieniai*), and that some had consisted only of a couple of words was a further indication of a lack of intent. That also stemmed from the Supreme Court's case-law (see paragraph 45 above). Such lack of direct intent to incite Internet users against homosexuals had also constituted a ground for the domestic institutions to refuse to initiate a pre-trial investigation.

100. One also had to note that, in line with international human rights standards, the domestic courts deemed that holding someone criminally accountable was an *ultima ratio* measure. The Convention recognised the right to insult, offend, shock and disturb. In the Government's view, "speech should only be criminalised if it was intended to incite the commission of violent criminal acts against individuals and was likely to produce such an effect".

101. Lastly, the Government noted that, by way of mitigating any alleged danger caused by the comments in question, the applicants could have deleted the negative comments from the first applicant's Facebook page, since there had been such a technical possibility. Instead they had chosen to keep them on the page – indeed, they had even referred to them subsequently (see paragraph 14 above).

(c) The intervening parties

102. The Aire Centre, ILGA-Europe, the ICJ and HRMI jointly submitted observations.

103. The third-party interveners firstly stated that while criminal law should be used sparingly in the area of freedom of expression, in a number of cases concerning incitement to commit acts of violence against others, the Court had nevertheless considered that a criminal law response had been appropriate (they referred to *Belkacem v. Belgium* (dec.), no. 34367/14, 27 June 2017). The interveners also considered that the elements of likelihood, foreseeability and imminence of hostility or violence had to be considered before determining whether and when instances of hate speech constituted incitement to commit violent acts and should therefore be

criminalised. In their view, from the case-law of the Court it appeared clear that there was no need to show that harm had actually been caused. Furthermore, where hate speech constituting incitement to commit violent acts against individuals had occurred, then the Court's position was clear: failure to investigate, prosecute and punish such hate speech amounted to a breach of the State's positive obligations under the Convention (in that context they cited *Faruk Temel v. Turkey*, no. 16853/05, § 62, 1 February 2011).

104. The interveners also pointed out that in many European jurisdictions the term "hatred" also covered hatred on the grounds of sexual orientation. The encouragement of such acts, including the exaltation or justification of violence or hostility by any means of public expression, including in the media, was criminalised. Such was the situation in, among other States, Spain, Austria, Croatia, Finland, Greece, Malta and Portugal. Moreover, most States recognised intent as one of the defining elements of incitement. Likewise, in the majority of the Council of Europe member States, for actions to be found to constitute incitement to hatred, they had to have occurred in public.

105. As to Lithuania, the interveners stated that LGBT people were perceived there as belonging to one of the most vulnerable social groups, as confirmed by various nationwide surveys (also see paragraph 144 below).

2. The Court's assessment

(a) General principles

106. Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved that ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Chassagnou and Others v. France* [GC], nos. 25088/94 and 2 others, § 112, ECHR 1999-III; *S.A.S. v. France* [GC], no. 43835/11, § 128, ECHR 2014 (extracts); and *Bączkowski and Others*, cited above, §§ 61 and 63, with further references).

107. The Court has also often emphasised that pluralism and democracy are built on genuine recognition of, and respect for, diversity. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 92, 17 February 2004).

108. The Court has also noted the States' positive obligation to secure the effective enjoyment of the rights and freedoms under the Convention. This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to

victimisation (see *Bączkowski and Others*, cited above, § 64; as to the States' positive obligations see also *Identoba*, cited above, §§ 63-64).

109. The Court has also held that the concept of "private life" is a broad term not susceptible to exhaustive definition, which covers also the physical and psychological integrity of a person (see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 126, 25 June 2019). Such elements as a person's sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, among other authorities, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008; for a broader context see also *Van Kück v. Germany*, no. 35968/97, § 78, 12 June 2003, on sexual self-determination constituting one of the aspects of a person's right to respect for his private life). In order for Article 8 to come into play, however, an attack on a person must attain a certain level of seriousness and be made in a manner causing prejudice to the personal enjoyment of the right to respect for one's private life (see, *mutatis mutandis*, *Delfi*, cited above, § 137, with further references; also see, on the importance of analysis of the seriousness of the impugned interference for Article 8 to come into play in the context of different types of cases, *Denisov v. Ukraine* [GC], no. 76639/11, §§ 110-14, 25 September 2018).

110. Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts where essential aspects of private life are at stake, requires efficient criminal-law provisions (see, *mutatis mutandis*, *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII).

111. The Court has acknowledged that criminal sanctions, including against the individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an *ultima ratio* measure (see, *mutatis mutandis*, *Vona v. Hungary*, no. 35943/10, § 42, ECHR 2013). That being so, it has also held that where acts that constitute serious offences are directed against a person's physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor (see *Identoba and Others*, cited above, § 86, and the case-law cited therein). The Court has likewise accepted that criminal-law measures were required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes (see *R.B. v. Hungary*, no. 64602/12, §§ 80 and 84-85, 12 April 2016; *Király and Dömötör v. Hungary*, no. 10851/13, § 76, 17 January 2017; and *Alković v. Montenegro*, no. 66895/10, §§ 8, 11, 65 and 69, 5 December 2017).

112. The Court has repeatedly held that Article 14 complements the other substantive provisions of the Convention and the Protocols; it has no

independent existence, since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see *Alekseyev*, cited above, § 106, with further references).

113. The Court has also reiterated that the prohibition of discrimination under Article 14 of the Convention duly covers questions related to sexual orientation and gender identity (see *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 28, ECHR 1999-IX; *Alekseyev*, cited above, § 108; and *P.V. v. Spain*, no. 35159/09, § 30, 30 November 2010).

114. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see, among many authorities, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV, see also *Molla Sali v. Greece* [GC], no. 20452/14, § 135, 19 December 2018). The Court has also repeatedly held that, just like differences based on sex, differences based on sexual orientation require "particularly convincing and weighty reasons" by way of justification. Where a difference in treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States. Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see, more recently, *Ratzenböck and Seydl v. Austria*, no. 28475/12, § 32, 26 October 2017, and the case-law cited therein).

115. As to the burden of proof regarding discrimination, the Court has established that once an applicant has shown a difference in treatment, it is for the Government to show that it was justified (see *Begheluri v. Georgia*, no. 28490/02, § 172, 7 October 2014, with further references). As regards the question of what constitutes *prima facie* evidence capable of shifting the burden of proof on to the respondent State, the Court stated in *Nachova and Others v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII) that in proceedings before it there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. As to whether statistics can constitute evidence, the Court has, in cases on the question of discrimination in which the applicants alleged a difference in the effect of a general measure or *de facto* situation, relied on statistics produced by the parties to establish a difference in treatment (see, *D.H and Others v. the Czech Republic*, cited above, § 175).

116. Lastly, the Court has also underlined that it is not its task to rule on the constituent elements of the offence of incitement to hatred and violence and discrimination. It is, moreover, primarily for the national authorities, in particular the courts, to interpret and apply domestic law. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention. In so doing, the Court has to satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts (see *Belkacem*, cited above, § 29, with further references).

(b) Application of the general principles to the present case

117. The Court finds it clear that comments on the first applicant's Facebook page (see paragraph 10 above) affected the applicants' psychological well-being and dignity, thus falling within the sphere of their private life. Indeed, the Government acknowledged that those comments had been deplorable for being "offensive and vulgar" (see paragraph 70 above). The fact that human dignity as a constitutional value must be protected by the State has also recently been emphasised by the Constitutional Court (see paragraph 35 above). That being so, and finding that the attacks on the applicants had attained the level of seriousness required for Article 8 to come into play, the Court holds that the facts of the case fall within the scope of Article 8 of the Convention. Hence, Article 14 is applicable to the circumstances of the case (see, *mutatis mutandis*, *Alekseyev*, cited above, § 107).

118. In the Government's submission, the case disclosed no element of discrimination (compare and contrast *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 34, ECHR 2004-VIII, and *Varnas v. Lithuania*, no. 42615/06, §§ 99-102, 9 July 2013, where the Government had acknowledged differential treatment), for the domestic authorities' decision not to start a criminal investigation regarding the comments at issue had nothing to do with the applicants' sexual orientation (see paragraph 96 above). Instead, their argument essentially was twofold: firstly, the applicants had themselves wished to provoke such a reaction, partly by using a religious symbol on the first applicant's clothing, and, secondly, the comments at issue had not reached a level at which they could be considered criminal. Accordingly, the Court will address those arguments in turn, in order to assess whether in dealing with the applicants' case the Lithuanian authorities had discharged their positive obligations under the Convention.

(i) As to the applicants' allegedly provocative behaviour

119. The Court observes that although in their application to the Court the applicants stated that the idea behind their posting of the photograph in question had been to announce the beginning of their relationship, in their

subsequent observations they admitted that the photograph had been meant to incite discussion about gay people's rights in Lithuania (see paragraph 91 above). That being so, and although the Government saw the latter fact as provocative, the Court does not view either of those reasons as illegitimate or meriting their suppression. On the contrary, it has already held that there is no ambiguity about the member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms (see *Alekseyev*, cited above, § 84). The Court also points to LGBT-friendly Vilnius's follow-up posts on its own Facebook page in which it was stated that the applicants' photograph had been posted to serve the aim of helping other LGBT people in Lithuania, and potentially those who were "condemned by others" and perhaps "[standing] on the roof of some house, or on the edge of a window sill or balcony", to move "to a safer spot". The applicants also confirmed this intention when interviewed by the LGL Association (see paragraphs 11 and 12 above). While accepting the Supreme Court's finding that the atmosphere in respect of issues concerning homosexuality is tense in Lithuania (see point 22 in paragraph 57 above; as confirmed by international bodies, see paragraphs 63 and 64 above), the Court cannot view the above-mentioned intentions, as indicated by the applicants, as having threatened to cause public unrest (see paragraph 44 above; compare and contrast *Donaldson*, cited above, § 29). In fact, it is a fair and public debate about sexual minorities' social status that benefits social cohesion by ensuring that representatives of all views are heard, including the individuals concerned (see, *mutatis mutandis*, *Alekseyev*, cited above, § 86).

120. Furthermore, and even though the Government placed much emphasis on what they saw as the shape of a cross on the first applicant's sweater in the photograph in question (see paragraph 94 above), the Court must note that this argument was not the object of any analysis whatsoever, either by the prosecutor or by the courts at two instances that ruled that the thirty-one comments referred to them by the LGL Association did not constitute a crime. In this context the Court notes the applicants' view that such argument by the Government was "additional" and "distracting", also given that the Government could only point to a single religion-related comment (see paragraph 90 above). As the Court does not consider it necessary to take a position on this view of the applicants, it suffices to note the Constitutional Court's case-law to the effect that Lithuania is a secular State where there is no State religion (see paragraph 38 above). That being so, it transpires that the criminal courts which examined the applicants' case focused on what they saw as the applicants' "eccentric behaviour", the argument which the Court will address next.

121. The Court thus recalls that the Klaipėda District Court considered that the picture of two men kissing did not contribute to social cohesion and the promotion of tolerance (see paragraph 21 above). That view was fully

endorsed by the Klaipėda Regional Court, which also found that it would have been preferable if the applicants had only shared such pictures among "like-minded people", since the Facebook social network allowed such a possibility (see paragraph 23 above). Given those express references to the applicants' sexual orientation, it is clear that one of the grounds for refusing to open a pre-trial investigation was the courts' disapproval of the applicants' demonstrating their sexual orientation (compare and contrast *Bączkowski and Others*, cited above, §§ 95 and 97).

122. The Court furthermore refers to the Klaipėda District Court's statements that "the majority of Lithuanian society very much appreciates traditional family values", whereby "family, as a constitutional value, [was] the union of a man and a woman", which that court found to be supported by the Constitution and the Constitutional Court's case-law (see paragraph 21 above). The Court has already considered a similar argument in *Kozak v. Poland* (no. 13102/02, § 98, 2 March 2010). In that case it accepted that the protection of the family in the traditional sense was, in principle, a weighty and legitimate reason that might justify a difference in treatment. However, in pursuance of that aim a broad variety of measures might be implemented by the State. Moreover, given that the Convention is a living instrument, to be interpreted in the light of present-day conditions, the State, in its choice of means designed to protect the family and to secure, as required by Article 8, respect for family life, must necessarily take into account developments in society and changes in the perception of social, civil status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life. In the present case, although the Klaipėda District Court cited the alleged incompatibility between maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality, the Court sees no reason to consider those elements as incompatible, especially in view of the growing general tendency to view relationships between same-sex couples as falling within the concept of "family life" (see *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 67, 20 June 2017).

123. The Court also has particularly strong reservations as to the validity of the latter element (that is to say what constitutes a family), since already in 2011 the Constitutional Court underlined that whilst marriage is a union between a man and a woman, the concept of family is not limited to the union of two such persons (see paragraph 34 above). This was confirmed by the Constitutional Court in 2019 when examining questions related to two persons of the same sex living in two different countries who wished to be reunited in Lithuania (see point 32.5 in paragraph 36 above). In the latter ruling the Constitutional Court also underlined not only the fact that under the Lithuanian Constitution "the concept of family [was] neutral in terms of gender" but also that "the Constitution is an anti-majoritarian act" and that the views of the majority may not override those of the minority (see points

31.3 and 32.5 in paragraph 36 above). The Court, for its part, has also held that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights would become merely theoretical rather than practical and effective, as required by the Convention (see, *mutatis mutandis*, *Alekseyev*, cited above, § 81, and the case-law cited therein).

124. Taking into account all the evidence, the Court thus considers it established that the applicants have made a *prima facie* case that their homosexual orientation played a role in the way they were treated by the State authorities (see, *mutatis mutandis*, *Begheluri*, cited above, § 176, 7 October 2014, and the case-law cited therein). It therefore remains for the Court to determine whether the Government have sufficiently demonstrated that the way the national authorities assessed the relevant facts, as presented in the criminal complaint lodged by the LGL Association, was acceptable (see paragraph 116 above). In particular, the Court is called upon to determine whether the decision by the prosecutor to discontinue the criminal investigation, subsequently confirmed by the national courts, was motivated by a discriminatory attitude and stereotypes related to sexual orientation (see, *mutatis mutandis*, *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, § 46, 25 July 2017).

(ii) As to the assessment by the domestic authorities whether the comments constituted a crime under Article 170 of the Criminal Code

125. On the facts of this case the Court firstly notes the prosecutor's view that the authors of the comments, including those stating that "it's not only the Jews that Hitler should have burned" and that "faggots ... [should be thrown] into the gas chamber" or "into the bonfire" or have "a free honeymoon trip to the crematorium", or have "their heads smash[ed]" or be "castrated" or be "[shot]"(see paragraph 10 above), had acted "unethically" but that such "amoral behaviour" had not reached the threshold required by Article 170 §§ 2 and 3 of the Criminal Code (see paragraph 18 above). The Klaipėda District Court came to the same conclusion, finding that those comments were mere "obscenities" and were simply words "not chosen properly" (see paragraph 20 above). However, whilst being careful not to hold that each and every utterance of hate speech, must, as such, attract criminal prosecution and criminal sanctions (see paragraph 116 above), the Court is unable to subscribe to such conclusions of the Lithuanian authorities. The Court recalls its finding that comments that amount to hate speech and incitement to violence, and are thus clearly unlawful on their face, may in principle require the States to take certain positive measures (see, *mutatis mutandis*, *Delfi*, cited above, §§ 153 and 159). It has likewise held that inciting hatred does not necessarily entail a call for an act of violence or other criminal acts. Attacks on persons committed by insulting,

holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner (see *Vejdeland and Others v. Sweden*, no. 1813/07, § 55). Moreover, the Court cannot but observe that other comments, even without calling for violence, regarding the Jews (see paragraph 52 above) have been treated by the Lithuanian authorities as falling under Article 170 of the Criminal Code. It also considers that the Government have not provided weighty arguments to refute the applicants' view that if comments such as those uttered in their case did not amount to inciting not only hatred but even violence on the basis of the applicants' sexual orientation, then it is hard to conceive what statements would (see paragraphs 19 and 87 above). Therefore, the Court, sharing the view of the Constitutional Court that the attitudes or stereotypes prevailing over a certain period of time among the majority of members of society may not serve as justifiable grounds for discriminating against persons solely on the basis of their sexual orientation, or for limiting the right to the protection of private life (see point 31.3 in paragraph 35 above), considers that the assessment made in this case by the national authorities was not in conformity with the fundamental principle in a democratic State, governed by the rule of law (see also, *mutatis mutandis*, *Carvalho Pinto de Sousa Morais*, cited above, § 46, and *Biao v. Denmark* [GC], no. 38590/10, § 126, 24 May 2016).

126. Secondly, the Government also relied on the prosecutor's finding that the comments lacked a "systematic character", since most of the comments referred by the LGL Association to the prosecutor had been written by different people (see paragraph 18 above). The Court again cannot subscribe to this argument. It notes that the Lithuanian courts' practice on this issue is not uniform, in that while the courts sometimes ascribe importance to an accused posting numerous discriminatory comments and find him or her guilty under Article 170 of the Criminal Code (see paragraphs 52 and 53 above), in other cases the making of a single discriminatory comment is sufficient to attract criminal liability (see paragraphs 46-49 and 54 above). In this context the Court, whilst acknowledging that it is not its task to take the place of the domestic courts to resolve problems of interpretation of domestic legislation (see, among many authorities, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 49, 20 October 2011), does not disregard the argument that the LGL Association put forward in the domestic proceedings (see paragraph 19 above), namely that the number of the comments could constitute a circumstance determining the gravity of the crime or the extent of the culprit's criminal liability, but that it did not constitute an indispensable element of the crime under the aforementioned provision of the Criminal Code.

127. The Court also notes the Klaipėda District Court's finding that the post on the first applicant's Facebook page and the comments under that post were in the "public space" (see paragraph 21 above), which was one of the necessary constitutive elements of a crime under Article 170 of the Criminal Code. The potential of the comments on the Internet as well as the danger they may cause, especially when they are published on popular Internet websites, has also been underlined by the Lithuanian Supreme Court (see paragraph 44 above). For its part, the Court has also held that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. At the same time, in considering the "duties and responsibilities" of those placing such information, the potential impact of the medium concerned is an important factor (see, *mutatis mutandis*, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt*, cited above, § 56, with further references). Accordingly, the Court does not find it unreasonable to hold that even the posting of a single hateful comment, let alone that such persons should be "killed", on the first applicant's Facebook page was sufficient to be taken seriously. This is further supported by the fact that the photograph had "gone viral" online and received more than 800 comments (see paragraph 10 above). The report on Lithuania by the ECRI also indicates that the country "has a problem" and that most hate speech takes place on the Internet, and also on social networks (see paragraph 56 above; see also points 26 and 27 of the report, cited in paragraph 57 above). The Court therefore also rejects the Government's argument that comments on Facebook are less dangerous than those on the Internet news portals (see paragraph 98 above). Neither can it see as pertinent the Government's argument that the people who commented negatively on the Facebook page of the first applicant had not outnumbered the applicants and their supporters (see paragraph 97 above).

128. The Court has already pointed out that criminal sanctions, including against the individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an *ultima ratio* measure (see paragraph 111 above; on the Klaipėda Regional Court's position in the applicants' case that criminal proceedings are *ultima ratio* measure, see paragraph 23 above). It considers that this equally applies to hate speach against persons' sexual orientation and sexual life. The Court observes that the instant case concerns undisguised calls on attack on the applicants' physical and mental integrity (see, in this context, *Panayotova and Others v. Bulgaria* (dec.), no. 12509/13, §§ 58 and 59, 7 May 2019, with further references), which require protection by the criminal law (see paragraph 111 above). Article 170 of the Criminal Code indeed provides for such a protection (see paragraph 30 above). However, due to the Lithuanian authorities' discriminatory attitude, the provisions of this Article were not

employed in the applicants' case, and the requisite protection was not granted to them. The Court considers that, in the circumstances of this case, it would have been manifestly unreasonable for the victims as well as downplaying the seriousness of the impugned comments to require the applicants to exhaust any other remedies. Accordingly, the Government's objection to the effect that the applicants could have had recourse to other – civil law – remedies (see paragraphs 70 and 82 above), must be dismissed.

(iii) Conclusion

129. Having regard to all the material at hand, the Court thus finds it established, firstly, that the hateful comments including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general were instigated by a bigoted attitude towards that community and, secondly, that the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether those comments regarding the applicants' sexual orientation constituted incitement to hatred and violence, which confirmed that by downgrading the danger of such comments the authorities at least tolerated such comments (see, *mutatis mutandis*, *Begheluri*, cited above, § 179). In the light of those findings the Court also considers it established that the applicants suffered discrimination on the grounds of their sexual orientation. It further considers that the Government did not provide any justification showing that the impugned distinction was compatible with the standards of the Convention (see also *Alekseyev*, cited above, § 109).

130. Accordingly, the Court holds that in the present case there has been a violation of Article 14, taken in conjunction with Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

131. The applicants complained that the authorities had not responded effectively to their complaints of discrimination on account of their sexual orientation.

The relevant provision of the Convention reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

132. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that

it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

133. The applicants complained that the State had failed to effectively respond to their complaint of having been discriminated against on account of their sexual orientation.

134. The applicants submitted that instances of hate speech strike at the core of the Convention's protections. In addition to violating the psychological and moral integrity of the applicants, they create an environment of intimidation that undermines the right to personal autonomy and self-determination. Given that the comments posted under the photograph on the first applicant's Facebook page included insulting language (such as "faggots" and "perverts"), the homophobic implication of their authors' speech was evident. Furthermore, the applicants were threatened with serious harm and even subjected to death threats in comments that contained such exhortations as "burn them", "exterminate them" and "kill them". By reading the comments the applicants were placed in a situation of intense fear and anxiety, which continuously affected their daily lives and routines. The aim of that verbal abuse was evidently to frighten the applicants so that they would desist from publicly displaying their affection for each other and from supporting the LGBT cause through their increased visibility.

135. The applicants thus stated that as of December 2014 they had been deprived of an effective legal remedy in the form of criminal proceedings, addressing the extreme instances of homophobic hate speech online. As a result of the Lithuanian authorities' refusal to protect them, they had suffered not only from feelings of fear and emotional distress but had also faced problems in their respective educational institutions. They had been singled out and verbally harassed in public spaces and they had received a number of threatening private messages in their social network mailboxes. The causal link between the State's failure to launch an effective pre-trial investigation regarding the above-mentioned instances of hate speech and the resulting atmosphere of impunity, which had led to subsequent attacks on the applicants, was self-evident. Those subsequent incidents had not been reported to the police, because the applicants had lost faith in the effectiveness of the Lithuanian law-enforcement system after the unsuccessful attempt to have a pre-trial investigation launched in relation to the initial hateful comments.

136. The applicants considered that in this particular case the Lithuanian authorities' refusal to open a pre-trial investigation reflected the general attitude in Lithuania towards alleged instances of homophobic online hate speech. For example, in the period between 2013 and 2015 the LGL Association had submitted twenty-four complaints to law-enforcement authorities in relation to two hundred and six instances of alleged online hate speech. On the basis of those complaints, twenty-eight pre-trial investigations had been initiated in 2013, thirteen in 2014 and eight in 2015. Interestingly enough, all of those pre-trial investigations had been either suspended or terminated, and thus had not led to the actual identification or punishment of the alleged perpetrators. The three main reasons for that had been: 1) the failure to identify the individual who had committed the criminal offence in question; 2) the failure to establish the constitutive elements of a criminal offence, and 3) the IP address in question had belonged to a foreign jurisdiction. Moreover, between 2013 and 2015 several requests for the launch of a pre-trial investigation had been refused altogether. It could therefore be concluded that the Lithuanian authorities systemically failed in providing an effective remedy for alleged victims of homophobic online hate speech.

137. The applicants insisted that the circumstances of the present case should be assessed in the light of the complex social realities in Lithuania, which at best could be described as being hostile towards LGBT individuals. This was clear from the results of a survey conducted by the European Union's Fundamental Rights Agency in 2013 according to which in the European Union Lithuania was the most homophobic and transphobic society, with the highest average number of violent incidents against LGBT people (see paragraph 63 above). For the applicants, the latter indicator was especially worrisome since it had been established that the prevalence of unpunished hate speech eventually led to actual acts of violence against individuals belonging to certain socially vulnerable groups (see point 28 in paragraph 58 above).

(b) The Government

138. The Government stated that the case-law of the domestic courts as regards the application of Article 170 of the Criminal Code, although not abundant, was nevertheless clear and settled. Basic principles regarding the application of Article 170 had been formulated by the Supreme Court. Moreover, the methodological recommendations issued by the Prosecutor General's Office were also of great value when considering applications for the institution of pre-trial proceedings concerning any acts potentially falling under that provision (see paragraph 31 above).

139. As a result, there were examples of cases in which a pre-trial investigation had been initiated and the people responsible for the crimes concerned had been brought to justice in district courts (see paragraph 54

above). Moreover, owing to measures taken by the law-enforcement institutions, there were numerous examples of cases wherein a pre-trial investigation had been started on the basis of Article 170 of the Criminal Code and the persons responsible had been found guilty and convicted. Those numbers ranged from one hundred and thirty-one pre-trial investigations opened in 2010 on the grounds of sexual orientation, to two such investigations opened in 2017. The Government also pointed out the decreasing number of cases being considered under that provision of the criminal code as regards any grounds, that is to say not limited to grounds of sexual orientation. That trend was also the result of preventive and educational measures taken by the State and was not due to any alleged mistrust of persons in State institutions.

The Government also considered that sometimes victims of hate crimes could obtain pecuniary compensation as a result of the satisfaction of a civil claim within criminal proceedings, should the culprit in question be convicted under Article 170 of the Criminal Code.

140. The Government also specified that between 2013 and 2017 the LGL Association had lodged an application on thirty occasions with the prosecutor's office for the initiation of a pre-trial investigation; on one occasion it had lodged an application for the reopening of a suspended investigation. Having considered those requests, the prosecutors concerned had refused to initiate a pre-trial investigation in only three cases. As regards the remaining twenty-seven cases in which a pre-trial investigation had been opened, one of them was still being pursued, one had been discontinued for failure to establish the constitutive elements of a crime, and twenty-five investigations had been suspended because all possible measures to establish the identity of the people who had committed the crimes in question had been exhausted and unsuccessful, since, as a rule, the IP addresses in question had been in another State. In that connection it had to be specified that hate crimes were distinguished by their having been committed in cyberspace; thus, the establishment of the IP address of a perpetrator could even depend on the will of other States to cooperate with Lithuanian authorities.

141. The Government could not agree with the statement of the third-party interveners regarding the allegedly negative attitude of the judicial institutions in general and the two Supreme Court rulings in particular (see paragraph 148 below). In fact, the Lithuanian courts, when considering cases related to alleged discrimination and hate speech, based their decisions on international standards in this field, including the Court's case-law (the Government specifically referred to the Supreme Court's ruling of 3 October 2017 in respect of case 2K-86-648/20016, see paragraph 47 above). Moreover, so-called "traditional values" – referred to by the third-party interveners in their observations – had never resulted in the acquittal of a person in a hate-speech case, since acquittals, including that in the

applicants' case, had instead been based on the lack of any of the constitutive elements of a crime. In that context the Government also disagreed with the third parties' assessment of the 18 December 2012 Supreme Court ruling (see paragraphs 39-43 above and paragraph 148 below), and claimed that the term "eccentric behaviour" therein referred not to the participants' sexual orientation, but to the unauthorised form in which they had expressed those ideas – namely, their above-mentioned unsanctioned demonstration next to the Seimas. Similarly, the Supreme Court's ruling of 1 March 2016 also could not be seen as hostile to homosexual people, for in that case the Supreme Court had had regard not only to the general social context, but also to the particular context in which the comment had been made, and the person had thus been acquitted for lack of any of the constitutive elements of a crime (see paragraphs 44 and 45 above).

142. In addition, in cooperation with international organisations, a number of training sessions for law-enforcement officials on how to recognise and respond to hate crimes had been organised. Some four hundred police officers and fifty prosecutors had taken part in those training sessions in 2015 and 2016. The Inspector had also held training sessions for the police which had included a discussion of issues related to conducting research into the incitement of hatred on the Internet. The Inspector had also taken an active part in a variety of training sessions for the media to help enable them to spot hate speech and to avoid allowing people to use the media to propagate it.

143. The Government lastly submitted that the State's obligation to investigate possible discriminatory motives for a violent act constituted an obligation to use its best endeavours; it was not absolute. In the applicants' case, however, no constitutive elements of a crime had been established.

(c) The intervening parties

144. The interveners pointed out that LGBT people were acknowledged to constitute one of the most vulnerable social groups in Lithuania, as confirmed by the results of representative surveys conducted at international level. They referred, in particular, to the survey conducted by the European Union's Agency of Fundamental Rights and to the EU Barometer statistics (see paragraphs 63 and 64 above).

145. At the domestic level, an online survey conducted by the national LGBT Association in 2016 had determined that, on account of their sexual orientation, 50% of respondents had reported having been victims of hate speech or hate crimes within the previous twelve months. However, only 14% of those respondents had reported those incidents to the law-enforcement authorities.

146. Consequently, the official figures for offences reported to the police did not speak to the real scale of anti-LGBT speech in Lithuania. Prejudicial

attitudes on the part of the law-enforcement and judicial authorities, including their failure to acknowledge the bias-related nature of a crime or their refusal to register – let alone investigate – reported incidents were among the main reasons cited by victims of homophobic hate speech to explain their decision not to report hate-speech cases.

147. It was also noteworthy that over 90% of all hate speech cases in Lithuania were related to the online environment.

148. The interveners also referred to the Supreme Court's rulings of 18 December 2012 and 1 March 2016, which they saw as indicative of the prejudicial nature of the law-enforcement institutions' attitude towards the LGBT community. In those rulings the Supreme Court had focused on LGBT persons' behaviour – finding it to be "provocative" or contravening "traditional family values" – instead of analysing the impugned hate speech statements in question or the general social context, in order to justify acquittals (see paragraphs 39-43, 44 and 45 above). This practice of the Supreme Court had been condemned by the ECRI in its report of 2016, in which Lithuania had been urged to take steps towards preventing the notion of "protecting public morals" from being used to justify or condone incitement of hatred against LGBT people (see point 31 of the ECRI report, cited in paragraph 58 above). Ultimately, as a vast majority of hate speech incidents against LGBT persons remained unreported and unprosecuted, the phenomenon itself continued to spread.

2. The Court's assessment

(a) General principles

149. The Court reiterates that the effect of Article 13 is to require the provision of a domestic remedy allowing the relevant national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision (see *Alekseyev*, cited above, § 97). The Court has also held that the provisions of the Convention must be interpreted and applied in a manner which renders their safeguards practical and effective, not theoretical and illusory (see, more recently, *Mihalache v. Romania* [GC], no. 54012/10, § 91, 8 July 2019). In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *De Souza Ribeiro v. France* [GC], no. 22689/07, § 80, ECHR 2012).

150. In the present case the Court has found that the applicants' rights under Article 14, taken in conjunction with Article 8, were infringed (see paragraph 130 above). Therefore, they had an arguable claim within the

meaning of the Court's case-law and were thus entitled to a remedy satisfying the requirements of Article 13.

(b) Application to the instant case

151. At the outset, the Court notes that it does not call into question that the Lithuanian criminal law, in particular Article 170 of the Criminal Code, and criminal justice system, including the courts, provide for a remedy which is generally effective for the purposes of Article 13 of the Convention. However, in the present case, the applicants allege that the authorities did not respond effectively to their complaints of discrimination on account of their sexual orientation (see paragraph 131 above). The Court is therefore called upon to determine whether Article 13 of the Convention can be infringed in situations where generally effective remedies are considered not to have operated effectively in a particular case due to discriminatory attitudes negatively affecting the application of national law. In this regard, the Court notes that in cases involving complaints under Article 13, based on such allegations of discriminatory attitudes affecting the effectiveness of remedies in the application of generally applicable national laws, the Court has usually not considered it necessary to separately examine the complaints under that provision if a violation of Article 14, taken together with other Convention provisions, has already been found (see, in particular, *Opuz v. Turkey*, no. 33401/02, § 205, ECHR 2009).

In the present case, and considering the nature and substance of the violation found in the applicants' case, on the basis of Article 14, taken in conjunction with Article 8, the Court finds that a separate examination of the applicants' complaint is warranted. In its assessment, the Court will have regard to general developments in the case-law of the national courts, to conclusions by international monitoring bodies reviewing the issue of discrimination on the grounds of sexual orientation in Lithuania and statistical information provided for by the Government, the applicants as well, as third-party interveners and international bodies.

152. Given the materials provided by the Government (see paragraph 54 above), the Court acknowledges that in those cases the district courts, that is, the courts of first level of jurisdiction, reached guilty verdicts regarding discriminatory and homophobic comments on the Internet as well as other types of homophobic behaviour. That being so, and inasmuch as it concerns the applicants' case, the Court cannot turn a blind eye to the fact that in reaching the conclusion that the comments at issue had been merely "unethical" and "immoral" the prosecutor relied on the practice of the Supreme Court to the same effect (see paragraphs 18 and 39-41 above). Indeed, in two cases concerning homophobic hate speech the Supreme Court reached verdicts exculpating those on trial (see paragraphs 39-45 above; compare and contrast the position of the lower courts, indicated in paragraphs 49-51 and 54 above). The Court notes that in the ruling of

18 December 2016 the Supreme Court had to have recourse to two dictionaries to reach a conclusion that calling people of homosexual orientation names such as "perverts" and "reprobates" who should "be urgently sent to a psychiatric hospital" was negative and demeaning, but had found the use of those names not calling for an application of Article 170 of the Criminal Code, which establishes criminal liability for discrimination, *inter alia*, on the basis of sexual orientation (see paragraphs 39 and 42 above). The Court notes with concern the emphasis in part of the Supreme Court's case law on the "eccentric behaviour" or the supposed duty of persons belonging to sexual minorities "to respect the views and traditions of others" in exercising their own personality rights (see paragraph 41 above).

At the same time, the Court recognises that the reliance by the prosecutor in the current case on the case-law of the Supreme Court ignored significant differences in the level of gravity of homophobic speech at stake in this case, compared to expressions examined by prior Supreme Court judgments, namely, that the Supreme Court had examined expressions of homophobic speech which were clearly less grave than those examined in the present case. As the Government have not provided a single verdict by the Supreme Court showing that a trend of interpretation, which was perceived by the prosecutor as rather lenient towards those accused of hate speech against homosexuals, has been reversed, it does not appear that the Supreme Court has had an opportunity to provide greater clarity on the standards to be applied in hate speech cases of comparable gravity. In that context the Court notes the statutory obligation on the domestic courts to take into account the Supreme Court's case-law (see also *Orlen Lietuva Ltd. v. Lithuania*, no. 45849/13, §§ 33-35, 29 January 2019). Accordingly, the Court finds that the manner in which the case law of the Supreme Court was applied by the prosecutor, whose decision was upheld by the domestic courts which examined the applicants' case, did not provide for an effective domestic remedy for homophobic discrimination complaints.

153. As regards the Government's reliance on the Inspector, the Court observes that although in one of the cases referred to by the parties the Inspector reached a conclusion that was instrumental in a conviction for hate speech (see paragraph 51 above), it was also criticised by the ECRI for upholding so-called "traditional values", as a basis for supporting intolerance (see paragraph 61 above; also see the results of EU Barometer survey in paragraph 64 *in fine* above). Similarly, on the facts of the case, and taking into account the gravity of the threats uttered by the Internet commenters, the Court has already found that a civil-law remedy, or a referral of such comments to the Inspector (see paragraph 70 above), did not constitute remedies that had to be exhausted (see paragraph 128 above).

154. On the facts of the present case the Court also notes the prosecutor's finding that the majority of the persons who had posted hate

inciting comments, including those directly calling for violence, on the first applicant's Facebook profile had used their own personal profiles (see paragraph 18 above). Accordingly, it cannot find that, at least in this case, failure to establish the identity of those persons and bring them to justice was impossible due to any technical limitations, even if the Lithuanian authorities had been willing to do so (see paragraph 140 above).

155. The Court cannot but find that the statistics provided both by the Government and the applicants, as well as those by the third-party interveners as well as by international bodies, show otherwise. Firstly, even acknowledging that between 2012 and 2015 some thirty pre-trial investigations regarding homophobic hate speech were opened in Lithuania, one may not overlook the fact that all of them were discontinued, mostly because the culprits could not be found (see paragraph 139 above). As the ECRI noted in 2016, the growing level of intolerance against sexual minorities had remained largely unchecked (see paragraph 56 above). That being so, the Court also gives weight to the applicants' argument that in view of the law-enforcement authorities' practice in this regard – and also in response to the outcome of their own case – they had not felt like complaining to the law-enforcement agencies again (see also point 53 of the ECRI report, cited in paragraph 59 above). In fact, in the applicants' case the regional court even considered that to open criminal proceedings would have been a "waste of time and resources" (see paragraph 23 above). As put forward by the applicants and the third party interveners, who also relied on the ECRI (see paragraphs 136 and 148 above), such prejudicial attitude of the domestic court is fraught with the risk that Article 170 of the Criminal Code would remain a "dead letter", that, in the words of the LGL association, the law-enforcement authorities chose not to apply "by giving unjustified preference to freedom of expression, or perhaps owing to other motives which, although not related to law, had an influence on law" (see paragraph 19 above). Secondly, the Court notes information regarding the Lithuanian law-enforcement institutions' failure to acknowledge bias-motivation of such crimes and to take such an approach which would be adequate to the seriousness of the situation (see points 54-55 of the ECRI report, cited in paragraph 59 above; also see points 57 and 58 of that report, cited in paragraph 60 above). In this connection the Court reminds that it has already held in *Identoba and Others* (cited above, § 77) that without such a strict approach on the part of the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence or even connivance in hate crimes. Regarding Lithuania, the most recent materials by the ECRI also show lack of a comprehensive strategic approach to tackle the issue of racist and homophobic hate speech by the authorities (see paragraph 62 above).

156. In the light of foregoing the Court holds that, despite one-off cases showing otherwise (see paragraph 54 above), the applicants have been denied an effective domestic remedy in respect of their complaint concerning a breach of their right to private life, on account of their having been discriminated against because of their sexual orientation. Consequently, the Court concludes that there has been a violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

157. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

158. The applicants each claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

159. The Government submitted that the applicants' claim was unsubstantiated.

160. The Court accepts that the applicants suffered distress and frustration on account of the violations of their rights under Articles 8, 13 and 14 of the Convention. The resulting non-pecuniary damage would not be adequately compensated for by the mere finding of those breaches (see, *mutatis mutandis*, *Identoba and Others*, cited above, § 110). Having regard to the relevant circumstances of the case and the principle of *ne ultra petitum* (see *Nagmetov v. Russia* [GC], no. 35589/08, § 71, 30 March 2017, with further references), as well as to equity considerations, the Court finds it appropriate to grant each of the applicants' claims in full.

B. Costs and expenses

161. The applicants noted that as they had been represented on a *pro bono* basis by the national LGBT rights organisation before the Lithuanian courts, they did not wish to claim any costs and expenses in relation to the proceedings at the national level. However, they claimed EUR 5,000 for the costs and expenses incurred before the Court.

162. The Government considered that the sum claimed was rather excessive.

163. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as

to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,000 for the proceedings before the Court.

C. Default interest

164. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits the Government's objection that the applicants have not exhausted the civil law remedies as regards their complaint under Article 14 of the Convention, taken in conjunction with Article 8, and rejects it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 14 of the Convention, taken in conjunction with Article 8;

4. *Holds* that there has been a violation of Article 13 of the Convention;

5. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to each of the applicants;

(ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to both applicants jointly;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points.

Done in English, and notified in writing on 14 January 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Robert Spano
Registrar	President