Beizaras and Levickas v. Lithuania

Recognizing Individual Harm Caused by Cyber Hate?

Viktor Kundrák[*]

Abstract

The issue of online hatred or cyber hate is at the heart of heated debates over possible limitations of online discussions, namely in the context of social media. There is freedom of expression and the value of the internet in and of itself on the one hand, and the need to protect the rights of victims, to address intolerance and racism, as well as the overarching values of equality of all in dignity and rights, on the other. Criminalizing some (forms of) expressions seems to be problematic but, many would agree, under certain circumstances, a necessary or even unavoidable solution. However, while the Court has long ago declared as unacceptable bias-motivated violence and direct threats, which under Articles 2, 3 and 8 in combination with Article 14 of the ECHR, activate the positive obligation of states to effectively investigate hate crimes, the case of Beizaras and Levickas v. Lithuania presented the first opportunity for the Court to extend such an obligation to the phenomenon of online verbal hate crime. This article will first address the concepts of hate speech and hate crime, including their intersection and, through the lens of pre-existing case law, identify the key messages for both national courts and practitioners. On the margins, the author will also discuss the issue of harm caused by verbal hate crime and the need to understand and recognize its gravity.

Keywords: hate speech, verbal hate crime, cyber hate, effective investigation, homophobia.

1 Introduction

Regulating the spread of hatred online is without doubt one of the most topical issues and falls within a broader discussion over the possible limitations of online

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discussions, namely in the context of social media. As the European Court of Human Rights ('Court') put it in *Handyside v. The United Kingdom*, "freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man".[1] In *Delfi AS v. Estonia*, it later stressed the importance of modern means of online communication which provide "an unprecedented platform for the exercise of freedom of expression". There is also a downside. With the internet, hate speech "can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online".[2] The general discussion about regulating online speech through the means of criminal law opens the question of whether the criminal response is the only appropriate means, and if so, in respect of what sort of expressions. If a criminal response is the primary way forward, whether more efforts should not be invested in non-criminal and preventive measures such as effective civil and administrative law remedies, ensuring a regulatory framework for a diverse and pluralist media, the control of which is independent of the government, or the adoption of clear policy guidelines on 'hate speech' and the application thereof by media regulators and self-regulatory bodies, or whether media outlets should not play a more active role in combating 'hate speech' and in promoting intercultural understanding.[3] In sum, criminalizing hate speech does not seem to be a cure-all and the (albeit dynamic) international legal developments tend to respond to the reality with too much of a delay.

The discussion about criminalizing *hate crimes* is then rather straightforward. However, although there is broad international consensus, and criminal law provisions in response to hate crime make up, in one way or another, a traditional part of national legislation, these laws are not used either, and confusion persists regarding the two phenomena of hate crime and hate speech, and how they intersect.

In the recent case of *Beizaras and Levickas v. Lithuania,*[4] the Court had the opportunity to address these intersections and shed light on what the State's positive obligations are once an individual reports a criminal case related to homophobic verbal hate crimes. In the present article, I will (i) elaborate on the concepts of hate crime and hate speech and the terminological pitfalls, (ii) summarize the Court's previous case law regarding the two phenomena, (iii) provide a case brief of the judgment in *Beizaras and Levickas v. Lithuania*, and (iv) assess the key messages of the judgment. In the final section, I will first argue that the Court inexplicably abandoned its previous case law on hate crime and verbal hate crime and put little emphasis on the harm caused to the victims of verbal hate crime and the related effects of stigmatization. Second, I will summarize the main points that can provide further guidance for states and

1 *Handyside v. The United Kingdom*, no. 5493/72, [Plenary] of 7 December 1976, § 49.

2 *Delfi AS v. Estonia*, no. 64569/09, [GC] 15 June 2015, § 110.

3 *Cf.* Responding to 'hate speech': Comparative overview of six EU countries (Art. 19, 2018), accessible at www.article19.org/wp-content/uploads/2018/03/ECA-hate-speech-compilation-report_March-2018.pdf.

4 *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020.

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practitioners in their endeavours to combat hate crime effectively and to act in line with the Court's standards.

2 Hate Crime and Hate Speech: Two Separate Yet Overlapping Concepts

Hate crime is defined by the Organization for Security and Co-operation in Europe (OSCE) Ministerial Council Decision 9/09 as "criminal offences committed with a bias motive".[5]This broad definition, applicable across all OSCE participating States, hence also all Council of Europe and European Union Member States,[6] has been further developed through the work of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and embraces primarily various bias-motivated violent assaults and property damage. According to the mentioned definition, an act can be considered a hate crime only if two elements are fulfilled. First, the basic act, for example, of causing physical harm to another person, must constitute a 'base offence' under domestic criminal law. Second, such an act must be motivated by bias. There is no list of bias motivations or, put in the language of human rights, protected characteristics agreed upon by the OSCE participating states but these should, in principle, constitute immutable or fundamental characteristics and markers of group identity.[7] If any of the two elements are missing, there cannot be a hate crime.

Despite the lack of international consensus on the possibility, let alone the need to criminalize incitement to hatred, collective defamation or Holocaust denial, there are two forms of verbal hate crime that fall within the OSCE definition: direct bias-motivated threats and incitement to violence.[8] The States have acknowledged that such manifestations of discrimination and intolerance threaten the security of individuals and societal cohesion and may give rise to conflict and violence on a wider scale. To address the phenomenon of hate crimes, the States committed to a number of positive actions including, inter alia, enacting specific and tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes; collecting, maintaining and making public, reliable data and statistics in sufficient detail on hate crimes; taking appropriate measures to encourage victims to report hate

5 17th OSCE Ministerial Council, Athens, 1-2 December 2009.

6 The OSCE definition and concept of hate crimes has been also endorsed by the (EU) Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law and Guidance on the mentioned Framework Decision of November 2018, *see*https://ec.europa.eu/newsroom/just/document.cfm?doc_id=55607.

7 Hate Crime Laws: A Practical Guide, OSCE, 2009, pp. 38-46.

8 *See*https://hatecrime.osce.org/what-hate-crime; or *Guide to good and promising practices on the way of reconciling freedom of expression with other rights and freedoms, in particular in culturally diverse societies*, Council of Europe, 2019, Para. 213; or *Preventing and responding to hate crimes. A resource guide for NGOs in the OSCE region*, OSCE, 2009. The Ministerial Council Decision 9/09 called on the participating States to "seek opportunities to co-operate and thereby address the increasing use of the Internet to advocate views constituting an incitement to bias-motivated violence including hate crimes and, in so doing, to reduce the harm caused by the dissemination of such material, while ensuring that any relevant measures taken are in line with OSCE commitments, in particular with regard to freedom of expression".

crimes, recognizing that under-reporting of hate crimes prevents States from devising efficient policies; building capacities of law enforcement, prosecution and judicial officials dealing with hate crimes; exploring ways to provide victims of hate crimes with access to counselling, legal and consular assistance as well as effective access to justice; or promptly investigating hate crimes and ensuring that the motives of those convicted of hate crimes are acknowledged.[9]

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A related and overlapping, yet not identical concept is that of hate speech. Although there is no universally adopted legal definition,[10] on European soil; that is, within the Council of Europe, one can refer to three principal resources. First, Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe on Hate Speech, which defines it as:

> covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.[11]

Second, with regard to the dissemination of racist and xenophobic propaganda through computer systems, there is the Additional Protocol to the Convention on Cybercrime defining racist and xenophobic material, which defines hate speech as:

> any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour,

9 OSCE Ministerial Council Decision 9/09, *ibid*. Based on its mandate to assist States in their efforts to meet these commitments, the ODIHR has developed a robust and globally unique set of tools and resources to address all relevant aspects of combating hate crime. *See* https://hatecrime.osce.org/odihrs-capacity-building-efforts and, most recently, *Hate Crime Victims in the Criminal Justice System*, OSCE, 2020.

10 Most recently, the UN has defined hate speech for working purposes as any kind of communication in speech, writing or behaviour that attacks or uses pejorative or discriminatory language with reference to a person or a group based on who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor. This is often rooted in, and generates, intolerance and hatred and, in certain contexts, can be demeaning and divisive. United Nations Strategy and Plan of Action on Hate Speech (May 2019) p. 2, available at www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf.

11 Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe on Hate Speech.

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> descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.[12]

The third and the most comprehensive definition is finally embedded in the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation (GPR) No. 15 on combating hate speech, which addresses hate speech as:

> advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatisation or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the grounds of 'race', colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status.[13]

The GPR No. 15 sets forth a set of recommendations, including: raising public awareness, providing support for those targeted by hate speech both individually and collectively, providing support for self-regulation by public and private institutions, or clarifying responsibility under civil and administrative law for the use of hate speech while respecting the right to freedom of expression and opinion.

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The concepts of hate speech and hate crime are born from the same intolerance, racism, homophobia, transphobia, misogyny, anti-Muslim hatred or anti-Semitism. One provides with a fertile ground for another and the Gordon Allport scale of prejudice or the derivate ADL pyramid of hate[14] illustrate well the interrelatedness of the two as well as of some less serious (e.g. discrimination) or far more grave (ethnic cleansing, extermination or genocide) expressions of intolerance. Each layer of such a pyramid requires different responses. What distinguishes the concepts of hate speech and hate crime is the fact that while hate crimes are always unacceptable, should be criminalized and harsher sentences imposed – compared with other, 'normal' and unbiased criminal acts, the hate speech concept embraces a wide range of instances which, whether we like it or not, should not be subject to criminal law regulation. While incitement to or threat of violence will *per se* mostly require a criminal response, incitement to hatred or denialist acts will often need to be assessed in their context. To

12 Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, adopted by the Committee of Ministers of the Council of Europe at its 109th Session on 8 November 2001; *see* Arts. 3 and 6 on the concrete action points the states committed to undertake.

13 The European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 15 on combating hate speech, preamble.

14 *Cf.* G.W. Allport, *The Nature of Prejudice*, Cambridge, MA, Addison-Wesley Publishing Company, 1954; *see also*www.adl.org/sites/default/files/documents/pyramid-of-hate.pdf.

decide, the courts inevitably need to weigh different competing interests, rights and freedoms at stake. The degree and nature of harm caused primarily to an individual and, secondarily, to a larger community and society as a whole, should always lie at the centre of the discussion.[15] I will question below how these presumptions have shaped the different positive obligations on States imposed by the Court in respect of the two categories of generally harmful acts, including the specific intersecting category of verbal hate crimes dealt with in *Beizaras and Levickas*.

3 Court Case Law on Hate Crime and Hate Speech: Two Different Perspectives

The effective investigation of hate crimes means the State authorities' "duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events". This obligation was imposed on States no earlier than in 2005 in the case of *Nachova et al. v. Bulgaria*[16] and has been applied for a long time strictly to violent acts under Articles 2 and 3 in combination with Article 14 of the European Convention on Human Rights ('Convention'). This is based on the premise that:

> [t]reating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts which are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are

15 Extensive research has been conducted on harm caused by hate crime, including to secondary victims. *See*, among others, P. Iganski, 'Hate Hurts More', *American Behavioral Scientist*, Vol. 45, 2001; F.M. Lawrence, *Punishing Hate: Bias Crimes under American Law,* HUP, 1st ed., 1999, p. 75; P. Iganski & S. Lagou, 'The Personal Injuries of 'Hate Crime', in Hall, N., Corb, A., Giannasi, P. and Grieve, J.G.D. (eds.), *The Routledge International Handbook on Hate Crime*, Abingdon: Routledge, 2014, pp. 34-46 ; on secondary victims, *see e.g.* B. Perry, 'Exploring the Community Impacts of Hate Crime', *in* N. Hall, A. Corb, P. Giannasi, & J. G. D. Grieve (Eds.), *The Routledge International Handbook on Hate Crime*, Abingdon: Routledge, 2014, p. 41. Opponents to hate speech regulation would generally dispute the existence of harm caused by hate speech, as opposed to, harmful impact thereof. *See e.g.* E. Barendt, 'What is the Harm of Hate Speech', *Ethical Theory and Moral Practice*, Vol. 22, 2019, pp. 522 and 539. Particular discussions are held regarding the specific harm caused by sexist online hate speech or online hate targeting and silencing members of LGBTI community; *see e.g.* M. Nadim & A. Fladmoe, 'Silencing Women? Gender and Online Harassment', *Social Science Computer Review*, 2019, accessible at https://doi.org/10.1177/0894439319865518; www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf; or Council of Europe Factsheet on Combating Hate Speech and Background Note on Sexist Hate Speech, Gender Equality Unit, 1 February 2016, accessible at www.coe.int/en/web/genderequality/sexist-hate-speech; or www.ilga-europe.org/what-we-do/our-advocacy-work/hate-crime-hate-speech; *see also* the most EU-wide survey EU LGBTI Survey II conducted by EU FRA, the results of which were published in May 2020; accessible at https://fra.europa.eu/en/project/2018/eu-lgbti-survey-ii.

16 *Nachova and Others*, [GC], nos. 43577/98 and 43579/98, 6 July 2005, § 160.

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> essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.[17]

The duty to unmask the biased motivation is furthermore complementary to the positive obligation of effective criminal investigation under the procedural limbs of Articles 2 and 3 of the Convention.[18] It is not an obligation of result, but one of means; for the investigation to be regarded as 'effective', it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible: the authorities must have taken all reasonable steps available to them to secure the evidence concerning the incident.[19]

The Court has identified a whole series of criteria that need to be considered, from a possible bias by association,[20] to recognizing the existence of mixed motives or the need to take into account the so-called bias/hate crime indicators.[21] In *Abdu v. Bulgaria*,[22] the Court has also significantly lowered the threshold of applicability of Article 3 regarding hate crimes committed by private individuals to acts which do not necessarily lead to serious injuries. In terms of protected grounds, the Court has had the opportunity to deal with mainly racist or ethnic (often anti-Roma) bias but has addressed also acts involving anti-religious bias[23] or homophobic hate crimes.[24] It has also declared unacceptable that State authorities which should protect those targeted by bias-motivated violence treat the victims in a discriminatory manner.[25]

All the cases mentioned above related to acts were interference with one's physical integrity seemed to have been a precondition to impose the positive obligation of effective investigation of hate crimes. However, it also appears that the Court has been aware of the need to address hate crimes that do not necessarily cause injuries and, in *R.B. v. Hungary* (a case concerning marches or Hungarian paramilitary far-right groups through a Roma settlement), extended such positive obligation under Article 8 of the Convention in respect of direct threats or threatening behaviour.[26] It did so referring to *Aksu v. Turkey*, concerning stereotypical and discriminatory references to Roma in two Turkish publications, in which the Court adjudicated that the notion of 'private life' embraces aspects of a person's physical and social identity and stressed that:

17 *See*, among many others, *Šečić v. Croatia*, no. 40116/02, 31 May 2007§ 66.
18 *McCann and Others v. United Kingdom*, no. 18984/91, [GC] 5 September 1995, § 161; *see also Eremiášová and Pechová v. Czech Republic*, no. 23944/04, 16 February 2012, § 87; *Assenov and Others v. Bulgaria*, no. 24760/94, [GC] 28 October 1998, § 102; and many others.
19 *Balázs v. Hungary*, no. 15529/12, 20 October 2015, § 51.
20 *Škorjanec proti Chorvatsku*, no. 25536/14, 28 March 2017, § 66.
21 *Balázs v. Hungary*, §§ 52 and 75. To explore the issue of bias indicators, *see Categorizing and Investigating Hate Crimes in Ukraine: A Practical Guide*, Warsaw, OSCE/ODIHR, 2019, pp. 29-32.
22 *Abdu v. Bulgaria*, no. 26827/08, 11 March 2014.
23 *Milanović v. Serbia*, no. 44614/07, 14 December 2010.
24 *Indentoba and Others v. Georgia*, 12 May 2015, no. 73235/12.
25 *Stoica v. Romania*, no. 42722/02, 4 March 2008, §§ 36, 122 and 128.
26 *R.B. v. Hungary*, no. 64602/12, 12 April 2016, §§ 53-102.

> any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group.[27]

While I believe that through *Aksu*, the Court prepared the ground for deducing the right to an effective remedy against group libel (collective defamation),[28] it has so far served as a basis for addressing verbal hate crimes.[29] By extending the 'right to an effective hate crime investigation' to verbal hate crimes, the Court seems to have accepted the consideration of the seriousness of mental harm caused by this sort of verbal act. Previously, it had been reluctant to do so.[30]

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The above summarized body of case law on hate crime offers great insight into domestic criminal proceedings and the precarious situation in which victims of hate crime often find themselves, facing discriminatory attitudes on the part of both the perpetrators and the state authorities which should protect them. Interestingly, the perspective of the Court's case law related to hate speech offers quite a different perspective. That of perpetrators claiming the violation of their freedom of expression guaranteed by Article 10 of the Convention in cases when their statements, be them part of political or historical debate, or of an artistic performance, were sanctioned by hate speech laws. Here, the Court has taken two alternative approaches to consider whether Article 10 had been violated. I would call the two approaches (i) a content-based approach to restricting speech and (ii) a context-based approach.[31]

The content-based approach consists in directly excluding some expressions from the Convention protection applying Article 17 of the Convention (Abuse of the Rights), declaring the application inadmissible. Such an approach is preferred by the Court and is used rather sporadically. The key criterion is that an expression aims at destroying other rights protected by the Convention. Thus, based on the content of and aim pursued by certain speech, the Court would launch what some have called a "mechanism against the Convention's auto-destruction".[32] With regard to the freedom of expression, Article 17 has been applied in basically two types of cases. First, the Court has made use of the provision when it faced expressions of an open racial (ethnic or religious) hatred

27 *Aksu v. Turkey, nos.* 4149/04 *and* 41029/04, [GC] 15 March 2012, § 58.

28 V. Kundrák, 'Why Prosecute Incitement to Hatred? On the Freedom of Expression and the Harm Caused by Hate Speech', *in Státní zastupitelství*, Prague: Wolters Kluwer, Vol. 2, 2017, pp. 43-56.

29 *See Király and Dömötör v. Hungary*, no. 10851/13, 17 January 2017, § 76.

30 *Karaahmed v. Bulgaria*, no. 30587/13, 24 February 2015, § 77.

31 V. Kundrák, *Slipping in Spiral: Questioning Harm Caused by Hate Speech and Its Potentiality* (E.MA thesis at EIUC, Venice and ULB, Brussels, 2015).

32 S. Van Drooghenbroeck, 'L'Article 17 De la Convention européenne des droits de l'homme Est-Il Indispensable?', *Revue trimestrielle des droits de l'homme*, Vol. 46, 2001, pp. 545.

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or incitement to violence[33] and, second, when dealing with the justification of a pro-Nazi policy and denial of the Holocaust or its factual circumstances.[34]

The context-based approach comes into play once a discourse does not fall under the exclusion of Article 17 and the case must be handled within the scope of Article 10 of the Convention, namely its second paragraph, applying the relevant five-stage proportionality test. Once acknowledging that freedom of expression is at stake, typically where protecting a particular debate may be in the public interest,[35] there will be strict scrutiny and the result will depend on the assessment of many variables.[36] Moreover, I would say that it has become quite characteristic in the free speech debate that the outcome of the Court's proceedings will to a large extent depend on the individual judge's subjective perceptions of the 'harmfulness' of a given hate speech.[37]

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In sum, the Court has developed a whole body of case law on the positive obligation to enact an effective investigation capable of unmasking the bias motivating violent attacks and direct threats. However, prior to Beizaras and Levickas, it had not expanded such an obligation to hate speech, let alone hate speech online. The main reason is that basically the hate speech case law had always been dealt with under Article 10 of the Convention. Consequently, the legal question was whether it was *possible* and, if so, under what conditions to sanction certain expressions. Yet, the question whether there exists a positive *obligation* to enact an investigation into hate speech cases is of a different nature. It is a question of treating one's criminal case, a case where there is a victim who has suffered harm and who seeks access to justice and an effective remedy.

33 *See e.g. Glimmerveen and Hagenbeek v. The Netherlands*, nos. 8348/78 and 8406/78, [Commission, Plenary] 11 October 1979; *Norwood v. The United Kingdom*, no. 23131/03, 16 November 2004; *Belkacem v. Belgium*, no. 34367/14, 27 June 2017.

34 *Garaudy v. France*, no. 65831/01, 24 June 2003; and *Witzsch v. Germany*, no. 7485/03, 13 December 2005; *M'Bala v. France*, no. 25239/13, 20 October 2015.

35 *Lehideux and Isorni*, no. 24662/94, 23 September 1998, § 46-56 (historical debate); *Féret v. Belgium*, no. 15615/07, 16 July 2009, § 66-82 (political debate); *Perinçek v. Switzerland*, no. 27510/08, [GC] 15 October 2015, § 231 (historical, political and legal debate).

36 Under the proportionality test, the following criteria would apply: the author's position and his/her role in the society; assessment of the form of expression, i.e. the literal style and type of media used (television broadcasting, newspaper interview, Internet discussion, distribution of electoral leaflets, etc.); (potential) impact of the expression; the severity of the sanction imposed; geographical context or time factors. *Cf.* M. Oetheimer, 'La Cour Européenne Des Droits de l'Homme Face Au Discours de Haine', *Revue trimestrielle des droits de l'homme*, Vol. 69, 2007, pp. 76-79. *See also Perinçek v. Switzerland*, cited above, §§ 242-273.

37 *See e.g. Féret v. Belgium* (cited above), where three judges voted against the conclusion on non-violation of Art. 10 of the Convention, having been generally in favour of a less restrictive approach to expressions that may incite discrimination and hatred; *see also* the concurring opinions in the case of *Vejdeland and Others v. Sweden*, no. 1813/07, 9 February 2012.

4 The Beizaras and Levickas Case

4.1 Facts

The application was filed by two Lithuanian nationals, Mr. Pijus Beizaras and Mr. Mangirdas Levickas, born in 1996 and 1995 respectively, both students, who form a same-sex relationship. Both are openly gay and are members of the National Lesbian, Gay, Bisexual and Transgender (LGBT) Rights Association ('the LGL Association').

In December 2014, the first applicant posted on his Facebook page a photograph of him kissing the second applicant. The post was public, not restricted to his Facebook 'friends', and therefore accessible to anyone. The goal was to announce the beginning of the applicants' relationship. The picture went viral and received more than 2,400 'likes' and more than 800 'comments' many of which were allegedly aimed at inciting hatred and violence against LGBT people and personally threatened the applicants. They included calls for homosexuals to be exterminated in gas chambers, burnt, castrated or shot.

Upon the applicants' request, the LGL Association filed a criminal complaint – under, among others, Article 170 §§ 2 and 3 of the Criminal Code ('Incitement against any national, racial, ethnic, religious or other group of people') – with the Prosecutor General's Office regarding thirty-one comments posted under the photo. In December 2014, a prosecutor at the Klaipėda District Prosecutor's Office decided not to initiate a pretrial investigation regarding the complaint. While all (29) authors of the comments were identified (since they all used their personal Facebook profiles), to consider the criminal nature of the respective comments, it had to be assessed whether they constituted an active attempt to incite to hatred or violence (§ 18); such active attempts should then also constitute a 'systematic action'. Since the vast majority of the authors wrote only one comment each, the prosecutor concluded that the objective element of a crime, within the meaning of the mentioned provision, was not established. Although the authors acted 'unethically', they were merely expressing their opinion and did not intend to incite hatred or violence. Such 'immoral behaviour' did not constitute an element of the criminal offence at hand. To support such conclusions, the prosecutor referred to a Supreme Court ruling of December 2012.[38]

The LGL Association contested the prosecutor's decision with the Klaipėda City District Court. However, the former court dismissed their appeal in January 2015 arguing, among others, that the authors chose 'improper words' to express their disapproval of homosexual people and that the 'mere use of obscenities' was not enough to incur criminal liability. The court also noted that the Facebook post was public and thus targeted the public at large. Furthermore, the picture of two men kissing was eccentric behaviour and did not contribute to the cohesion

38 Ruling of the Lithuanian Supreme Court of 18 December 2012 in case no. 2K-677/2012 acquitting a person who posted a comment stating that gay people were "perverts" and "belonged in a psychiatric hospital". In that case the Supreme Court considered that such a comment, even though unethical, had not actively incited hatred or discrimination against homosexual people.

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of those within society who had different views or to the promotion of tolerance. The first applicant should have taken into account the fact that his freedom of expression had to be balanced with his 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". The court stressed that a union between a man and a woman was a constitutional value. The criminal proceedings were an *ultima ratio* measure and not applicable in the given case.

In February 2015, the Klaipėda Regional Court upheld the prosecutor's and district court's conclusions. It also indicated that since the first applicant did not restrict the outreach of the Facebook post to his friends or 'like-minded people', it could be interpreted as "an attempt to deliberately tease or shock individuals with different views or to encourage the posting of negative comments". According to the regional court, 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 (§ 23).

4.2 The Court's Assessment

The applicants complained that they had been discriminated against due to their status. In particular, the domestic authorities' refusal to open a pretrial investigation regarding the hateful comments constituted a violation of Article 14, taken in conjunction with Article 8 of the Convention. They also complained that the authorities' response deprived them of the right to an effective remedy.

On the merits of the application,[39] the Court recalled the values of pluralism, tolerance and broadmindedness and 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 (§ 106). With reference to *Identoba et al. v. Georgia*,[40] the Court noted that to secure a minority member the effective enjoyment of the rights and freedoms under the Convention, States are bound by positive obligations because minorities are more vulnerable to victimization.

It went on to note that the physical and psychological integrity of a person fall within the concept of 'private life' and that a person's sexual orientation and sexual life make part of the personal sphere protected by Article 8 of the Convention (*S. and Marper v. The United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66). This provision can come into play when an attack on a person attains a certain level of seriousness and is made in a manner causing prejudice to the personal enjoyment of the right to respect one's private life (*mutatis mutandis, Delfi AS v. Estonia*, cited above, § 137, with further references). Criminal measures

39 For the purposes of this article I will not address the objection of the Government of lack of exhaustion of domestic remedies based on the argument that the domestic criminal proceedings were initiated by LGL Association (§§ 68-83 of the judgment). However, the issue of third-party reporting of hate crimes in a legal setting where victims of crime dispose of rather limited procedural rights and face secondary victimization deserves special attention, too.

40 *Identoba and Others v. Georgia*, op. cit., §§ 63-64.

and sanctions might be necessary in the case of the most serious expressions of hatred, inciting others to violence. Yet, they can be invoked only as an *ultima ratio* measure. At the same time, 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; such criminal measures are required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes (*R.B. v. Hungary*, cited above, §§ 80 and 84-85; *Király and Dömötör v. Hungary*, cited above, § 76; and *Alković v. Montenegro*, no. 66895/10, 5 December 2017, §§ 8, 11, 65 and 69).

The Court then accepted that the Facebook comments affected the applicants' psychological well-being and dignity, thus falling within the sphere of their private life under Article 8 of the Convention. The Lithuanian Government argued that the authorities' refusal to start a criminal investigation did not constitute discriminatory treatment since (i) the applicants allegedly aimed at provoking the hateful reactions and (ii) the comments at issue had not reached the criminal threshold.

To the first argument, the Court underscored the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms (*cf. Alekseyev v. Russia,* nos. 4916/07 and 2 others, 21 October 2010, § 84). It further recalled that according to both district and regional courts, the picture of two men kissing did not contribute to social cohesion and the promotion of tolerance. The regional court even noted that it would have been preferable if the applicants had only shared such pictures among 'like-minded people'. The Court also mentioned the domestic courts' reference to the Constitutional value of the family as a relation between a man and a woman.

It stressed that while the concept of 'family life' under the Convention embraces relationships between same-sex couples, the State should not fall short of taking into account developments in society and changes in the perception of social, civil status and relational issues. In sum, and in the light of the state authorities' statements, the Court was of the view that the courts disliked that the applicants demonstrated their sexual orientation which was partially why they had approved the prosecutor's refusal to open an investigation.

It went on to examine the authorities' assessment of the acts as not meeting the criminal threshold. As to whether the comments reached the criminal threshold under Article 170 of the Criminal Code, the Court put particular emphasis on the prosecutor's view that the different utterances, including regrets that Hitler did not burn, exterminate or castrated homosexuals, were 'unethical' and constituted 'amoral behaviour', or the district court's conclusion that these comments were mere 'obscenities' and simply words 'not chosen properly'. Referring to *Delfi AS v. Estonia* (cited above, §§ 153 and 159), it reiterated that comments that amount to hate speech and incitement to violence, and are thus clearly unlawful on face value, may in principle require the States to take certain positive measures. Referring to *Vejdeland v. Sweden* concerning a homophobic campaign targeting pupils, it recalled that the threshold rests even lower since also insults that do not call for violence, but hold up to ridicule or slander "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" (*Vejdeland and Others v. Sweden*, cited above, § 55). The Court noted with concern that in anti-Semitic hate speech cases, which did not even amount to incitement to violence, the Lithuanian authorities did apply the relevant provision of the Criminal Code. Their different treatment of the applicants' case seemed to be made solely on the basis of their sexual orientation, and therefore in breach of the fundamental principle in a democratic State, governed by the rule of law.

The Court did not further accept the argument based on the alleged non-systemic nature of the comments. The domestic case law was inconsistent on the matter and, in the past, a single discriminatory comment was sufficient to attract criminal liability. It emphasized the viral potential of the internet and the degree of impact of even one single hateful comment inciting to violence, let alone brutal killing. In that context, the argument put forward by the government, that the positive comments outnumbered the negative ones seemed less relevant.

Although criminal sanctions addressing the most serious expressions of hatred, including inciting others to violence due to one's sexual orientation or sexual life, could be invoked only as an *ultima ratio* measure, the present comments constituted undisguised calls for an attack on the applicants' physical and mental integrity. The protection by criminal law was necessary and, in theory, available under Article 170. However, while the comments were motivated by:

> bigoted attitudes towards that community [...] 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.

Therefore, there has been a violation of Article 14, taken in conjunction with Article 8 of the Convention.

The Court then found that the case at hand deserved separate examination under Article 13 of the Convention, which provides the right to an effective remedy. The Court first concluded that the prosecutor, whose decision was upheld by the courts, examining the applicants' case, did not provide for an effective domestic remedy for homophobic discrimination complaints. It noted that while the domestic courts had reached guilty verdicts regarding similar homophobic comments, the prosecution put particular emphasis on the Supreme Court's case law where this court used the comments of '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. Little attention was paid to the relevance of the gravity of speech although the other mentioned Supreme Court's judgments involved far less serious comments than the present case.

Second, the Court disagreed with the government that non-criminal remedies were appropriate. While it previously held that the comments at stake required a criminal response, the proposed recourse to the Inspector of Journalistic Ethics was problematic as, in the past, the institution was also criticized by ECRI for upholding so-called 'traditional values', as a basis for supporting intolerance. Third, the Court stressed that in the present case, unlike possibly elsewhere, most of the authors of the hateful comments could be identified. To do so, no technical issue seemed to stand in the authorities' way. Fourth, the Court took a critical look at the available statistical data as well as ECRI's findings indicating that the failure of the authorities in the present case was only part of a bigger picture where the law enforcement seemed to have been systematically failing to acknowledge the biased motivation behind similar crimes. The Court concluded that the applicants had been denied an effective domestic remedy in respect of their complaint, and therefore there was a breach of Article 13 of the Convention.

5 Commentary

5.1 Abandoning Verbal Hate Crime Case Law to the Detriment of a Victim-Centred Approach

In respect of the Court's case law on hate crime and hate speech outlined above, the commented case constitutes, in a way, a missing piece of the puzzle. First, the previous case law on the effective investigation of hate crimes had – prior to *Beizaras and Levickas* – only concerned physical violence or verbal assaults constituting individual and direct threats with physical violence. However, the comments in the case at hand were of a different nature since the perpetrators were not explicitly and directly threatening the applicant(s). First, as opposed to *R.B., Király and Dömötör*, or *Alković*,[41] the perpetrators were not in the victims' proximity. They posted the comments online and could have physically resided anywhere around the globe. Second, and on a related point, it is questionable whether in the light of the particular wording, the comments would qualify as threats under the criminal legislation (in Lithuania or elsewhere). The Court did, without dispute, deliver a key ruling addressing the hot topic of online hate speech and hate crimes, namely in the area where the two phenomena overlap – the issue of online verbal hate crimes.

I will address below the main takeaways from the judgment and guidance for the future. Yet before doing so, I feel it is important to start with a few critical notes. In my view, the harm and its nature caused to victims of hate-motivated violence or threats therewith should lie at the centre of any hate crime and hate speech discussion. As opposed to the previous hate speech cases adjudicated by the Court under Article 10 of the Convention, in the present case the applicants were placed on the other side of the pitch since they fell victim to words that harm. In that sense, the Court seems not to have fully exploited the opportunity to approach the case through a victim-centred perspective.

41 All three cases cited above.

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Previously, it had done so; in cases regarding the effective investigation of ill-treatment or bias-motivated violence and threats, some of which are mentioned above, the Court was forced to address the question whether a certain act met the threshold of Article 3 or caused mental suffering necessary to activate Article 8 of the Convention. For instance, in *M.C. and A.C. v. Romania* concerning homophobic attacks against participants of an LGBTI march, the Court held that:

> the aim of the physical and verbal abuse was probably to frighten the applicants so that they would desist from their public expression of support for the LGBTI community [...]. The applicants' feelings of emotional distress must have been exacerbated by the fact that, although they followed to the letter the instructions issued by the organisers of the march in order to avoid becoming victims of aggression [...] and had no distinctive marks on them, they were attacked because of their participation in the gay march and thus because they were exercising rights guaranteed by the Convention.[42]

Similarly, in *R.B. v. Hungary* where the Court established the positive obligation of the effective investigation of verbal hate crimes, it held that:

> the Court's case law does not rule out that treatment which does not reach a level of severity sufficient to bring it within the ambit of Article 3 may nonetheless breach the private-life aspect of Article 8, if the effects on the applicant's physical and moral integrity are sufficiently adverse and that the applicant, who is of Roma origin, felt offended and traumatised by the allegedly anti-Roma rallies organised by different right-wing groups [...] in the predominantly Roma neighbourhood [...] and, in particular, the racist verbal abuse and attempted assault to which she had been subjected [...] in the presence of her child.

The present case provided a topical scenario of hate crime and hate speech online, where an individual's mental integrity was undoubtedly affected, regardless of the fact that tens, hundreds or thousands of miles may have separated the perpetrators and the victims. The court could have well picked up on its previous case law on verbal hate crimes and put forward arguments why online hate is harmful and how online threats affect the victims. However, for unclear reasons, the Court unexpectedly deviated from that case law and – instead of applying *Aksu v. Turkey* to conclude on the applicability of Article 8 of the Convention – it surprisingly referred to the case of *S. and Marper v. The United Kingdom,* which seems far less relevant for the present case.[43] Following the *Aksu* Grand Chamber judgment and the verbal hate crime cases concerning persons of Roma origin would allow the Court to expand the notion of private life under Article 8, in the

42 *M.C. and A.C. v. Romania*, no. 12060/12, 12 April 2016, § 117.

43 *S. and Marper v. The United Kingdom*, nos. 30562/04 and 30566/04, [GC] 4 December 2008, § 66. The case concerned retention of fingerprints and DNA information in cases where the defendant in criminal proceedings is acquitted or discharged.

particular context of stereotyping or stigmatizing certain groups and minorities, in order to cover the impact of homophobic (and potentially) transphobic verbal hate crimes. The Court could easily refer to the cases of *Identoba et al. v. Georgia*[44] or *M.C. and A.C. v. Romania*[45] (both concerning homophobic violence) to address the positive obligation to investigate homophobic verbal hate crime online. One can only speculate why the Court ignored *R.B.*, *Király and Dömötör*, or *Alković*.[46] To do justice, the Court did refer to some of these judgments to establish that some forms of bias-motivated violence and threats require a criminal response – but then 'abandoned' the case law later in the judgment, in respect of establishing the positive obligation to respond to the comments through the means of criminal law.

It is also fair to say that at one point, the Court addressed the danger of hate speech going viral which, in fact, is probably one of the most important elements of online hate speech that allows one single hateful, slandering or stigmatizing comment to cause serious harm and trauma. We know, and the applicants together with the intervening LGL Association also put forward such arguments, that online verbal hate crimes do cause mental suffering and anxiety. Furthermore, the impact can be multiplied also because the perpetrators often happen to hide in anonymity.[47]

The point is finally of not only the general values and interests that the international fight against hate crime and hate speech represents. Recognizing or disregarding harm caused by online verbal hate crimes may have concrete implications in domestic criminal proceedings. The procedural rights of (hate crime but also other) victims in criminal proceedings is a problem in and of itself, as proved, for example, by the recent hate crime case *Lakatošová and Lakatoš v. Slovakia*.[48] Often, for individuals to claim their status as a victim of a crime, that is, to have some sort of standing in the criminal proceedings, the actual existence and level of harm needs to be assessed.[49] Proving such harm might then be particularly difficult in cyber hate cases, namely when state authorities decide to treat verbal hate crimes under incitement to hatred (or similar) provisions: the objective of these provisions is often to defend public interests such as public order or the principles of equality and non-discrimination – not necessarily the integrity of individuals. The standing of victims, however, directly affects their involvement (or absence thereof) in criminal proceedings; that is, their right to seek redress and compensation. In particular, to propose evidence, provide victim testimonies and contest the courts' decisions. Furthermore, recognizing that a

44 *Ibid*. In *Beizaras and Levickas*, the Court did refer to *Identoba and Others* but not explicitly in the context of homophobic hate crimes and when reaching the conclusion that the acts at hand enacted a positive obligation of the State authorities to investigate the case.

45 *M.C. and A.C. v. Romania*, no. 12060/12, 12 April 2016.

46 *Ibid*.

47 https://rm.coe.int/starting-points-for-combating-hate-speech-online/16809c85ea, or T. McGonagle, *The Council of Europe against Online Hate Speech: Conundrums and Challenges*, Expert Paper, pp. 27-30; accessible at https://rm.coe.int/16800c170f.

48 *Lakatošová and Lakatoš v. Slovakia*, no. 655/16, 11 December 2018, §§ 90-94.

49 For instance, in France; *see Hate Crime Victims in the Criminal Justice System*, 2020, p. 59.

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victim of a hate crime 'exists' goes hand in hand with a State's duty to provide a needs-based support to that, including protection, and legal and psychological assistance.[50]

As an inspiration for both national and international jurisdictions, a particularly strong and persuasive argument in favour of victims of verbal hate crimes online was recently put forward by the Czech Constitutional Court, which was called upon to assess whether a district court's decision to deprive the applicant of his status as a victim – and thus exclude him from the trial – constituted a breach of his constitutional guarantees of access to justice. While the criminal act, consisting in the defendant's calls for the extermination of persons of Roma ethnicity posted on the applicant's Facebook 'wall', was dealt with under a traditional hate speech provision (notice the similarity of the scenario with the case of *Beizaras and Levickas*),[51] the district court argued that the applicant was not personally affected by the expressions since they did not threaten or anyhow target him in person. The Czech Constitutional Court unambiguously refuted such argument and implicitly proposed a historical comparison between a Facebook profile and Jewish shops vandalized during the *Kristallnacht* events of 1938:

> the horrible experience with stigmatisation of social minorities should not be merely reflected in adoption of "generally protective" criminal legislation but also in a more in-depth examination and understanding of the harm caused to those who are targeted by such attacks. The courts should always assess how an individual attack affects the personal integrity of a concrete individual (due to being under threat, worries, defamation etc.) [...] The courts must not, however, abscond this difficult situation by deploying procedural measures to avoid hearing the victims' voices.[52]

5.2 Obligation to Conduct Effective Investigation?

The judgment undoubtedly constitutes an important contribution to the debate about online hate speech and hate crimes, as well as about homophobia and transphobia, in Lithuania and beyond. Regarding its guidance for the future, it is first of all clear that homophobic verbal hate crimes can activate, under Article 8 in combination with Article 14, the positive obligation to enact a criminal response, including when such acts are committed online. Yet, to conclude that the Court created a new positive obligation to investigate and prosecute hate speech would be far-fetched. All that glitters is not gold and I believe that the

50 For further analysis of these duties and the conundrums, *see Hate Crime Victims in the Criminal Justice System*, 2020.

51 In particular, Section 404 of the Czech Criminal Code (Expressing Sympathies for Movements Seeking to Suppress Human Rights and Freedoms).

52 Judgment of the Constitutional Court of the Czech Republic of 2 April 2019, ref. no. III. ÚS 3439/17, concerning a Czech singer of Roma origin who, after publicly disagreeing with a music award being handed over to a former band leader of neo-Nazi band, received around 4,000 hateful messages including calls for extermination of Roma.

following parameters need to be discussed to assess the practical implications of the case.

First, the victims of hate crime will always need to prove that they fell victim of a violation of the Convention in the sense of Article 34 and any of the substantive provisions, such as Articles 2, 3 or 8 of the Convention. The interference with their physical or mental integrity will thus be key. While it will be easier to establish harm caused by hate crime consisting in a physical assault, threats therewith or property damage,[53] it might be much more difficult with incitement to hatred or 'denialism' which typically address the wider public. The 'existence of a victim of a violation of the Convention' will be key. Although the Court has not addressed this issue explicitly, we may assume that in the present case, the nexus between the harmful comments and their impact on the applicant's integrity was determined by their mere placement under the first applicant's Facebook post. In the case of a post inciting hatred against a minority group published online, without mentioning or tagging a particular individual, it may be challenging to establish such a connection.

Second, notwithstanding the legal qualification of the comments by the Lithuanian authorities, the Court stressed on many occasions that the comments amounted to incitement to violence against gays. The Court had previously accepted that criminal sanction for such acts may be necessary. Hence, the threshold is still set rather high to conclude that other forms of hate speech such as incitement to hatred or discrimination, Holocaust denial and similar would automatically qualify. It should also be noted that incitement to violence together with direct threats fall within the OSCE definition of hate crimes (see above). There is a strong international consensus about the need to criminalize biased incitement to violence but the same can hardly be said about forms of hate speech of lesser gravity. The Court had extensively addressed the issue of conflict between freedom of expression and other competing rights and interests (as per the second paragraph of Art. 10) in the past and implicitly stressed the need to consider the gravity of the speech in the present case as well. An important message is that the Court did not seek to establish that the threats or danger stemming from the comments were anyhow imminent.[54]

Third, in line with the previous hate crime case law, the Court assessed the situation against the context in the country as described by international monitoring bodies, such as ECRI. Where such bodies conclude on wide-scale intolerance against particular minorities, let alone on the state authorities' systemic failure or reluctance to address those, the scrutiny will be rather strict.[55]

Fourth, the discriminatory treatment of the victims by the investigating authorities will constitute the straw breaking the camel's back. It is unacceptable if the same authorities which should protect the victims and offer effective

53 *R.B. v. Hungary*, or *Alković v. Montenegro*, both cases cited above.

54 *Cf.* S. Stavros, 'A Gay Kiss on the Internet: Can Strasbourg Litigation Help Win the War Against Homophobia?', OxHRH Blog, 27 January 2020, accessible at http://ohrh.law.ox.ac.uk/a-gay-kiss-on-the-internet-can-strasbourg-litigation-help-win-the-war-against-homophobia.

55 *See R.B. v. Hungary*, op. cit.; or *Lingurar and Others v. Romania*, no. 5886/15, 16 November 2018, § 119.

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remedies use biased and derogatory expressions,[56] disregard obvious indicators of bias,[57] or apply relevant legislation or domestic case law in an arbitrary and discriminatory manner. The present case included several instances of such conduct, which is especially harmful vis-à-vis hate crime victims. A few illustrative examples: the prosecutor's argument that the first applicant should have taken into account the fact that his freedom to express himself through the posted photo was inseparable from the obligation to respect the views and traditions of others; the courts' consideration of what the majority population allegedly thought ('the majority of Lithuanian society very much appreciate[d] traditional family values'); derogatory victim blaming, when the district and regional courts blamed the first applicant that he had not restricted the post to his friends or 'like-minded people'.

Fifth, it is worth stressing that while the Court established the need to respond to similar comments through the means of criminal law, it did not explicitly expand the positive obligation under Articles 2, 3 and 8 in combination with Article 14 of the Convention to conduct an effective investigation of hate crime. It rather focused on the discriminatory application of the law by the prosecution and courts. Indeed, under Article 13 of the Convention, the Court assessed the conundrums of the remedy against homophobic speech, including in the light of the level of intolerance in the country as well as the State's efforts (or lack of) to address it. If in the future the Court gets a chance to assess the very investigation and particular steps taken (or absence thereof), unlike with the effective investigation of hate crime, the positive obligation to unmask bias motivation may not seem particularly pertinent in respect of incitement to violence (but also many other different forms of hate speech) online. Unlike physical assaults or direct threats that take place offline, and often without any witnesses, proving bias motivation is not the most challenging aspect of hate speech investigation since the very words used often serve as evidence of the bias behind the message.

What really mattered in the present case (and what may be relevant in other similar cases) was the state authorities' failure to recognize the gravity of the homophobic comments and accept that, in the light of the Court's case law on freedom of expression, namely under its Article 17 (see above), the victims' interests and need for protection under criminal law clearly outweighed the perpetrators' freedom to share their world views. These were, in fact, blatantly unacceptable homophobic calls for brutal violence attached under the photo of the applicants' who could legitimately fear that the violence takes shape at some point. Whatever the case is, the investigation never started and the Court had no investigative steps to assess – as it usually does under the relevant positive obligation. We will thus have to wait until the Court identifies the parameters of an effective investigation of biased incitement to violence.

56 *Stoica v. Romania*, cited above, §§ 36, 122 and 128.

57 *See Balázs v. Hungary*, op. cit. *See also e.g. Lakatošová and Lakatoš v. Slovakia*, cited above, §§ 76 and 96.

Finally, States also need to make sure to implement general measures which appropriately respond to hate crimes, including verbal hate crimes. They need to, first, recognize the gravity of the agenda and, second, start addressing the issue comprehensively. While relevant legislation is most often in place, States often fail to turn the laws into practice.[58] In the present case, the Court has noted that the Lithuanian authorities were, in general, failing to acknowledge the bias-motivated hate crimes (§ 155 of the judgment). Not only are there conceptual confusion and lack of awareness among the practitioners, according to ODIHR's findings, States namely lack the mechanisms to record hate crimes, that is to record the biased motives.[59] Hence, first, they cannot collect reliable data and cannot develop appropriate policies to comprehensively address the problem. Second, they cannot trace the biased motivation through the criminal proceedings so that, at the end of the day, an aggravated sentence is imposed on the perpetrator. While Lithuania has already received some extensive criticism from ECRI and most recently in the present case, we can also observe efforts to remedy the situation ranging from working closely with civil society, and training law enforcement to improve the recording and data collection mechanisms (see ECRI's most recent conclusions mentioned in § 62).

6 Conclusion

The impacts or the value of the judgment at hand is twofold. First of all, it has considerable potential to spark debates about the situation of same-sex couples in Lithuania and across Europe and, in that sense, help advocacy which goes beyond the issues dealt with in the judgment, such as same-sex marriage, the constitutional protection of family, the meaning of the latter notion and the like. Second, the consequences are legal. Yet, these should not be overestimated. The judgment does not provide a *carte blanche* for states to criminalize and investigate hate speech. Freedom of expression remains one of the cornerstones of a democratic state and society and can be limited only in exceptional circumstances.

However, the internet and cyber hate can be used to harm and silence individuals. From hate speech there is only one step to bias-motivated violence

58 While many states do provide a criminal law framework for some instances of hate speech, these laws are not as much applied. *Cf*. Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, pp. 3-6; accessible at https://op.europa.eu/en/publication-detail/-/publication/ea5a03d1-875e-11e3-9b7d-01aa75ed71a1. It is noteworthy that incitement to hatred based on sex, gender or sexual orientation is often not covered by the relevant provisions; *See* Responding to Hate Speech against LGBTI people: Policy Brief (Art. 19, 2013), accessible at www.article19.org/wp-content/uploads/2013/10/525b9eb64.pdf.

59 *See* ODIHR's 2018 Hate Crime Data Key Findings, at https://hatecrime.osce.org/infocus/2018-hate-crime-data-now-available; "Hate crime victims disadvantaged by gaps between hate crime legislation and implementation, OSCE human rights head says", OSCE, 15 November 2019, accessible at www.osce.org/odihr/439127.

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and hate crimes. Verbal hate crimes, including online threats and incitement to violence, which targeted two young men in the case of *Beizaras and Levickas*, are illustrative of how words can harm. However, while the Court picked up on its previous case law on verbal hate crimes, regrettably, it chose not to address the harm caused to a member of a group or community which happens to be subject to stigmatization and marginalization. Still, the Court showed no mercy for the criminal justice agents who apply criminal legislation (the goal of which is to punish extreme expressions of intolerance and protect those vulnerable) in a discriminatory manner by either relativizing calls for homophobic violence by treating them as 'immoral behaviour' or re-victimizing the victims.

In terms of guidance for the future, the positive obligation to investigate hate speech will arise only if (i) verbal attacks interfere with an individual's personal sphere; that is, one's mental integrity – the connection can be established, for instance, by the fact that threatening expressions are posted under one's post or on one's Facebook wall; (ii) the act attains sufficient degree of gravity; for instance, direct threats and incitement to violence would qualify. Furthermore, the Court will (iii) look into the general climate in a given country with regard to a particular minority or group and the level of intolerance or hostility; and assess (iv) whether the criminal justice authorities have not treated the case at hand in a discriminatory or selective manner; while, at the same time, (v) the need to uncover racist, homophobic or similar bias – a positive obligation typical for hate crimes – will not be as much pertinent for biased incitement to violence where the discriminatory element is inherent. Finally, (vi) the Court might assess the State's efforts to combat intolerance through appropriate actions such as creating suitable policies, building the capacities of the police and prosecution to recognize hate crimes or improving the recording and data collection mechanisms which enable them to monitor bias-motivated crimes in a comprehensive manner.