Cases Against Lithuania in the European Court of Human Rights (2019–2021): In Search of Landmark Judgments

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Abstract: The article deals with the 2019–2021 case-law of the European Court of Human Rights in cases against Lithuania, trying to identify landmark judgments, i.e., such judgments that may have a lasting effect on the Court's future case-law. Virtually all ECtHR Chamber judgments adopted in the said period, by which cases were decided on the merits, as well as inadmissibility decisions are discussed. Their significance not only for the Strasbourg Court's case-law but also for Lithuanian law (including courts' case-law) is demonstrated, some pertinent problems of Lithuanian law are identified, which are particularly highlighted by the Strasbourg Court's judgments in "Lithuanian" cases. Using the method of exclusion, three judgments of the said period are selected, which could be treated (in advance and subject to reservations) as landmark ones: *Drėlingas v. Lithuania* (2019), *Rinau v. Lithuania* (2020) and – as the "most suitable" candidate for the status of a landmark judgment – *Beizaras and Levickas v. Lithuania* (2020). The article provides an explanation, nowhere laid out so far, what factors may have led to that that the *Drėlingas* judgment, as it is, has at all become possible, which, although being a Chamber judgment, clearly dissonates with the Grand Chamber judgment in *Vasiliauskas v. Lithuania* (2015).

Keywords: *European Court of Human Rights; cases against Lithuania; case-law; landmark judgments.*

In lieu of introduction

The topic of this article was prompted by the article of Prof. Egidijus Jarašiūnas written in 2016.[2] The author asks – and makes this question the title of his article: Are there judgments in the case-law of the Court of Justice of the European

1 Article submitted for publication on 24 November 2021.

2 Egidijus Jarašiūnas, *Didieji sprendimai: ar Europos Sąjungos Teisingumo Teismo pastarųjų metų jurisprudencijoje yra sprendimų, kuriuos galima vadinti „didžiaisiais"?*, from *Universitas est. Mykolo Romerio universitetui 25. Liber amicorum Alvydui Pumpučiui: mokslo studija*, A. Monkevičius *et al.* (Vilnius: Mykolas Romeris University, 2016).

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Union (CJEU) of recent years that can be called "great"? The reference point for "recent years" chosen by him is the date of coming into effect of the Treaty of Lisbon (1 December 2009). Having started, quite rightly, his deliberation with an explanation (clarification) of the concept of "great judgments", E. Jarašiūnas goes on to discuss some CJEU judgments which, in his opinion, deserve the epithet of "great".[3] One may agree or disagree to holding judgments selected by him as "great" (or to the fact that some judgments were not assigned to this category), but it is reasonable to call only such judgments "great" which are not only "most legally important"[4] but also are "always bigger than usual legal undertakings".[5] At the same time, E. Jarašiūnas admits that "great judgments" are achievements that are not possible without a certain risk.[6]

One cannot overlook the fact that the very concept of "great judgments" is imported from the French legal discourse[7] – it has been applied quite mechanically in European Union (EU) law. However, this concept is not common in other languages, perhaps owing also to the fact that it sounds a bit pretentious. This does not, in itself, make it unacceptable or, all the more so, incorrect. However, speaking about jurisprudential innovations, the word "great" is usually avoided. For example, texts in English, instead of the French epithet "*grand*", meaning "great", use its verbatim equivalent "*leading*" or, even more often, "*landmark*".[8] Of course, all apex national courts, as well as international courts, have adopted such decisions, which, more than most others, are pivotal in further development of their case-law. These decisions are therefore not routine decisions, they are not "just precedents", they mark a certain new point in the development of case-law and in this sense can be called landmark judgements. They provide key guidance for future case-law. Without "great judgements" of the CJEU, the European Union's legal system would not be as it is now.[9] This also applies to other legal systems: without their landmark (or "great") decisions, they would all be different.

3 *Ibid.*, 266–288.

4 *Ibid.*, 259.

5 *Ibid.*, 290.

6 *Ibid.*, 289–292.

7 This is also reflected in the titles of some of the works cited by E. Jarašiūnas.

8 The Lithuanian word "*riboženklinis*", used in the Lithuanian version of this article, is a verbatim translation of the English word "*landmark*". Perhaps it has not yet been widely accepted but has already been approved by Lithuanian language editors. See Robert Spano, *Teisės viešpatavimas kaip Europos žmogaus teisių konvencijos kelrodis – Strasbūro Teismas ir teisėjų nepriklausomumas* [Original English title" *The Rule of Law as the Lodestar of the European Convention on Human Rights*: The Strasbourg Court and the Independence of the Judiciary], transl. E. Kūris, *Teisė* 119 (2021): 9, 19.

9 E. Jarašiūnas, *Op. cit.*, 256.

In this article, I will be using not "great judgments" but "landmark judgments", as a concept which is more usual, more formal and, above all, less pretentious. The fact that a certain judgment is deemed "great" does not mean that it is "great" in all the meanings of this word, which are numerous, and some of them even have a certain value or emotional charge. A judgment can be "great" because it has substantially shifted, maybe even reversed the development of case-law in the direction of greater consolidation of the rule of law, more effective enforcement of human rights and/or consolidation of internal coherence of law. It can be "great" also because, although it did not have a fundamental impact on the development of case-law, it has solved a momentous dispute of great public concern in a particular extraordinary case. A judgment can be "great" also because the principles and/or methodology formulated therein must now be followed in relevant cases, but this does not in itself mean that it is progressive, i.e., is directed toward greater consolidation of the rule of law. The latter aspect of the judgment's "greatness" is a value-neutral one. Judgments with at least one of the here-mentioned meanings are to be considered landmark, but only those of them which not only draw guidelines for the future (and can pass the test of time), but also have a certain value-direction, are worthy of the title of a "great judgment". For example, *Dred Scott v. Sandford*[10] was a "great decision" in the third meaning of those mentioned here, as it constitutionalised slavery, making it even more entrenched. Incidentally, after *Marbury v. Madison*,[11] it was the first US Supreme Court decision, by which a federal law (the so-called Missouri Compromise) was found unconstitutional. Therefore, *Dred Scott* can, of course, quite rightly be called a landmark decision, as its influence on US constitutional law (and not only on it) is beyond doubt. But hardly anyone would seriously call it "great" in the first of the here-mentioned meanings. From a short-term perspective, the *Dred Scott* was a destructive decision, as it brought the disputes over slavery, ongoing at the national level, to the extreme, that grew into the American civil war. And from the contemporary viewpoint, it was shameful. I call such decisions *korematsu* – I write this word (though originating from a surname) in lowercase and use it as generic.[12] The high courts of various countries (international courts, too) have various *korematsu* in their case-law – although they would prefer not to have them.

If any ECtHR judgments at all can be titled "great", when being distinguished as such, they must be disassociated from the third, value-neutral meaning of the word "great". The second meaning is also to be set aside, as when a "great

10 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

11 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

12 *Korematsu v. United States*, 323 U.S. 214 (1944). In that case, the Supreme Court justified the internment of Japanese Americans during World War II.

judgment" is understood in this meaning, its "greatness" is mainly determined by the notoriousness of the case in question in a state or even on a broader scale rather than by the jurisprudential value of the judgment itself. If by a "great judgement" is understood a judgment, which put an end to a dispute which had raised much emotion, it will probably be remembered for a long time; for some time it may even be deemed an administration of justice *par exellence* and can strengthen the society's confidence in law, courts and justice at that time, but in the long term – depending on the specific circumstances and on the overall development of society – its assessment can turn into negative. And, on the contrary, a court decision in a notorious case may be received negatively by both the society and legal professionals, but later it may turn out not only as having been reasonable in that particular situation, but as having long-term benefit for the society and its law. It would not be reasonable if decisions that "everyone is talking about" are lightly called "great" for the sole reason that "everyone is talking about" them. But all of them are landmark decisions in one or another aspect, in other words, the most important ones.

Thus, only those landmark judgments can be called "great", which not only have a crucial impact on the development of case-law but also better than theretofore consolidate fundamental values, which law is meant to protect and defend. One can argue about this concept of "great decisions", too, asking: what are those fundamental values consolidated by such "great decisions"? There will never be unanimity on values. For pragmatic purposes, this argument must be pre-empted (otherwise it would never end) and the problem simplified by stating that fundamental legal values are the more or less universally recognized elements of the rule of law: law's foreseeability, stability, clarity and internal consistency in law; its publicity and forward-lookingness; prohibition to require the impossible; prevention of authorities' and officials' arbitrariness; non-discrimination and legal equality of persons subject to law; protection and defence of human rights, etc.

In the author's opinion, the selection of ECtHR's "great judgments" is more complicated, maybe more controversial than CJEU's "great judgments". Assessment of the "greatness" of the latter has more or less clear ground to spring from: the CJEU has to ensure uniform interpretation and application of EU law at the EU and Member State level. Most of CJEU judgments are not determined by the balance of competing values, which has to be searched for in ECtHR cases. CJEU judgments are almost unaffected by whether or not there is a European consensus on a particular issue (opinions of the EU Member States can be and are paid heed to, however, even if those opinions are completely divergent, CJEU does not state that this alone allows Member States to interpret and apply the relevant provisions of EU law in a way that each of them deems to be better, hence, differently). CJEU judgments are pronounced *ex cathedra*, not only without publishing judges' separate opinions but

even without indicating the ratio of votes cast (it is believed that this should vouchsafe them greater authority). Meanwhile, ECtHR judgments, even the most significant ones, are often adopted not unanimously but by a certain majority, at times very narrow, even minimal, and are often immediately criticised in the alongside-published separate opinions of judges who disagree with them.[13] They clash not only with national legislative and law-application practices but also with value stances underlying them. It is, therefore, much more difficult for an ECtHR judgment to be recognized as "great". In spite of that, the number of such judgments is not negligible. To wit, there is a wide consensus that "great" judgments, in the first of the three above-mentioned meanings, include, for example, judgments adopted in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,*[14] wherein ECtHR's position regarding the relationship between the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, the Convention) and EU law is formulated, *Vinter and Others v. United Kingdom,*[15] which enshrines the right of life-prisoners to ask for replacement of that sentence with a fixed-term custodial sentence ("right to hope"), or *Bărbulescu v. Romania,*[16] which prohibits the narrowing of an employee's privacy at the workplace to zero. Such judgments are certainly landmark ones, but it would not be incorrect to call them "great", as well. Usually, these are judgments of ECtHR Grand Chamber. There is probably a reason to maintain that at least one such judgment has been adopted by the Grand Chamber also in a "Lithuanian" case – *Cudak v. Lithuania:*[17] this judgment narrowed the application of the state immunity doctrine in judicial disputes over civil rights of a person (at least those allegedly violated by foreign states' missions). On the other hand, though in this sense the distinction of certain ECtHR judgments as "great" is meaningful, their "greatness" is usually limited to "sectorial" set of problems: they are treated as "great" only in relation to a certain right enshrined in the Convention, for example: the most important judgments on the right to life; the most important judgments on the right to liberty and security; the most important judgments on the freedom of expression, and so on. Besides, a judgment can be eminently significant (landmark),

13 A judgment may be determined by the fact that some judges, who disagree with the majority's reasoning, join the majority and vote for a conclusion in question but criticise that reasoning in their separate opinions. In such a case, the reasoning in support of the conclusion does not, in itself, garner the majority of votes. Cf. *Merabishvili v. Georgia* ([GC], no. 72508/13, 28 November 2017), where eight judges voted against the finding of a violation of Article 18 of the Convention, nine voted for the finding of this violation, but as many as four out of those nine disagreed with the reasons stated in the judgment, meant to substantiate that finding.

14 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98, 30 June 2005).

15 *Vinter and others v. United Kingdom* ([GC], no. 45036/98, 9 July 2013).

16 *Bărbulescu v. Romania* ([GC], no. 61496/08, 5 September 2017).

17 *Cudak v. Lithuania* ([GC], no. 15869/02, 23 March 2010).

even "great", in one respect (for example, owing to the general principles enunciated in it), but in other respects its "greatness" may be, mildly put, dubious (for example, owing to the application of those principles in that particular situation, even if the final conclusion does not raise any major doubts).[18] Lastly, a jurisprudential doctrine can be adjusted, even substantially amended, by a new (revolutionary?) judgment, which would wipe out what was established perhaps even by a series of previous landmark judgments, as, for example, it happened when ECtHR (at last) recognized that Article 10 of the Convention guarantees not only the right to receive and impart information but also to search for it.[19] Due to all these circumstances, when speaking about ECtHR judgments, the concept of "great judgments" is to be used – and is actually used – very cautiously; however, it is common to refer to the Court's most important judgments as landmark ones.

ECtHR landmark judgments are usually grouped according to the rights enshrined in the Convention: right to life (Article 2); prohibition of torture (Article 3); right to a fair trial (Article 6), etc. Truth to say, there may be certain doubts regarding the fact that some "semi-official" information sources, such as the website of the Council of Europe (ECtHR being an institution of the Council of Europe), include in these categories only two or three judgments.[20] Their selection criteria are not clear. Some categories include such judgments, the long-lasting effect of which on the law of the Convention can hardly be considered exceptional, whereas more significant judgments are not mentioned.[21] Judgments are included, the positive meaning of which is undoubted, but they, as it is often the case with medication, can have not so innocent side effects.[22] Much more informative and

18 Cf. the ambivalent assessment of the judgment in *Ramanauskas v. Lithuania* ([GC], no. 74420/01, 5 February 2008), in Egidijus Kūris, On Lessons Learned and Yet to Be Learned: Reflections on the Lithuanian Cases in the Strasbourg Court's Grand Chamber, *East European Yearbook on Human Rights* 2, 1 (2019): 9–11, 39.

19 *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, 8 November 2016).

20 Landmark Judgments, Council of Europe, accessed on 15 November 2021, https://www.coe.int/en/web/human-rights-convention/landmark-judgments.

21 E.g., *Nagla v. Latvia* (no. 73469/10, 16 July 2013) and *The Sunday Times v. United Kingdom (no. 1)* ([Plenary], no. 6538/74, 26 April 1979) are indicated as judgments most significant for the freedom of expression. Freedom of Expression: Landmark Judgments, Council of Europe, accessed on 15 November 2021, https://www.coe.int/en/web/human-rights-convention/expression1. Is that all?! What about *Magyar Helsinki Bizottság v. Hungary* (footnote 18 *supra*)? Or *Delfi AS v. Estonia* ([GC], no. 64569/09, 16 June 2015)? Or *Pentikäinen v. Finland* ([GC], no. 11882/10, 20 October 2015)?

22 E.g., *Sejdić and Finci v. Bosnia and Herzegovina* ([GC], nos. 27996/06 and 34836/06, 22 December 2009). It is really a landmark judgment on prohibition of discrimination. However, the enforcement of this judgment has been too complicated by the reason of particularities of the Constitution of Bosnia and Herzegovina, which is an annex to the Dayton Accords. Prohibition of Discrimination: Landmark Judgments, Council of Europe, accessed on 15 November 2021, https://www.coe.int/en/web/human-rights-convention/discrimination1.

better substantiated are overviews of the most important "sectorial" judgments provided on ECtHR's own website,[23] however, on some issues their number is too big to allow to call them all not only "great" but even landmark judgments. In addition, reviews of the most important judgments in cases against individual states are presented, but their selection criteria are not provided.[24] For example, the entry "Lithuania" refers to as many as 50 judgments.[25] No matter how much we could be possessed by parochial patriotism, even admitting that the importance of some of the judgments listed there certainly reaches beyond the borders of Lithuania, we should not disallow the fact that the number of landmark (literally) judgments adopted in "Lithuanian" cases is not that big.

Although not very clear, the grouping of the most important ECtHR judgments by state makes sense. From the perspective of the law of the Convention, the criterion for their distinguishing can be neither the notoriousness of a case nor the effect of a judgment on law of a respective country (as their impact on law of other countries without similar problems may be minimal or there may be no impact at all). Of course, one cannot prohibit anyone from using the concept of a landmark judgment to describe the judgment's effect solely on a relevant state and her law, but that would be assessment from the perspective of the law of the country concerned rather than from the perspective of the law of the Convention.[26] And, from the perspective of the law of the Convention, there can be only one criterion – that after a relevant judgment, the Court's case-law changes towards deeper entrenchment of the rule of law.

However, the time factor also matters. It is not always possible to clearly predict what significance one or another judgment may have (or may eventually acquire).[27] Even a very important judgment can soon be obscured by another, even

23 Factsheets, European Court of Human Rights, accessed on 15 November 2021, https://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=.

24 Country Profiles, European Court of Human Rights, accessed on 15 November 2021, https://www.echr.coe.int/Pages/home.aspx?p=press/country&c=.

25 Lithuania, European Court of Human Rights, accessed on 15 November 2021, https://www.echr.coe.int/Documents/CP_Lithuania_ENG.pdf.

26 E.g., the judgment in *Lisovskij v. Lithuania* (no. 36249/14, 2 May 2017) must have been very important for Lithuanian law (case-law) in that respect that it revealed serious shortcomings in the planning of adjudication of complicated criminal cases in courts, the delay of which (no matter that it is not deliberate), when the defendant is detained before the proceedings, can result in finding, in Strasbourg, of a violation of Article 5 § 3 of the Convention. Therefore, from the perspective of Lithuanian law (and, specifically, courts' case-law) alone, this judgment could be considered a landmark judgment. However, it does not contain any doctrinal or methodological novelties. Though *Lisovskij* precedent is referred to in other ECtHR cases, from the perspective of the law of the Convention it is "just another" judgment concerning duration of detention or pre-trial imprisonment – far from being a landmark judgment.

27 E.g., right after the delivery of the judgment in *Buzadji v. Moldova* ([GC], no. 23755/07, 5 July 2016), hardly many expected how important it would eventually become (at least for some time).

more important one, sometimes furthering and complementing it, and sometimes modifying the doctrine formulated in it. But such assessment is more reliable when carried out after a considerable period of time. This does not negate the need or the possibility of trying to anticipate the importance of new judgments. In the Lithuanian legal literature, the latest judgments adopted in cases against Lithuania are usually analysed in the context of "sectorial" problems, thus, in isolation from other "sectorial" topics. Indirectly stimulated by E. Jarašiūnas, I am undertaking an attempt to identify (if possible) judgments adopted by ECtHR in cases against Lithuania in recent years, which, by analogy to CJEU judgments, one would wish to call "great", but, in order to be on the safe side, would have to limit oneself to the use of a more formal word "landmark". However, unlike my colleague, who chose the date of coming into effect of the Treaty of Lisbon as the reference point in time for his deliberation, I do not have such a clear reference point in time. My choice of it, therefore, is rather arbitrary: the period chosen by me will be the past three years, i.e., 2019–2021. The outcome of this selection (and analysis) cannot be predicted in advance: there may be a few candidates for landmark judgements in the "Lithuanian" cases of the chosen period, or there may be none.

1. Judgments which are not candidates to be landmark ones

The selection to be carried out can and needs to be narrowed right away. As is well known, ECtHR hears cases in a variety of formations: a single judge; a Committee of three judges; a Chamber of seven judges; the Grand Chamber of seventeen judges. All these different formations are the "Court" for the purposes of the Convention. The absolute majority of applications (against all states) are recognised as not meeting the admissibility criteria laid down in Article 35 of the Convention and are rejected by a single judge. Cases, which do not raise complicated questions of interpretation and application of the law of the Convention and in which all that has to be done is application of already known principles, are examined by Committees, which usually adopt one of three decisions: find a violation of a particular Article of the Convention; declares an application inadmissible; or strike it out of the Court's list of cases on one of the grounds provided for in Article 37 of ECHR. Complex cases are examined by Chambers of seven judges, and the most complex ones (over a dozen annually) – by the Grand Chamber. Cases are either relinquished in favour of the Grand Chamber by a Chamber (Article 30 of the Convention) or they, upon being decided by a Chamber, are referred to the Grand Chamber by a decision of a panel of five judges at the request of either party (Article 43).

In the attempt to select landmark judgments (even if with reservations, even if in advance) in "Lithuanian" cases in 2019–2021, one needs from the outset to dissociate oneself from judgments of three levels. No doctrinal novelties appear (neither can they appear) in single judge or Committee judgments. The Grand Chamber case-law also has to be ruled out, as it did not examine any cases against Lithuania during the chosen period. We are left with Chamber judgments, of which 29[28] were adopted in 2019–2021.[29] This number includes judgments by which cases were decided on the merits (*judgments* in English; *arrêts* in French), also decisions as to the inadmissibility (*decisions* in English; *décisions* in French), by which applicants' applications were rejected.[30] The number of the former is 21, that of the latter 8.

Inadmissibility decisions were adopted in the following cases: *Daktaras v. Lithuania*[31] (under Article 6 § 1 of ECHR – the application was declared manifestly ill-founded); *Mozeris and "Eugenijos ir Leonido Pimonovų Alzheimerio paramos fondas" v. Lithuania*[32] (under Article 13 of ECHR and Article 1 of Protocol No. 1 to the Convention – non-exhaustion of legal remedies; under Article 6 § 1 of the ECHR – the application was declared manifestly ill-founded); *Cudak v. Lithuania*[33]

28 It is more likely than not that by the end of 2021 one or more judgments will be adopted in "Lithuanian" cases, but the author would be surprised himself if any of them (despite their importance for Lithuanian law or possible future citation in subsequent ECtHR case-law) would be a candidate for landmark judgments.

29 Delivered by 15 November 2021. Right before the delivery of this article for publishing (24 November 2021), another judgment was published – in *Tarvydas v. Lithuania* (no. 36098/19, 23 November 2021, not yet in force at the time of delivery of the article), in which a violation of Article 6 § 1 of the Convention was found. This judgment is not discussed herein.

30 In the official Lithuanian translation of the Convention, ECtHR judgments by which cases are examined on the merits are translated as *sprendimai*, and decisions recognising applications inadmissible and rejecting them as *nutarimai*. This is the translation we have; it is probably unlikely that it will change. But compare this, for example, to final acts of the Constitutional Court of the Republic of Lithuania: when the Constitutional Court decides a case on the merits, it adopts a ruling (*nutarimai*), and when it refuses to examine a petition or inquiry, dismisses legal proceedings in a case, gives an interpretation of its earlier ruling, etc. – it adopts a decision (*sprendimas*). This is just one of the examples of the inconsistency (should we say "mess"?) in Lithuanian legal terminology. This inconsistency was noted by other authors as well. See, e.g., Pranas Kūris, Danutė Jočienė, *Bylos prieš Lietuvą Europos Žmogaus Teisių Teisme: kai kurios patirtys*, in *Lietuvos teisė 1918–2018 m.: Šimtmečio patirtis and perspektyvos: mokslo studija*, P. Kūris and others (Vilnius: Mykolas Romeris University, 2018). For the sake of avoidance of such confusion, in the Lithuanian version of this article, ECtHR's *nutarimai* are called *nepriimtinumo sprendimai* (inadmissibility decisions), though that is not in line with the official Lithuanian translation of ECHR (by the way, ECtHR previously used the name *sprendimai dėl priimtinumo* (decisions as to the inadmissibility), too, but it was dropped when the Convention was modified and the Court was reformed).

31 *Daktaras v. Lithuania* (dec., no. 43154/10, 26 March 2019).

32 *Mozeris and "Eugenijos ir Leonido Pimonovų Alzheimerio paramos fondas" v. Lithuania* (dec., no. 66803/17, 2 April 2019).

33 *Cudak v. Lithuania* (dec., no. 77265/12, 23 April 2019).

(under Article 6 § 1 of the ECHR – the application was declared manifestly ill-founded); *Dardanskis and Others v. Lithuania*[34] (under Article 3 of the ECHR – the application was struck out of the Court's list of cases); *Zarubin and Others v. Lithuania*[35] (under Article 6 § 1 of ECHR – the application is inadmissible as incompatible *ratione materiae* with the provisions of the Convention or the Protocols thereto; under Articles 10, 13, 14, 18 of the ECHR and Article 4 of Protocol No. 4 to the Convention – the application was declared manifestly ill-founded); *Butkus v. Lithuania*[36] (under Article 8 of the ECHR and Articles 8 and 14, taken in conjunction, – the application was struck out of the Court's list of cases); *Galakvoščius v. Lithuania*[37] (under Article 1 of Protocol No. 1 to the Convention – the application was declared clearly inadmissible); *Makarčeva v. Lithuania*[38] (under Article 8 of ECHR and Articles 8 and 14, taken in conjunction, – the application was declared manifestly ill-founded).

There is no reason to assert that all these cases that ended with inadmissibility decisions required only simple, mechanical application of the conditions (criteria) for admissibility of applications. Some of them raised questions that were not usual at all. For instance, in *Daktaras*, the applicant complained, *inter alia*, that upon search of his home and seizure of financial documents, his communication with his advocate was allegedly interfered with, therefore, his right to a fair trial was violated – but the case file shows otherwise. In *Makarčeva*, the applicant raised the issue of absence of a possibility in Lithuania to register a civil partnership for persons living together – however, the applicant did not prove that namely this would have been the choice of her and her late partner, to whom she was not married (otherwise one could consider what importance this case could have for introducing or not introducing the civil partnership institution, which is a hot issue in Lithuania). In *Dardanskis and Others*, 16 applicants, sentenced to life imprisonment, complained about the violation of their right under the Convention to ask for replacement of their sentence with a fixed-term custodial sentence (this was not provided for in Lithuanian laws) – however, after the judgment in *Matiošaitis and Others v. Lithuania*[39] and relevant amendments to national laws, this matter is deemed "resolved" (Article 37 § 1 (b) of ECHR). The case of *Zarubin and Others*

34 *Dardanskis and others v. Lithuania* (dec., no. 74452/13, 583/14, 23542/14, 24971/14, 32519/14, 38916/14, 46591/14, 46640/14, 49765/14, 60038/14, 14696/15, 16039/15, 19405/15, 23905/15, 24187/15, 33339/17, 18 June 2019).

35 *Zarubin and others v. Lithuania* (dec., no. 69111/17, 69112/17, 69113/17, 69114/17, 26 November 2019).

36 *Butkus v. Lithuania* (dec., no. 48460/16, 21 January 2020).

37 *Galakvoščius v. Lithuania* (dec., no. 11398/18, 7 July 2020).

38 *Makarčeva v. Lithuania* (dec., no. 31838/19, 28 September 2021).

39 *Matiošaitis and others v. Lithuania* (no. 22662/13, 51059/13, 58823/13, 59692/13, 60115/13, 69425/13, 23 May 2017).

v. Lithuania is particular in its own right – in that case four Russian journalists (or persons who introduced themselves as journalists), who illegally attempted to enter an event in Lithuania, where representatives of the Russian opposition were taking part, and even tried "to psychologically terrorise" them, were expelled from Lithuania and banned from re-entering the country for a certain period of time; the Chamber examined this case *de plano*, without giving notice of the application to the Government of the Republic of Lithuania; in the Court's assessment the applicants' actions clearly departed from the tenets of responsible journalism, and Lithuanian courts examined their case virtually in a flawless manner. Finally, in *Cudak*, the applicant, the same as in the namesake case of *Cudak*, examined by the Grand Chamber in 2010,[40] complained that after reopening of the court proceedings after the above-mentioned judgment of the Grand Chamber, she was not reinstated at work in the Embassy of the Republic of Poland in Vilnius, from which she was unlawfully dismissed, and the compensation paid to her was too small; the Court, firstly, had to decide *ex proprio motu* whether, under Article 46 of the Convention, it was not prevented from examining the applicant's complaint; having established that the application was submitted regarding new proceedings before a court, it examined the applicant's complaint. All these issues are not routine, but there were no doctrinal or methodological novelties in the reasoning underlying the findings; besides, the Court's findings were partly determined by assessment of facts (in several cases almost exclusively by it), which allowed some complaints to be declared manifestly ill-founded. It would be futile to look for candidates for landmark decisions among them.[41]

The great majority of judgments by which cases were examined on the merits can be similarly ruled out. There is no possibility here and, for reasons of time-effectiveness of the research, it is not even worth explaining in detail why most of those judgments do not pretend to be considered as being able to make at

40 *Cudak v. Lithuania* (footnote 16 *supra*).

41 Inadmissibility decisions can also be landmark decisions, by the way. One of the most recent examples is *Zambrano and Others v. France* (no. 41994/21, 7 October 2021), by which the applicant's application was rejected, *inter alia*, because the Court found him having abused the right of application – the applicant sought to flood the Court with analogous applications (regarding alleged unlawfulness of anti-Covid-19 measures) and thus to paralyse its activity. If the concept of a landmark decision is used in another sense, namely, as describing decisions that are most important for national law only (but not for the law of the Convention), among "Lithuanian" cases, the decision adopted in *Savickas and others v. Lithuania* (no. 66365/09, 12845/10, 28367/11, 29809/10, 29813/10, 30623/10, 15 October 2013) may be deemed to be such one, for it upheld the Supreme Court's interpretation (which changed the courts' previous practice) to the effect that Article 6.272 of the Civil Code (no. 1001010ISTAIII-1864 in the Register of Legal Acts) allows a person to claim compensation for an unjustifiably lengthy examination of cases; it is thus considered that in Lithuania there already is, from the relevant date, an effective legal remedy required by the Convention in such cases.

least a slightly greater impact on ECtHR case-law. Those judgments are: *Grigolovič v. Lithuania*[42] (only regarding award of just satisfaction according to an earlier ECtHR judgment[43]); *Orlen Lietuva Ltd. v. Lithuania*[44] (a case arising out of the competition relationship – no violation of Article 6 § 1 of ECHR was found, and the complaint under Article 7 § 1 was rejected as manifestly ill-founded); *Velečka and Others v. Lithuania*[45] (an "ordinary" case of detention conditions – violation of Article 5 § 3 of ECHR); *Kosaitė-Čypienė and Others v. Lithuania*[46] (a case of the "impossibility" of childbirth at home, the judgment adopted in which repeats the reasoning of the case examined by the Grand Chamber in 2016,[47] – no violation of Article 8 of ECHR was found); *Beinarovič and Others v. Lithuania*[48] (only regarding award of just satisfaction according to an earlier ECtHR judgment[49]); *Širvinskas v. Lithuania*[50] (a dispute regarding the determination of the place of residence of a child – a violation of Article 8 of ECHR was found); *Januškevičienė v. Lithuania*[51] (a case of a breach of the presumption of innocence – a complaint under Article 6 § 2 of ECHR was rejected as the Chamber majority held that the applicant had not exhausted domestic legal remedies, and no violation of Article 13 was found); *Stankūnaitė v. Lithuania*[52] (a case of, *inter alia*, failure to enforce a court decision to transfer a child to the mother – no violation of Article 8 of ECHR was found); *Bastys v. Lithuania*[53] (a case of not granting security clearance to a Deputy Speaker of the Seimas, after which he resigned – no violation of Articles 13 and 8 of ECHR, taken in conjunction, was found); *Šeiko v. Lithuania*[54] (a case regarding a low pension, which shrank even more owing to a criminal offence committed by the recipient herself – no violation of Article 1 of Protocol No. 1 to the Convention was found); *Černius and Rinkevičius v. Lithuania*[55] (a case of (non-) compensation of legal costs after the applicants won a case in court – a violation

42 *Grigolovič v. Lithuania* (no. 54882/10, 15 January 2019).
43 *Grigolovič v. Lithuania* (no. 54882/10, 10 October 2017).
44 *Orlen Lietuva Ltd. v. Lithuania* (no. 45849/13, 29 January 2019).
45 *Velečka and Others v. Lithuania* (56998/16, 58761/16, 60072/16, 72001/16, 26 March 2019).
46 *Kosaitė-Čypienė and Others v. Lithuania* (no. 69489/12, 4 June 2019).
47 *Dubská and Krejzová v. the Czech Republic* ([GC], no. 28859/11, 28473/12, 15 November 2016).
48 *Beinarovič and Others v. Lithuania* (no. 70520/10, 21920/10, 41876/11, 25 June 2019).
49 *Beinarovič and Others v. Lithuania* (no. 70520/10, 21920/10, 41876/11, 2 June 2018).
50 *Širvinskas v. Lithuania* (no. 21243/17, 23 July 2019).
51 *Januškevičienė v. Lithuania* (no. 69717/14, 3 September 2019).
52 *Stankūnaitė v. Lithuania* (no. 67068/11, 29 October 2019).
53 *Bastys v. Lithuania* (no. 80749/17, 4 February 2020).
54 *Šeiko v. Lithuania* (no. 82968/17, 11 February 2020).
55 *Černius and Rinkevičius v. Lithuania* (no. 73579/17, 14620/18, 18 February 2020).

of Article 6 § 1 of ECHR was found); *Abukauskai v. Lithuania*[56] (a case regarding compensation for damage allegedly suffered by the applicants by reason of inappropriate investigation of an arson – no violation of Article 1 of Protocol No. 1 to the Convention was found); *Anželika Šimaitienė v. Lithuania*[57] (a case regarding dismissal of a judge and failure to pay compensation for the period of suspension from judicial office – a violation of Article 1 of Protocol No. 1 to the Convention was found, whereas the complaint under Article 6 § 1 of ECHR was declared manifestly ill-founded); *Kaminskas v. Lithuania*[58] (a case of demolition of an unlawfully built house, which allegedly violated the applicant's right to home privacy, – no violation of Article 8 of ECHR was found); *Čivinskaitė v. Lithuania*[59] (a case of the demotion of a prosecutor to a lower position – no violation of Article 6 § 1 of ECHR was found); *Arewa v. Lithuania*[60] (a case of an excessively lengthy criminal investigation – no violation of Article 6 § 1 of ECHR was found, and the complaint under Article 8 was rejected as the Court decided that the applicant had not exhausted domestic legal remedies); *Ancient Baltic Religious Association "Romuva" v. Lithuania*[61] (a case regarding denial of state recognition to a religious association – violations of Articles 14 and 9, taken in conjunction, and of Article 13 of ECHR were found); *Šaltinytė v. Lithuania*[62] (a case regarding alleged discrimination on the grounds of age – no violation of Article 6 § 1 of ECHR, and Article 14 of ECHR, and Article 1 of Protocol No. 1 to the Convention, taken in conjunction, was found).

As most of the inadmissibility decisions, the majority of these cases were not routine, either. Whatever the outcome of the case (finding of a violation or no violation), the reasoning provided in the judgments – both *ratio* and broader doctrinal considerations – should be of use to Lithuanian courts. For example, the judgment in *Orlen Lietuva Ltd.* systemically presents the Court doctrine on giving reasons in court decisions and on "divergent" case-law, it also discusses (and recognises) the role of court precedents in Lithuanian law. In this case, it was accepted that "divergent" case-law did not lead to a violation of Article 6 § 1 of ECHR (perhaps mostly) because the argumentation of the Supreme Administrative Court was sufficient (albeit concise) and therefore it made it clear why one law-application alternative was chosen over the other. The case of *Širvinskas* also

56 *Abukauskai v. Lithuania* (no. 72065/17, 25 February 2020).

57 *Anželika Šimaitienė v. Lithuania* (no. 36093/13, 21 April 2020).

58 *Kaminskas v. Lithuania* (no. 44817/18, 4 August 2020).

59 *Čivinskaitė v. Lithuania* (no. 21218/12, 15 September 2020).

60 *Arewa v. Lithuania* (no. 16031/18, 9 March 2021).

61 *Ancient Baltic Religious Association "Romuva" v. Lithuania* (no. 48329/19, 8 June 2021).

62 *Šaltinytė v. Lithuania* (no. 32934/19, 26 October 2021; not yet in effect at the time of writing this article).

teaches a lesson in its own way: in that case, the temporary place of residence of the applicant's under-age daughter was turned into a permanent place of residence by means of a "judicial trick", which prevented him from further seeking that the girl's place of residence is determined to be with him. In the case of *Januškevičienė*, in the opinion of the author of this article, we have a manifest violation of the presumption of innocence, as in the court decision, adopted in the proceedings in which the applicant was a party, she was mentioned as having committed a criminal offence. Nevertheless, ECtHR Chamber held that before claiming a violation of the presumption of innocence, the applicant had not exhausted domestic legal remedies. Unfortunately, the Chamber did not see the contradiction of its judgment to its well-established case-law, according to which a civil compensatory measure does not automatically (and in general) eliminate the consequences of a violation of the presumption of innocence. However, even if the Court rendered a judgment that can be easily criticised in this respect,[63] such a decision of a domestic court, where a person who is not a party in the case in the case is recognised of having committed a criminal offence, is unequivocally to be treated as flawed and cannot in any way be justified, so Lithuanian courts should draw proper conclusions even from this case, which unexpectedly and (in the author's opinion) undeservedly ended successfully for Lithuania. In *Arewa*, which otherwise would not be an exceptional case, the situation was such which the Supreme Administrative Court examining the applicant's case aptly called "rather paradoxical": a person's permit for temporary residence in Lithuania had not been extended, but at the same time he was made subject to a remand measure – a written commitment not to leave his place of residence. Drawing necessary conclusions from this situation (noted by the domestic court well ahead of the applicant's application to ECtHR) goes beyond the limits of Lithuanian courts' reaction to ECtHR judgements and raises questions to national legislator.

The *Černius and Rinkevičius*, *Ancient Baltic Religious Association "Romuva"* and *Anželika Šimaitienė* judgments raise even more acute questions for domestic legislative authorities. Of course, this alone does not make such judgments landmark ones from the perspective of possible future ECtHR case-law. The situation found in the first of these cases, *Černius and Rinkevičius*, can also be called "rather paradoxical" (citing the expression used by the Supreme Administrative Court in the case of *Arewa*). Without going into too much detail (including, in the author's opinion, defective reasoning of administrative courts in rejecting the applicants' claims for damages caused by unfounded decisions of public officials, though courts could have used more appropriate procedural arguments), it is a classical

63 Cf. the separate opinion of the author and two other judges of this article in *Januškevičienė v. Lithuania* (footnote 51 *supra*).

Catch-22 situation:[64] a person, who believes to have been unlawfully fined, has to choose whether to give up, not to defend his infringed right, and to put up with financial losses incurred owing to officials' decision, or to defend his rights in court and, if he wins, to suffer even greater losses, as he would have to pay legal costs, which would not be reimbursed. This judgment was responded to by the Constitutional Court (by coincidence, exactly about then it had a case pending which raised similar issues), which, in its 19 March 2021 ruling,[65] found Article 302[1] of the Code of Administrative Offences,[66] "insofar as that article did not provide that, upon the decision of a court to discontinue a case on an administrative offence where the event or body of an administrative offence had not been established, the person, taking into account the circumstances of the case, was to be compensated for the necessary and reasonable fees of a lawyer", in conflict with Article 30 § 1 and Article 31 § 6 of the Constitution, and the constitutional principle of a state under the rule of law, and also Article 106 of the Code of Criminal Procedure,[67] "insofar as, under that article, a person with regard to whom an acquitting judgment has been adopted, taking into account the circumstances of the case, is not compensated for the necessary and reasonable fees of a lawyer", in conflict with the said provisions of the Constitution. The Constitutional Court, among other things, explicated that the Constitution "give[s] rise to legislator's duty to establish such a legal regulation under which the right of a person to defend his/her rights in a court, *inter alia*, by making use of legal assistance provided by a lawyer, is implemented in reality and effectively, among other things, to provide that, taking into account the circumstances of the case, a person who is not held legally liable because it has not been established that he/she has committed an offence, is compensated for the necessary and reasonable costs incurred in the exercise of that right". In the Constitutional Court's ruling, a direct reference is made to ECtHR judgment in *Černius and Rinkevičius*. It is too early to prognosticate that that ruling will be instrumental in eliminating the need to apply to ECtHR with complaints similar to those examined in *Černius and Rinkevičius*, but it has certainly made it possible to avoid at least completely analogous cases.

The case of *Ancient Baltic Religious Association "Romuva"* revealed the non-transparency of Lithuanian legislative process, which in this case manifested itself

64 In the Lithuanian version of this article, I prefer the original English term, which usually is not translated. For a Lithuanian translation see: Joseph Heller, *22-oji išlyga*, transl. Vytautas Petrukaitis (Vilnius: Sofoklis, 2015).

65 Ruling of the Constitutional Court of the Republic of Lithuania of 19 March 2021 "On the compliance of Article 302[1] of the Code of Administrative Offences of the Republic of Lithuania and Article 106 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania". No. 2021-05546 in the Register of Legal Acts.

66 Wording of 18 November 2010; Official Gazette *Valstybės žinios*, 2010, No. 142-7257.

67 As amended on 26 June 2020; No. 15006 in the Register of Legal Acts.

in the fact that by the Seimas' political will – and, as it transpired from the case file, with the Catholic Church acting on the backstage of the Seimas' law-making – a religious association was denied state recognition, which otherwise met all criteria set out in the law, thus denying it the right guaranteed by law. This judgment was also quickly responded to by the Constitutional Court (another coincidence: it was due to examine a case raising similar issues, which was the first one on the chronological list of petitions at the time when the ECtHR judgment was adopted). The Constitutional Court, in its 7 September 2021 ruling,[68] found the provision "Religious associations may request state recognition following a period of not less than 25 years from the date of their initial registration in Lithuania" of Article 6 § 2 of the Law of the Republic of Lithuania on Religious Communities and Associations,[69] which was challenged by the applicant – a group of Seimas members, not in conflict with the Constitution. A hypothesis cannot be ruled out that had this provision been declared unconstitutional (as was expected by the petitioner), a new term after which the religious association could apply for state recognition would be set in a law would have been much longer than 25 years, perhaps even such that many of the current members of the religious association *Romuva* would hardly live long enough to see its end. At the same time, the Constitutional Court recognised that the provision "If the request is denied, it may be resubmitted after the lapse of 10 years from the day the request was denied" (not challenged by the applicant but directly related to the challenged provision) of the said paragraph was in conflict with Article 26 § 1 and Article 43 § 1 of the Constitution. In the ruling, it is explicated that the legal regulation, under which a religious association acquires the right to apply for state recognition at least 25 years after its initial registration in Lithuania, lays down the requirement which a religious association must meet, so that the procedure for granting state recognition to it could be initiated, during which it will be assessed whether the religious association, which has submitted the relevant application, may be granted state recognition, i.e., whether it satisfies the criteria of state-recognised religious association. Thus, this time period of not less than 25 years "is not one of the conditions for granting state recognition to a religious community (namely, to have support in society and to ensure that the teaching and practices of that church or religious organisation are not in conflict with the law and public morals) and may not be identified with them; this time period is only a precondition for instituting the procedure for granting state recognition". The latter doctrinal turn is not only

68 Ruling of the Constitutional Court of the Republic of Lithuania of 7 September 2021 "On the compliance of paragraph 2 of Article 6 of the Law of the Republic of Lithuania on Religious Communities and Associations with the Constitution of the Republic of Lithuania". No. 2021-18922 in the Register of Legal Acts.

69 Official Gazette *Valstybės žinios*, 1995, No. 89-1985.

innovative – in the author's assessment, it is also very powerful from the point of view of constitutional logic. It transpires from the ruling that the Constitutional Court took inspiration also from ECtHR case-law, *inter alia*, the judgment in *Ancient Baltic Religious Association "Romuva"*.[70] Of course, it is not incumbent on the Constitutional Court whether the Seimas grants state recognition to the association *Romuva*. This, however, at least partly depends (indirectly) on the Committee of Ministers of the Council of Europe (CM), which supervises the enforcement of ECtHR judgments.

The ECtHR judgment in *Ancient Baltic Religious Association "Romuva"* poses one more challenge (or at least raises a question) for the Constitutional Court. In that case, a violation of Article 13 of the Convention was found, as the applicant could not defend in court its right to state recognition. One may ask what possibilities are under Lithuanian law to file an individual constitutional complaint with the Constitutional Court for a person (legal or natural), whose application cannot be previously examined by other Lithuanian courts (e.g., administrative), taking of decisions whereat is deemed a precondition to applying the Constitutional Court. Isn't the requirement provided for in the Law on the Constitutional Court[71] (and in the Constitutional Court's case law) for a person to have exhausted "all statutory possibilities of appeal against a court decision" (Article 56 § 2 item 2) too rigid? Doesn't it imply that in another situation, where a final decision on a person's rights is taken by the Seimas (or another body whose decision cannot be appealed in court), there will again be grounds for ECtHR to examine whether there has not been a violation of Article 13 of the Convention? But this is a separate topic.

Finally, the case of *Anželika Šimaitienė* has also revealed at least one problem of Lithuanian law – maybe even a constitutional one. Under the currently established and seemingly never seriously questioned legal regulation (and law-application practice), the powers of a judge suspected of or charged with a criminal act may be suspended by the Seimas (between sessions of the Seimas, by the President of the Republic); powers are suspended until the final decision in a pre-trial investigation or decision in a criminal case becomes effective; if any circumstances become apparent during the pre-trial investigation, by reason of which a criminal process is not possible, or in case of failure to collect sufficient data to prove the fault of the judge for commitment of a criminal act, or if the court in a criminal case does not find the judge guilty, powers of the judge are renewed and he is to be paid salary for the time his powers were suspended (paragraph 4 of Article 47 of

70 It should be noted that the Constitutional Court referred to that judgment while it had not yet become final: the Constitutional Court's ruling was adopted on 7 September 2021, while the ECtHR judgment became final three months after its delivery, none of the parties having requested the case to be referred to the Grand Chamber, – on 8 September 2021.

71 No. 0931010ISTA0000I-67 in the Register of Legal Acts.

the Law on Courts[72]). The question remains what income a judge, whose powers are suspended, has to live on (and what he can do in terms of occupation), with the pre-trial investigation continuing for months, years (which, regrettably, is not so rare). There arise similar questions regarding the social and health insurance of such a judge, too. The Constitution imperatively prohibits a judge from holding any other elective or appointive office, working in any business, commercial, or other private establishments or enterprises, receiving any remuneration other than the remuneration established for the judge and payment for educational or creative activities (Article 113 § 1). But does this prohibition also apply to a judge whose powers are suspended? The case of *Anželika Šimaitienė* demonstrates that this constitutional prohibition is understood exactly so, i.e., that it also applies to a judge whose powers are suspended. If this is so, is such an interpretation and practices based on it duly justified? The official constitutional doctrine is still silent on this issue (hence, there is a possibility to develop it). However, it is obvious that a judge, whose powers are suspended, also finds himself in *Catch-22* situation: he has to choose whether to wait for a would-be outcome of the pre-trial investigation favourable for him or acquittal in court but at that time to have no income (and no possibility to engage in any other activities), or to resign (if resignation is accepted) and, realistically speaking, to lose a possibility of becoming a judge again, even if he is not convicted. It certainly cannot be ruled out that a situation analogous to the one already discussed herein can again become the subject of examination by ECtHR.[73]

Despite the here-discussed important, in my opinion, legal issues, as well as the probability that ECtHR may have to examine (in certain aspects) similar cases, neither *Černius and Rinkevičius*, nor *Ancient Baltic Religious Association "Romuva"*, nor *Anželika Šimaitienė* judgments are to be regarded as landmark ones from the perspective of the development of the law of the Convention. In these cases, existing general principles of the law of the Convention were applied, but no new doctrine was enunciated. That is certainly not a drawback. Such – supposedly

72 Republic of Lithuania Law on Courts of 31 May 1994 No. I-480.

73 Just before submission of this article for publishing, I have become aware that the Constitutional Court will be examining a virtually analogous problem, however, pertaining not to suspension of the powers of judges but suspension of civil servants, as the Constitutional Court has been filed a petition for examination of the constitutionality of provisions of the Law on the Civil Service concerning suspension of civil servants and related losses. "A case is started to be examined according to the petition of a natural person, asking to assess the constitutionality of provisions of the Law on the Civil Service concerning suspension of civil servants from office", the Constitutional Court of the Republic of Lithuania, accessed on 24 November 2021, https://www.lrkt.lt/lt/apie-teisma/naujienos/1331/pradedama-nagrineti-byla-pagal-fizinio-asmens-prasyma-ivertinti-valstybes-tarnybos-istatymo-nuostatu-susijusiu-su-valstybes-tarnautojo-nusalinimu-nuo-pareigu-konstitucinguma:387.

"non-innovative" – are the absolute majority of judgments of various national and international courts. ECtHR case-law, like that of other courts, is making progress not so much by "revolutionary" judgments, which open up the previously unseen jurisprudential horizons, all the more so, reversing previous case-law, but by its steady evolution, where principles laid out in earlier judgments are reaffirmed and thus further consolidated in subsequent judgments, equipped with solid reasoning. Such "non-innovativeness", even the routineness of judgments is the manifestation and guarantee of stability and foreseeability of the law of the Convention. On the other hand, if ECtHR judgments were to be called landmark ones owing to their significance for the respondent state (in this case, Lithuania), among other things, owing to the impetus they make to amend national legal regulation, the three here-discussed judgments would certainly fall among the most significant recent "Lithuanian" judgments of the Court. However, this would already be an expansion or even variation of the meaning of the "landmark judgments" concept explained herein. In this article, the identification of ECtHR judgments as (potentially) landmark ones is determined not by the national perspective but by that of ECtHR itself.

2. *Drėlingas*, *Rinau*, *Beizaras and Levickas*

There remain to be discussed three ECtHR's "Lithuanian" judgments of 2019–2021, which, in my opinion, can at this stage – in advance and perhaps with reservations – be regarded as candidates for landmark judgments: *Drėlingas v. Lithuania*,[74] *Rinau v. Lithuania*[75], and *Beizaras and Levickas v. Lithuania*.[76] Of course, giving of such a title quite soon after the adoption of respective judgments is risky, especially as those judgments, except probably for *Beizaras and Levickas*, are not yet widely referred to even in ECtHR's own case-law, and only one of them, that is to say, the same *Beizaras and Levickas* judgment, was more (but yet not very) widely commented on in public discourse. However, in the author's opinion, all these judgments have the potential to give the Court doctrinal and/or methodological tools in deciding other cases.

2.1. *Drėlingas*

It looks like the *Drėlingas* judgment has yet to wait for a deeper professional analysis. The first comments in the (non-specialised) Lithuanian (and not only Lithuanian)

74 *Drėlingas v. Lithuania* (no. 28859/16, 12 March 2019).

75 *Rinau v. Lithuania* (no. 10926/09, 14 January 2020).

76 *Beizaras and Levickas v. Lithuania* (no. 41288/15, 14 January 2020).

media were informational and political, where this judgment was treated as Lithuania's political victory, indicating that ECtHR Grand Chamber 2015 judgment in *Vasiliauskas v. Lithuania*[77] was taken down, the latter being perceived as the state's historical and geopolitical (thus primarily not legal) defeat. This could also be objected to, as, anyhow, Grand Chamber judgments are not overcome by Chamber judgments, thus, the *Vasiliauskas* judgment remained as it was. On the other hand, it is obvious that the *Drėlingas* judgment dissonates with *Vasiliauskas*: the latter rejected Lithuanian court's case-law when certain persons (usually former NKVD officers) were convicted for participation in genocide, by which term there was called the massive killing of Lithuanian partisans by the Soviet Union in the post-war years, whereas by the *Drėlingas* judgment it was accepted that it could be that such conviction did not violate the Convention. Taking a wider look, very many doubt whether courts, especially international ones, are an appropriate mechanism for redressing historical grievances and correcting of historical evils. These doubts have valid grounds, however, for the sake of objectivity, it has to be stated that both cases, *Vasiliauskas and Drėlingas,* in ECtHR were initiated not by a state harbouring historical grievances (which, as some could rebut, used its own courts to redress those grievances) but by the convicted individuals, seeking to revise legal assessment given by that state to their activities, by which they – as it had been proven in national courts – contributed to inflicting those historical grievances. Though it seemed that the *Vasiliauskas* judgment deep-sixed to such a possibility, in *Drėlingas* not only ECtHR but an international court as such, recognised for the first time that Lithuania might treat the postwar Soviet repressions as genocide and punish its remaining perpetrators (today hardly there remain many those to be prosecuted).

Paradoxically enough, it was the *Vasiliauskas* judgment, so unacceptable to Lithuania, that was one of the preconditions for the *Drėlingas* judgment. This, to the best of the author's knowledge, has not yet been hinted upon by anyone commenting on the judgement. Be that as it may, it is worth considering whether it was due to a peculiar set of various circumstances, coincidences, maybe even happenstances that in the case of *Drėlingas* no violation of Article 7 of the Convention was found. The author guesses (the validity of which guess cannot be reliably demonstrated to an assessing "outsider") that if the sequence of events had been at least a bit different, the final outcome could have been different, too. The fact that these things have not yet been evaluated and even commented on by anyone is not surprising, as it is not easy for "external" analysts to spot some seemingly insignificant, procedural fragments unrelated to the essence of the case. They will be discussed here in the chronological order, accompanied by hypothetical (maybe even rhetorical) questions.

77 *Vasiliauskas v. Lithuania* ([GC], no. 35343/05, 20 October 2015).

1) *The case of Vasiliauskas*. Vytautas Vasiliauskas complained about his conviction for participation in killing of Lithuanian partisans, which Lithuanian law equated to genocide. The Criminal Code[78] (the Criminal Code) defines genocide (at the textual level) wider than the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[79] (the Genocide Convention). The applicant's application was lodged with ECtHR in 2005 and was pending for eight years – four years before the case was given notice of to the Government and four years after that. In September 2013, a Chamber of seven judges decided to relinquish the case in favour of the Grand Chamber. A public hearing was appointed at the beginning of April 2014. At the request of the Government, it was postponed, pending the Lithuanian Constitutional Court ruling in an abstract constitutional review case, where constitutionality of the Criminal Code provision on liability for genocide was challenged. That constitutional justice case was initiated by six courts examining genocide cases, in one of which the same V. Vasiliauskas, whose case was pending in Strasbourg, was a defendant. However, the case pending in Strasbourg was the one in which that person was already convicted, meanwhile the Constitutional Court was about to examine a case where the court that initiated it yet was in a position to convict him in another criminal case: the offence was the same – genocide but committed against other persons, in another place, at a different time. The expected ruling of the Constitutional Court[80] was adopted on 18 March 2014. By it, it was acknowledged, among other things, that Article 99 of the Criminal Code[81] "insofar as it establishes that actions aimed at physically destroying, in whole or in part, persons belonging to any national, ethnical, racial, religious, social, or political group are considered to constitute genocide", was not in conflict with the Constitution. Thus, a broader concept of genocide, including actions aimed at destroying people belonging to social and political groups than that enshrined in the Genocide Convention, was approved. At the same time, Article 3 § 3 of the Criminal Code[82] "insofar as this paragraph establishes the legal regulation under which a person may be brought to trial under Article 99 of the Criminal Code for the actions aimed at physically destroying, in whole or in part, persons belonging to any social or political group, where such actions had been

78 No. 1001010ISTAIII-1968 in the Register of Legal Acts.

79 United Nations, Treaty Series, vol. 78, p. 277. For a Lithuanian translation see: No. 048T001KONVRG482744 in the Register of Legal Acts.

80 Ruling of the Constitutional Court of the Republic of Lithuania of 18 March 2014 "On the compliance of certain provisions of the Criminal Code of the Republic of Lithuania that are related to criminal responsibility for genocide with the Constitution of the Republic of Lithuania". No. 2014-03226 in the Register of Legal Acts.

81 Wording of 26 September 2000; Official Gazette *Valstybės žinios*, 2000, No. 89-2741.

82 Wording of 22 March 2011; Official Gazette *Valstybės žinios*, 2011, No. 38-1805.

committed prior to the time when responsibility was established in the Criminal Code for the genocide of persons belonging to any social or political group" was found unconstitutional. Thus, criminal prosecution is permissible for "more widely defined" genocide but only for actions committed after the definition of genocide was expanded in the above-said manner in the Criminal Code. This was of no relevance to the applicant because he was convicted not for actions against members of a social or political group not mentioned in the Genocide Convention *per se* but for actions against Lithuanian partisans, i.e., as the Court of Appeal of Lithuania and, subsequently, the Supreme Court of Lithuania explained yet before the Constitutional Court, against members of such a social or political group, which constituted such a significant part of the national, ethnic, racial or religious group, that its destruction would affect the entire national, ethnic, racial or religious group, i.e., the Lithuanian nation. It transpires from the *Vasiliauskas* judgment that the interpretation by the Constitutional Court did not convince the majority of the Grand Chamber. Of course, the fact that the ruling of the Constitutional Court was adopted already after the conviction of the applicant, besides, in an abstract constitutional review case, which was not related to the case regarding which the applicant applied to ECtHR (although it was related to another case in which the same person was tried), also had some bearing. The Court found violation of Article 7 of the Convention by a one vote majority (9:8). One of ECtHR Grand Chamber's reproaches to Lithuanian courts was that their judgments did not provide a broader historical explanation of the significance of the partisans for the Lithuanian nation.[83] It can be debated whether the *Vasiliauskas* judgment was to be understood as the prohibition for Lithuania to treat participation in massive killing of partisans as participation in the genocide of the Lithuanian nation or as an assessment of Lithuanian courts' decisions as insufficiently substantiated. Judging by the publicly expressed frustration of politicians and commentators in Lithuania and the triumph in the media of Russia (which had joined the case as a third-party intervener), there was an almost universal adoption of the first of these interpretations.

2) *The Supreme Court 25 February 2016 ruling.*[84] In this ruling, with numerous references to the ECtHR judgment in the case of *Vasiliauskas*, the Supreme Court acquitted M. M. who was charged with genocide. That person was accused of participating in an attempt to detain the last Lithuanian partisan in hiding, resulting in the death of the latter, – actions committed in 1965, i.e., more than a decade after the Lithuanian partisan movement had already been suppressed. For

83 Cf. the separate opinion of the author of this article in *Vasiliauskas v. Lithuania* (footnote 76 *supra*).

84 Ruling of the judicial panel of the Criminal Division of the Supreme Court of Lithuania of 25 February 2016 in criminal case No. 2K-5-895/2016.

this reason, his case was regarded as having a "political lining". But one may ask: what course would the events have taken if M. M. had not been acquitted?

3) *Reopening of the proceedings in the case of Vasiliauskas.* V. Vasiliauskas died a couple of weeks before the delivery of the ECtHR judgment in his case. At the request of his heirs, his case was reopened. The Supreme Court, in its 27 October 2016 ruling,[85] in an emphatically gentlemanly manner, acquiesced to the reproaches stated by ECtHR in the case of Vasiliauskas regarding insufficiency of reasoning by national courts, even admitted its own fault that it had allegedly failed to sufficiently explain the particular significance of the partisans for the Lithuanian nation. According to the Supreme Court, the violation of Article 7 of the Convention, as found by ECtHR, could only be rectified by modifying the charges against V. Vasiliauskas. As the defendant had already passed away, this was impossible. Therefore, V. Vasiliauskas' criminal conviction was annulled, and the criminal case was discontinued. One may hypothetically ask: if V. Vasiliauskas were still alive and charges against him had been modified, could this have had any effect on other genocide cases examined by Lithuanian courts (the number of which seems to have been a single digit at that time)? If not, what would the position of the Strasbourg Court have been, had it received new applications similar to that of V. Vasiliauskas, regarding other criminal convictions similar to those by which that person was convicted?

4) *Closure of the procedure of supervision of the execution of the Vasiliauskas judgment.* On 7 December 2017, the CM closed the procedure of supervision of the execution of the *Vasiliauskas judgment.*[86] In the CM's assessment, Lithuanian authorities took all necessary individual measures "to put an end to violations established and erase their consequences so as to achieve as far as possible *restitutio in integrum*", as well as general measures "preventing similar violations". The general measures mentioned by the CM included that the Supreme Court and the Constitutional Court "have significantly developed ... the case-law on genocide ... since [V. Vasiliauskas'] conviction". Truth to say, the Constitutional Court had had its case-law developed yet before the case of *Vasiliauskas* was examined by ECtHR, but this did not help to obviate the finding of a violation of Article 7 of the Convention, but the judgment of the Supreme Court in M. M.'s case was certainly conducive to this very positive assessment: the CM was of the opinion that the Supreme Court demonstrated a balanced, differentiated judicial response

85 Ruling of the Supreme Court of Lithuania (Plenary Session) of 27 October 2016 in criminal case No. 2A-P-8-788/2016.

86 The resolution on execution of the judgment of the European Court of Human Rights in *Vasiliauskas against Lithuania* (adopted by the Committee of Ministers on 7 December 2017 at the 1302nd meeting of the Ministers' Deputies), Council of Europe, accessed on 15 November 2021, https://rm.coe.int/native/09000016807647ff.

to genocide charges: not all the accused were convicted, some were acquitted. We may hypothetically ask: what would the evaluation of the CM have been, had the Supreme Court not acquitted M. M.?

5) *The giving of the notice of the case of Drėlingas to the Government.* Stanislovas Drėlingas lodged an application with the Strasbourg Court in May 2016. The Court gave notice of it to Lithuanian Government on 29 January 2018, relatively fast. This time element merits special attention: the application communicated to the Government a little less than two months after the CM's resolution to close the supervision in *Vasiliauskas.* Thus, the CM, when closing the supervision, was not aware of the case of *Drėlingas.* Also, not only the respondent state was ignorant about, but also the state that had joined the case of *Vasiliauskas* as a third-party intervener (it did not request to be granted leave to join the case of *Drėlingas* as a third-party intervener). A hypothetical question: would the CM 7 December 2017 decision have been so unambiguously favourable for Lithuania, had the CM had any knowledge at that time about S. Drėlingas' application?

6) *The second case of Vasiliauskas.* It "slipped by" completely unnoticed. This case originated from a criminal case in which the Constitutional Court was applied to with a request to investigate the compliance of the Criminal Code provisions on genocide with the Constitution and in which the Constitutional Court 18 March 2014 ruling was adopted. The ruling, in which it was explained that the Lithuanian partisans constituted a very significant part of the Lithuanian nation, destruction of which would affect the entire Lithuanian nation as a national group (using a term employed in the Genocide Convention), did not prevent V. Vasiliauskas' conviction in that new criminal case. In August 2015, V. Vasiliauskas filed a second application with the Strasbourg Court. He died three months later, but his heirs were supporting the application, until at a certain moment in time their lawyer (for unknown reasons) ceased responding to the Court's letters. Such non-communication, and thus non-cooperation, is understood in ECtHR practice as a wish to no longer pursue the application. In such cases, the application is struck out of the Court's list of cases (the case is discontinued). Namely this was decided by the Committee of three judges by its 13 December 2018 inadmissibility decision.[87] The second case of *Vasiliauskas* thus was not examined on the merits. A hypothetical question would be: what would the position of the CM have been, had it been aware of the second case of *Vasiliauskas*? Would it have closed the supervision procedure, or would it have waited? Would it have expressed its support for the measures taken by Lithuanian authorities in a more moderate way? Also: what would the outcome of the second case of *Vasiliauskas* have been if the applicant's lawyer had not ceased to cooperate with the Court? Or: what course

87 *Vasiliauskas v. Lithuania* ([Committee] dec., no. 58905/15, 13 December 2018).

would the events have taken if the Committee of three judges had decided that it was necessary to continue examination of V. Vasiliauskas' second application as "if respect for human rights as defined in the Convention and the Protocols thereto so requires" (as provided for in Article 37 § 1 of ECHR in fine)?

7) *The case of Drėlingas.* It was examined by a Chamber on 29 January 2019, and the judgment was delivered on 12 March 2019. The content of the judgment is not discussed here, and the Court's reasoning is not analysed. However, it should be noted that the judgment pays considerable attention to the CM's position, expressed by it when closing the supervision in *Vasiliauskas*. Thus, if after the *Vasiliauskas* judgment the prevailing view was that the judgment implied a prohibition for Lithuania to treat destruction of partisans as a genocide, after the *Drėlingas* judgment, the second of the above-mentioned alternative interpretations gained authority: in the case of *Vasiliauskas*, Lithuanian courts' judgments were assessed as insufficiently substantiated but nothing more. A hypothetical question could be: what would the Chamber (or maybe the Grand Chamber, if the case had been relinquished in its favour) judgment have been in the case of *Drėlingas*, had the CM not closed the supervision in *Vasiliauskas*? Or had the CM's stance regarding individual and general measures taken by Lithuanian authorities not been so unambiguously favourable to Lithuania?

8) *The panel of judges of the Grand Chamber 2 September 2019 decision.* Having been served with the Chamber judgment, which was the unfavourable to him, S. Drėlingas requested his case to be referred to ECtHR Grand Chamber. The request was not granted. The panel meetings are not public; those *hors de la Cour* can only speculate on the motives of the five members of the panel, maybe even on the moment of the personality factor for this decision of the panel. Whatever versions may be raised, they will be neither denied nor confirmed. As many things in life, law also has its secrets – and will always have. But one may ask: what would the Grand Chamber's judgment have been in the case of *Drėlingas*, had the decision of the panel been to the contrary, thus, had the case been referred to the Grand Chamber?

The hypothetical questions asked here cannot be answered with any certainty. But one may ask anyway. It is like a construction of mental alternative history, where elements that often go unnoticed but have a bearing on the final outcome, gain their proper weight.

Today, the long-term effects of the *Drėlingas* judgment can hardly be prognosticated. No doubt, it will have political and moral significance, as well as significance for the perception of history, even though it is too early yet to assess its scale. This judgment is certainly important both for human rights law and criminal law, as well as international law. Perhaps it will contribute to the broader application of the concept of genocide, which has so far been extremely conservative and has not allowed this word to be officially used for naming many cases of geno-

cide that have taken or are taking place in the world. It evidently has this potential. However, it is also possible that the *Drėlingas* judgment will remain the only such in the field of judgments on the issue of genocide. So far, it has not yet gained considerable jurisprudential import even in ECtHR's own judgments. The only Court decision, where reference has been made to the *Drėlingas* judgment so far, is the inadmissibility decision in *Allen v. Ireland*,[88] which concerns alleged sexual exploitation. In that case, which is not related to genocide or other crimes of such scale, a Chamber of seven judges referred to the *Drėlingas* judgment stating that "Committee of Ministers' role [in assessing measures taken by a state] does not mean that [they] ... cannot raise a new issue undecided by the initial judgment". Such a statement, although correct, is not formulated verbatim in the *Drėlingas* judgment.

2.2. *Rinau*

The case of *Rinau* was about non-execution of the German court judgment on child custody which for quite a long time aroused much fervour in Lithuania. This case concerns the refusal of the State of Lithuania to perform its positive obligation to ensure the rights of the applicants – a father, German citizen, and his daughter of minor age – under Article 8 of ECHR enshrining the right to respect for private and family life. The unusually long (89 pages) judgment widely revealed an unpleasant image of Lithuanian public life, where politicians interfered with legal processes and judicial authorities actually surrendered to the mob and followed the approach "defend one of ours", i.e. the child's mother, who, without the consent of the father, took the daughter from Germany to Lithuania and, in spite of the German court judgment on awarding custody of the child to the father, refused to transfer her. The resistance to the execution of a seemingly unremarkable foreign court judgment was virtually universal. It involved child care officials, members of the Seimas, the Minister of Justice and the Government *in corpore*, the Prosecutor General, the President of the Supreme Court, some other judges, media and, most importantly, the community. New "legal" ways were resourcefully searched for to prevent the child's return to Germany, and they were "found" over and over, no matter how legally crooked they were. Pressure was exercised on the bailiff who sought to perform his duty to execute the court judgment. Pressure, including political, was exerted on other officials to prevent them from taking measures to execute the German court judgment. The President of the Supreme Court unilaterally, clearly overstepping his powers, suspended the execution of the Court of Appeal decision favourable to the child's father. To delay the return of the child,

88 *Allen v. Ireland* (no. 37053/18, 19 November 2019).

CJEU was requested for a preliminary ruling, which was obviously unnecessary, and the Government took an unprecedented decision to provide the mother with financial support she needed for litigation. Even the Law on Citizenship was very urgently amended so to enable granting of citizenship of the Republic of Lithuania to the girl, who, by joint decision of the parents, already had the German citizenship. A full-scale hate campaign was carried out against the father who sought the return of the child. All these shocking facts cannot be described briefly, but there is no need for it. ECtHR noted that a violation of Article 8 of the Convention was determined namely by procedural vagaries and political interference. Whoever would endeavour to find a positive character amongst the facts of the case, as depicted in the judgment (excluding judges who ruled that the German court order has to be enforced), would probably find the only one – the then President of the Republic, who kept proper distance from the process that had to be a legal process but turned into a bacchanalia of muddy mind, where rational arguments are not heard and those who express them are demonised. Finally, the father managed to take over the girl himself and return with her to Germany through Latvia. Against the father, criminal prosecution was initiated, but that ship has sailed – the prosecution was discontinued. Some time later, the mother went to live in Germany, where, without further incitement from Lithuanian authorities and not receiving its constant support, she has become more moderate and reportedly is allowed to communicate with the child.

Of course, the mere fact that the dispute over the child caused so much emotion and the case was so notorious (in addition, it gave rise to an important CJEU judgment,[89] which was delivered within less than two months as of the Supreme Court's request) does not make the *Rinau* judgment singular in terms of the law of the Convention. Still, this case is one of those rare cases in which the Court held that a violation was committed not by one or another decision-maker but basically by the state as such, where a great number of its unaccountable officials – who still have not been called to account –, as well as high ranking politicians, kept implanting the child's mother with a deceitful hope that she would succeed in keeping her daughter in Lithuania in spite of judgments of German and (subsequently) Lithuanian courts and international obligations of the State of Lithuania under ECHR, EU law and the 1980 Hague Convention on the Civil Aspects of International Child Abduction. What is critical from the perspective of the law of the Convention is that this judgment demonstrates the importance of facts: had facts of the case been presented concisely, this aspect of interference of the whole state with the return of the child to the court-ordered custody of the father would not have been visible. Whereas now

89 Decision of the European Court of Justice of 11 July 2008 *Inga Rinau*, C-195/08 PPU, ECLI:EU:C:2008:406.

it was possible to distinguish, in the judgment, two periods, which differed in their assessment. During the first period, the process of returning the child took longer than permitted under the Hague Convention, but the necessary judicial decisions were finally taken, therefore, the Court did not find a violation of Article 8 of the Convention regarding this period. As for the second period, when a multitude of actors got involved in the process, the Court had to state that the said article was indeed violated and that was done by "Lithuanian authorities". Even if the *Rinau* judgment can be held a candidate for landmark judgments only with significant reservations because the legal analysis contained in it is not particularly innovative, it stands out among other judgments in how the Court operates facts in order to arrive at adequate legal conclusions on their basis. A Court judgment can be a landmark one not only by reason of the (new) doctrine formulated in it but also by reason of the methodology of the examination.

2.3. *Beizaras and Levickas*

ECtHR case-law contains a number of cases on hate speech, as well as a number of cases on sexual minorities-related topics. They are not reviewed here. *Beizaras and Levickas* is about both of the above. This is already enough to make this case topical, especially in the era of widespread online hate speech.

In *Beizaras and Levickas* two young homosexual men kissed and uploaded their kiss photo to *Facebook*, where they received hundreds of comments transfused with hate. It was suggested that young people should be hanged, burned, poisoned with gas, castrated, beaten, etc., and that this fate should befall all gay people. One commentator wished Hitler to have burnt "not only Jews". The young people reached out to the LGBTI association, members of which they were, and asked it to report about the comments to the prosecutor's office, especially since they were not only discriminatory but also incited to violence. The prosecutors acknowledged the comments to be "unethical" and "inappropriate" but refused to initiate a pre-trial investigation because, in their opinion, the comments did not constitute an element of a criminal offence. Their views were supported by court, claiming that criminal investigation would be a "waste of time and resources". In the assessment of the state institutions, the applicants' behaviour was "provocative": they purportedly should have foreseen that owing to the "eccentric" photo of their kiss, they would receive negative comments from those members of society who have a different attitude to the same sex relationship, i.e., from the majority of Lithuanian society, who profess "traditional family values". In this way, Lithuanian state institutions resorted to victim blaming *par excellence*.

In Lithuanian authorities' interpretation, criminal law is an *ultima ratio* measure that does not need to be resorted to if the calls for violence do not appear to be systematic: and they allegedly were non-systematic, as many of those

haters wrote a comment or two, which meant that their intentions were not criminal. None the less, the seriousness of incitement to murder or to causing other harm should not be considered proportional to the number of utterances of such incitement. Henry II did not have to ask twice who would rid him of "this meddlesome priest", as Thomas Becket was gone already after the first utterance of this question.

ECtHR followed different tenets than Lithuanian courts. It found violations of Article 14 and 8, in conjunction, and of Article 13 of ECHR. The lengthy judgment (of 62 pages) deals not only with the applicants' situation but also with the more general problem of homophobic hate. To that end, the Court does not limit itself to the facts of this case but looks into the broad context of the situation in question. That broader context encompasses the intolerant attitude of society toward LGBTI members, probably also typical of the government representatives, as well as Lithuanian courts' case-law on hate speech against various minority groups: while members of racial or ethnic minorities often succeed in finding justice in courts, this is almost never possible for homosexual people. The judgment pays considerable attention to various general legal issues (each of them could be the subject of a separate analysis), such as: the concept of family relations; criminal law as an *ultima ratio* measure and its relationship with the positive obligations of the state; systematic or non-systematic character of incitement to violence; the applicants' victim status and its relation to strategic litigation, etc. Even the attempts to justify intolerance with quasi-religious arguments are discussed: the need to respond to them was triggered by the Government's effort to justify homophobic hate attacks by the fact that a cross could be seen (if that was really a cross) on the clothes of one of the two people in a kiss – stating that this could have offended commentators' religious feelings (calls for castration, burning and hanging probably well became the sincerity and depth of those feelings).

Though the judgment quotes a lot of domestic and international documents on hate speech, especially on homophobic hate speech, it mentions the very concept of hate speech only briefly, as ECtHR was not judging whether the comments were hate speech – that was obvious not only to ECtHR but also to respective Lithuanian agencies: to rephrase Potter Stewart, "they knew it when they read it".[90] ECtHR was adjudicating on whether Lithuanian authorities were right in refusing to initiate criminal prosecution of the commentators, thus whether that hate speech had to incur criminal liability. In ECtHR's assessment, it had: "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

90 I have in mind the famous adage by this Justice of the US Supreme Court "*I know it when I see it*", by which P. Stewart "defined" pornography. *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

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" (§129).

In 2020 and 2021, messages emerged that Lithuanian prosecutors are beginning to take a more unsmiling position with regard to online hate comments. It would be premature to link this precisely to the *Beizaras and Levickas* judgment. The impact of the latter on Lithuanian legal practice will have to be assessed later, as well as its impact on the Supreme Court's case-law, which is not considered in the judgment as friendly to representatives of sexual minorities. It should be noted that the Supreme Court did not examine this particular case of these two applicants, but the lower courts relied on its *ultima ratio* doctrine, which is very much indulgent for haters. That doctrine was formulated in other cases where the degree of severity of homophobic speech was lower than in *Beizaras and Levickas*, but *res interpretata* of this case could be an incentive to modify that doctrine. However, the case of *Beizaras and Levickas* is not so much about the limitations of any legal doctrine, rather about the intolerance and inertia of society, which are much more difficult to overcome and which takes much longer than to modify a legal doctrine; therefore, the real impact of the case on society can be felt (or not) only after some time.[91]

The *Beizaras and Levickas* judgment soon gave an impulse for an inadmissibility decision in the case of *Lilliendahl v. Iceland*,[92] where the jurisprudential concept of hate speech, only slightly touched upon in *Beizaras and Levickas*, was already analysed quite extensively. In the case of Lilliendahl, the comments of the 74-year-old applicant, pronounced in a radio broadcast, were intolerant, but he did not incite to violence. This applicant's pronouncements were much less dirty, "strict" and dangerous than those in *Beizaras and Levickas* – the latter not only degraded and insulted sexual minorities but also posed threat for members of the LGBTI community. However, before examining the complaint of this applicant under Articles 10 and 14 of ECHR, the Court assessed whether those pronouncements were *ratione materiae* compatible with ECHR. To that end, the Court assessed them under Article 17, which in principle negates the possibility of application of any right or freedom enshrined in ECHR if the applicant uses it for a purpose clearly contrary to the values of the Convention. The Court admitted that it could not state that the high threshold for the application of Article 17 was reached in that case. However, the applicant's conviction was recognised to

91 Cf. the judgment in *L. v. Lithuania* (no. 27527/03, 11 September 2007) on gender reassignment, which fails to be enforced for fourteen years already.

92 *Lilliendahl v. Iceland* (inadmissibility decision, no. 29297/18, 12 May 2020).

be consistent with Article 10 of the Convention, and *per extensionem* also consistent with Article 14, therefore, his complaints were found manifestly ill-founded and rejected.

In *Beizaras and Levickas*, on the contrary, no analysis under Article 17 of ECHR was needed at all. The structural difference between these two complementary cases is that in the "Lithuanian" case the applicants were victims of hate speech, they complained under Article 8 of the Convention; whereas in the "Icelandic" case the applicant was a hate peddlar, who complained under Article 10. The Court summed up its case-law on hate speech. Hate speech can be of two types ("categories"): (i) of the gravest forms; (ii) of such forms, which do not fall entirely outside the protection of Article 10 of ECHR but which the states are permitted to restrict. *Beizaras and Levickas* is clearly a case of the first type, while *Lilliendahl* of the second type. It can be considered *de jurisprudentiae ferenda* that if any hypothetical commentator from *Beizaras and Levickas* were convicted and subsequently challenged his conviction under Article 10 of the Convention, the Court's conclusion on the application of Article 17 would probably be different from that in *Lilliendahl* (unless the sentence were disproportionate to the gravity of the offence). Abuse of right is abuse of right, period.

The *Beizaras and Levickas* and *Lilliendahl* judgments not only complement each other. Together, they enshrine that sexual minorities must be protected not only from such hate speech which, through the "mediation" of Article 17 of the Convention, is not protected by its Article 10 but also from such hate speech which does not reach the threshold of application of Article 17, consequently, at least theoretically falls within the ambit of protection under Article 10. By the way, this applies not only to sexual minorities but to all individuals. These two cases are not only about equality of persons belonging to minorities with other members of society but also about the safety of anyone from verbal attacks that can induce physical attacks. These cases are not about freedom of speech, rather than about freedom from speech.

A non-categorical conclusion

After reviewing ECtHR's "Lithuanian" case-law of 2019–2021, we have to go back to the initial question: whether, among these Court judgments, we can find such that could be candidates for the status of a landmark judgment.

Usually, it is the Grand Chamber judgments that are (or could be) candidates to become landmark (all the more so, "great") judgments. So far, the Grand Chamber has examined only five "Lithuanian" cases. The author of this article has already thoroughly analysed, in another publication, the judgments adopted in

those cases (and in a broader context than the legal context alone).[93] Invoking that analysis for search of "great judgments", the result is not impressive in terms of quantity. Out of five judgments of the Grand Chamber in "Lithuanian" cases – *Ramanauskas v. Lithuania*,[94] *Cudak v. Lithuania*,[95] *Paksas v. Lithuania*,[96] *Kudrevičius and others v. Lithuania*[97] and *Vasiliauskas v. Lithuania*[98] – some have already lost their previous weight. For example, the reliability of the *Ramanauskas* judgment, which used to be almost the main doctrinal source in *agents provocateurs* cases, shrank significantly after the case of *Ramanauskas v. Lithuania* (no. 2),[99] in which the same applicant, who at the time when he was committing a new criminal offence in Lithuania boasted about a victory in Strasbourg, got caught once again – and lost. The *Vasiliauskas* judgment, as a source of law, has never been much serviceable (despite the fact that it is quoted at times), but its authority, as of a whole (if any), has been undermined by the *Drėlingas* judgment. The weight of the *Paksas* judgment has also considerably wavered, as, in view of the fact that in recent years quite a large number of countries have encountered manipulation of elections from abroad, events examined in that case are already often seen and assessed differently than more than a decade ago. Only two "Lithuanian" judgments of the Grand Chamber, *Cudak* and *Kudrevičius and Others*, today remain at about the same level as when the principles formed in them were a new weighty word in the Strasbourg Court's case-law (though the doctrinal value of *Cudak* is certainly bigger).

The analysis in this article allows putting the *Beizaras and Levickas* judgment in the first place among the candidates, that judgment having already paired itself with its "sequel", the *Lilliendahl* decision, and, no doubt, will have more "sequels", as the number of cases of this topicality is increasing. With certain reservations, the *Drėlingas* judgment can also be regarded a candidate for landmark judgments, and with even greater reservations – the *Rinau* judgment, too. Passage of a longer period of time will allow to better evaluate whether these insights about possible landmark judgments will have been proven to be right. If not, this would not in itself diminish their value, as jurisprudential law can be moving toward the same results by evolution and taking smaller steps.

93 E. Kūris, *Op. cit.* 3–41.

94 *Ramanauskas v. Lithuania* (footnote 18 *supra*).

95 *Cudak v. Lithuania* (footnote 17 *supra*).

96 *Paksas v. Lithuania* ([GC], no. 34932/04, 6 January 2011).

97 *Kudrevičius and others v. Lithuania* ([GC], no. 37553/05, 15 October 2015).

98 *Vasiliauskas v. Lithuania* (footnote 77 *supra*).

99 *Ramanauskas v. Lithuania (no. 2)* (no. 55146/14, 20 February 2018).