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# country report



**Rule of Law Programme South East Europe (Bucharest)**

## The case of KÖVESI v. ROMANIA

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**The European Court of Human Rights rules: Kövesi's dismissal as head of the Romanian anti-corruption agency was illegal**

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The current head of the newly created European Public Prosecutor's Office, Laura Codruța Kövesi, comes from Romania. There, she served as Attorney General for six years and heads the Romanian Anti-Corruption Agency (DNA) from 2013, until she was released in July 2018 in a controversial case and after a decision by the Romanian Constitutional Court. Kövesi appealed to the European Court of Human Rights (ECtHR) in Strasbourg against this dismissal. On May 5, 2020, the ECtHR ruled that her release has run against the standards of the European "Convention for the Protection of Human Rights and Fundamental Freedoms" (ECHR).

In this (particularly in Romania) highly anticipated decision, the Court found that the Romanian state's dismissal of Ms Kövesi had violated her rights to *freedom of expression* and *fair trial* as laid down in Article 10 and Article 6 (1) ECHR.

### **Background to Kövesi's dismissal in 2018**

The proceedings before the ECtHR must be viewed in the context of the change of government in Romania at the end of 2016. Shortly after, a coalition government led by the social democrats tried in various ways to slow down the reform progress made by Romania in the preceding years, especially in the field of fighting corruption. This included, e.g., changes of the thresholds regarding liability of corrupt deeds (introduced in January 2017 in an accelerated procedure - and subsequently withdrawn, following mass protests).

By 2016, Romania had made significant progress in prosecuting corruption crimes. The Romanian anti-corruption agency ("DNA"), headed by Kövesi, played a central role therein. The judicial reform announced by the then PSD-ALDE government coalition were met with criticism and opposition not only from civil society, but also from the majority of Romanian judges and prosecutors, including the Superior Council of Magistracy (the Council of Judges and Prosecutors; "CSM"): Among other things, the government's planned changes in status of the judiciary were criticized. Kövesi was one of those who positioned herself against these reform plans.

As a result, then Minister of Justice, Toader, commissioned an extensive report to assess Kövesi's professional competence as head of the agency. At that time Kövesi was already in her second term as Chief Prosecutor of DNA. The audit report, written in a rather harsh tone, highlighted her publicly voiced criticism of the judicial reforms that had started in 2017. Her refusal to appear before a parliamentary committee was also criticized. Although the Supreme Magistracy Council largely rejected the reasons and conclusions of the report submitted by the Minister of Justice, the Minister requested the Romanian President to dismiss Kövesi from her post. President Johannis initially refused. However, following a controversial decision in a case related to separation of powers, triggered by the government at that time, the Romanian Constitutional Court obliged the head of state to comply with the Minister of Justice's request for dismissal, thereby depriving the president of any discretion in decisions of this kind and reducing the right of the Superior Council of Magistracy as a representative of the judiciary.

The constitutional dispute ended with Kövesi's dismissal. According to the Romanian Constitutional Court's interpretation, Kövesi could only have requested to check before a lower court whether the formal requirements for dismissal were respected. However, the grounds for dismissal presented by the Ministry of Justice remained unassailable in court. According to many observers, the decision of the Romanian Constitutional Court clearly shifted the balance in the separation of powers in favor of the executive and was perceived internationally as an additional risk for the independence of the public prosecution in Romania. The ECtHR itself also criticized the Romanian court decision.

## Admissibility of the complaint

The two most important legal interests in the case "Kövesi v. Romania" relate to freedom of expression (Article 10 ECHR) and of access to a court of law in the national legal system, Article 6(1) ECHR. Both are directly related here, because the independence of the public prosecutor's office requires the possibility of moderate public criticism and analysis. At the same time, the state should ensure judicial protection against illegal dismissals, even in cases of (high-ranking) judicial officers. Only when this protection is effectively guaranteed, one can speak about standards based on the rule of law.

The Romanian Ministry of Justice took the view before the Strasbourg Court that it was a matter of a constitutional dispute that had already been resolved domestically, which is why in their view Kövesi's application would not be admissible at all.

The ECtHR used the so-called *Vilho Eskelinnen* test to determine whether the civil servant concerned was entitled to (labor-law related) court proceedings within the meaning of Article 6 of the ECHR on his/her dismissal. According to this test, the exclusion of legal protection is compliant with the European convention only if two conditions are met: its explicit exclusion in national law and the need to protect a national interest. In the case of Kövesi, the Strasbourg judges came to the conclusion that both requirements were not met: national law would also consider Kövesi's employment from a labor law perspective, whereby it would have been possible for her to have the formal requirements for her release checked by a court, which was also confirmed by the Romanian Constitutional Court. Regarding the second criterion, the court states:

*"[...] the absence of any judicial control of the legality of the decision of removal cannot be in the interest of the State. Senior members of the judiciary should enjoy – as other citizens – protection from arbitrariness from the executive power and only oversight by*

*an independent judicial body of the legality of such a removal decision is able to render such a right effective."*

## Central considerations of the Court

The applicant, Laura Kövesi, initially complained that she had no right to an effective judicial review in the Romanian legal system to contest her dismissal. She could lodge a legal action only with respect to *formal* dismissal requirements. However, she had no opportunity to submit for court review the report of the Ministry of Justice containing the dismissal grounds. During the proceedings before the Romanian Constitutional Court she had also no legal standing that would have enabled her to express her arguments. On the other hand, the ECtHR emphasized that the Ministry of Justice's report was in itself only preliminary, which means that it could not have automatically resulted in dismissal. Only the presidential decree signed by President Johannis had such an effect. The ECHR stated that some non-governmental organizations in Romania tried to challenge the Justice Minister's report prior to the ECtHR procedures, but this was always rejected by national court. The Court concludes that:

*"Such an avenue would not have been an effective remedy for the core of the applicant's complaint – the fact that her removal had been an illegal disciplinary sanction triggered by her opinions expressed publicly in the context of legislative reforms – which would have called for an examination of the merits and the internal legality of the decree in question."*

This means that the legal protection afforded in the national legal system in her case is not compatible with the protection granted by Article 6 (1) ECHR (right to a fair trial). In addition, the ECHR also stresses the increasing importance of *"procedural fairness in cases involving the removal or dismissal of prosecutors, including the intervention of an authority independent of the executive and the legislature in respect of decisions affecting the appointment and dismissal of prosecutors"*. By doing so, Romania violated the core of the applicant's right of access to a court: *"owing to the specific boundaries for a review of her case set down in the ruling of the Constitutional Court"*.

The then head of the Romanian anti-corruption agency also felt that her rights had been violated because the real reason for her dismissal were her critical comments on the judicial reforms initiated by the Ministry of Justice. She perceived her right to freedom of expression violated.

During the Strasbourg proceedings, the Romanian government representative stated that the main reasons for the dismissal were Kövesi's lacking qualifications, including in the areas of management and communication. The Strasbourg based Human Rights Court, on the other hand, emphasized that - although (high-ranking) judicial officers are committed to a certain level of loyalty and must express their criticism prudently - a (judicial) official can defend himself against a violation of his right to freedom of expression. In this context, the ECtHR points out that the main reasons (for dismissal) contained in the report relate to the applicant's critical remarks on the judicial reform, suggesting that there is a link between the critical remarks and the dismissal. The ECtHR did not find convincing the Romanian government's allegation that Kövesi's dismissal was due to lacking professional skills.

In this case, the ECHR applied the classic proportionality test, which gradually checks whether the violation was prescribed by law, whether it had a legitimate purpose, and whether the violation was ultimately necessary in a democratic society.

Although the ECHR could not find a legitimate purpose here, it tried to balance the interests of the state and the complainant. It is worth noting that the government named "protecting the rule of law" as a target for the release, on the grounds that Kövesi's statements triggered a nation-wide legal conflict. The ECtHR noted the opposite: namely, that Kövesi's statements were intended to defend the rule of law in Romania, which was also confirmed by numerous national and international reports. As a result, the government followed no legitimate purpose.

However, the ECtHR continues and considers it "useful" to analyze the balance between the interests of the complainant and the government, considering all the circumstances of the case. The Court emphasized that "*questions concerning the functioning of the justice system fall within in the public interest, the debate of which generally enjoys a high degree of protection under Article 10*". Against this background, the ECtHR draws attention to the role of public prosecutors in judicial reform debates:

*" It refers in this connection to recommendation (REC(2000)19 of the Committee of Ministers of the Council of Europe, which recognises that prosecutors should have the right to take part in public discussions on matters concerning the law, the administration of justice and the promotion and protection of human rights, and they should be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption."*

The judicial reform and anti-corruption are issues that serve the public interest. As a result, Kövesi's dismissal was difficult to reconcile with the independence of the judiciary, especially with the principle of independence of the prosecutors. The ECtHR concludes that "the premature removal of the applicant from her position as chief prosecutor of the DNA defeated the very purpose of maintaining the independence of the judiciary". This has also had a chilling (detering) effect on other judicial officers, as they had been prevented from participating in similar discussions by the top official's dismissal.

## Assessment

With this decision, the Court that has existed since 1959, once again demonstrates its important role in protecting the fundamental rights of citizens of European countries whose judicial systems have recently undergone major changes or in which individual complaints to a constitutional court are impaired.

In terms of domestic policy, the decision does not currently play a prominent role in Romania, since a change of government took place in 2019 and all central actors in the judicial reforms 2017-2018 are no longer in office. Nevertheless, the Strasbourg decision puts a certain end to years of discussions about rule of law reforms in Romania. Within the domestic discourse, it has been vigorously debated over whether the reforms of the past three years had strengthened or in fact weakened the independence of the judiciary.

For Laura Kövesi, too, this decision only brings (unquestionably fundamental) satisfaction and, to a certain extent, rehabilitation. Kövesi has deliberately not requested any financial compensation (in terms of just satisfaction). The decision of May 5th, 2020 marks the end of many years of controversy (with countless disciplinary proceedings) in Romania about her

work. This, however, does not affect her current role. She has been appointed to serve as (first) Chief European Prosecutor in 2019 and is currently working intensively on developing this newly created institution in Luxembourg, so that the European Public Prosecutor's Office can start operating by the end of this year.

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