

## European Court of Human Rights (Fourth Section), CASE OF KÖVESI v. ROMANIA (Application no. 3594/19), Judgement dated 05.05.2020 (final as of 05.08.2020)

Member State

 Romania

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Topic

rule of law, freedom of expression, independence of prosecutors

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Sector

Freedom of Expression and Association

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Deciding Court Original Language

European Court of Human Rights/Curtea Constitu?ional? a României

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Deciding Court English translation

European Court of Human Rights/Romanian Constitutional Court

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Registration N

3594/19

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Date Decision

05.05.2020

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ECLI (if available)

ECLI:CE:ECHR:2020:0505JUD000359419

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National Follow Up Of (when relevant)

The judgement of the European Court of Human Rights (Fourth Section), CASE OF KÖVESI v. ROMANIA (Application no. 3594/19) is a follow-up of the Decision no. 358/2018 of the Constitutional Court of Romania that forced the Romanian President to dismiss Laura Codru?a Kövesi from the position of chief prosecutor of the Romanian National Anti-Corruption Directorate. By Decision no. 358/2018, the Constitutional Court of Romania assessed that it existed a legal conflict of a constitutional nature between the Minister of Justice and the President of Romania, generated by the refusal of the President of Romania to put into practice the proposal of the Minister of Justice to dismiss Laura Codru?a Kövesi from the position of Chief Prosecutor of the

National Anticorruption Directorate and ruled that the President of Romania was due to issue the decree on the dismissal of Laura Codruța Kövesi from the position of chief prosecutor of the National Anticorruption Directorate.

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## EU legal sources and CJEU jurisprudence

N/A

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## ECtHR Jurisprudence

Council of Europe: Committee of Ministers, Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, 6 October 2000, Rec(2000)19;

The Consultative Council of European Prosecutors in its Opinion No. 9 (2014) on European norms and principles concerning prosecutors of 17 December 2014.

Baka v. Hungary [GC], no. 20261/12, 23 June 2016  
Boyle and Rice v. the United Kingdom, 27 April 1988, Series A no. 131  
Brisco v. Romania, no. 26238/10, 11 December 2018  
Denisov v. Ukraine [GC], no. 76639/11, 25 September 2018  
Di Giovanni v. Italy, no. 51160/06, 9 July 2013  
Efendiyeva v. Azerbaijan, no. 31556/03, 25 October 2007  
Gîrleanu v. Romania, no. 50376/09, 26 June 2018  
Golder v. the United Kingdom, 21 February 1975, Series A no. 18  
Guja v. Moldova [GC], no. 14277/04, ECHR 2008  
Harabin v. Slovakia, no. 58688/11, 20 November 2012  
Karácsony and Others v. Hungary [GC], nos. 42461/13 and 44357/13, 17 May 2016  
Kayasu v. Turkey, no. 64119/00, 13 November 2008  
Khuzhin and Others v. Russia, no. 13470/02, 23 October 2008  
Kudeshkina v. Russia, no. 29492/05, 26 February 2009  
Kuznetsov and Others v. Russia, no. 184/02, 11 January 2007  
Lupeni Greek Catholic Parish and Others v. Romania [GC], no. 76943/11, 29 November 2016  
Morice v. France [GC], no. 29369/10, ECHR 2015  
Nazsiz v. Turkey (dec.), no. 22412/05, 26 May 2009  
Nedeltcho Popov v. Bulgaria, no. 61360/00, 22 November 2007  
Özpınar v. Turkey, no. 20999/04, 19 October 2010  
Ramos Nunes de Carvalho e Sá v. Portugal [GC], nos. 55391/13 and 2 others, 6 November 2018  
Regner v. the Czech Republic [GC], no. 35289/11, 19 September 2017  
Serdal Apay v. Turkey (dec.), no. 3964/05, 11 December 2007  
Suküt v. Turkey (dec.), no. 59773/00, 11 September 2007  
Vilho Eskelinen and Others judgment [GC], no. 63235/00, ECHR 2007-II  
Vogt v. Germany, 26 September 1995, Series A no. 323  
Wille v. Liechtenstein [GC], no. 28396/95, 28 October 1999

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## Subject Matter

rule of law – independence of the judiciary – primacy of EU law – freedom of expression of prosecutors - premature termination of chief prosecutor's mandate following public criticism of legislative reforms - criticism in context of debate of public interest, not containing attacks against

the judiciary - statements calling for high degree of protection - chilling effect of the measure defeating the very purpose of maintaining the independence of the judiciary.

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### Legal issue(s)

The case deals with the Romanian legal system for removing high-ranking prosecutors in management positions, based on the discretionary assessment and power of a politician, the Minister of Justice, who was discontent by the views of Laura Codruța Kövesi, from her position as chief prosecutor of the National Anti-Corruption Directorate, concerning legislative reforms affecting the judiciary that she had expressed publicly, in her professional capacity.

Related to Article 10 ECHR, the case deals with the following questions:

(i) whether the views and criticisms on legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system and the prosecutor's competence to investigate corruption offences, pertaining to the highest anticorruption office holder in the judiciary, fell within the context of a debate on matters of great public interest, and thus called for a high degree of protection for the applicant's freedom of expression as prosecutor and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State;

(ii) whether the impugned interference of the Romanian State authorities (i.e., removal from high-ranked position of a prosecutor), motivated by the views and criticisms on legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system and the prosecutor's competence to investigate corruption offences, was a consequence of the previous exercise of the right to freedom of expression.

For the first time in Romania's history, the ECtHR held that, by means of a decision of the Romanian Constitutional Court (i.e., by its decision no. 358/2018), there has been a violation of the independence of the judiciary and the freedom of expression of prosecutors.

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### Request for expedited/PPU procedures

YES. The ECtHR decided to give priority treatment to the application in accordance with Rule 41 of the Rules of the Court.

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### Interim Relief

N/A

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### National Law Sources

Articles 51(2)-(6) and 54(1) of Law no. 303/2004 on the rules governing judges and prosecutors  
Article 29(7) of Law no. 317/2004 regarding the Superior Council of the Judiciary

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### Facts of the case

Background: Laura Codruța Kövesi was Romania's youngest and first woman prosecutor-general, having served as head of the Romanian National Anti-Corruption Directorate from 2013 to 2018. Laura Codruța Kövesi now serves as the European Union's first anti-fraud prosecutor in charge of the new European Public Prosecutor's Office (EPPO), based in Luxembourg, which investigates, prosecutes, and brings judgment for crimes against the EU budget.

On 7 April 2016, the President of Romania, on the basis of the proposal by the Minister of Justice and the endorsement of the Superior Council of the Judiciary, reappointed Laura Codru?ă Kövesi as chief prosecutor of the National Anti-Corruption Directorate for a new three-year term, from 16 May 2016 to 16 May 2019. On 23 February 2018, the Minister of Justice sent the Superior Council of the Judiciary a report on the managerial activity of the National Anti-Corruption Directorate, which included a proposal for the removal of Laura Codru?ă Kövesi from her position as chief prosecutor. The Superior Council of the Judiciary decided by a majority of votes not to endorse the removal proposal by the Minister of Justice. In this context, President of Romania refused to sign off on the proposal to remove her from office. In response, the Prime Minister lodged with the Constitutional Court of Romania an application to resolve the constitutional conflict firstly between the Minister of Justice and the President and secondly between the Government and the President, caused by the President's refusal to follow up on the request for removal of the chief prosecutor of the National Anti-Corruption Directorate. The Decision no. 358/2018 of Romanian Constitutional Court forced the Romanian President to dismiss Laura Codru?ă Kövesi from the position of chief prosecutor of the Romanian National Anti-Corruption Directorate. On 9 July 2018 the applicant was removed from her position by presidential decree.

By Decision of 5 May 2020, in Case Kövesi v. Romania (Application no. 3594/19), the European Court of Human Rights held, unanimously, that there had been a violation of Article 6 § 1 (right to a fair trial) and Article 10 (right to freedom of expression) of the European Convention on Human Rights.

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#### Reasoning (role of the Charter or other EU, ECHR related legal basis)

Article 10: The premature termination of the applicant's mandate constituted an interference with her right to freedom of expression. No evidence had been brought to show that the impugned measure had served the aim of protecting the rule of law or any other legitimate aim. The measure had been a consequence of the previous exercise of her right to freedom of expression. In cases where it concluded that the interference had not pursued a legitimate aim, the Court found a violation of the Convention without further investigation. However, in the circumstances of the case, it was useful to establish also whether the interference had been necessary in a democratic society.

The impugned interference had been prompted by the views and criticisms that the applicant had publicly expressed. The Court attached particular importance to the office held by the applicant, whose functions and duties included expressing her opinion on legislative reforms which were likely to have an impact on the judiciary and its independence and, more specifically, on the fight against corruption conducted by her department. Her views and statements had not contained attacks against other members of the judiciary; nor had they concerned criticisms with regard to the conduct of the judiciary when dealing with pending proceedings. Her statements had not gone beyond mere criticism from a strictly professional perspective. Accordingly, the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for her freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State.

Although the applicant had remained on as a prosecutor, she had ultimately been removed from her position as chief prosecutor before the end of her mandate. That removal and the reasons justifying it could hardly be reconciled with the particular consideration to be given to the nature of

the judicial function as an independent branch of State power and to the principle of the independence of prosecutors, which was a key element for the maintenance of judicial independence. Against that background, her removal defeated the very purpose of maintaining the independence of the judiciary. Furthermore, the premature termination had been a particularly severe sanction, which undoubtedly had a “chilling effect” in that it had to have discouraged not only her but also other prosecutors and judges in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.

Lastly, due account had to be taken of the procedural aspect of Article 10. In the light of the considerations that led it to find a violation of Article 6 § 1, the Court considered that the impugned restrictions on the applicant’s exercise of her right to freedom of expression under Article 10 had not been accompanied by effective and adequate safeguards against abuse.

The applicant’s removal from her position of chief prosecutor of the DNA had not pursued a legitimate aim and, moreover, was not a measure “necessary in a democratic society” within the meaning of that provision.

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#### Relation of the case to the EU Charter

The EU Charter was not referred to in this case.

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#### Relation between the EU Charter and ECHR

N/A

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#### Use of Judicial Interaction technique(s)

comparative reasoning with foreign legislation

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#### Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The national court – the Constitutional Court of Romania – makes simple citation of its caselaw as to outline the following so-called legal premises:  
prosecutors operate under the authority of the minister of justice, which, of course, entails a subordination of all prosecutors, since the constitutional text does not discriminate.

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#### Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The national court – the Constitutional Court of Romania – makes simple citation of the ECtHR caselaw as to outline the following so-called legal premises: prosecutors operate under the authority of the minister of justice, which, of course, entails a subordination of all prosecutors, since the constitutional text does not discriminate (Judgment of 22 May 1998, issued in the Case Vasilescu vs. Romania, Paragraphs 40 and 41, of Judgment of 3 June 2003, issued in the Case Pantea vs. Romania, Paragraph 238).

Also, it makes reference to the French Constitutional Council and Decision of the French Constitutional Council no. 2017-680 QPC of 8 December 2017, Paragraph 9, assessing it is a similar situation, in the sense that magistrates from the prosecutors’ offices are placed under the guidance and control of their hierarchic supervisors and under the authority of the minister of

justice, and their independence refers to the free exercise of their actions in front of jurisdictions; moreover, this independence must be reconciled with the prerogatives of the Government and cannot provide the same safeguards to the magistrates from the prosecutors' office as those applicable to sitting magistrates.

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### Strategic use of judicial interaction technique (purpose aimed by the national court)

The presumably scope pursued by the national court when using judicial interaction techniques was to solve an institutional conflict in favour of the Minister of Justice.

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### Impact on Legislation / Policy

1. Further to the rendering of the ECtHR decision in this case, the President of Romania publicly requested the Constitutional Court of Romania to revise its Decision no. 358/2018. In its response (also publicly released), the Constitutional Court of Romania firmly rejected such scenario, invoking lack of legal background for acting so. For accuracy purposes, the main statements of the Constitutional Court of Romania were the following:

“The decisions of the Constitutional Court are generally binding and are not subject to review, as they have res judicata authority.

Publicly invoking the need for a review of the decisions of the Constitutional Court represents a very serious infringement of the Court's and its judges' independence.

It is for the legislator to comply with the ECtHR judgment, insofar as it becomes final, by identifying an appropriate legislative solution in the light of the legal framework covered by that judgment, and not of the one covered by Constitutional Court Decision No 358/2018.”

2. On 18 August 2020, the Romanian Judges' Forum Association (RJFA) and the Association Initiative for Justice (AIJ) submitted a communication pursuant to Rule 9.2 of the Rules of the Committee of Ministers with regard to the execution of the judgment of the European Court of Human Rights (ECHR) in the Kövesi v. Romania case. The two associations proposed general measures necessary for the enforcement of the ECHR ruling in Kovesi v. Romania case. Great majority of such proposal were considered. As a result:

2.1. The provisions of Article 9 paragraph 3 Law No. 303/2004 on the rules governing judges and prosecutors, introduced by Law No 242/2018 (“Judges and prosecutors are obliged, in the exercise of their duties, to refrain from any defamatory manifestation or expression, in any way, against the other powers of the state - legislative and executive”) have been removed from the Law No. 303/2022 on the rules governing judges and prosecutors (in force as of 2022). Note is to be made that the above-cited provisions of Article 9 paragraph 3 Law No. 303/2004 on the rules governing judges and prosecutors (in force at the time Laura Codruța Kövesi was removed from the position of chief prosecutor of the Romanian National Anti-Corruption Directorate) were considered “to be unnecessary at best and dangerous at worst” within the Opinion adopted by the Venice Commission at its 116th Plenary Session (Venice, 19-20 October 2018). The said opinion also stated that “It is obvious that judges should not make defamatory statements with respect to anyone, not only with respect to state powers. It seems unnecessary to specify this by law. On the contrary, it seems dangerous to do so, especially as the notion of defamation is not clearly defined and this obligation relates specifically to other state powers. (...) In addition, the new provision cannot be justified as a reflection of the principle of loyal cooperation between institutions, the importance of which was underlined by the Venice Commission already in

2012 in respect of Romania. If this were the motivation of the provision, the same obligation would have to be imposed on all state powers, including with respect to criticism of judges by holders of political office. There are serious doubts as to how such a general restriction on magistrates' freedom of expression could be justified. At least from the point of view of necessity and legal clarity, the restriction may be seen as problematic under Article 10 ECHR. It should therefore be deleted."

2.2. The principle of prosecutors' independence has been reintroduced in the national legislation. Article 3 paragraph 1 of Law No. 303/2004 on the rules governing judges and prosecutors, which was in force until the changes introduced by Law no 242/2018 ("Prosecutors (...) are independent, in accordance with the law.") has been reflected in the Law No. 303/2022 on the rules governing judges and prosecutors (in force as of 2022).

2.3. The system for appointing/removing high-ranking prosecutors in management positions has been slightly modified. Law No. 303/2022 on the rules governing judges and prosecutors (in force as of 2022) provides that the President may reject the proposal to revoke high-ranking prosecutors in management positions, but only for procedural grounds. It also establishes the procedure for the removal from office of Chief prosecutors and provides the right to challenge the decree of the President of Romania on the removal from office before administrative courts, which shall examine both its legality and merits. The current legal framework governing judges and prosecutors provides for a procedure on removal from office with guarantees against excessive political influence, subject to the jurisdiction of administrative courts.

2.4. Freedom of expression of prosecutors has been expressly provided in the most recent (and currently in force) legal framework. Law No. 303/2022 on the rules governing judges and prosecutors (in force as of 2022) provides that "magistrates may express their opinions regarding public policies or legislative initiatives in the judiciary sector or other domains of public interest, provided that such have no political character".

Considering the above, on 11 April 2023 the Romanian Government declared that its obligations stated under Article 46 of the Convention had been fully completed and, thus, requested for the monitoring procedure related to this case to be ceased.

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Notes on the national implementation of the preliminary ruling by the referring court

N/A

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Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

N/A

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Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

Before reaching the ECtHR, in its Decision no. 358 of 30 May 2018, the national court – the Constitutional Court of Romania - indicated the following: the Ad-hoc Report on Romania (Rule 34), adopted by the Group of States against Corruption (GRECO) in its 79th plenary session – Strasbourg, 19 – 23 March 201; the European Standards as Regards the Independence of the Judicial System, adopted by the Venice Commission in its 85-a plenary session (Venice, 17-18 December 2010); The European Commission for Democracy through Law (Venice Commission):

Opinion no. 169/2001 on the Law amending the Constitution of Romania, adopted in its 51st plenary session of 5—6 July 2002, Para. 59; Opinion no. 892/2017 on the Law on the Public Ministry from Polonia, as amended, adopted by the Venice Commission in its 113th plenary session of 8—9 December 2017, Paragraphs 27 and 28; the Joint Opinion no. 791/2014 on the draft Law on the Public Ministry in the republic of Moldova, prepared by the Venice Commission, Department for Human Rights of the General Directorate for Human Rights and Rule of Law of the Council of Europe and by the Office of Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (OSCE), adopted by the Venice Commission in its 102nd plenary session of 20—21 March 2015, Paragraph 28; the Report of the Venice Commission on the independence of the judiciary, Part II: the Public Ministry, adopted in its 85th plenary session of 17—18 December 2010, Paragraph 7; Opinion no. 709/2012 on the drafts to amend the Law on the Public Ministry, adopted by Venice Commission, in its 94th plenary session of 8—9 March 2013, Paragraph 20.

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#### [Did the national court take into account national case law on fundamental rights?](#)

The national court – the Constitutional Court of Romania – did not take into account national case law on fundamental rights.

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#### [If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information](#)

The Romanian Government did not challenge the ECtHR judgement in this case, which became final on 05.08.2020.

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#### [Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?](#)

The Romanian Government did not challenge the ECtHR judgement in this case, which became final on 05.08.2020.

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#### [Impact on national case law from the same Member State or other Member States](#)

As of the rendering of the ECtHR judgement, CASE OF KÖVESI v. ROMANIA (Application no. 3594/19) has been broadly cited and invoked in legal procedures (both in front of the Judicial Inspection, and in litigations before the competent national courts of law).

It has been generally perceived as a benchmark in all legal matters related to freedom of expression of prosecutors and judges (magistrates).

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#### [Connected national caselaw / templates](#)

European Court of Human Rights (Second Section), CASE OF EM?NA?AO?LU v. TURKEY (Application no. 76521/12), Judgement dated 09.03.2021 (final as of 05.07.2021)

European Court of Human Rights (Fourth Section), CASE OF MIROSLAVA TODOROVA v. BULGARIA (Application no. 39650/18), Judgement dated 19.10.2021

European Court of Human Rights (First Section), CASE OF ?UREK v. POLAND (Application no. 40072/13), Judgement dated 16.06.2022 (final as of 10.10.2022)

European Court of Human Rights (Fourth Section), CASE OF STANCU AND OTHERS v.

ROMANIA (Application no. 22953/16), Judgement dated 18.10.2022 (final as of 18.01.2023)

European Court of Human Rights (Fourth Section), CASE OF ZHABLYANOV v. BULGARIA (Application no. 36658/18), Judgement dated 27.06.2023 (final as of 27.09.2023)

European Court of Human Rights (First Section), CASE OF TULEYA v. POLAND (Applications nos. 21181/19 and 51751/20), Judgement dated 06.07.2023 (final as of 06.10.2023)

European Court of Human Rights (First Section), CASE OF NARBUTAS v. LITHUANIA (Application no. 14139/21), Judgement dated 19.12.2023

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Other

N/A

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(Link to) full text

<https://hudoc.echr.coe.int/fre?i=001-202415>

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History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. Constitutional Court of Romania/Decision no. 358 of 30 May 2018
  2. European Court of Human Rights (fourth section), Case of Kövesi v. Romania (Application no. 3594/19), 5 May 2020
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