

# European Court of Human Rights: Recent Judgments on the Freedom of Expression. The Cases of *Erdogdu v. Turkey* and *Constantinescu v. Romania*

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Once again the European Court of Human Rights has held that the Turkish authorities have acted in breach of Article 10 of the Convention, this time by convicting Ümit Erdoğan, the editor of the review *İşçilerin Sesi* ("The Workers' Voice"). In 1993 Erdoğan was sentenced to six months' imprisonment and fined by the National Security Court: an article published in the review was considered to be propaganda against the territorial integrity of the State, which is an offence under the Prevention of Terrorism Act. The Court especially took into account that the article referred to parts of Turkish territory as Kurdistan and applauded acts of violence and the national resistance against the State by the PKK. In 1997 the National Security Court deferred sentencing Mr. Erdoğan, ordering that he would be sentenced if, within three years from the date of deferral, he was convicted in his capacity as editor of an offence with intent.

In a judgment delivered at Strasbourg on 15 June 2000 the European Court of Human Rights (Fourth Section) has found that by convicting Erdoğan the judicial authorities of Turkey violated Article 10 of the European Convention on Human Rights. According to the Strasbourg Court, the Turkish authorities did not take sufficient account of the freedom of the press or the right of the public to have access to a different perspective on the Kurdish problem. Although the Court underlined its awareness of the concerns of the authorities regarding the fight against terrorism, it was not persuaded that the litigious article would have highly detrimental consequences for the prevention of disorder and crime in Turkey. Nor was the article to be considered as an incitement to violence and hatred. As to the applicant's benefiting from a deferral of sentence, the Court was of the opinion that because this order only took effect if Mr. Erdoğan committed no further offences with intent as an editor, this was to be considered as a ban effectively censoring the applicant's exercise of his profession. The Court also regarded the ban as unreasonable, as it forced Mr. Erdoğan to refrain from publishing any article that would be considered contrary to the interests of the State. Such a limitation on freedom of journalistic expression was disproportionate because it meant that only ideas that were generally accepted, welcome or regarded as inoffensive or neutral could be expressed. Consequently, the Court concluded that there had been a violation of Article 10 of the Convention. The Turkish judge of the European Court of Human Rights, Judge Gölcüklü delivered a separate

opinion. Although he voted with the majority of the Court, Judge Gölcüklü expressed his doubts on the political opportunity to protect the freedom of expression in a way that this freedom can be abused to undermine the democratic rights and freedoms itself.

In the case of *Constantinescu v. Romania*, the European Court of Human Rights in its judgment of 27 June 2000 (First Section) found no violation of Article 10 of 5 5 the Convention. The case concerns the applicant's conviction for criminal defamation. Constantinescu, the president of a teachers' trade union, was convicted by the Bucharest District Court in 1994 following the publication in the press of comments he had made regarding an internal dispute in the Union and the functioning of the judicial system. More specifically, in an interview with a journalist of the newspaper *Tineretul Liber* Constantinescu had referred to three members of the previous trade union leadership who had refused to return money belonging to the Union after the election of new leaders as *delapidatori* (receivers of stolen goods). It was also mentioned that the new leadership of the Union had lodged a criminal complaint against them. The Bucharest District Court considered these statements by Constantinescu as defamatory, as he must have been aware when making this remarks in the presence of journalists that the prosecution had dropped the charges against the three teachers concerned. Before the Strasbourg Court Constantinescu alleged a violation of Article 6 (fair trial) and Article 10 (freedom of expression) of the European Convention. He maintained that he had not been allowed to prove that his comments were true and had not been informed that the charges had been dropped by the prosecution when the article appeared. As a matter of fact, the European Court of Human Rights noted a violation of Article 6 of the Convention because the Bucharest District Court found the applicant guilty of defamation without affording him an opportunity to give evidence and defend his case. On the other hand, the Court found no violation of Article 10 of the Convention. The European Court of Human Rights underlined that the Bucharest District Court had based its conviction on the use of the defamatory word *delapidatori* by Constantinescu referring to the three teachers, and not on the fact that he had expressed opinions criticising the functioning of the system of justice in trade union disputes. The Court considered that Constantinescu could quite easily have voiced his criticism and contributed to a free public debate on trade union problems without using the word *delapidatori*, which explicitly refers to a criminal offence, of which the three teachers were never convicted. Accordingly, Constantinescu should have refrained from using this description. Hence, the Strasbourg Court reached the conclusion that the State's legitimate interest in protecting the reputation of the three teachers did not conflict with the applicant's interest in contributing to the aforementioned debate. The Court also found that the penalty imposed, namely a fine of 50,000 ROL (leu) and an award of 500,000 ROL (leu) to each teacher for non-pecuniary damage, was not disproportionate. It was within their margin of appreciation for the Romanian courts to consider the conviction of Constantinescu "necessary in a democratic society" in order to protect the rights of others, which is fully in

accordance with para. 2 of Article 10 of the Convention. In a partially dissenting opinion judge Casadevall (Andorra) expressed his opinion that the arguments developed by the Romanian authorities were neither pertinent nor sufficient to legitimise the interference in the applicant's freedom of expression. Casadevall inter alia referred to the judgment of the Romanian Supreme Court in 1999 which annulled the applicant's conviction because the motive of intent to defame was not proven. According to Casadevall this judgment in itself contained an implicit confirmation of a violation of Article 10 of the European Convention.

***Erdogdu gegen die Türkei, Antrag Nr. 00025723/94, vom 15. Juni 2000***

*Erdogdu v. Turkey, Application number 00025723/94, of 15 June 2000*

<https://hudoc.echr.coe.int/eng?i=001-58607>

***Constantinescu gegen Rumänien, Antrag Nr. 00028871/95, vom 27. Juni 2000***

*Constantinescu v. Romania, Application number 00028871/95, of 27 June 2000*

<https://hudoc.echr.coe.int/eng?i=001-58737>

