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**ANALYSIS OF THE
CASE OF EZELIN V. FRANCE**

**JUDGMENT OF THE EUROPEAN COURT OF
HUMAN RIGHTS
ISSUED ON 18 MARCH 1991**

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Introduction

This Analysis considers the judgment of 18 March 1991 of the European Court of Human Rights (hereinafter referred to as the “European Court”) on the case of *Ezelin v. France*. The case concerns the violation of the right to Freedom of Assembly guaranteed by the European Convention on Human Rights (hereinafter referred to as “European Convention” or “ECHR”) that was decided by the European Court.

This Analysis aims to study the facts of the case, including a thorough examination of the applicant’s complaints and the French Government’s arguments. The Analysis will also provide an overview of the specific approaches of the European Commission on Human Rights (hereinafter referred to as “European Commission” or “Commission”) and the European Court regarding the interpretation of the rights and freedoms in question. However, the Analysis will not specifically address the issue of just satisfaction. The analysis will be carried out by applying a checklist which the Court uses when examining violations of each ECHR right and freedom. The Analysis will also highlight the significant features of the case which played an important role and became the principal guide to the interpretation of the rights and freedoms guaranteed by the European Convention.

This Analysis is educational in character and is primarily designed to enable legal professionals, including judges, lawyers, advocates, legal service providers and others involved in the protection of human rights - including law students - to identify the criteria and the standards that the European Court follows when interpreting the rights and freedoms guaranteed by the European Convention.

PART I – CASE OF EZELIN V. FRANCE

A. Short summary of the facts of the case

The applicant, Mr. Roland Ezelin, is a French national and lawyer (avocat) who lives at Basse-Terre (Guadeloupe), who was Vice-Chairman of the Trade Union of the Guadeloupe Bar at that time. On 12 February 1983, a number of Guadeloupe independence movements and trade unions held a public demonstration at Basse-Terre to protest against two court decisions whereby prison sentences and fines were imposed on three militants for criminal damage to public buildings. The applicant took part in the public demonstration and carried a placard.

The Chief Superintendent of the Basse-Terre police drew up a report on the very same day and sent it to the local public prosecutor. The report, which had eleven appendices, gave the following account:

"While at the station, I was informed in a radio message about the demonstration being held today by various independence movements in the Champ d'Arbaud, Basse-Terre, from 9 a.m. ... Demonstrators had set off at 10.30 a.m. and were marching through the streets of the town chanting slogans which were hostile to the police and the judiciary. During the procession, graffiti was painted on various buildings, in particular the Institute d'émission d'Outre-mer, known as the 'Central Treasury'. The group of 450-500 people who had left the Champ d'Arbaud had joined another group of 500 people, at the rue Schoelcher, forming a compact group of about 1,000 people, following the leaders, who announced over loudspeakers the slogans to be chanted. Some of the leaders were recognized by the police officers. At 11.10 am the demonstrators reached the police station and assembled in front of it. ... The demonstrators then took up their position in front of the police station and were addressed by two leaders from outside the district who were unknown to the police officers present. ... Among the other demonstrators were identified also Dr Corentin and Mr. Ezelin, a barrister. They displayed a banner with the words 'LAWYERS - DOCTORS'. The majority of demonstrators, however, including the most worked up and the most aggressive ones, were people from outside Basse-Terre, most of them from Grande-Terre island, it seemed, and consequently unknown to the police. ... The procession then went along the boulevard Félix-Eboué and eventually reached the Champ d'Arbaud, where it dispersed, after making two lengthy stops, during which further speeches were made and slogans chanted by the crowd, firstly in front of the Law Courts in order to insult the judges and then outside the prison in order to demonstrate their solidarity with the imprisoned militants. After the demonstrators had passed, it was found that they had taken advantage of these stops to paint offensive and insulting graffiti in green, red and black on the walls of the administrative buildings".

The investigation that was immediately undertaken failed to identify those responsible for defacing the buildings. According to information received, most of the graffiti were the work of girls who were not from Basse-Terre, no doubt to avoid recognition as far as possible. One of them was claimed to be a teacher from Pointe-à-Pitre, but this could not be positively established. The intelligence service (Renseignements généraux) confirmed that the persons responsible for the graffiti were among the demonstrators who arrived by coach from Pointe-à-Pitre. They did not know their identities..."

The chronology of events and legal proceedings, which were held in the case of Ezelin are described in Table No. 1 below.

Table No.1

THE DOMESTIC JUDICIAL INVESTIGATION	
21 February 1983	A judicial investigation was commenced on 21 February 1983 into the commission by a person or persons unknown, of the offences of criminal damage to public buildings and insulting the judiciary.
24 February 1983	On 24 February, the Principal Public Prosecutor at the Basse-Terre Court of Appeal wrote to the Chairman of the Guadeloupe Bar informing him that, according to the police report of 21 February 1983, it appeared that Mr. Ezelin, of the Guadeloupe Bar, took part in a public demonstration against the judiciary in circumstances likely to entail criminal liability under Article 226 ¹ of the Criminal Code." The Principal Public Prosecutor at the Basse-Terre Court of Appeal also asked that the Chairman of the Guadeloupe Bar to provide his opinion of the case after hearing his colleague's explanations.
14 March 1983	In a letter of 14 March 1983 the Chairman of the Bar informed the Principal Public Prosecutor of the outcome of his investigations, stating that Mr. R. Ezelin had been carrying a placard on his own which bore the words 'Trade Union of the Guadeloupe Bar against the Security and Freedom Act'. No act, gesture or words insulting to the judiciary could be attributed to him. His participation in a demonstration had therefore been confined to protesting at the use of the 'Security and Freedom' Act. ... ". He further indicated that the facts, even assuming the worst with regards to Mr. Ezelin, and the report by the Chief Superintendent ... does not accuse him of any insulting gesture, act or words.....".
25 April 1983	On 25 April 1983 the applicant was summoned to appear before the investigating judge in order to give evidence as a witness, and at the interview he stated that he had nothing to say on the matter.
19 May 1983	On 19 May 1983 the judicial investigation ended with a discharge order on the ground that no evidence had been obtained which would make it possible to identify those responsible for the graffiti or for the insulting or threatening words uttered during the demonstration.
THE DISCIPLINARY PROCEEDINGS AGAINST THE APPLICANT	
1 June 1983	On 1 June 1983, the Principal Public Prosecutor lodged a complaint against the applicant with the Chairman of the Bar, which in particular included that according to the police report of 21 February 1983, Mr. Ezelin had participated in a demonstration at Basse-Terre on 12 February 1983. During the demonstration, a number of particularly offensive graffiti had been painted on the walls of the Law Courts calling one of the judges who had taken part in one of the decisions a fascist and calling all the judges 'MAKO' [pimps]. The demonstrators even chanted death threats on numerous occasions against police officers who witnessed the events. The complaint further stated that the Basse-Terre investigating judge opened an investigation on the offences of criminal damage to public buildings. All the persons reported as having taken part in the demonstration were interviewed and they stated either that had not seen

¹ First para. of Article 226 of the Criminal Code reads as follows:

"Anyone who by his acts or by means of the written or spoken word has publicly attempted to bring discredit on any action or decision taken by a court, in a manner likely to impair the authority or independence of the judiciary, shall be liable to imprisonment for not less than one month and not more than six months and a fine of not less than 500 francs and not more than 90,000 francs or to only one of these two penalties."

	<p>anyone paint the graffiti or, at the very least, that they did not know who was responsible. Only Roland Ezelin refused to answer the questions. The proceedings ended with a discharge order.... His refusal to reply to the investigating judge as a witness displays, moreover, an attitude of contempt for justice. Therefore, there has been a breach under Article 106² of the Decree of 9 June 1972. In conclusion, the Principal Public Prosecutor requested the Chairman of the Bar to kindly bring disciplinary proceedings against Mr. Ezelin before the Bar Council. ... "</p>
25 July 1983	<p>At a Disciplinary Hearing held under Article 104³ of Decree no. 72-468 of 9 June 1972 the Bar Council adopted the following decision on 25 July 1983:</p> <p>"... At the request of the Principal Public Prosecutor, the Chairman of the Bar has already given an opinion dated 14 March 1983 as to the first series of charges against Mr. Ezelin, which in particular stated the following: ...It does not appear from the judicial investigation that Mr. Ezelin committed a breach of Article 106 of the Decree of 9 June 1972 in connection with taking part in the aforesaid demonstration or that any disciplinary sanction can consequently be imposed on him. ... As regards the second series of charges against Mr. Ezelin, it appears both from the judicial investigation and from Mr. Ezelin's explanations that his refusal to make a statement to the investigating judge was prompted by anxieties based on Article 105⁴ of the Code of Criminal Procedure and a concern to comply with Article 89 of the Decree of 9 June 1972 as some of the persons summoned by the investigating judge in connection with the events on which his evidence was being sought had previously consulted him as a lawyer.... It does not appear to the board that this refusal may be regarded as contempt for justice and the judiciary.</p> <p>...For these reasons, The Bar Council decided that there was no occasion to impose any disciplinary sanction on Mr. Roland Ezelin on account of the matters of which it was seized by the Principal Public Prosecutor on 1 June 1983. In addition the board recommended the Chairman of the Bar to remind both Mr. Ezelin and the whole of the Bar of the traditional rules of good behavior and sound judgment in all activities in which their status as avocats may be involved.</p>
12 December 1983	<p>The Principal Public Prosecutor appealed to the Basse-Terre Court of Appeal against the decision of the Bar Council. On 12 December 1983 the Court of Appeal reversed the Bar Council's decision and imposed the disciplinary penalty of a reprimand on Mr. Ezelin, a heavier penalty than a warning:</p> <p>"...It is not alleged that Mr. Ezelin took part in this demonstration any more actively than by his constant presence and by carrying a placard..... It is beyond doubt that Mr. Ezelin, who formed part of the procession, could not have failed to see these insulting and offensive graffiti being painted in</p>

² Article 106 of Decree of 9 June 1972 reads as follows:

"Any contravention of statutes or regulations, infringement of professional rules or breach of integrity, honour or discretion, even relating to non-professional matters, shall render the avocat responsible liable to the disciplinary sanctions listed in Article 107."

³ Article 104 of Decree no. 72-468 of 9 June 1972 reads as follows:

"The Bar Council sitting as a disciplinary board shall proceed against and punish offences and misconduct by an avocat or a former avocat where at the material time he was entered on a Bar roll, list of trainees or list of honorary avocats."

⁴ Article 105 of the Code of Criminal Procedure reads as follows:

"An investigating judge in charge of an investigation and judges and senior police officers (officiers de police judiciaire) acting on judicial warrants shall not, with the intention of preventing the exercise of the rights of the defence, examine as witnesses persons against whom there is substantial, consistent evidence of guilt."

	<p>very large letters on all the walls of the Law Courts-the place of work of judges and barristers alike - and of the council building, and that he could not have failed to hear the threats and insults that were unceasingly directed against a police constable and insults uttered against various other persons, including a judge of the Court of Appeal, a well-known regional figure and the judiciary as a whole.</p> <p>... Such misconduct on the part of a member of the Bar publicly proclaiming his profession cannot be justified ... and it amounts to a breach of discretion under Article 106 of Decree of 9 June 1972.</p> <p>... Furthermore, Mr. Ezelin, when examined as a witness by the investigating judge, refused to give evidence about matters of which he had knowledge, without giving any reason. He thus contravened the provisions of Article 109⁵, third para., of the Code of Criminal Procedure, which are binding on all citizens and of whose requirements he could not, as a lawyer, be unaware.</p> <p>... For these reasons.... the court sitting in public, Sets aside the decision taken on 25 July 1983 by the Council of the Bar of the department of Guadeloupe at the Basse-Terre Court of Appeal, sitting as a disciplinary board sentences Mr. Ezelin, of that Bar, to the disciplinary penalty of a reprimand; and Awards costs against him.</p>
19 June 1985	<p>On 19 June 1985 the applicant appealed on points of law. He argued in particular that the disciplinary sanction imposed on him infringed Articles 10 and 11 of the ECHR.</p> <p>On 19 June 1985 the Court of Cassation delivered a judgment dismissing the appeal. It said, inter alia:</p> <p>"... The Court of Appeal added that Mr. Ezelin, who was at the demonstration as an avocat and had heard the threats and insults and seen the offensive graffiti painted on the walls of the Law Courts, the place of work of judges and barristers alike, did not at any time express his disapproval of these actions or leave the procession in order to dissociate himself from these criminal acts. It was entitled to infer from this that his behaviour was a breach of discretion amounting to a disciplinary offence.</p> <p>...</p> <p>... Article 109 of the Code of Criminal Procedure lays a duty on any person heard as a witness to give evidence; and by Article 106 of the Decree of 9 June 1972, any infringement of statutes or regulations constitutes a disciplinary offence, irrespective of the investigating judge's power to fine a witness who refuses to give evidence. ... The Court was entitled to infer from this that Mr. Ezelin, who had thus refused to give evidence without justifying his refusal on the basis of Article 105 of the Code of Criminal Procedure or of professional confidentiality, had committed a breach of the law and of discretion vis-à-vis the investigating judge and that these amounted to a disciplinary offence. The Court of Appeal thus justified its decision in law, and none of the limbs of the ground of appeal is well-founded ..."</p>

⁵ Third paragraph of Article 109 of the Code of Criminal Procedure reads as follows:

"Anyone summoned to be examined as a witness shall be required to appear, to take the oath and to give evidence, subject to the provisions of Article 378 of the Criminal Code [duty of professional confidentiality]. If a witness fails to appear, the investigating judge may, on an application by the public prosecutor, have the witness brought before him by the police and impose on him a fine of not less than 2,500 francs and not more than 5,000 francs. If the witness subsequently appears, however, he may, if he apologises and provides an explanation, be excused this penalty by the investigating judge, after the public prosecutor has made submissions. The same penalty may, on an application by the prosecutor, be imposed on a witness who, although he has appeared, refuses to take the oath and to give evidence."

B. The applicant's complaints under the European Convention

In his application of 16 October 1985 to the Commission (no. 11800/85), Mr. Ezelin relied on Articles 10 and 11 of the ECHR. He submitted that the disciplinary sanction imposed on him seriously interfered with his rights to freedom of expression and peaceful assembly. The Commission declared the application admissible on 13 March 1989. In its report of 14 December 1989 (made under Article 31) the Commission considered that there had been a breach of Article 11 (by fifteen votes to six) and unanimously expressed an opinion that no separate issue arose under Article 10.

Table No.2 highlights the complaints of the applicant under the European Convention and the French Government's arguments against the alleged violations raised by the applicant before the European Court during its hearings held in private on 21 November 1990 and 18 March 1991:

Table No. 2

<i>Articles allegedly violated</i>	<i>The applicant's complaints</i>	<i>The arguments of the Government of France</i>
<p>Article 11, which reads as follows: Freedom of assembly and association 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.</p>	<p>The applicant considered that the disciplinary sanction imposed on him by the Basse-Terre Court of Appeal was incompatible with his freedom of expression and his freedom of peaceful assembly, which were protected by Articles 10 and 11 of ECHR.</p>	<p>The Government of France in the form of written memorial asked the European Court to find that there had been no violation of Article 11</p>
<p>Article 10, which reads as follows: Freedom of expression 1. Everyone has the right to</p>	<p>The applicant considered that the disciplinary sanction imposed on him by the Basse-Terre Court of Appeal was</p>	<p>The Government of France endorsed the Commission's view that no separate issue arose under Article 10</p>

<p>freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.</p> <p>2.The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.</p>	<p>incompatible with his rights to freedom of expression and peaceful assembly, which were protected by Articles 10 and 11 of ECHR.</p>	
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C. The Judgment of the European Court

Table No. 3 below underlines the complaint of the applicant made before the Commission and the European Court, the objections of the Government of France made orally and presented in written memorials, as well as the standing of the Commission on the complaints raised by the applicant. It also explains the judgment of the European Court, highlighting the reasoning set forth with respect to the complaints of the applicant and the alleged violations of his rights guaranteed by Article 10 and Article 11 of ECHR.

Table No. 3

AS TO THE LAW			
<i>The applicant's complaints</i>	<i>Objections of the Government of France</i>	<i>Standing of the European Commission</i>	<i>Judgment of the European Court</i>
The applicant considered that the disciplinary sanction imposed on him by the Basse-Terre Court of Appeal was	The Government indicated that this sanction was also designed to punish Mr. Ezelin for his refusal to give evidence to the	The Commission suggested that the only matter in issue was the applicant's participation in the demonstration, rather	The applicant was in fact punished for not showing his disapproval of the "demonstrators' offensive and insulting

<p>incompatible with his rights to freedom of expression and peaceful assembly, which are protected by Articles 10 and 11 of the Convention.</p>	<p>investigating judge. The Government criticized the Commission for suggesting that the only matter in issue was the applicant's participation in the demonstration.</p>	<p>than the refusal to give evidence to the investigating judge.</p>	<p>acts" and for not leaving the procession in order to dissociate himself from them; and also for having refused to give evidence although he had not invoked Article 105 of the Code of Criminal Procedure or professional confidentiality. <u>Nevertheless, he was summoned before the investigating judge as a result of having taken part in the demonstration.</u> The question of the refusal to give evidence - an issue which in itself does not come within the ambit of Articles 10 and 11 - is a secondary one. It may be noted, moreover, that Mr. Ezelin did not remain totally silent in the presence of the investigating judge: he stated that he <u>had nothing to say on the matter</u>, and the judge did not see fit to use his power under Article 109, third para., of the Code of Criminal Procedure.</p>
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<p>ALLEGED VIOLATION OF ARTICLE 10 – FREEDOM OF EXPRESSION</p>			
<p>The applicant submitted that his rights and freedoms guaranteed by Article 10 of ECHR had been violated</p>	<p>The Government of France endorsed the Commission's view that no separate issue arose under Article 10</p>	<p>The Commission unanimously expressed an opinion in its report of 14 December 1989 that no separate issue arose under Article</p>	<p>In the circumstances of the case, this provision [claims of the applicant under Article 10] is to be regarded as a <i>lex generalis</i>⁶ in relation to Article 11 a <i>lex</i></p>

⁶ *Lex Generalis*-- A law of general application, as apposed to one that affects only a particular person or a small group of people. Bryan A. Garner, Editor in Chief, Black's Law Dictionary, seventh edition, West Group, ST. PAUL, MINN., 1999.

⁷ *Lex specialis derogat generali* - specific law prevails over (abrogates, overrules, trumps) general law. One test that is applied in circumstances when (1) both customary and treaty sources of law exist and (2) these two

		10 under the circumstances of the case.	specialis ⁷ , so that it is unnecessary to take it into consideration separately. On this point the Court agrees with the Commission.
ALLEGED VIOLATION OF ARTICLE 11- FREEDOM OF ASSEMBLY AND ASSOCIATION			
The applicant submitted that his rights and freedoms guaranteed by Article 11 of ECHR, in particular freedom of assembly had been violated	The Government of France in the form of written memorial asked to hold that there had been no violation of Article 11	In its report of 14 December 1989 (made under Article 31) the Commission expressed the opinion that there had been a breach of Article 11 (by fifteen votes to six).	Notwithstanding its autonomous role and particular sphere of application, <u>Article 11 must, in the present case, also be considered in the light of Article 10.</u> The protection of personal opinions, secured by Article 10 is one of the objectives of freedom of peaceful assembly as enshrined in Article 11
WHETHER THERE WAS AN INTERFERENCE WITH THE EXERCISE OF THE FREEDOM OF PEACEFUL ASSEMBLY			
The applicant considered that the disciplinary sanction imposed on him by the Basse-Terre Court of Appeal was incompatible with his freedom of expression and his freedom of peaceful assembly, which were protected by Articles 10 and 11 of the Convention.	In the Government's submission, Mr. Ezelin had not suffered any interference with the exercise of his freedom of peaceful assembly and freedom of expression: he had been able to take part in the procession unhindered and to express his convictions publicly, in his professional capacity and as he wished; he was reprimanded only after the event and on account of personal conduct deemed to be inconsistent with the obligations of his profession.	The Commission did observe that the only matter in issue was the applicant's Participation in the demonstration rather than punishing Mr. Ezelin for his refusal to give evidence to the investigating judge.	The Court does not accept this submission. The term "restrictions" in para. 2 of Article 11 - and of Article 10 - cannot be interpreted as not including measures - such as punitive measures - <u>taken not before or during but after a meeting.</u>
	In the second place, the	In the Commission's	...Neither the report

sources cannot be construed consistently. Bryan A. Garner, Editor in Chief, Black's Law Dictionary, seventh edition, West Group, ST. PAUL, MINN., 1999.

	<p>Government maintained that despite the peaceful nature of Mr. Ezelin's own intentions and behaviour, the sanction of which he complained had in no way infringed his freedom of peaceful assembly seeing that the demonstration had got out of hand.</p>	<p>opinion, no intentions that were not peaceful could be imputed to the applicant.</p>	<p>made by the Chief Superintendent of the Basse-Terre police nor any other evidence shows that Mr. Ezelin himself made threats or daubed graffiti. <u>The Court accordingly finds that there was in this instance an interference with the exercise of the applicant's freedom of peaceful assembly.</u> It must therefore be determined whether the sanction complained of was "<u>prescribed by law</u>", prompted by one or more of the <u>legitimate aims</u> set out in para. 2 and "<u>necessary in a democratic society</u>" for achieving them.</p>
WHETHER THE INTERFERENCE WAS "PRESCRIBED BY LAW"			
<p>The applicant submitted that article 106 of the decree of 9 June 1972 was in no way intended to restrict the right of assembly of avocats; moreover, the general nature of the words "breach of ... discretion" made it impossible to define a breach in advance and allowed of any sanction after the event.</p>	<p>The Government considered, on the contrary, that this provision required avocats, who were "officers of the court" (<i>auxiliaires de la justice</i>), to respect a number of professional principles of a legal and ethical nature. The provision was sufficiently precise where, as in the instant case, the conduct being punished was contrary to the rules of the profession.</p>		<p>According to the Court's case-law, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail....</p> <p>In this case the legal basis of the sanction complained of lay solely in the special rules governing the profession of avocat. Article 106 of the relevant Decree of 9 June 1972 provides unequivocally that any avocat, even in his non-professional activities, has special obligations and the Court of Cassation has held that</p>

			these include the respect due to the judicial authorities. <u>That being so, the interference was "prescribed by law".</u>
WHETHER THE INTERFERENCE HAD LEGITIMATE AIM			
The applicant claimed that the sanction was not in pursuit of a <u>legitimate aim</u> ; it resulted in his being <u>prevented</u> from expressing his ideas and his trade-union demands.	The Government submitted that its purpose was the <u>"prevention of disorder"</u> .	The Commission indicated, the authorities took the view that such an attitude was a reflection of the fact that the applicant, as an avocat, endorsed and actively supported such excesses.	The Court indicated that it is apparent from the evidence that Mr. Ezelin incurred the punishment because he had not <u>dissociated himself</u> from the unruly incidents which occurred during the demonstration. The interference was therefore in pursuit of a legitimate aim, the <u>"prevention of disorder"</u> .
NECESSITY IN A DEMOCRATIC SOCIETY			
In the applicant's submission, the interference of which he was complaining was not "necessary in a democratic society". To claim that he should have left the procession in order to express his disapproval of acts committed by other demonstrators was, he said, to deny his right to freedom of peaceful assembly.	The Government, on the other hand, submitted that the disputed measure did indeed answer a "pressing social need", having regard in particular to Mr. Ezelin's position as an avocat and to the local background. By not disavowing the unruly incidents that had occurred during the demonstration, the applicant had ipso facto approved them. Furthermore, they claimed, it was essential for judicial institutions to react to behaviour which, on the part of an "officer of the court" (<i>auxiliaire de la justice</i>), seriously impaired the authority of the judiciary and respect for court decisions. Lastly, the	The Commission contended that a disciplinary penalty based on an impression to which Mr. Ezelin's behaviour might give rise was not compatible with the strict requirement of a "pressing social need" and therefore could not be regarded as "necessary in a democratic society".	The Court has examined the disciplinary sanction in question in the light of the case as a whole in order to determine in particular whether it was proportionate to the legitimate aim pursued, having regard to the special importance of freedom of peaceful assembly <u>and freedom of expression, which are closely linked in this instance.</u> The <u>proportionality principle demands that a balance be struck</u> between the requirements of the purposes listed in Article 11 § 2 and those of the free expression of opinions by word, gesture or even silence by persons assembled...in public

	<p>gravity of the two breaches of professional duty of which the applicant was accused justified the sanction imposed on him, which was a light, token sentence that did not offend against the proportionality principle laid down in the Court's case-law.</p>	<p>places. The pursuit of a just balance must not result in <u>avocats being discouraged</u>, for fear of disciplinary sanctions, from making clear their beliefs on such occasions. Admittedly, the penalty imposed on Mr. Ezelin was at the lower end of the scale of disciplinary penalties given in Article 107 of the Decree of 9 June 1972; it had mainly moral force, since it did not entail any ban, even a temporary one, on practicing the profession or on sitting as a member of the Bar Council. The Court considers, however, that the freedom to take part in a peaceful assembly and in this instance a demonstration that had not been prohibited - is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does <u>not himself commit any reprehensible act</u> on such an occasion... The sanction complained of, however minimal, does not appear <u>to have been "necessary in a democratic society"</u>. It <u>accordingly contravened Article 11</u>.</p>
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Table No. 4

ARTICLES ALLEGEDLY VIOLATED AND DAMAGE	COMMISSIONS OPINION	COURT'S JUDGMENT
Article 10 of ECHR	No separate issue arose under Article 10 of ECHR (unanimous)	It is unnecessary to make a separate examination of the case under Article 10 of ECHR (unanimous)

Article 11 of ECHR	Violation (by fifteen votes to six)	Violation (by six votes to three)
25,000 French Francs for non-pecuniary damage was claimed	Should be awarded (but no figure was suggested)	The judgment in itself constitutes just satisfaction as to the alleged non-pecuniary damage. 40,000 French Francs should be reimbursed to the applicant for costs and expenses

Dissenting Opinion of Judge Ryssdal: Judge Ryssdal considered that there was no violation of Article 11 of ECHR since the penalty was one of the lightest disciplinary sanctions and did not restrict the applicant’s continued freedom to practice law, and did not go beyond the margin of appreciation.

Dissenting Opinion of Judge Matscher: Judge Matscher considered that the sanction imposed on the applicant was minimal and proportionate for the serious breach of the duty of “discretion” which is a professional ethical rule laid on him as an avocat. Therefore the imposed disciplinary sanction was necessary in a democratic society.

Dissenting Opinion of Judge Pettiti: Judge Pettiti considered that a) it was not clear that the minimal sanction imposed after the event had an effect such as to place an obstacle in the way of the freedom to demonstrate; b) the Court had not given sufficient consideration in its reasoning with respect to the provisions of the domestic law being compatible with the Convention from the point of view of the margin of appreciation/proportionality ratio and c) whether the present case provided an appropriate occasion for expressing the importance of the principle attached to the right to demonstrate.

Concurring Opinion of Judge De Meyer: Judge de Meyer considered that by taking part in the demonstration in issue, the applicant exercised both his freedom of expression and his freedom of assembly. The exercise of each of them was inextricably bound up with the exercise of the other; the reasoning set forth in the judgment showed that there was an infringement both of freedom of expression and of freedom of assembly.

PART II -- STUDY OF THE JUDGEMENT OF THE EUROPEAN COURT

The Right to peaceful assembly is considered as a fundamental right in a democratic society and, like the right to freedom of expression, one of the foundations of such a society. It is also a major part of the political and social life of any country, and is an essential part of the activities of political parties⁸.

The structure of Articles 8-10 of the Convention allows restriction of the rights guaranteed by them. However the Strasbourg organs apply four tests where the alleged violation of Articles 8-10 is considered. First, is the Article in question applicable; secondly was there an

⁸ See “Human Rights and the Police” Workbook for Practice Oriented Teaching. Council of Europe, Strasbourg, 1 September 1998 CI (98) 1; Findings and Decisions of Treaty Bodies, Appendix A.

interference with the right in question; thirdly, if so, was it in accordance with⁹, or prescribed by law¹⁰ and was it in pursuit of one or more of the legitimate purposes indicated in Articles 8-10; and finally was the interference necessary in a democratic society.

The study of the judgment of the European Court on the case of *Ezelin v. France* shows that during the examination of the applications regarding alleged violations of Articles 10 and 11, the European Commission and the European Court applied the tests set out above.

1. Whether Article 10 and Article 11 of ECHR are Applicable?

During the application of this test, the Commission and the Court examine the scope of the rights and freedoms guaranteed by Articles 10 and 11 in the light of the facts of the case concerned. The study of the decisions of the European Commission and the judgments of the European Court show that the right to freedom of assembly is widely interpreted. In the case of *Ezelin v. France* both the European Commission¹¹ and the European Court¹² decided that it was unnecessary to consider Article 10 separately. The analysis of the case shows that the Court highlighted the close links between Articles 10 and 11 in the case as a whole (para. 51 of the judgment) and explicitly stated in para. 37 of the judgment:

Notwithstanding its autonomous role and particular sphere of application, Article 11 must, in the present case, also be considered in the light of Article 10 (see the *Young, James and Webster* judgment of 13 August 1981, Series A no. 44, p. 23, § 57). The protection of personal opinions, secured by Article 10 is one of the objectives of freedom of peaceful assembly as enshrined in Article 11.

However the European Commission and the European Court decided that it is not necessary to make a separate examination of the case under Article 10 of ECHR. In that respect, it is important to consider the Concurring Opinion of Judge De Meyer, where he mentions.

I willingly accept that it was "unnecessary to make a separate examination of the case under Article 10 ". But, in my view, that should have meant that it was necessary to examine it not simply in relation to Article 11 even considering that Article "in the light of Article 10)", but rather in relation to both Articles taken together.

By taking part in the demonstration in issue, the applicant in fact exercised both his freedom of expression and his freedom of assembly, and the conduct for which he was criticized came within the ambit of the former as much as within that of the latter. Both freedoms were in this instance more than "closely linked": the exercise of each of them was inextricably bound up with the exercise of the other.

In my opinion, the reasoning set forth in the judgment shows that there was an infringement both of freedom of expression and of freedom of assembly¹³.

A study of the Court's case law shows that the freedom of assembly and association are closely linked with the right to freedom of expression guaranteed by Article 10 of ECHR. This is explained by the fact that one of the most effective ways of expressing opinions, ideas

⁹ See Article 8(2) of ECHR.

¹⁰ See Articles 9(2), 10 (2) and 11 (2) of ECHR.

¹¹ See the judgment of the European Court on the case of *Ezelin v. France* (18 March 1991), para. 29.

¹² *Ibid* at para. 35.

¹³ *Ibid* at the Concurring Opinion of Judge De Meyer.

beliefs and thoughts is assembly and association. This is very clearly indicated in the case of *Young, James and Webster v. UK*, where the Court explicitly stated:

Moreover, notwithstanding its autonomous role and particular sphere of application, Article 11 must, in the present case, also be considered in the light of Articles 9 and 10 (see, *mutatis mutandis*, the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1976, Series A no. 23, p. 26, par. 52)¹⁴.

The protection of personal opinion afforded by Articles 9 and 10 in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11. Accordingly it strikes at the very substance of this Article...

In this further respect, the treatment complained of - in any event as regards Mr. Young and Mr. Webster - constituted an interference with their Article 11 rights¹⁵.

The principle of “*lex specialis*” is a general principle of law and it is widely accepted. *Lex specialis* has two methods of application in International Law —in one case it is an application of the general law and in the second case it is an application as an exception to the general law. The main purpose of *lex specialis* rule is to indicate which rule should be applied. If *lex specialis* contains dispute settlement provisions applicable to its content, the *lex specialis* prevails over any dispute settlement provision in *lex generalis*¹⁶.

One of the difficulties in the *lex specialis* is to define distinctions between general and special rules. Rules cannot be considered as “general” or “special” in the abstract but only in relation to some other rule. A rule may be of a general or special character in regard to its subject matter or in regard to the number of actors whose behaviour is regulated by it¹⁷.

As for the Concurring Opinion of Judge De Meyer with respect to not examining the violation of Article 10 separately, analysis of the further judgments of the European Court on the alleged violation of Articles 10 and 11 illustrates that in a number of cases, the Court has reaffirmed its standing with respect to the protection of personal opinions, secured by Article 10 of the Convention, being one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention¹⁸. In the case of *Djavit An v. Turkey*, where the applicant complained that the refusals by the Turkish and Turkish-Cypriot authorities to allow him to cross the “green line” in order to participate in meetings had prevented him from exercising his right to freedom of expression, including the freedom to hold opinions and ideas and to receive and impart information as guaranteed by Article 10 of the Convention, stated that:

...Thus, observing that the applicant's grievances relate mainly to alleged refusals of the “TRNC” authorities to grant him permits to cross over the “green line” and meet with Greek Cypriots, the Court considers that Article 11 of the Convention takes precedence as the *lex specialis* for assemblies, so that it is unnecessary to examine the issue under Article

¹⁴ See the judgment of the European Court on the case of *Young, James and Webster v. UK* (1982) para. 57.

¹⁵ *Ibid.*

¹⁶ See ITLOS, *Southern Bluefin Tuna Case* of 27 August 1999, para. 123.

¹⁷ See for example International Law Commission, Study Group on Fragmentation Koskenniemi. The function and the scope of the *lex specialis* rule and the question of “self-contained regimes”: conceptual preliminaries, para. 2.

¹⁸ See for example the Judgment of the European Court on the Case of *Djavit An v. Turkey* (2003), para. 39.

10 separately. The Court will, however, have regard to Article 10 when examining and interpreting Article 11.

In another case, namely in the case of *Wilson, National Union of Journalists And Others V. the United Kingdom*, where the applicants complained of an interference with their freedom to hold opinions, the opinion in question being that an employee should be allowed to choose to be represented by a trade union in negotiations with the employer, the European Court stated:

...The Court does not, however, consider that any separate issue arises under Article 10 that has not already been dealt with in the context of Article 11 of the Convention. It is not, therefore, necessary to examine this complaint separately¹⁹.

In both judgments the Court held unanimously that it is not necessary to examine separately the applicants' complaint under Article 10 of the Convention.

In the case of *Ezelin v. France* the Court also indicated that "...notwithstanding its autonomous role and particular sphere of application, Article 11 must, in [the case of *Ezelin v. France*] also be considered in the light of Article 10 " and held that it is not necessary to make a separate examination of the case under Article 10 of ECHR²⁰. The Court also set forth in the judgment that the freedom of peaceful assembly and freedom of expression are closely linked in this instance.

The examination of the judgment on the case of *Journalists And Others v. the United Kingdom* shows that in that case the Court did explicitly state that no separate issue arises under Article 10 that has not already been dealt with in the context of Article 11 of the Convention and therefore finds that there is no need to examine the complaint of the applicant on the violation of Article 10 separately.

In the case of *Djavit An v. Turkey* the Court did justify its standing on not making a separate examination of the case under Article 10 with the fact that Article 11 of the Convention takes precedence as the *lex specialis* for assemblies; however the Court did state that it will have regard to Article 10 when examining and interpreting Article 11.

It is noticeable that in the case of *Ezelin*, the Commission in its Opinion indicated that *no separate issue arose under Article 10 of ECHR* i.e. no question rose under Article 10 that was not considered under Article 11 while the Court judgment stated, that *it is unnecessary to make a separate examination of the case under Article 10 of ECHR, since this provision is to be regarded as a lex generalis in relation to Article 11.*

The reasoning of the Court on this issue leaves an extent for wider interpretation of the question on whether or not the Court did set aside the right to freedom of expression or took it into account when examining the violation of the right to freedom of assembly; however the Court meanwhile indicated that it shares the opinion of the Commission. In the Judgment the Court did also indicate that *freedom of peaceful assembly and freedom of expression are closely linked in this instance* which was also emphasized in the Concurring Opinion of Judge Meyer, where the Judge mentioned that.

¹⁹ See the judgment of the European Court on the Case of *Wilson, National Union of Journalists and Others V. the United Kingdom* (2002), para. 50.

²⁰ See the judgment of the European Court on the Case of *Ezelin v. France*, (18 March 1991), para. 37.

...taking part in the demonstration in issue, the applicant in fact exercised both his freedom of expression and his freedom of assembly, and the conduct for which he was criticized came within the ambit of the former as much as within that of the latter. Both freedoms were in this instance more than "closely linked": the exercise of each of them was inextricably bound up with the exercise of the other²¹.

2. If yes, is there any interference with the rights and freedoms guaranteed by Article 11

Articles 8-11 of the European Convention have a common structure i.e. the first part of the Articles guarantee actual rights and freedoms, while the second part provides the list of interests, based on which the interference by the state authorities will be justified.

Table No. 3 describes the submissions made by the Government of France as well as the opinion of the European Commission and the Court on this issue. The Government of France submitted that the applicant had not suffered any interference with the exercise of his freedom of assembly and, in support, indicated that the applicant was able to take part in the demonstration and express his opinions, and was reprimanded only after the demonstration.

The Court underlined the meaning of the term "restriction" prescribed in Article 11 of ECHR and noted that the term "restriction" involves interferences made not only before and during but also after the demonstration. The Court also underlined this issue with respect to Article 10 in the *Handyside* judgment²².

The European Court also emphasized the justifications made by the national judicial authorities of France, mainly the Court of Appeal and the Court of Cassation, according to which the applicant did not express his disapproval of those actions, did not dissociate himself from those criminal acts or leave the procession (See *Table No. 1*). It is obvious, that the basis of mentioned decisions was the fact that the applicant did attend the demonstration and the procession.

The European Court therefore found that there was an interference with the exercise of the applicant's freedom of peaceful assembly.

3. Whether the interference was "justified"

According to the test developed by the European Court in its judgments, after examining the question on the existence of an interference, the Court proceeds with the assessment of the justification of the interference. i.e. whether the interference was "prescribed by law", whether the interference was prompted by a legitimate aim and whether or not it was "necessary in a democratic society".

A. Whether the interference is "prescribed by law"

The legal basis of the restrictions of the rights guaranteed by the European Convention should be justified. This question should be regulated by the national legislations of Member States of the Council of Europe.

²¹ Ibid Concurring Opinion of Judge Meyer.

²² See the judgment of the European Court on the Case of *Handyside v. UK* (7 December 1976), para. 43.

The term “**prescribed by law**” is indicated in Article 11(2) of the Convention. The European Court has developed certain criteria and principles for interpreting the terms “prescribed by law” and “in accordance with the law”. Those principles and criterions include the following minimum requirements:

- a. The law should be precisely defined in order to enable people likely to be affected by a law to understand it and to foresee the consequences of their actions in order to avoid the violation of a law. This is the test on “certainty”.
- b. The law should be accessible and reachable.

The presented principles are more thoroughly indicated in the *Sunday Times* judgment, where the European Court stated:

... the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice²³.

In the case of *Ezelin v. France*, the European Court applied the above mentioned test and underlined the complaints made by the applicant with respect to the nature of the words “breach of ... discretion”, which made it impossible, according to Mr. Ezelin, to define a breach in advance. The Government of France, however, argued that the provision of the law in question was sufficiently precise and the conduct being punished was contrary to the rules of the profession (See *Table No. 3*). The Court however, also indicated that the experience shows that it is impossible to attain obsolete precision.

When defining the legal basis of the sanction, the Court indicated that in the instant case this lay solely on the special rules governing the profession of avocat. Article 106 of the relevant Decree of 9 June 1972 provides unequivocally that any avocat, even in his non-professional activities, has special obligations and the Court of Cassation passed a decision stating that these include the respect due to the judicial authorities. *The European Court therefore found that the interference was “prescribed by law”*.

B. Whether the interference was prompted by a legitimate aim

The interference should be prompted by a “legitimate aim” and be proportionate to the aim pursued. According to the approach developed by the European Court, in order to justify the legitimate aim of the restriction of the freedom of assembly, the state authorities should prove that the restrictions were proportionate to the aims pursued and were necessary in a democratic society. For the interference with the right to freedom of assembly to be

²³ See the judgment of the European Court on the case of *Sunday Times v. UK* (29 March 1979) para. 49.

considered as “necessary in a democratic society” it should imply the existence of a “pressing social need”.

The “principle on proportionality”²⁴ is implied in those instances where the State Authorities restrict the rights to freedom of assembly and association, as well as in a number of other rights and freedoms. The State Authorities are obliged then to justify that the pursued aims are strictly proportionate to the restrictions on the rights guaranteed by the European Convention, even when it is apparent that the interference with the Convention rights are prompted by a legitimate aim²⁵.

According to Article 11(2), the restriction of the rights and freedoms protected by Article 11 will only be in compliance with the Convention if it is aimed at protecting one of the legitimate aims listed below:

1. National security,
2. Public safety,
3. The prevention of disorder or crime,
4. The protection of health or morals,
5. The protection of the rights of others.

Ezelin claimed that the restriction of his rights was not in pursuit of a legitimate aim. whilst the Government of France stated, that the restriction of the rights of the applicant was aimed at “preventing disorder” by referring to a relevant legitimate aim indicated in Article 11(2).

In accordance with the observations of the Commission, as indicated in Table No. 3, Ezelin incurred the punishment since he had not dissociated himself from the unmanageable incidents which took place during the demonstration and, according to the Authorities of France, their interference was based on the fact that the applicant, as an avocat, enforced and actively supported such actions.

The Court therefore found, that the interference was in pursuit of a legitimate aim i.e. “preventing disorder” which was submitted by the Government of France.

C. If so, is the restriction “necessary in a democratic society”

The phrase “necessary in a democratic society” is explicitly stated in para. 2 of Article 11 of the Convention as a basis for a restriction on the exercise of the rights guaranteed by the first para. of the Article. According to many ECHR specialists, in particular Steven Greer:

...the phrase “necessary in a democratic society” is arguably one of the most important clauses in the entire Convention since, in particular, it gives the Strasbourg organs the widest possible discretion in the condoning or condemning of the interference with rights which states seek to justify by reference to one or more of the legitimate purposes in the second para.s of Articles 8 to 11 of ECHR. One of the key tasks for the Court and the Commission, and one of the most difficult, is to test the persuasiveness of any such

²⁴ The term “Proportionate” is not used either in the text of the Convention or in its Protocols; however the “Principle of Proportionality” is an approach defined by the European Court to the protection of Convention rights and freedoms.

²⁵ See for example the judgment of the European Court on the case of *Barthold V. Germany* (25 October 1984).

defence to ensure that it complies with the genuine interests of democracy and its not merely political expediency in disguise....²⁶

The European Court has developed certain standards and criteria and implies them when considering whether certain restrictions are necessary in a democratic society. In the case of *Handyside v. UK* the Court has held that:

... "necessary", ... is not synonymous with "indispensable"... the words "absolutely necessary" and "strictly necessary" ... neither has it the flexibility of such expressions as "admissible", "ordinary", "...useful", "...reasonable"...or "desirable"....²⁷

The study of the above-mentioned cases shows that the main test that the Commission and the Court applied was the following:

1. Is there pressing social need for the restriction?
2. Is the restriction proportionate to the need?
3. Is the restriction relevant and sufficient?

Table No. 3 shows that in the case of *Ezelin*, both the Commission and the Court examined the restriction made by the state authorities of France within the framework of the interpretation of the principle "necessary in a democratic society" mentioned above. The Commission underlined that a disciplinary penalty based on an impression to which Mr. Ezelin's behaviour might give rise was not compatible with the *strict* requirement of a "pressing social need" and therefore could not be regarded as "necessary in a democratic society". The Court gave a wide interpretation and once more indicated that the disciplinary sanction in question should be examined in the light of the case as a whole, having regard to the special importance of freedom of peaceful assembly *and freedom of expression, which are closely linked in this instance*. The Court emphasized the fact that although the sanction complained of, however minimal, does not appear to have been "necessary in a democratic society". It accordingly contravened Article 11²⁸. It is noticeable that Judge Pettiti in his dissenting opinion indicated:

... As regards freedom to demonstrate, and interpreting Article 11§ 2, it is not clear that the minimal sanction imposed after the event, a purely moral sanction, had an effect such as to place an obstacle in the way of freedom to demonstrate.

For the rest, the majority has not, in my opinion, given sufficient consideration to the margin-of-appreciation/proportionality ratio in the case (see, *inter alia*, the *Handyside*, *Müller and Others* and *Markt Intern* cases)....²⁹

Another question that was raised by Judge Ryssdal, Judge Pettiti and Judge Matscher concerned the professional ethics of avocats. The Court in its reasoning indicated that:

...the freedom to take part in a peaceful assembly - in this instance a demonstration that had not been prohibited - is of such importance that it cannot be restricted in any way, even for

²⁶ The Exceptions to Articles 8 to 11 of the European Convention, by Steven Greer, Reader in Law University of Bristol; Council of Europe, H/inf (2002) 10, page 14.

²⁷ See the judgment of the European Court on the case of *Handyside v. UK* (4 November 1976) at para. 48. See also the judgment of the European Court on the case of *Lingens v. Austria*, (24 June 1986) para.s. 37-41.

²⁸ See the judgment of the European Court in the case of *Ezelin v. France* 26 April 1991, Series A no. 202, para.s 51-53.

²⁹ *Ibid* at Dissenting Opinion of Judge Pettiti.

an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion³⁰.

Judge Matscher highlighted the fact that the Convention itself does not include any rules directly applicable to the professional ethics and it leaves these to the Contracting States. It is obvious from the facts of the Case that on 25 July 1983 the Bar Council passed a decision stating that there was no occasion to impose any disciplinary sanction on Mr. Roland Ezelin on account of the matters held on 12 February 1983. However, notwithstanding the fact that the Bar Council did not find any disciplinary violation in the actions of Mr. Ezelin, the Board "...recommended the Chairman of the Bar to remind both Mr. Ezelin and the whole of the Bar of the *traditional rules of good behaviour and sound judgment in all activities* in which their status as avocats may be involved"³¹. Judge Pettiti also underlined this feature, stressing the fact that the Court did not deal directly³² with the problem raised concerning the judge/avocat relationships, whereas the Bar Council did. As indicated Judge Pettiti in his Dissenting Opinion "...there is therefore a paradox which may make the Court's reasoning appear contradictory..."³³

Historically, national regulatory norms and international standards were developed for the organization and functioning of the legal profession. The national rules governing the good behaviour of lawyers including avocats, advocates and defence attorneys arise from its own traditions and are adapted by certain countries³⁴ for the organization and operation of a profession of a lawyer. The internationally recognized standards are embodied in the United Nations Basic Principles on the Role of Lawyers³⁵, Council of Europe's (CoE) Recommendation on the Freedom of Exercise of the Profession of Lawyer³⁶ as well as standards in the Code of Conduct for Lawyers in the European Union promulgated by the Council of the Bars and Law Societies of the European Union³⁷ (CCBE).

It is also noticeable that UN Basic Principles reaffirms a number of rights and freedoms such as effective access to justice, assistance of competent legal counsel, as well as the right to a fair and public hearing by an independent tribunal established according to law guaranteed by the Universal Declaration of Human Rights (UHDR)³⁸, International Covenant on Civil and Political Rights³⁹ (ICCPR), and International Covenant on Economic, Social, and Cultural Rights⁴⁰ (ICESCR).

³⁰ *Ibid* at para. 53.

³¹ *Ibid* at para. 18.

³² *Ibid* at para. 33.

³³ *Ibid* at Dissenting Opinion of Judge Pettiti.

³⁴ See for example legislative and administrative frameworks on the regulation of the ethical conduct of lawyers (advocates) in Finland, France, Italy, Germany, Greece, Luxembourg.

³⁵ Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

³⁶ Council of Europe, Rec(2000)21, of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer (Adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers' Deputies).

³⁷ Code of Conduct for Lawyers in the European Union was originally adopted at the CCBE Plenary Session held on 28 October 1988, and subsequently amended during the CCBE Plenary Sessions on 28 November 1998 and 6 December 2002. The CCBE represents European bar associations and law societies in the European Union, European Economic Area, and other international organizations. It is comprised of delegations from bar associations of 18 countries, including both EU and EU accession states.

³⁸ Universal Declaration on Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

³⁹ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and

CoE Recommendation on the Freedom of Exercise of the Profession of Lawyer, which was developed having regard to the provisions of the European Convention as well as the United Nations Basic Principles on the Role of Lawyers underlines the fundamental role that lawyers and professional associations of lawyers play in ensuring the protection of human rights and fundamental freedoms⁴¹.

It is also noticeable that the even though the UN Basic Principles and the CoE Recommendation are not binding, nevertheless they prescribe standards for the legal profession in such areas as access to lawyers and legal services, lawyer qualification and training, duties and responsibilities of lawyers, professional guarantees for lawyers, disciplinary proceedings and etc., which all Member States should “[respect] and [take] into account ... within the framework of their national legislation and practice⁴²”.

Given the growing need to unify, harmonize and develop the legal profession in Europe on 28 October 1988 CCBE adopted a Code of Conduct for Lawyers in the European Union, which is another source of standards that should be consulted when developing frameworks for regulating the legal profession. The Code is intended to be binding on all lawyers in CCBE Member States, including those from both the EU and other European countries that have CCBE observer status. Currently 12 European countries⁴³ have incorporated the rules of CCBE Code of Conduct for Lawyers in their national relevant legislative and/or administrative frameworks and the rules of CCBE Code of Conduct are binding on lawyers (advocates). In some countries such as Finland and Italy, the CCBE Code of Conduct is applicable to cross-border advocacy. As for France, it should be pointed out that 180 French Bars have adopted different positions. Some Bars have integrated it; others only refer to part or the whole Code. The “Harmonized Policies and Procedures Manual” prepared by the National Bars’ Council specifically refers to the CCBE Code of Conduct in its Article 3.3 on relationship between European lawyers⁴⁴.

The developments in the field of the ethical regulation of lawyers attempts to unify the main requirements and standards which would assist lawyers in choosing the appropriate course of action when they are faced with an ethical issue in their respective or other countries. As indicated above, some provisions regulating the activities of lawyers are incorporated in the European Convention. As prescribed by Principle 1(3) of the CoE Recommendation on the Freedom of Exercise of the Profession of Lawyer:

Lawyers should enjoy freedom of belief, expression, movement, association and assembly, and, in particular, should have the right to take part in public discussions on

accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 23 March 1976, in accordance with Article 49.

⁴⁰ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

⁴¹ Council of Europe, Committee of Ministers Recommendation Rec(2000)21 to member states on the freedom of exercise of the profession of lawyer, the Preamble.

⁴² See the Preamble to the UN Basic Principles on the Role of Lawyers and the Preamble of the Council of Europe Recommendation on the Freedom of Exercise of the Profession of Lawyer.

⁴³ Those Countries are: Austria, Belgium, Denmark, Germany, Luxemburg, Norway, Spain, Sweden, UK (Law Society of England and Wales), Iceland, UK (Bar of England and Wales), Law Society of Northern Ireland, UK (Law Society of Scotland).

⁴⁴ Link: <http://www.cnb.avocat.fr/Pedef/RIH.pdf>

matters concerning the law and the administration of justice and to suggest legislative reforms⁴⁵.

According to Principle VI (4) of the CoE Recommendation on the Freedom of Exercise of the Profession of Lawyer, “The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers” and Principle VI (3) of the same Recommendation states: “Disciplinary proceedings should be conducted with full respect of the principles and rules laid down in the European Convention ...”⁴⁶.

It is noticeable that despite the fact that the CoE Recommendation on the Freedom of Exercise of the Profession of Lawyer was not adopted while the case of *Ezelin* was pending before the European Court, many of the provisions of the Recommendation with respect to the rights of lawyers (avocats) were clearly emphasized in the Judgment of the Court, in particular the standing of the Court with respect to the freedom of taking part in peaceful assemblies, where the Court prescribed the following:

...freedom to take part in a peaceful assembly in this instance a demonstration that had not been prohibited - is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion⁴⁷.

It is important to note that in the case of *Ezelin*, the Bar Council passed a decision on 25 July 1983 stating that no act could be attributed to the Mr. Roland Ezelin and therefore no penalty was warranted on account of the matters which occurred during the demonstration. However on the appeal of the Principal Public Prosecutor, a disciplinary penalty was imposed in relation to the applicant.

The questions underlined by Judge Matscher in the Dissenting Opinion were mainly regarding the fact that the Convention itself does not include any rules directly applicable to the professional ethics and it leaves these to the Contracting States; although stating that the relevant National Rules must be compatible with the Convention. The Judge also indicated that the attitudes towards the conduct of the members of the Bar differ from country to country and under French Rule the members of the Bar are required to observe “*discretion*”⁴⁸. Judge Rysdal also indicated in his Partly Dissenting Opinion that:

... the French Disciplinary Code for Lawyers may be different from that of other countries, especially as regards an avocate’s liability to disciplinary sanctions for “breach of integrity, honour or discretion” as provided for in Article 106 of the Decree of 9 June 1972. However, States must be considered to enjoy a margin of appreciation in determining the necessity in a democratic society of the rules that govern professional behaviour and whether they have infringed in particular cases....⁴⁹

The study of the provisions of the European Convention as well as the analysis of the case law of the European Court show that amongst the court officers, only judges enjoy a special protection from the interferences (Article 10 of ECHR, para. 2). The Court recognized that the members of the judiciary must enjoy public trust and they must be protected against destructive attacks lacking any factual basis. Moreover, since they have a duty of *discretion*,

⁴⁵ See the Council of Europe’s Recommendation on the Freedom of Exercise of the Profession of Lawyer, Principle VI (4).

⁴⁶ *Ibid* at Principle VI (3) and VI (4).

⁴⁷ See the Judgment of the European Court on the Case of *Ezelin v. France* (18 March 1991), para. 53.

⁴⁸ *Ibid* at Dissenting Opinion of Judge Matscher.

⁴⁹ *Ibid* at Partly Dissenting Opinion of Judge Rysdal.

judges cannot respond in public to various attacks, such as, for instance, politicians are able to do⁵⁰.

The Committee of Ministers of the Council of Europe, while developing the Recommendation on the Freedom of Exercise of the Profession of Lawyer, had regard to the provisions of ECHR, among other things, and was guided by the conscious need for:

... a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason⁵¹

The study of the case law of the European Court shows that the interference with the right to freedom of expression for “maintaining the authority and impartiality of the judiciary” mainly involves cases on restraints forced upon and/or the prosecution of journalists for allegedly prejudicial reporting of court hearings (trials)⁵² as well as alleged defamation of judges⁵³.

PART III -- SIGNIFICANT FEATURES OF THE CASE

There are two remarkable features in the judgment of the European Court on the case of *Ezelin v. France* which became vital for further interpretation of cases regarding the alleged violation of the right to peaceful assembly, as well as becoming benchmarks for laws regulating freedom of assembly.

1. All restrictions on the exercise of freedom of assembly must pass the test of proportionality —meaning that the least intrusive means of achieving an objective should always be preferred — and that includes the penalties that are imposed for breaching rules that regulate the holding of assemblies⁵⁴.

The Court indicated in the judgment in the case of *Ezelin* that:

...The term "restrictions" in para. 2 of Article 11 (art. 11-2) - and of Article 10 (art. 10-2) - cannot be interpreted as not including measures - such as punitive measures - *taken not before or during but after a meeting* (cf. in particular, as regards Article 10 (art. 10), the Handyside judgment of 7 December 1976, Series A no. 24, p. 21, § 43, and the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 19, § 28)⁵⁵.

2. The State's need to prevent disorder must not discourage people from making their beliefs known in a peaceful way.

The Court did indicate in its judgment on the case of *Ezelin* that:

⁵⁰ See the Judgment of the European Court on Human Rights on the case of *De Haes and Gijssels v. Belgium* (24 February 1997), para. 37.

⁵¹ See the Council of Europe, Committee of Ministers Recommendation Rec (2000)21 to member states on the Freedom of Exercise of the Profession of Lawyer (Adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers' Deputies), the Preamble.

⁵² See for example the Judgment of the European Court on the case of *Sunday Times v. the United Kingdom* (26 April 1979). See also the Judgment of the European Court on the case of *Observer and Guardian v. the United Kingdom* (24 October 1991).

⁵³ See for example the judgment of the European Court on the case of *Prager and Oberschlick v. Austria* (26 April 1995).

⁵⁴ See the Benchmarks for Laws related to Freedom of Assembly and List of International Standards. URL:

http://www.osce.org/documents/odihr/2004/05/3675_en.pdf

⁵⁵ See the judgment of the European Court on the Case of *Ezelin v. France*, (26 April 1991), para. 39.

.... pursuit of a just balance must not result in avocats being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions. Admittedly, the penalty imposed on Mr. Ezelin was at the lower end of the scale of disciplinary penalties ...; it had mainly moral force.... The Court considers, however, that the freedom to take part in a peaceful assembly in this instance a demonstration that had not been prohibited - is of such importance that it cannot be restricted in any way, even for an *avocat*, so long as the person concerned *does not himself commit any reprehensible* act on such an occasion ...⁵⁶.

⁵⁶ Ibid at paras. 52 and 53.