

**MOCK TRIAL**  
**BASED ON THE**  
**JUDGMENT OF THE**  
**EUROPEAN COURT OF**  
**HUMAN RIGHTS IN THE**  
**CASE OF *EZELIN v.***  
***FRANCE***

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This mock trial exercise, including the methodology, was developed by Advocate Narine Gasparian, for the Armenian Non-Governmental Organization “Legal Guide”, who is solely responsible for its content. This Mock trial is intended for educational and training purposes only. The methodology used herein are those of the author and do not necessarily represent the views of Legal Guide.

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## **Introduction**

This Mock trial has been developed using the the judgment of the European Court of Human Rights (hereinafter referred to as the “European Court”) dated 18 March 1991 in 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 “the European Convention”).

This Mock trial aims to provide young legal professionals an opportunity to study the procedure and the approaches of presenting pleadings before the European Court by arguing the case of *Ezelin v. France* before the European Court. It will also provide an opportunity for participants to conduct a thorough examination of the applicant’s complaints, the French Government’s arguments and the relevant approach of the European Court.

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

**MOCK TRIAL**  
**BASED ON THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS**  
**IN THE CASE OF *EZELIN v. FRANCE***

**I. INSTRUCTIONS FOR THE ORGANIZERS OF THE MOCK TRIAL**

**A. Purpose of the Mock Trial**

This mock trial is for law students, legal professionals, particularly young lawyers passing training on the European Convention, and advocates as well as journalists that are specialising in the field of investigative journalism.

The mock trial should be organized after the participants have taken part in a training on the main principles and standards about Article 10 (Freedom of Expression) and Article 11 (Freedom of Association and Assembly) of the the European Convention. It aims to provide an opportunity for the participants to use theoretical knowledge, including the norms and standards on Articles 10 and 11 of the European Convention in the practice.

After the mock trial the participants:

- a) Will improve their knowledge on the approaches and principles developed by the European Court on certain questions related to the exercise of the Freedom of Expression and the Freedom of Assembly;
- b) Will learn how to interpret the facts of the case by directly applying the norms defined by Articles 10 and 11 of the European Convention and the case laws of the European Court;
- c) Will improve their skills on making legal conclusions, applying the facts of the case and the relevant judgments of the European Court;
- d) Will improve their oral advocacy skills.

**B. Instructions on Preparation and Implementation of the Mock Trial for the Organizers**

The organizer(s)/trainer(s) of the mock trial should be well aware of the norms of Articles 10 and 11 of the European Convention as well as the relevant judgments of the European Court.

Given the specifics and aims of this mock trial, it should be organized for small groups i.e. a group having minimum 10 and maximum 13 participants.

The mock trial shall be organized in the following format:

- a) Preparatory stage;
- b) Actual implementation of the mock trial;
- c) Commenting by the trainer(s) on the performance of the mock trial;
- d) Conclusion of the mock trial.

1) Preparatory Stage of the Mock Trial: The trainer(s) of the mock trial shall present the materials on Articles 10 and 11 of the European Convention no less than one and not more than three days in advance of the actual implementation of the mock trial, and at the end of the presentation, introduce the aim of the mock trial. The roles shall then be divided amongst the participants in accordance with the procedure set out below:

1. Group A, which may consist of between three and four participants, should be provided with the below indicated *Attachment A*, which includes the rules for Group A, and

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- Attachment D*, which includes the non official brief of the facts of the case of *Ezelin v. France*. Group A should protect the rights and freedoms of the Applicant before the European Court.
2. Group B, which may consist of between three and four participants should be provided with the below indicated *Attachment B* ,which includes the rules for Group B, and *Attachment D* which includes the non official brief of the facts of the case of *Ezelin v. France*. Group B should represent the interest of the respondent state i.e. France.
  3. The bench, which may consist of between four and five participants should be provided with the *Attachments A, B, C and D*.
  4. *Attachment D*, which includes the judgment of the European on the case of *Ezelin v. France*, should be provided to the participants only after the presentation of the trainer(s) on the performance of the mock trial.
  5. The participants should also be provided with the relevant materials necessary for the preparation of the mock trial, including the texts of Articles 10 and 11, which is included in *Attachment F*. They should also be provided with a list of relevant judgments of the European Court on Articles 10 and 11, if possible also the texts of those judgments.
  6. *Attachment E*, which includes the judgment of the European Court on the case of *Ezelin v. France*, should be provided to the participants only at the end during the conclusion of the mock trial.

The Participants of the mock trial will need at least one day for the preparation and, where possible, time and facilities for team discussion should be arranged.

The preparatory stage of the mock trial also includes activities on designing the court room in accordance with the relevant structure<sup>1</sup> as well as establishing measures for notification to the participant about the time limits during the performance of the mock trial. This might be done either by the trainer(s) or a participant who is not performing the mock trial.

## 2. The Performance of the Mock trial

The mock trial should be conducted according to the following procedure and timelines:

<i>Description of the activities</i>	<i>Implementers</i>	<i>Time limits</i>
Opening remarks	Trainer (s)	5 minutes
Presentation of the facts of the case	Applicant's first representative	5 minutes
Presentation of oral pleadings on the alleged violations of the rights of the Applicant to the freedom of expression. The pleadings should be justified by directly applying the norms of the European Convention and relevant judgments of the European Court	Applicant's second representative	15 minutes
Presentation of oral pleadings on the alleged violations of the rights of the Applicant to the freedom of assembly. The pleadings should be justified by directly applying the norms of the European Convention and relevant judgments of	Applicant's third representative	15 minutes

<sup>1</sup> There should be tables for judges allocated in the centre of the room/classroom, and two tables and chairs equal to the number of the representatives/ of the Applicant and the Respondent State, which should be placed so that the representatives of the parties can see the bench. The trainer should sit so that his /her actions do not disturb the participants. The support trainer in charge of notifying parties about the time limitations should sit where he/she will be visible both to the bench and the participants.

the European Court		
Presentation of the facts of the case if the Applicant distorted the facts of the case	Respondent's first representative	5 minutes
Rejection of the alleged violation of the right to freedom of expression of the Applicant and provision of relevant justification by the means of direct application of European Convention norms and the judgments of the European Court	Respondent's second representative	15 minutes
Rejection of the alleged violation of the right to freedom of assembly of the Applicant and provision of relevant justification by the means of direct application of European Convention norms and the judgments of the European Court	Respondent's third representative	15 minutes
Delivering rebuttal	Applicant's fourth representative, or one of the three	5 minutes
Delivering response	Respondent's fourth representative, or one of the three	5 minutes
Drafting the judgment to be delivered by the bench on the case of <i>Ezelin v. France</i>	Participants involved in the bench	20 minutes
Publication of the judgment	Participants involved in the bench	5 minutes

*Notification: The indicated time includes the questions asked by the bench and the answers of the participants.*

### 3. Comments by the Trainer (s) on the Performance of the Mock Trial

During the performance of the mock trial, the trainer(s) should make relevant notes on the oral pleadings presented by the representatives of the Applicant and the agents of the Respondent State. At the end of the mock trial, right after the publication of the judgment by the bench, the trainer(s) should present their comments and feedback on the skills of the representatives of the Applicant, Respondent State and the bench, in particular:

- Presentation of oral pleadings by the representatives of the Applicant without changing and distorting the facts of the case, taking into account only the information provided during the mock trial,
- On the legal interpretation of the facts of the case by directly applying European Convention norms and European Court judgments as well as on the legal conclusions made as a results of comparing the relevant judgments with the facts of the case of *Ezelin v. France*.
- On the presentation of legal arguments, according to the scope of the legal issues, primary oral pleadings and the response raised by the Applicant during the mock trial.
- On the logical continuation, justification and structure of the oral pleadings presented by the representatives of the Applicant and the Respondent State.
- On the proficiency of the oral advocacy skills, on legal literacy and the preciseness of the oral speech demonstrated by the representatives of the Applicant and the Respondent State.

- On the exactness, clarity and straightforwardness of the questions asked by the participants involved in the bench, by taking the relevant norms and principles adopted by the European Court on the examination of the alleged violations of Articles 10 and 11 of the European Convention as a basis.
- On the compliance of the judgment given by the bench with the European Convention Norms and the accepted structure and the logic of the judgments of the European Court.
- Other relevant suggestions and comments.

#### 4. Conclusion of the Mock Trial

At the end of the mock trial, the trainer (s) shall present the judgment passed by the European Court on the case of *Ezelin v. France*, including separate opinions. The trainer (s) shall also initiate a discussion on the differences between the approaches of the European Court and the bench of this mock trial as well as the specifics of the judgments passed by the European Court and this mock trial.

## **PART II. ATTACHMENT A --EZELIN V. FRANCE --GROUP A**

Your Group is representing the Applicant in this case to be considered by the European Court. The case concerns alleged violation of the rights of the Applicant to Freedom of Expression and Freedom of Assembly guaranteed by Articles 10 and 11 of the European Convention.

The details of your client's are indicated in Attachment D. Your client submits that his rights to freedom of expression and assembly have been violated.

For presenting oral arguments/pleadings before the European Court you shall do the following:

1. Familiarise yourselves with the facts of the case;
2. Familiarise yourselves with the content of Articles 10 and 11 of the European Convention;
3. Develop Pleadings presenting the interests of your client before the Court and protecting the rights and freedoms of your client in accordance with the norms of the European Convention;
4. Consider and examine all those arguments that are likely to be presented by the representatives of the Respondent State.

You should present complaints to the Court stating that your client's rights to freedom of expression and freedom of assembly have been violated and submit relevant supporting facts and arguments.

It is recommended that you consider the following questions:

1. Whether there was an interference with your client's rights to freedom of expression and assembly guaranteed by Articles 10 and 11 of the European Convention?
2. Whether the interference with your client's rights to freedom of expression and assembly were prescribed by law and proportionate to the aim pursued?
3. Whether the interference with your Client's rights to freedom of expression and assembly was necessary in a democratic society?

You need to use the following while presenting your oral arguments:

1. Follow the internationally accepted principles on oral advocacy;
2. Ensure that your oral pleadings/arguments are justified, well structured, logically linked and clearly divided amongst the members of your team;
3. Apply and directly use the relevant judgments of the European Court as support for your legal arguments;
4. Ensure that the scope of the response on Articles 10 and 11 submitted by you is limited to the facts of the case and to the Respondent state's primary oral pleadings.

### **PART III. ATTACHMENT B-- *EZELIN V. FRANCE*--GROUP B**

Your Group will be acting as a Respondent State, i.e. France, in this case to be examined before the European Court. The case concerns alleged violation of the Applicant's rights to freedom of expression and freedom of assembly guaranteed by Articles 10 and 11 of the European Convention.

The details of the case of your client are indicated in Attachment D. The Applicant submits that his rights to freedom of expression and assembly have been violated.

For presenting arguments/pleadings before the European Court you shall do the following:

1. Familiarise yourselves with the facts of the case,
2. Familiarize yourselves with the content of Articles 10 and 11 of the European Convention,
3. develop arguments/pleadings for presenting the interests of the Respondent State before the Court,
4. Consider and examine all those arguments that are likely to be presented by the Applicant.

You should present complaints to the European Court stating that the Applicant's rights to freedom of expression and freedom of assembly have not been violated and submit that the interference with the right to freedom of assembly was prescribed by the law and was proportionate to the aim pursued.

It is recommended that you address the following questions:

1. Whether there was an interference with the Applicant's rights to freedom of expression and assembly guaranteed by Article 10 and 11 of the European Convention;
2. If yes, whether the interference with the Applicant's rights to freedom of expression and assembly were proportionate to the aim(s) pursued as indicated in Article 10(2) and 11(2) of the European Convention;
3. Whether the interference of the Respondent State with the Applicant's rights to freedom of expression and assembly were prescribed by law and proportionate to the aim pursued;
4. Whether the interference of the Respondent State with the Applicant's rights to freedom of expression and assembly was necessary in a democratic society.

You need to use the following while presenting your oral arguments:

1. Follow the internationally accepted principles on oral advocacy;
2. Ensure that your oral pleadings/arguments are justified, well structured, logically linked and clearly divided amongst the members of your team;
3. Apply and directly use the relevant judgments of the European Court as support for your legal arguments;
4. Ensure that the scope of the response on Articles 10 and 11 submitted by you is limited to the arguments and rebuttal of the Applicant.

## **PART IV. ATTACHMENT C -- *EZELIN V. FRANCE* -- GROUP C**

Your Group will be acting as the bench in this case to be examined before the European Court. The case concerns alleged violations of the Applicant's rights to freedom of expression and freedom of assembly guaranteed by Articles 10 and 11 of the European Convention.

The details of the case are indicated in Attachment D. The Applicant submits that his rights to Freedom of Expression and Assembly were violated.

For handling the trial at the European Court you shall do the following:

1. Familiarise yourselves with the facts of the case,
2. Familiarise yourselves with the content of Articles 10 and 11 of the European Convention,
3. Familiarise yourselves with Attachments B and D,
4. Consider and examine all those arguments that are likely to be presented by the Applicant and the government of the Respondent State.
5. Familiarise yourselves with the instructions to the Applicant and Respondent State set out in Attachments A and B, in order to prevent those instructions not being followed by the representatives of the Applicant and the Respondent State during the mock trial.

It is recommended that you find out the matters set out below by asking questions about:

1. Whether there was an interference with the rights of the Applicant on Freedom of Expression and Assembly guaranteed by Articles 10 and 11 of the European Convention;
2. If yes, whether the interference with the Applicant's rights to Freedom of Expression and assembly were pursuing the aim(s) as indicated in Articles 10(2) and 11(2) of the European Convention;
3. Whether the Respondent State's interference with the Applicant's rights to Freedom of Expression and Assembly were prescribed by law and proportionate to the aim pursued;
4. Whether the Respondent State's interference with the Applicant's rights to the Freedom of Expression and Assembly was necessary in a democratic society.

You reserve the right to exercise the following:

1. To run the trial before the European Court in accordance with the Regulations and accepted practice of the Court,
2. to actively ask questions to the representatives of the Applicant and the Respondent State;
3. If necessary, Judges may, at their discretion, extend total oral argument time beyond the allocated time, up to an additional 5 (five) minutes per representative of the Applicant or Respondent state;
4. Deliver a judgment, which should have similar structure as the judgments handed down by the European Court in reality. You, as a member of the bench, should deliver a judgment as a result of the impartial assessment of the arguments presented by both parties during the mock trial exercise. The bench does not have a right to consider and address any questions which were not pleaded by the parties.

## **PART V. ATTACHMENT D - NON OFFICIAL SUMMARY OF THE FACTS OF THE CASE *EZELIN v. FRANCE* (JUDGMENT OF 18 MARCH 1991)**

### **I. Background to the case**

The Applicant, Mr. Roland Ezelin is a French national, 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:

"... The demonstration being held today by various independence movements in the Champ d'Arbaud, Basse-Terre, from 9 a.m. onwards, whose progress we were monitoring, had taken the form of a procession in town. Demonstrators had set off at 10.30 a.m. and were marching through the streets of the town chanting slogans hostile to the police and the judiciary. During the procession, graffiti were daubed in paint on various buildings, in particular the Institut d'émission d'Outre-mer, known as the 'Central Treasury'. The group of 450-500 people which had left the Champ d'Arbaud had joined another group of 500 people, at the rue Schoelcher, forming a compact group of about a thousand people headed by the leaders, who announced over loudspeakers the slogans to be chanted. Some of the leaders were recognized. At this point I reported what was happening to the Chief Constable (call-sign 'Polaire'). At ten past eleven the demonstrators reached the police station and assembled in front of it. While I made the necessary arrangements for countering any attack on the building, the demonstrators 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. The speakers, urged the police officers to move up and join them. There followed a violent tirade against Police Officer Beaugendre, who was accused of betrayal, after which the crowd of demonstrators rhythmically chanted BEAUGENDRE-MAKO! UN JOUR OU TE PAYE' (One day you will pay). 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 demonstrators left the police station at about 11.30 a.m. and headed in the direction of the Law Courts and the council building. The procession then went along the boulevard Félix-Eboué and eventually reached the Champ d'Arbaud, where it dispersed after having made two lengthy halts 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 gone past, 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..."

## **B. THE DOMESTIC JUDICIAL INVESTIGATION**

A judicial investigation was commenced on 21 February 1983 into the commission by a person or persons unknown of offences of criminal damage to public buildings and insulting the judiciary. On 24 February, the Principal Public Prosecutor at the Basse-Terre Court of Appeal wrote to the Chairman of the Guadeloupe Bar informing that according to the police report of 21 February 1983 from which it appears 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 of the Criminal Code." The Principal Public Prosecutor at the Basse-Terre Court of Appeal also asked that the Chairman of the Guadeloupe Bar let him know his opinion of the case after hearing his colleague's explanations.

In a letter of 14 March 1983 the Chairman of the Bar informed the Principal Public Prosecutor of the outcome of his investigations, as follows:

"... 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. ... ."

And he concluded:

"This being so, having regard to:

(a) the facts: even assuming the worst as regards Mr. Ezelin, the report by [the] Chief Superintendent ... does not accuse him of any insulting gesture, act or words; and

(b) the provisions of Article 226 of the Criminal Code, it does not seem to me that my colleague Mr. Ezelin can have incurred any liability in exercising his right to join a demonstration which had not been prohibited, carrying a placard with the words 'Trade Union of the Guadeloupe Bar against the Security and Freedom Act'.... ."

After a postponement, the Applicant was summoned to appear before the investigating judge on 25 April 1983 in order to give evidence as a witness, and at the interview he stated that he had nothing to say on the matter. 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.

## **C. THE DISCIPLINARY PROCEEDINGS AGAINST THE APPLICANT**

### **1. The decision of the Bar Council**

On 1 June 1983 the Principal Public Prosecutor sent the Chairman of the Bar a complaint against the applicant, which read as follows:

"Further to my letter of 24 February 1983 and our conversation of 31 May last, I wish to bring to your attention, under Article 113 of the Decree of 9 June 1972, the conduct of Mr. Ezelin, whose name appears on the roll of the members of the Guadeloupe Bar. In my earlier letter I sent you a photocopy of a police report of 21 February 1983 which gave an account of Mr. Ezelin's participation in a demonstration at Basse-Terre on 12 February 1983. During the demonstration, a number of particularly offensive graffiti were daubed in paint 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 Basse-Terre investigating judge opened an investigation into the commission by a person or persons unknown of offences of criminal damage to public buildings, insulting the judiciary and aiding and abetting. All the persons reported as having taken part in the demonstration were interviewed and they stated either that they had not seen anyone paint the graffiti or, at the very least, that they did not know who the people responsible were. Only Roland Ezelin refused to answer the questions.

As the proceedings ended with a discharge order, I am sending you attached a photocopy of the record of his examination as a witness, the date of which had been delayed for more than a month in order to suit his convenience.

His refusal to reply to the investigating judge as a witness displays, moreover, an attitude of contempt for justice. In these circumstances I consider that there has been in this case a breach under Article 106 of the Decree of 9 June 1972 and I accordingly would ask you to kindly bring disciplinary proceedings against Mr. Ezelin before the Bar Council. ... ."

At a disciplinary hearing held under Article 104 of Decree no. 72-468 of 9 June 1972 the Bar Council adopted the following decision on 25 July 1983:

"... 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. It appears both from that opinion and from further explanations obtained from Mr. Ezelin that he took part in the relevant demonstration in response to a call by the Trade Union of the Guadeloupe Bar, of which he is one of the leaders, in order to protest against the use of the direct-committal procedure" - obviating the need for a preliminary judicial investigation - "and the continuation in force of the so-called Security and Freedom Act, which has since been repealed. 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. The inquiries made into these events have, moreover, been brought to an end with a discharge order that has now become final.

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 105 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.

Mr. Ezelin was relying on the provisions of Article 105 of the Code of Criminal Procedure, while it may seem regrettable that Mr. Ezelin did not make clearer to the judge his reasons for refusing to make a statement, it does not appear to the board that this refusal may be regarded as contempt for justice and the judiciary....

Consequently, having regard to the evidence, to Mr. Ezelin's explanations and to his usual excellent professional conduct, the board considers that there is no occasion to impose any disciplinary sanction on Mr. Ezelin.

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 seised 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 behaviour and sound judgment in all activities in which their status as avocats may be involved.

## **2. The Basse-Terre Court of Appeal's judgment of 12 December 1983**

The Principal Public Prosecutor appealed to the Basse-Terre Court of Appeal against this decision and asked the Court to impose on the applicant the disciplinary penalty of a warning. 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:

"It is established that on 12 February 1983 Mr. Ezelin took part in a demonstration in the streets of Basse-Terre.

The police report and appended documents make it clear beyond contradiction that the acknowledged purpose of the demonstration, which was organised by the independence movements in the département, was to protest noisily against the recent sentences of three militants to 15 days' imprisonment and a FRF 10,000 fine for damage to administrative buildings."

"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.

Following those events a judicial investigation was opened into the commission by a person or persons unknown of offences of damage to public buildings, insulting the judiciary and aiding and abetting. Mr. Ezelin was summoned as a witness by the investigating judge, together with a number of other persons recognised by the police officers. After he had taken the oath, during the examination he answered all the questions with "I have nothing to say on the matter".

It appears from the foregoing that Mr. Ezelin, avocat at the Court of Appeal and member of the Bar Council, participated in the whole of the demonstration which took place in the aforementioned, undisputed circumstances.

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 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.

He was there in his capacity as an avocat, since he carried a placard announcing his profession, and at no time did he dissociate himself from the demonstrators' offensive and insulting acts or leave the procession.

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 the Decree of 9 June 1972.

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 109, third paragraph, of the Code of Criminal Procedure, which are binding on all citizens and of whose requirements he could not, as a lawyer, be unaware.

Seeing that Mr. Ezelin contravened a statutory provision and showed a lack of discretion, he rendered himself liable to the disciplinary sanctions listed in Article 107 of the Decree of 9 June 1972."

"Having regard to the unanimously favorable opinion of his professional conduct, the Court considers that the penalty should be a reprimand.

For these reasons,

Having regard to sections 22 et seq. of Act no. 71-1130 of 31 December 1971 and Articles 104 et seq. of Decree no. 72-468,

Sitting in public as a full court,

Sets aside the decision taken on 25 July 1983 by the Council of the Bar of the département 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.

### **3. The Court of Cassation's judgment of 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 (art. 10, art. 11) of the Convention.

On 19 June 1985 the Court of Cassation delivered a judgment dismissing the appeal. It said, *inter alia*:  
"... The Court of Appeal ... did not hold [Mr. Ezelin] liable in virtue of a collective responsibility for criminal offences committed by other demonstrators but stated that during the demonstration, whose purpose was to protest noisily against recent criminal sentences, insults had been uttered and offensive graffiti daubed on all the walls of the Law Courts, directed against the judiciary as a whole and against a judge of the Court of Appeal by name and a well-known figure in the département who practised as a barrister. 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 daubed 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 excesses or leave the procession in order to dissociate himself from these criminal acts. It was entitled to infer from this that the behaviour was a breach of discretion amounting to a disciplinary offence. ...

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. It added that Mr. Ezelin gave no reason to explain this attitude. It 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 ...."

## **II. Relevant domestic law and practice**

The following provisions of French law need to be set out:

### **A. General provisions**

#### **1. The Criminal Code**

Article 226, first paragraph

"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."

## **2. The Code of Criminal Procedure**

### Article 105

"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."

### Article 109

"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. Provisions relating specifically to avocats**

### **1. The Decree of 9 June 1972.**

#### Article 89

"An avocat must not, in any matter, make any disclosure in breach of professional confidentiality. He must, in particular, respect the confidentiality of judicial investigations in criminal matters by refraining from communicating any information from the file and from publishing letters or other documents concerning a current investigation."

#### Article 104

"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."

#### Article 106

"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."

#### Article 107

"The disciplinary penalties shall be:

A warning;

A reprimand;

Suspension for a period not exceeding three years;  
Striking off the roll of avocats or list of trainees or  
Withdrawal of honorary status.

A warning, a reprimand and suspension may, if so provided in the decision in which the disciplinary penalty is imposed, entail loss of membership of the Bar Council for a period not exceeding ten years.

The Bar Council may further order, as an ancillary penalty, that any disciplinary penalty shall be publicly displayed on the Bar's premises."

Article 113

"The Chairman of the Bar, either on his own initiative or on an application from the Principal Public Prosecutor or on a complaint by any party affected, shall inquire into the conduct of the avocat concerned. He shall then either discontinue the proceedings or refer the matter to the Bar Council.

If he has received a complaint, he shall inform the complainant. If the facts were reported to him by the Principal Public Prosecutor, he shall notify the latter."

## **2. The Act of 15 June 1982 "on the procedure applicable in the event of professional misconduct by an avocat at a court hearing"**

Avocats are bound by the oath they take when entering upon their duties. The wording of the oath is given in section 1 of the Act of 15 June 1982:

"I swear, as an avocat, to defend and counsel in a dignified, conscientious, independent and humane manner."

Before that Act came into force, the oath was worded as follows:

"I swear, as an avocat, to defend and counsel in a dignified, conscientious, independent and humane manner, with respect for the courts, the public authorities and the rules of the Bar, and neither to say nor to publish anything contrary to statute, regulations, morals, the security of the State, or public order." (Article 23 of the Decree of 9 June 1972)

An avocat who took the oath before the Act of 15 June 1982 came into force is deemed to have taken it in its current form.

In a judgment of 9 June 1964 the Court of Cassation (First Civil Division) held that the avocat's oath "also [bound] him in all circumstances not to deviate from the respect due to the courts and to the public authorities". (Juris-Classeur périodique 1964, II, no. 13797, note by J.A.).

Moreover, in a judgment of 30 June 1965 the Court of Cassation held that an avocat, while being entitled to protest at any infringement of the rights of the defence, must refrain from any expression which would reflect on the honour or discretion of a judge.

## **PART VI. ATTACHMENT E--JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE CASE OF *EZELIN V. FRANCE***

**This is an extract from the judgment – paragraph numbers have been included for your reference**

### **PROCEEDINGS BEFORE THE COMMISSION**

28. In his application of 16 October 1985 to the Commission (no. 11800/85), Mr. Ezelin relied on Articles 10 and 11 (art. 10, art. 11) of the Convention. He submitted that the disciplinary sanction imposed on him seriously interfered with his freedom of expression and of peaceful assembly.

29. The Commission declared the application admissible on 13 March 1989. In its report of 14 December 1989 (made under Article 31) (art. 31) it expressed the opinion that there had been a breach of Article 11 (art. 11) (by fifteen votes to six) and that no separate issue arose under Article 10 (art. 10) (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment.

### **FINAL SUBMISSIONS TO THE COURT**

30. At the hearing on 20 November 1990 the Agent of the Government maintained the submissions made in his memorial. In those the Court was asked to hold that there had been no violation of Article 11 (art. 11) and to endorse the Commission's view that no separate issue arose under Article 10 (art. 10).

Counsel for the applicant asked the Court to find that there had been a breach of freedom of expression and of freedom of peaceful assembly guaranteed in Articles 10 and 11 (art. 10, art. 11) and to award his client the compensation sought.

### **AS TO THE LAW**

31. 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 (art. 10, art. 11) of the Convention.

32. The Government pointed out that this sanction was also designed to punish Mr. Ezelin for his refusal to give evidence to the investigating judge. They criticised the Commission for suggesting that the only matter in issue was the applicant's participation in the demonstration.

33. The applicant was in fact punished for having neither shown his disapproval of the "demonstrators' offensive and insulting acts" nor left 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 (see paragraphs 20 and 21 above). Nevertheless, he was summoned before the investigating judge as a result of having taken part in the demonstration. That being so, the question of the refusal to give evidence - an issue which in itself does not come within the ambit of Articles 10 and 11 (art. 10, art. 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 had nothing to say on the matter, and the judge did not see fit to use his power under Article 109, third paragraph, of the Code of Criminal Procedure (see paragraphs 15, 20 and 21 above).

### **I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)**

34. The applicant based one of his submissions on Article 10 (art. 10), which provides:

"1. Everyone has the right to 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. ...

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."

35. In the circumstances of the case, this provision is to be regarded as a *lex generalis* in relation to Article 11 (art. 11), a *lex specialis*, so that it is unnecessary to take it into consideration separately. On this point the Court agrees with the Commission.

## **II. ALLEGED VIOLATION OF ARTICLE 11 (art. 11)**

36. The main question in issue concerns Article 11 (art. 11), which provides:

"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...."

37. Notwithstanding its autonomous role and particular sphere of application, Article 11 (art. 11) must, in the present case, also be considered in the light of Article 10 (art. 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 (art. 10), is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 (art. 11).

### **A. Whether there was an interference with the exercise of the freedom of peaceful assembly**

38. 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.

39. The Court does not accept this submission. The term "restrictions" in paragraph 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).

40. In the second place, the 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.

In the Commission's opinion, no intentions that were not peaceful could be imputed to the applicant.

41. The Court points out that prior notice had been given of the demonstration in question and that it was not prohibited. In joining it, the applicant availed himself of his freedom of peaceful assembly. Moreover, neither the report made by the Chief Superintendent of neither the Basse-Terre police nor any other evidence shows that Mr. Ezelin himself made threats or daubed graffiti.

The Court of Appeal found the charge of not having "dissociate[d] himself from the demonstrators' offensive and insulting acts or [left] the procession" (see paragraph 20 above) proven. The Court of Cassation noted that at no time did he "express his disapproval of these excesses or leave the procession in order to dissociate himself from these criminal acts" (see paragraph 21 above).

The Court accordingly finds that there was in this instance an interference with the exercise of the applicant's freedom of peaceful assembly.

## **B. Whether the interference was justified**

42. It must therefore be determined whether the sanction complained of was "prescribed by law", prompted by one or more of the legitimate aims set out in paragraph 2 and "necessary in a democratic society" for achieving them.

### **1. "Prescribed by law"**

43. 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.

44. The Government considered, on the contrary, that this provision required avocats, who were "officers of the court" (auxiliaires de la justice), 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.

45. 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 - 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 (see, among other authorities, the Müller and Others judgment previously cited, Series A no. 133, p. 20, § 29). Experience shows, however, that it is impossible to attain absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society (ibid.).

In the instant 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 (see paragraph 25 above); and the Court of Cassation has held that these include the respect due to the judicial authorities (see paragraph 27 above). That being so the interference was "prescribed by law".

### **2. Legitimate aim**

46. The applicant claimed that the sanction was not in pursuit of a legitimate aim; it resulted in his being prevented from expressing his ideas and his trade-union demands.

The Government, on the other hand, submitted that its purpose was the "prevention of disorder".

47. It is apparent from the evidence that Mr. Ezelin incurred the punishment because he had not dissociated himself from the unruly incidents which occurred during the demonstration. As the Commission noted, 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 interference was therefore in pursuit of a legitimate aim, the "prevention of disorder".

### **3. Necessity in a democratic society**

48. 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.

49. 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" (auxiliaire de la justice), seriously impaired the authority of the judiciary and respect for court decisions. Lastly, the 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.

50. 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".

51. 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 and freedom of expression, which are closely linked in this instance.

52. The proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2 (art. 11-2) and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places. The 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.

53. 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 (see paragraph 25 above); it had mainly moral force, since it did not entail any ban, even a temporary one, on practising 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 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.

In short, the sanction complained of, however minimal, does not appear to have been "necessary in a democratic society". It accordingly contravened Article 11 (art. 11).

### **III. APPLICATION OF ARTICLE 50 (art. 50)**

54. Article 50 (art. 50) provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant sought compensation for damage and reimbursement of expenses under this provision.

#### **A. Damage**

55. Mr. Ezelin claimed compensation in the amount of 25,000 French francs (FRF) for non-pecuniary damage, on the ground that publication of the sanction complained of in legal journals and the local publicity which ensued had harmed his reputation and interests.

56. The Government left the matter to the Court's discretion in the event of the Court's finding that damage had indeed been sustained.

The Delegate of the Commission submitted that compensation should be awarded, but did not suggest any figure.

57. In the circumstances of the case the finding that there has been a breach of Article 11 (art. 11) affords Mr. Ezelin sufficient just satisfaction for the damage alleged.

#### **B. Costs and expenses**

58. The applicant also claimed reimbursement of FRF 40,000 in respect of fees, costs and expenses incurred in the Court of Cassation (FRF 15,000) and in the proceedings before the Convention institutions (Commission: FRF 10,000; Court: FRF 15,000).

No observations were made by the Government or the Delegate of the Commission.

59. On the basis of the information in its possession and its case-law on the subject, the Court, making an assessment on an equitable basis, allows the applicant's claim in full.

### **FOR THESE REASONS, THE COURT**

1. Holds unanimously that it is unnecessary to make a separate examination of the case under Article 10 (art. 10);

2. Holds by six votes to three that there has been a violation of Article 11 (art. 11);

3. Holds unanimously that this judgment in itself constitutes sufficient just satisfaction as to the alleged non-pecuniary damage;

4. Holds unanimously that the respondent State is to reimburse the applicant FRF 40,000 (forty thousand French francs) for costs and expenses.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 April 1991.

Signed: Rolv RYSSDAL  
President

Signed: Marc-André EISSEN  
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 53 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Partly dissenting opinion of Mr. Ryssdal;
- (b) Dissenting opinion of Mr. Matscher;
- (c) Dissenting opinion of Mr. Pettiti;
- (d) Concurring opinion of Mr. De Meyer.

## **PARTLY DISSENTING OPINION OF JUDGE RYSSDAL**

I agree that it is not necessary to examine the case separately under Article 10 (art. 10) and that there was an interference with Mr. Ezelin's right to peaceful assembly under Article 11 (art. 11). I also consider that it was prescribed by law and pursued a legitimate aim under paragraph 2 of Article 11 (art. 11-2), namely the prevention of disorder. The central question, however, is whether this interference was necessary in a democratic society. It is in this respect that my views differ from those of the majority of the Court.

The French disciplinary code for lawyers may be different from that of other countries, especially as regards an avocat'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 been infringed in particular cases.

Although opinions may differ as to whether the Court of Appeal's reaction - confirmed by the Court of Cassation - was appropriate, I cannot say that the disciplinary sanction of a reprimand for the two professional shortcomings found in Mr. Ezelin's conduct went beyond the margin of appreciation left to the national authorities. It cannot be overlooked that in the applicable scale of penalties a reprimand is one of the lightest disciplinary sanctions which, in the present case, involved no restrictions on the applicant's continued freedom to practice law.

I therefore conclude that there has been no violation of Article 11 (art. 11) in the present case.

## **DISSENTING OPINION OF JUDGE MATSCHER**

(Translation)

The European Convention does not include any rules directly applicable to professional ethics; it leaves these to the Contracting States. Obviously, the relevant national rules must be compatible with the Convention, but the Contracting States have a substantial discretion in this sphere.

Attitudes towards the conduct of members of the Bar differ from country to country. Under French rules, members of the Bar are required to observe "discretion" (*délicatesse*). Although worded differently, the same idea can be found in the legislation or professional rules of several European countries.

In my opinion, there is not the slightest doubt - in view of the facts of the case as they appear from the file (open participation in a demonstration, in which hotheads shouted or daubed on the walls of buildings insults or threats against judges and against the police, whereby he associated himself with the demonstrators; behaviour offensive to the judge who had summoned him) - that the applicant was in serious breach of the duty of "discretion" which the professional ethical rules laid on him as an avocat.

It remains to be determined whether, in the permissive society of today, a member of the Bar can still be required to behave with "discretion", as I understand it, or, to use the terms of the Convention (or of the Court's case-law), whether the sanction (which was in any case a minimal one and therefore proportionate in the circumstances) imposed for behaviour contrary to the requirements of "discretion" was "necessary in a democratic society".

The majority of the Court appeared to think not; for the reasons just given, I cannot share their view.

## **DISSENTING OPINION OF JUDGE PETTITI**

(Translation)

I have not voted with the majority for the following reasons.

I consider that the majority has confined itself, as the Commission did, to the issue of Article 11 (art. 11). There was a second aspect, however.

1. As regards freedom to demonstrate, and interpreting Article 11 § 2 (art. 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).

2. The second aspect was the one raised by the Agent of the French Government in the memorial and at the hearing: can the State organise the relations between the judiciary and the Bar as regards professional ethics so as to be able to judge the behaviour of officers of the court from the point of view of the discretion required of members of the Bar and of the judiciary, whether on the occasion of a demonstration or in relation to any other isolated incident?

If so, are the measures taken as a result of the disciplinary proceedings and of the provisions of domestic law compatible with the Convention from the point of view of the margin-of-appreciation/ proportionality ratio?

I have not been able to find any precise answer to these two questions in the Court's reasoning.

On the first point, the majority has not, in my view, explained its conclusion that a subsequent sanction could be sufficient to deter the person concerned from participating in another demonstration at a later stage. That being the case, it would in any event have been necessary to express a view on the question of proportionality: at what point did such a subsequent sanction become disproportionate? The Court could have adopted an approach based on its reasoning in the *Albert and Le Compte v. Belgium* case in determining the threshold of applicability of Article 6 (art. 6) in relation to civil rights and obligations.

Moreover, was the contested sanction intended to be deterrent or merely symbolic?

The requirement that the interference found to be lawful be proportionate in relation to the aim of public interest presupposes a direct ratio between the elements considered. Where the Court assesses this ratio, it does so generally in the light of the margin of appreciation left to the States; however, I do not find in the Court's reasoning in the present judgment these usual criteria, either with regard to the pressing social need or in relation to necessity in a democratic society. It is the major consideration of the freedom to demonstrate on which the Commission and the Court concentrated in particular. No criticism under the Convention was directed at the conduct of the authorities concerning the demonstration itself; the Court interpreted Article 11 (art. 11) from the point of view of the a posteriori sanction.

In so far as the Court states that Article 10 (art. 10) is to be regarded as a *lex generalis* in relation to Article 11 (art. 11), *lex specialis*, with the result that it is not necessary to take into consideration Article 10 (art. 10) separately, it should be noted that paragraph 2 of Article 10 (art. 10-2) provides as follows:

"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."

A similar notion is to be found in an analysis of proportionality.

In paragraph 52 of the judgment the Court referred to the need to strike a just balance so as to avoid discouraging individuals from demonstrating their beliefs; in paragraph 53 it is said that the freedom to take part in an assembly or demonstration cannot be restricted unless the person concerned has acted reprehensibly. By implication this reasoning also presupposes the assessment of proportionality or the examination of what is reprehensible as the point of reference; this was not expressly stated.

It is indeed true that the scope of the judgment is limited to the case before the Court and by the fact that the review carried out by the Court of the right to participate freely in a demonstration absorbed the examination of the other problems. The Court in its summary of the facts observed that no obstacles had been placed in the way of the demonstration despite its controversial nature and that no criminal proceedings came to trial, the criminal investigation having been terminated by a general discharge order, which was not appealed against.

On another point the reasoning of the judgment may appear questionable where the majority rejects the Government's arguments concerning the refusal to give evidence (Article 109 of the Code of Criminal Procedure), taking the view that the summons to appear as a witness was the consequence of the demonstration.

The requirements of Article 109 apply irrespective of the classification of the facts preceding the summons by the judge.

It would have been preferable in this connection to draw attention to the specific position of lawyers and the relevant practice in France on this matter.

It also seems to me to be regrettable that the majority did not refer to the margin of appreciation of the State in such a field, based on the second paragraphs of Articles 10 and 11 (art. 10-2, art. 11-2). If it had done so, the Court would no doubt have cited its usual case-law, under which a margin is accorded to States to a greater or lesser extent depending on the Articles and cases in question.

It could have been concluded that as far as judge/avocat relations and disciplinary proceedings were concerned (equation = conduct of the person concerned: the severity of the sanction), the margin of appreciation could be at least as broad as that accorded in the Handyside and Markt Intern cases. In any event the question of proportionality necessarily arose and had to be analysed and defined, which it was not.

Since the Court, agreeing on this point with the Commission, did not deal directly (see paragraph 33) with the problem raised concerning the judge/avocat relationship with reference to Articles 106 and 107 of the Decree of 9 June 1972 and Article 8 of the Act of 15 June 1982 with regard to the oath, the judgment leaves open the question of the compatibility of these provisions with the Convention. The Bar Council had also taken account of the above-mentioned provisions because in point two of the operative part of its decision it reminded the whole of the Bar "of the traditional rules of good behaviour and sound judgment in all activities in which their status as avocats [might] be involved".

There is therefore a paradox which may make the Court's reasoning appear contradictory. In so far as disciplinary sanctions are made conditional on the finding of punishable or reprehensible conduct, the authorities are indirectly encouraged to take decisions of a criminal nature, whereas it is the French

tradition precisely for the prosecuting authority in minor cases to leave the matter to be dealt with in disciplinary proceedings under Article 106.

The Court, in its majority, like the Commission, showed the importance which it attached to the right to demonstrate, but did the case under examination provide an appropriate occasion for expressing this principle?

**CONCURRING OPINION OF JUDGE DE MEYER**  
**(Translation)**

I willingly accept that it was "unnecessary to make a separate examination of the case under Article 10 (art. 10)"<sup>2</sup>. But in my view that should have meant that it was necessary to examine it not simply in relation to Article 11 (art. 11), even considering that Article "in the light of Article 10 (art. 10)"<sup>3</sup>, but rather in relation to both Articles (art. 10, art. 11) 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 criticised 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"<sup>4</sup>: 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 assembly<sup>5</sup>.

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<sup>2</sup> Point 1 of the operative provisions of the judgment.

<sup>3</sup> Paragraph 37 of the judgment.

<sup>4</sup> Paragraph 51 of the judgment.

<sup>5</sup> See in particular paragraph 52 of the judgment.

## **PART VII. ATTACHMENT F-- SUPPORTING MATERIALS**

### **Article 10. Freedom of Expression**

- 1 Everyone has the right to 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.
- 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.

### **Article 11<sup>6</sup> – 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.

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<sup>6</sup> Heading added according to the provisions of Protocol No. 11 (ETS No. 155).