



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

**CASE OF TARANTINO AND OTHERS v. ITALY**

*(Applications nos. 25851/09, 29284/09 and 64090/09)*

JUDGMENT

STRASBOURG

2 April 2013

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Tarantino and Others v. Italy,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Danutė Jočienė, *President*,

Guido Raimondi,

Peer Lorenzen,

Dragoljub Popović,

Işıl Karakaş,

Nebojša Vučinić,

Paulo Pinto de Albuquerque, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 5 March 2013,

Delivers the following judgment, which was adopted on that date:

**PROCEDURE**

1. The case originated in three applications (nos. 25851/09, 29284/09 and 64090/09) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Ms Claudia Tarantino, Mr Giuseppe Reitano, Ms Laura Aziz, Mr Maurizio Brancadori, Mr Massimo Crosia, Mr Massimo Filetti, Mr Pasqualino La Mela and Mr Carmelo Marcuzzo (“the applicants”), on 18 May 2009, 2 and 16 November 2009 respectively.

2. The applicants were represented by Mr G. Lipari, a lawyer practising in Misilmeri. The Italian Government (“the Government”) were represented by their co-Agent, Ms P. Accardo.

3. The applicants complained of a violation of their right to education as provided by Article 2 of Protocol No. 1 to the Convention. In particular they alleged that the aims pursued by Law no. 127/1997 regulating the *numerus clausus* were not legitimate and the measure not proportionate.

4. On 21 June 2011 the applications were joined and communicated to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicants are all Italian nationals. The relevant information can be found in the table in the appendix.

#### A. Background of the cases

##### 1. *The first applicant, Ms Tarantino*

6. On 4 September 2007, Ms Tarantino failed to pass the entrance examination to gain access to the Faculty of Medicine in Palermo. In 2007 two thousand students sat this examination and there were two hundred and ten places available. She unsuccessfully attempted the examination again in 2008 and 2009.

7. On 14 December 2007, the first applicant and other students lodged a complaint with the President of the Republic alleging that Law no. 264/1999, in particular the two binding criteria used by the Ministry to set the number of students allowed entry to the relevant faculty of each university (see paragraph 17 below), were incompatible with Article 3(2)(c) and (g) of the Treaty establishing the European Economic Community, Directive 2005/36/CE on the recognition of professional qualifications, Article 15 of the Charter of Fundamental Rights of the European Union (the “EU”), Article 6 § 2 of the Treaty on the European Union, with regard to the principle of equality, and Article 2 of Protocol No. 1 to the Convention. She further contested the State’s decision to impose the same limitations on private universities, and the adequacy of the entrance examinations. The first applicant also asked to be provisionally admitted to the university under a conditional clause.

8. By a decree of 2 July 2008 the Supreme Administrative Court (*Consiglio di Stato*) rejected her request for an interim measure.

9. On 23 September 2008 the first applicant made further pleadings and reiterated her request that the matter be referred to the European Court of Justice (the “ECJ”). Those pleadings were passed on to the Supreme Administrative Court in October 2008.

10. By a decree of 28 April 2009, adopted on the basis of the Supreme Administrative Court’s advisory opinion, delivered on 12 November 2008 (no. 2256) and notified to the first applicant on 14 May 2009, the President of the Republic rejected the complaints. The decree held that, bearing in mind the human and material resources of the universities, the contested access restrictions, allowing access only to the most meritorious, were reasonable and therefore compatible with the EU provisions invoked. Moreover, in line with the increase in society’s needs for qualified doctors,

admissions to the faculties of medicine in 2008-09 had increased by 10-20%. It noted that the professional exam, after a degree had been obtained, was not an academic title in itself but a State examination as held in most States. Lastly, it dismissed the allegation that the entry examination's content was inadequate.

## 2. *The remaining seven applicants*

11. The other seven applicants had been or are still working as dental technicians or hygienists for a number of years.

12. On 4 September 2009, despite their relevant professional experience, those seven applicants failed to pass the entrance examination to gain access to the Faculty of Dentistry. Any preceding and subsequent attempts were also unsuccessful.

13. Mr Marcuzzo (hereinafter "the eighth applicant") had, nevertheless passed the entrance examination in the academic year 1999/2000. However, following his failure to sit exams for eight consecutive years by reason of grave family problems (as provided by the University Rule, Article 149 of Royal Decree no. 1592/1933), he lost his student status in July 2009.

14. These applicants conceded that they had not pursued available domestic remedies, since in their view they would have been ineffective. According to the well-established jurisprudence of the Supreme Administrative Court, limited access to universities is compatible with the Constitution and EU law (*ex pluribus*, the above-mentioned advisory opinion of 12 November 2008). The eighth applicant also argued that the Supreme Administrative Court had constantly held that subjective reasons, such as family problems (as in his case), could not be considered as exceptions to the rule favouring continuity of studies. In consequence, his claim could not be successful.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Law no. 127/1997

15. Law no. 127/1997, modifying section 9(4) of Law no. 341/1990, introduced, for the first time, a *numerus clausus* (limited access) to both public and private Italian universities. Section 17(116) of the same law provided that it was for the Ministry of Universities and Scientific and Technological Research to establish those limits. However, the law did not establish or set clear criteria to determine the faculties subject to restrictions, the number of available places or the selection procedure.

16. On 27 November 1998 (judgment no. 383/1998), having been asked to examine the constitutionality of section 17(116) of Law no. 127/1997, the Constitutional Court delivered a judgment upholding the constitutionality of

the law. It considered that the discretion applied by the Ministry of Universities and Research was not unfettered, since it must act according to an established legal framework. In this respect, in the absence of national legislation on the matter, the Constitutional Court made reference to relevant EU directives, which aimed to ensure an adequate standard of education. The court further noted that it was for Parliament to rule on the subject.

17. Following the Constitutional Court judgment, Law no. 264/1999 was enacted. It provided that the Ministry of Universities and Research would establish the entrance quota of the Faculties of Medicine, Veterinary Medicine, Dentistry, Architecture and Nursing on the basis of two binding criteria: the capacity and resource potential of the universities; and society's need for a particular profession (*fabbisogno di professionalità del sistema sociale e produttivo*). Based on that assessment, the Ministry would set the number of students allowed entry to the relevant faculty of each university.

18. On 21 April 2009, the Antitrust Authority (the "AA") delivered a recommendation on the criteria for access to the Faculty of Dentistry. The AA noted that: (a) in practice, the two criteria established by the law were applied on the basis of the observations of the Ministry of Universities and Research and the Ministry of Health; and (b) any data gathered would be discussed by an expert task-force, composed *inter alios* of representatives from the National Federation of Doctors, and the Chamber of Doctors and Dentists.

19. In the AA's view, the Italian Government were acting in breach of the Constitutional Court judgment (no. 383/1998 mentioned above) and EU law, in so far as the enacted law took into account not only educational standards but also data concerning occupational demand. Noting that the assessments were made with exclusive regard to the national health service occupational demand, the AA concluded that limiting access to the Faculty of Dentistry amounted to an unreasonable restriction of competition in professional services. Indeed, by considering only public demand, to the exclusion of any private demand, the number of dentists was artificially reduced and dental fees were unjustifiably increased. Furthermore, the AA disapproved of the participation of professional associations in the task force (mentioned above), in so far as their decisions might be highly influenced by their own interests.

20. To be admitted, candidates were required to pass a multiple-choice examination consisting of eighty questions on general culture (including international geography and history), biology, chemistry, mathematics and physics. The exam, based on the high school syllabus, aimed to test the candidates' aptitude for the subject matter pertaining to the faculty of their choice.

## B. Jurisprudence

21. The relevant domestic courts repeatedly found that a *numerus clausus* and the way in which it was applied in the Italian legal framework were in accordance with both the Constitution and European Union legislation. Judgments in support of those findings include, *inter alia*: judgment no. 1931 of the Supreme Administrative Court of 29 April 2008; judgment no. 5418 of the Supreme Administrative Court of 24 June 2008; judgment no. 5542 of the Supreme Administrative Court of 6 June 2008; judgment no. 197 of the Florence Tuscany Administrative Tribunal of 12 February 2007; judgment no. 4559 of the Naples Administrative Tribunal of 2008; judgment no. 1931 of the Florence Tuscany Administrative Tribunal of 17 April 2008; judgment no. 145 of the Trent Administrative Tribunal of 11 June 2008; and judgment no. 1631 of the Supreme Administrative Court of 15 April 2010.

In particular, in respect of the complainants' claim that the criterion related to society's need for a particular profession should not be limited to the national territory – to the exclusion of the current and imminent future needs of the entire European Community – the Supreme Administrative Court, in its judgment no. 1931 of 29 April 2008, held as follows.

It is evident that the major criterion of influence was that based on the capacity and resource potential of universities, which allowed for proper scientific training as required by EU legislation. As had previously been upheld by the Constitutional Court (judgment no. 393 of 1998), the right to higher levels of education, even for the most meritorious, depended on the availability of technical means and human resources, particularly in the study of sciences, which was both theoretical and practical. Indeed, EU legislation did not ban *numeri clausi*. European directives provided for the recognition of titles and degrees based on standards of minimum studies and guarantees of a real possession of the necessary knowledge to carry out a profession. However, they left it to individual States to determine the instruments, means and methods to fulfil the obligations set by those directives. The impugned criterion had less weight than the one mentioned above, and was indeed secondary. It would come into play in the unlikely event that availability was so abundant that it would be necessary to limit access to the profession to avoid saturating the market. With reference to a recommendation by the Health Ministry to limit the number of registered students (which formed the basis of the decision on the number of places available for the years 2006-07) the court considered that it was to be seen as a quantitative restriction not in view of the needs in society, but in the light of a need to ensure that specialised studies reached European standards. Given that the relevance of this criterion to the decision on the number of candidates to be registered each year had not been proven, and

because EU law did not provide for unlimited and unconditional access to education for students, it was not necessary to refer the matter to the ECJ.

22. According to the Supreme Administrative Court judgment no. 1855 of 2005, the time-limit of eight years indicated in decree no. 1592 of 1933 is not a prescriptive period which can be interrupted, but the maximum time before the expiry of the right (to attend the course).

### **C. Relevant European Union law**

23. Article 39 (ex Article 48) of Title III relates to the free movement of persons, services and capital of the Treaty establishing the European Community. It reads as follows:

“1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.”

24. Other relevant European Union texts include: Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice; Council Directive 93/16/EEC of 5 April 1993 on facilitating the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications; and Council Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 1 TO THE CONVENTION

25. The applicants complained of a breach of their right to education under Article 2 of Protocol No. 1 to the Convention, which provides as follows:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

26. The Government contested that argument.

#### A. Admissibility

27. The Government considered that the extraordinary remedy before the President of the Republic was a judicial remedy which the applicants could opt for as an alternative to proceedings before the regional administrative tribunals (the “TAR”). They considered that in the present case all the applicants had at their disposal and undertook that remedy to complain about the alleged breaches.

28. The applicants contended that proceedings before the TAR would be ineffective given constant jurisprudence to the effect that limited access to universities was compatible with the domestic, EU and Convention law. They relied particularly on judgments nos. 1931, 5418, 5542 of the Supreme Administrative Court of 2008, and judgment no. 1631 of the Supreme Administrative Court of 15 April 2010. The applicants later noted that the Government had conceded that all the applicants had exhausted domestic remedies.

29. The Court reiterates that Article 35 § 1 of the Convention requires that the only remedies to be exhausted are those that are available and sufficient to afford redress in respect of the breaches alleged. The purpose of Article 35 § 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, *inter alia*, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). However, an applicant is not obliged to have recourse to remedies which are inadequate or ineffective (see *Raninen v. Finland*, 16 December 1997, § 41, *Reports of Judgments and Decisions* 1997-VIII). It follows that the pursuit of such remedies will have consequences for the identification of the “final decision” and, correspondingly, for the calculation of the starting point for the running of the six-month rule (see, for example, *Kucherenko v. Ukraine* (dec.),

no. 41974/98, 4 May 1999, and *Prystavska v. Ukraine* (dec.), no. 21287/02, 17 December 2002).

30. The Court notes that the Government's submission to the effect that all the applicants undertook the remedy before the President of the Republic is incorrect, as it was only the first applicant who undertook such proceedings. Moreover, the Court reiterates that proceedings before the President of the Republic are considered as an extraordinary remedy which applicants are not required to pursue for the purposes of satisfying the requirements of Article 35 of the Convention (see *Nasalli Rocca v. Italy* (dec.), no. 8162/02, 31 March 2005).

31. However, the Court notes that, as it appears from the status of domestic jurisprudence (see Relevant domestic law and practice above), the matters at issue in the present case have repeatedly come before the domestic courts, which consistently rejected the claimants' requests. In these circumstances the Court can accept that an attempt to bring proceedings before the Regional Administrative Tribunals followed by an appeal to the Supreme Administrative Court had no prospects of success. Thus, in line with the Government's lack of an objection in this respect, the Court finds no reason to reject this part of the application for non-exhaustion of domestic remedies.

32. The same holds in respect of the subsidiary complaint of the eighth applicant.

33. The Court further notes that since the first applicant attempted the examination again in 2008 and 2009, no issue arises in respect of the six-month time-limit pursuant to her undertaking the above-mentioned extraordinary remedy.

34. Lastly, the Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## **B. Merits**

### *1. The parties' observations*

#### **(a) The applicants**

35. The applicants contended that the restriction applicable to admission for the courses of their choice, namely the basis for applying the *numerus clausus*, was contrary to the Constitution and EU law.

36. They further alleged that the aims pursued by the law were not legitimate or proportionate. In particular, while acknowledging the need to guarantee an appropriate level of skills for future professionals, they contested the two criteria established by Law no. 264/1999 and applicable to both public and private universities. Furthermore, they considered that the needs of the community could not be assessed only on the basis of the public sector, particularly given that the majority of professionals, especially in the dental field, worked in the private sector. Moreover, the assessment was totally local and did not take into consideration the possibility that persons studying in Italy might want to practise in another country.

37. The applicants explained that the number of places for individual universities was established by the Ministry of Universities on a regional basis according to the needs of the area. Recently, however, the Italian institutions had realised that the limited access had created a lack of professionals to the extent that certain regions had stated that their hospitals would soon be short of doctors and dentists. They cited as an example (as reported by the press) the region of Lombardy, which had estimated that by 2015 it would have lost 40 % of the current workforce (doctors and dentists) owing to retirement. The region had asked the Government to abolish the current system of limited access, but the Italian Ministry of Health had considered that there were already more doctors than necessary in Italy. The applicants considered that the extent to which a sector was saturated was not a legal reason to impede operators from accessing the market. The applicants opined that the real purpose of the restrictions was to protect doctors' and dentists' interests by restricting competition in the sector, a purpose in conflict with EU law. In particular, they contested the application of those restrictive measures to private universities, which could otherwise increase their admission numbers without causing an extra financial burden on the State. Thus, the current system denied the applicants access to an education of their choice, even against payment to a private university or, if necessary, to a State one. This amounted to restricting the right to education without a valid reason. In this respect, the applicants noted that in the Belgian linguistics case the Court had found the impugned measure to be proportionate in view of the fact that it did not prevent those applicants from enrolling (at their own expense) in private French language schools in the region.

38. The applicants noted that the Court was being called on to determine the compatibility with the Convention of the measures at issue and not the facts of the case examined by the national courts. They considered that the measure, namely the combination of the entrance examination and the restriction based on "society's need for a particular profession" (and not the *numerus clausus per se*), was not proportionate given the aims pursued.

39. They further contended that the existence of a professional exam aiming to assess the adequate preparation of doctors and dentists following their tertiary studies made it unnecessary to restrict prior access to university. Moreover, the entrance exam consisted of a multiple choice questionnaire and was therefore only adequate to assess scientific notions and not one's natural disposition. They contended that it was random, inadequate and tainted by numerous episodes of corruption and errors in formulating questions. They contended that most of the applicants had obtained a distinction in their other degrees and their failure to successfully pass the entrance examination was not attributable to their lack of preparation but to the low numbers established. They cited for example the dentistry exam in 2010 where, for every place available, there were 26 candidates.

**(b) The Government**

40. The Government submitted that in principle it was not incompatible with Article 2 of Protocol No. 1 to limit access to university studies, bearing in mind available resources and the aim of achieving high levels of professionalism, particularly in respect of critical professions such as those in the medical field. Thus, the application of a *numerus clausus* could not breach the said provision if it were reasonable and in the general interest of society. The matter fell within the wide margin of appreciation of the State.

41. In the present case the State had opted for a selection process based on an aptitude test, which provided for an objective assessment allowing the best candidates to benefit from the limited places available. They further considered that the AA's recommendation did not concern the general aspects justifying the measure. Moreover, the Government submitted that it was not for the Court to examine the facts which lead the domestic courts to take one particular decision as opposed to another.

42. The Government further considered that the eighth applicant's situation was in accordance with pre-established regulations.

*2. The Court's assessment*

**(a) General principles**

43. The Court reiterates that the guarantees of Article 2 of Protocol No. 1 apply to existing institutions of higher education within the member States of the Council of Europe and that access to any institution of higher education existing at a given time is an inherent part of the right set out in the first sentence of Article 2 of Protocol No. 1 (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, §§ 134-42, ECHR 2005-XI, and *Mürsel Eren v. Turkey*, no. 60856/00, § 41, ECHR 2006-II).

44. In spite of its importance, this right is not, however, absolute, but may be subject to limitations; these are permitted by implication since the

right of access “by its very nature calls for regulation by the State” (see “*Case relating to certain aspects of the laws on the use of languages in education in Belgium*” v. *Belgium* ((Merits), 23 July 1968, Series A no. 6)). Admittedly, the regulation of educational institutions may vary in time and in place, *inter alia*, according to the needs and resources of the community and the distinctive features of different levels of education. Consequently, the Contracting States enjoy a certain margin of appreciation in this sphere, although the final decision as to the observance of the Convention’s requirements rests with the Court (see *Leyla Şahin*, [GC], cited above, § 154 and, *Ali v. the United Kingdom*, no. 40385/06, § 53, 11 January 2011).

45. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not bound by an exhaustive list of “legitimate aims” under Article 2 of Protocol No. 1. Furthermore, a limitation will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Leyla Şahin*, [GC], cited above, § 154).

46. The Court notes that Article 2 of Protocol No. 1 in any event permits limiting access to universities to those who duly applied for entrance and passed the examination (see *Lukach v. Russia* (dec.), no. 48041/99, 16 November 1999).

**(b) Application to the present case regarding all the applicants**

47. In the present case, the Court accepts that the restrictions chosen by the Italian State, namely the entrance examination and the *numerus clausus per se*, were foreseeable, on the basis of Law no. 127/1997 and Law no. 264/1999 enacted later, giving further details as to the application of the *numerus clausus*.

48. The Court further considers that these restrictions conform to the legitimate aim of achieving high levels of professionalism, by ensuring a minimum and adequate education level in universities running in appropriate conditions, which is in the general interest.

49. As to the proportionality of the restrictions, firstly in relation to the entrance examination, the Court notes that assessing candidates through relevant tests in order to identify the most meritorious students is a proportionate measure to ensure a minimum and adequate education level in the universities. With regard to the content of the tests, albeit in a different context, the Court has held in *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (7 December 1976, § 53, Series A no. 23) that the setting and planning of the curriculum fall in principle within the competence of the Contracting States and it is not for the Court to rule on such matters.

Similarly, the Court is not competent to decide on the content or appropriateness of the tests involved.

50. As to the *numerus clausus*, the Court notes that the applicants' emphasis is on the basis used for applying the *numerus clausus*, namely the two criteria referring to a) the capacity and resource potential of universities, and b) society's need for a particular profession - the Court considers that a balance must be reached between the individual interest of the applicants and those of society at large, including other students attending the university courses. The Court notes that the two criteria are in line with the Court's case-law holding that regulation of the right to education may vary according to the needs and resources of the community and of individuals (see *Belgian linguistics case*, cited above). It further notes that, in the present case, such restrictions need to be seen in the context of the highest level of education, namely tertiary education.

51. As to the first criterion, resource considerations are clearly relevant and undoubtedly acceptable – a notion which follows logically from the interpretation given to the provision, namely that the right to education entails access to any institution of higher education “existing” at a given time (*ibid.*). The Court reiterates that the Convention lays down no specific obligations concerning the extent of the means of instruction and the manner of their organisation or subsidisation (see *X v. the United Kingdom*, no. 8844/80, Commission decision of 9 December 1980, DR 23, p. 228, and *Georgiou v. Greece* (dec.), no. 45138/98, 13 January 2000). This implies a right to access to education only in as far as it is available and within the limits pertaining to it. The Court notes that such limits are often dependent on the assets necessary to run such institutions, including, *inter alia*, human, material and financial resources with the relevant considerations, such as the quality of such resources. This is relevant particularly when the universities are State-run.

52. In so far as the applicants complained that the same restrictions applied to private universities and therefore to instruction they were willing to pay for, it is undeniable that the resources *vis-à-vis* theoretical and practical education would in fact be largely dependent upon the private universities' human, material and financial capital and therefore on that basis it would be possible to have higher admission numbers without causing an extra burden on the State and its structures. However, it is not irrelevant that the private sector in Italy is partly reliant on State subsidies. More importantly, in the present circumstances the Court cannot find disproportionate or arbitrary the State's regulation of private institutions as well, in so far as such action can be considered necessary to prevent arbitrary admission or exclusion and to guarantee equal treatment of persons. It is recalled that the fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, without distinction (see *Leyla Sahin*, [GC], cited above, § 153).

Accordingly, the State has an obligation to regulate them to ensure the Convention is complied with. In particular, the Court considers that it is justified for the State to be rigorous in its regulation of the sector – especially in the fields of study in question where a minimum and adequate education level is of utmost importance – to ensure that access to private institutions should not be available purely on account of the financial ability of candidates, irrespective of their qualifications and propensity for the profession.

53. Furthermore, the Court recognises that overcrowded classes can be detrimental to the effectiveness of the education system in a way which hinders the specific training experience.

54. Thus, bearing in mind the competing interests, the Court considers that the first criterion imposed is both legitimate and proportionate.

55. As to the second criterion, namely, society's need for a particular profession, the Court considers that its interpretation is indeed restrictive. It only has a national outlook pertaining, moreover, to the public sector, thus ignoring any relevant needs originating in a wider EU or private context. Furthermore, it may be considered short-sighted in so far as it does not appear that serious consideration is given to future local needs.

56. However, in the Court's view such a measure is nevertheless balanced in so far as the Government are entitled to take action with a view to avoiding excessive public expenditure. The Court observes that the training of certain specific categories of professionals constitutes a huge investment. It is therefore reasonable for the State to aspire to the assimilation of each successful candidate into the labour market. Indeed, an unavailability of posts for such categories due to saturation represents further expenditure, since unemployment is without doubt a social burden on society at large. Given that it is impossible for the State to ascertain how many graduates might seek to exit the local market and seek employment abroad, the Court cannot consider it unreasonable for the State to exercise caution and thus to base its policy on the assumption that a high percentage of them may remain in the country to seek employment there. In the Court's view, therefore, the second criterion is also proportionate.

57. Lastly, the Court notes that the applicants were not denied the right to apply to any other course in which they might have expressed an interest (see, *mutatis mutandis*, *Lukach*, (dec.) cited above), and in respect of which they had the requisite qualifications. Nor have they been denied the opportunity to pursue their studies abroad in line with their possible wish to pursue careers abroad. Given that it does not appear that there is a limit on the number of times a candidate can sit the test, the applicants still have the opportunity to be successful and gain access to the course of their first choice.

58. In conclusion, the Court considers that the measures imposed were not disproportionate and that in applying those measures the State did not exceed its margin of appreciation.

59. It follows that there has not been a violation of Article 2 of Protocol No. 1 to the Convention.

**(c) Application to the present case regarding Mr Marcuzzo**

60. In so far as it can be said that the eighth applicant's claim goes further than that argued above, in that he was made to re-sit the entrance examination after having been excluded from the course following his eight-year absence, the Court notes that it has not been argued that the measure was unforeseeable. It further considers that it is not unreasonable to exclude from a course of studies a student who has failed to sit examinations for eight consecutive years, particularly in view of the fact that a *numerus clausus* applies to the university course in question. In consequence, the Court finds that the measure pursued a legitimate aim and in the light of the State's entitlement to regulate the right to education, the measure was proportionate. In fact it achieved a balance between the interests of the applicant on the one hand and those of other persons who wished to enter the said course and the needs of the community at large on the other hand.

61. It follows that there has not been a violation in respect of this part of the complaint related to the eighth applicant.

**II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION**

62. The first applicant complained about the unfairness of the proceedings, in particular their outcome, the fact that the domestic court failed to request a referral to the ECJ to ensure compliance of the measures with EU law, and the lack of reasons, in that the decision of 28 April 2009 had not replied to all her arguments. She invoked Article 6 § 1 of the Convention, which in so far as relevant, provides as follows:

“1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

63. The Court notes that the first applicant, in lodging a special appeal with the President of the Republic in 2007, did not institute contentious proceedings falling within the scope of Article 6 of the Convention (see *Nardella v. Italy* (dec.), no. 45814/99, ECHR 1999-VII, and *Nasalli Rocca* (dec.), cited above), and therefore the provision is not applicable.

64. It follows that the complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4 of the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

65. The applicants (except the first applicant) complained that they had been discriminated against under Article 14, which provides as follow:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

66. The applicants alleged that freshly graduated students had more chance of passing knowledge-based examinations, in particular those based on high school syllabi, and that therefore the system was discriminatory on grounds of age.

67. The Court observes that university is a knowledge-based institution, and therefore it cannot be considered unreasonable or arbitrary to set knowledge-based examinations. Moreover, it has not been shown that persons of a certain age have found it more difficult to pass the examination. The complaint is therefore unsubstantiated. Lastly, the Court considers that the subjective perception an applicant may have of an exam cannot in itself raise an issue under Article 14.

68. It follows that the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

### FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints concerning Article 2 of Protocol No. 1 to the Convention admissible and the remainder of the applications inadmissible;
2. *Holds* by 6 votes to 1 that there has not been a violation of Article 2 of Protocol No. 1 to the Convention;
3. *Holds* unanimously that there has not been a violation of Article 2 of Protocol No. 1 to the Convention in respect of the eighth applicant's further complaint.

Done in English, and notified in writing on 2 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos  
Deputy Registrar

Danutė Jočienė  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Judge Pinto de Albuquerque is annexed to this judgment.

D.J.  
F.E.P.

## ANNEX

| Application nos. | Date of introduction | Name, DOB, residence       |
|------------------|----------------------|----------------------------|
| 25851/09         | 18/05/2009           | <b>Claudia TARANTINO</b>   |
|                  |                      | 22/07/1988                 |
|                  |                      | Palermo                    |
|                  |                      |                            |
| 29284/09         | 02/11/2009           | <b>Giuseppe REITANO</b>    |
|                  |                      | 30/01/1973                 |
|                  |                      | Catania                    |
|                  |                      |                            |
| 64090/09         | 16/11/2009           | <b>Laura AZIZ</b>          |
|                  |                      | 22/10/1985                 |
|                  |                      | Milano                     |
|                  |                      |                            |
|                  |                      | <b>Maurizio BRANCADORI</b> |
|                  |                      | 01/06/1966                 |
|                  |                      | Macerata                   |
|                  |                      |                            |
|                  |                      | <b>Massimo CROSIA</b>      |
|                  |                      | 21/01/1969                 |
|                  |                      | Piacenza                   |
|                  |                      |                            |
|                  |                      | <b>Massimo FILETTI</b>     |
|                  |                      | 11/12/1967                 |
|                  |                      | Catania                    |
|                  |                      |                            |
|                  |                      | <b>Pasqualino LA MELA</b>  |
|                  |                      | 24/04/1969                 |
|                  |                      | Catania                    |
|                  |                      |                            |
|                  |                      | <b>Carmelo MARCUZZO</b>    |
|                  |                      | 23/11/1974                 |
|                  |                      | Siracusa                   |
|                  |                      |                            |

## PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

The *Tarantino and Others* case deals with a state-imposed *numerus clausus* system for obtaining access to State or private university studies in certain areas such as dentistry and medicine. The dispute revolves around the disproportionate criteria used by the respondent Government to regulate the *numerus clausus*, but underlying this question of proportionality are fundamental issues such as the scope and implications of the right to university education and the States Parties' margin of appreciation in university regulation. With all due respect, I cannot agree with the majority, since I find that the criteria used by the respondent State were indeed disproportionate. With regard to the applicants' other complaints, I concur with the majority.

### University education as a human right

The right to university education is a human right. In spite of the negative formulation of Article 2 of Protocol No. 1 to the European Convention on Human Rights (the Convention), States Parties have a positive obligation to provide not only access to the existing schools and educational establishments and official recognition of completed studies<sup>1</sup>, but also to promote access to education for every child, if necessary by creating additional educational possibilities. This broad international obligation is also supported on Article 28 of the UN Convention on the Rights of the Child (193 States Parties, including the respondent State, which ratified it in 1991 without reservations), read in conjunction with Article 26 (1) of the Universal Declaration of Human Rights and Article 13 of the International Covenant on Economic, Social and Cultural Rights (160 States Parties, including the respondent State, which ratified it in 1978 without reservations)<sup>2</sup>. The States Parties' obligation corresponds to a

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<sup>1</sup> Case “*relating to certain aspects of the laws on the use of languages in education in Belgium*” v. *Belgium* (Merits), Series A, no. 6, § 42.

<sup>2</sup> See also CESR General Comment No. 13 on The right to education, E/C.12/1999/10, 8 December 1999, para. 6, stressing that “functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party”, which implies an enhanced obligation to set up institutions and organise programmes where no sufficient offer is available. Moreover, in a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 137, ECHR 2005-XI).

human right to education in the public education system<sup>3</sup>, including State universities<sup>4</sup>.

In fact, States Parties have power to regulate access to education and *a fortiori* to university studies<sup>5</sup>, but this regulation is subject to the supervision of the European Court of Human Rights (the Court), as in the case of refusal to enter university for lack of timely proof of special requirements<sup>6</sup>, refusal to readmit a student to repeat the first year of university studies on account of failure in the first-year examinations and a poor attendance record at compulsory classes<sup>7</sup>, suspension or expulsion from university or a similar higher education institution<sup>8</sup>, annulment of university entrance exam results<sup>9</sup>, and prohibition to sit a university exam or the forced interruption of studies due to the enforcement of a prison sentence<sup>10</sup>.

Since the right to education comprises the freedom to provide for education, Article 2 of Protocol No. 1 also covers the right to establish and run private schools and universities<sup>11</sup>. Although this right does not imply a positive obligation on the State to fund private schools and universities<sup>12</sup>, it does impose a negative obligation not to discriminate against private schools and universities, i.e. not to impose unjustified constraints, restrictions or prohibitions in comparison to State schools and universities.

<sup>3</sup> *Campbell and Cosans*, Series A, no. 48, § 33; and *Timishev v. Russia*, no. 57762/00, §§ 63-67, 13 December 2005.

<sup>4</sup> *Leyla Sahin*, cited above, § 137. See also para. 17 of CESR General Comment No. 13, cited above: “Higher education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms at all levels.”

<sup>5</sup> *Leyla-Sahin*, cited above, § 136.

<sup>6</sup> *Lukach v. Russia* (dec), no. 48041/99, 16 November 1999.

<sup>7</sup> *X v. the United Kingdom*, no. 8844/80, Commission decision of 9 December 1980.

<sup>8</sup> *İrfan Temel and Others v. Turkey*, no. 36458/02, 3 March 2009, *Yanasik v. Turkey*, no. 14524/89, Commission decision of 06 January 1993, and *Sulak v. Turkey*, no. 24515/94, Commission decision of 17 January 1996.

<sup>9</sup> *Mursel Eren v. Turkey*, no. 60856/00, 7 February 2006.

<sup>10</sup> *Georgiou v. Greece* (dec.), no. 45138/98, 13 January 2000, and *Durmaz, Isik, Unutmazans Sezal v. Turkey* (dec.), nos. 46506/99, 46569/99, 46570/99 and 46939/99, 4 September 2001.

<sup>11</sup> *Costello-Roberts v. the United Kingdom*, Series A, no. 247, § 27, and *Kjeldsen and Others v. Denmark*, Series A, no. 23, § 50. See also Article 13 (4) of the ICCESR, which affirms “the liberty of individuals and bodies to establish and direct educational institutions”, provided the institutions conform to the educational objectives set out in Article 13 (1) and certain minimum standards.

<sup>12</sup> *Verein Gemeinsam Lernen v. Austria*, no. 23419/94, Commission decision of 6 September 1995, on the funding of private non-religious schools, and, previously, *X v. the United Kingdom*, no. 7527/76, Commission decision of 5 July 1977, and *X. and Y. v. the United Kingdom*, no. 9461/81, Commission decision of 7 December 1982, on the funding of private religious schools. See also para. 54 of CESR General comment No. 13, cited above.

### **The State's margin of appreciation in university regulation**

Governments enjoy a certain discretion in exercising their regulatory powers over State schools<sup>13</sup>. States Parties may impose a mandatory period of attendance at State school<sup>14</sup>, but State schools have an obligation to provide teaching of national languages<sup>15</sup>, to convey knowledge in an objective, critical and pluralistic manner<sup>16</sup>, and to organise non-discriminatory classes<sup>17</sup> and a safe environment, free of any form of ill-treatment<sup>18</sup>. Governments may not exercise the same degree of control in respect of private schools as that applied to State schools. While State schools enjoy a certain degree of institutional autonomy, in line with each State's educational policy, private schools must enjoy a greater degree of autonomy.

Institutional autonomy includes, as a minimum, establishment of the academic curriculum and control over the admission, evaluation, suspension and expulsion of students, the selection and promotion of academic and administrative staff and the budget and financial organisation of the institution<sup>19</sup>. As a crucial guarantee of academic freedom, institutional

<sup>13</sup> *Lautsi v. Italy* (GC), no. 30814/06, 18 March 2011.

<sup>14</sup> *Konrad v. Germany* (dec.), no. 35504/03, 11 September 2006.

<sup>15</sup> *Cyprus v. Turkey* (GC), no. 25781/94, §§ 273-280, 10 May 2001.

<sup>16</sup> *Folgero and Others v. Norway* (GC), no. 15472/02, 29 June 2007, *Hasan and Eylem Zengin v. Turkey*, no. 14448/04, 9 October 2007, and *Kjeldsen and Others*, cited above, § 50. See also CESR General Comment No. 13, cited above, para. 28, which refers to teaching in an “unbiased and objective way, respectful of the freedoms of opinion, conscience and expression”, and *Keyishian v. Board of Regents*, 385 US 589 (1967), and the inspiring words of Justice Brennan on academic freedom: “*Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.*”

<sup>17</sup> *D.H. and Others v. Czech Republic*, no. 57325/00, 13 November 2007, and paras. 31-34, and 59 of the CESR General Comment No. 13, cited above.

<sup>18</sup> *Campbell and Cosans*, cited above, § 41.

<sup>19</sup> See the 2009 Lisbon Declaration of the European University Association, which required that “each university should define and pursue its mission, and thus collectively provide for the needs of individual countries and Europe as a whole”. In the light of this mission, institutional autonomy should include “academic autonomy (curricula, programmes and research), financial autonomy (lump sum budgeting), organisational autonomy (the structure of the university) and staffing autonomy (responsibility for recruitment, salaries and promotion)”. In the same vein, paragraph 40 of CESR General Comment No. 13, cited above, states: “The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities.” On institutional autonomy of universities, see also Justice Powell's opinion on a racially sensitive admission policy in *Regents of the University of California v. Bakke*, 438 US 265, 312 (1978), Justice Stevens' opinion on university policy to deny students the use of campus facilities for religious purposes in *Widmar v. Vincent*, 454 US 263, 278 (1981), Justice Stevens' opinion, for the unanimous court, on the power to deny readmission of a student following failure in some examinations in *Regents of University of Michigan v. Ewing*, 474 US 214 (1985), Justice

autonomy is simultaneously the best insurance of the freedom to provide for education and the right to education<sup>20</sup>. Were the Government or other public authority to intervene in the regulation of any of these aspects, either by imposing *a priori* certain rules or quashing *a posteriori* rules or decisions approved by private schools, this intervention would have to comply with strict requirements of necessity and proportionality<sup>21</sup>. Thus, the States Parties' margin of appreciation is wider with regard to the regulation of State schools and narrower with regard to that of private schools. An even narrower margin of appreciation applies *a fortiori* to higher education, where institutional autonomy plays a pivotal role<sup>22</sup>. Conversely, the more the State funds private schools and universities, the wider its margin of appreciation.

### **The application of the Convention standard to this case**

The Italian Government establishes the *numerus clausus* to obtain access to medicine and dentistry studies in State and private universities, on the basis of two criteria: the capacity and resource potential of universities and society's need for a particular profession. In reality, the second criterion refers to the needs of the national public health sector. These criteria result from the work of a task force composed, *inter alia*, of representatives from the National Federation of Doctors and the Chamber of Doctors and

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Souter's opinion, with which Justices Stevens and Breyer agreed, on mandatory fees to fund student associations' activities in *Board of Regents of University of Wisconsin v. Southworth*, 529 US 217 (2000), and Justice O'Connor's opinion on a racial affirmative-action programme in *Grutter v. Bollinger*, 539 US 306, 329 (2003).

<sup>20</sup> In this respect, the principle of the institutional autonomy of universities is instrumental both for the interpretation and application of laws and for the resolution of competing claims between governments, universities, scholars, administrative staff and students.

<sup>21</sup> First, the interference must be foreseen by a law. Second, the interference must be necessary in the sense that it adequately advances the "social need" (social interests and rights and freedoms of others) pursued and reaches no further than necessary to satisfy the said "social need". Third, the interference must be proportionate, meaning that a fair balancing of the competing rights, freedoms and interests has been achieved, whilst ensuring that the essence (or minimum core) of the right or freedom is respected (*Belgian Linguistic cases*, cited above, § 5 of Law part, I, B). The same line of argument was established long ago in *Trustees of Dartmouth College v. Woodward*, 17 US 518 (1819). In the *Hochschulurteil* judgment (BVerfGE 35, 79), the German Constitutional Court also held that academic freedom could only be restricted to safeguard other constitutional values. In its judgment of 11 September 2007 (case C-76/05), the ECJ confirmed that courses given by educational establishments essentially financed by private funds, notably by students and their parents, constitute services within the meaning of the TFEU, and any restrictions on access to a private school established in another Member State had to be justified.

<sup>22</sup> Underlining the "central importance of institutional autonomy, tempered by a recognition that this brings with it heavy responsibilities" in the European Higher Education Area, see the European Association for Quality Assurance in Higher Education (ENQA) report on "Standards and Guidelines for Quality Assurance in the European Higher Education Area", third edition, 2009, Helsinki, p. 11.

Dentists. The number of places for individual universities is established on a regional basis. Generally speaking, the increase in the number of places assigned to a specific university offset by the decrease in the number of places assigned to other universities in the same region.

The first criterion is justified by the respondent Government on the basis of the need to ensure high quality standards in university education and a high degree of professionalism in medical and dentistry classes, namely guaranteeing a balanced ratio of students-academic staff, rational use of the available material resources and controlled access to trainee posts at public hospitals and subsequently to the labour market. Hence, *numerus clausus* is presented as a magic formula to avoid overcrowded university buildings, with too few professors for too many students, who would not then have a chance to obtain practical training before entering the labour market.

The second criterion is justified by the respondent Government as corresponding to the purpose of avoiding excessive public expenditure at present and in the future, since teaching and training medical doctors and dentists implies significant expenditure for the present generation and any future saturation of the labour market would imply further expenditure, given the social charges associated with unemployment.

Unfortunately both criteria are groundless, since they pertain more to fiction than to reality.

### **Capacity and resource potential of universities as a criterion of *numerus clausus***

The respondent Government did not provide the Court with any data on the capacity and resource potential of universities that could justify the *numerus clausus* established in the relevant years of 2007-2009. Nor did the respondent Government advance any reasons for such *numerus clausus* to be applied to private universities.

In fact, ministerial decisions with regard to *numerus clausus* do not present any technical motivation, and instead result from discretionary choices<sup>23</sup>. There is simply no objective basis for the political choice, which remains free from any genuinely founded empirical constraint.

Worse still, this criterion ignores the simple fact that private universities are largely independent of State funding in Italy, and could thus increase the number of available places at their own expense. As explained above, the respondent Government enjoy a very narrow margin of appreciation in

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<sup>23</sup> The Government do not even feel constrained to follow the numbers suggested by each university on its own enrolment capacity (see the example mentioned by the Italian Anti-Trust Authority in its report of 21 April 2009, where it refers to *scelte di opportunità* and *dalle risposte dei ministeri non emergono le motivazioni tecniche concernenti tale riduzione*).

establishing any limitations on private universities<sup>24</sup>, and the Court was not informed of any substantive reason that could justify such a serious interference with the right to establish private universities and their institutional autonomy. Thus, Italian private universities have the right to establish their own limits to enrolment, taking into account their human, material and financial resources. In other words, State-imposed *numerus clausus* on private universities impinges gravely on the freedom to provide for education, in so far as it prevents private universities which have an adequate material infrastructure and sufficient staff capacity from being able to increase places at their own cost, and also on the right to education, in that it denies university admission to persons who are prepared to fund the cost of this service from their own pocket<sup>25</sup>. Hence, the impugned system of *numerus clausus* is already disproportionate on the basis of the first criterion used by the respondent Government.

**Society's need for a particular profession as a criterion of *numerus clausus***

The respondent Government interprets society's need as the need experienced by the Italian public health sector. This criterion aggravates the disproportionality of the respondent State's interference with the right to education, since it ignores the fact that the Italian health sector also contains a private sector, with its own needs<sup>26</sup>. This omission is particularly censurable in the case of dentistry, since the vast majority of dentists work in the private sector<sup>27</sup>. Moreover, this criterion neglects the fact that Italy is

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<sup>24</sup> This does not preclude, but on the contrary, presupposes a rigorous quality assessment of universities, including private universities, following, for example, the general guidelines established in the 2003 Graz Declaration of the European University Association, the 2004 'Code of Good Practice' of the European Consortium for Accreditation, and the "Standards and Guidelines for Quality Assurance in the European Higher Education Area", drafted by the European Association for Quality Assurance in Higher Education (ENQA) in cooperation with European University Association (EUA), the European Association of Institutions in Higher Education (EURASHE), and the National Unions of Students in Europe (ESIB) and endorsed by the Ministers of Education of the Bologna signatory States at the Bergen meeting of May 2005.

<sup>25</sup> This was exactly the Court's argument in the *Belgian Linguistics Case*, cited above, § 7 of Law part, II, 7. One of the applicants claimed that his right to education was violated because in the Dutch-unilingual region, where a French-speaking minority was present, there were Dutch-speaking State schools, but none that were French-speaking. That claim was rejected by the Court precisely because there was nothing to prevent the applicant from enrolling at his own expense in one of the private French-language schools which existed in the Dutch-unilingual region.

<sup>26</sup> It is very doubtful that a rigorous objective assessment of the needs of the health market can ever be achieved, especially if one takes into account the needs of the private sector in all its aspects.

<sup>27</sup> As the Italian Anti-Trust Authority underlined, in its report of 21 April 2009, "*la massima parte delle prestazioni odontoiatriche in Italia non viene fornita dagli odontoiatri del Sistema Sanitario Nazionale..., ma privatamente, ossia dagli odontoiatri liberi*

a member of a wider market of health services, namely the European Union, within which professionals are entitled to move and work freely<sup>28</sup>. Furthermore, this criterion is in essence contradictory to the developing European Higher Education Area, through the Bologna process<sup>29</sup>, which aims not only at greater institutional autonomy for universities, in the sense that the primary responsibility for quality assurance in higher education lies with each institution itself<sup>30</sup>, but also at widening overall participation and particularly increasing the participation of under-represented groups in higher education<sup>31</sup>. In addition, this criterion runs counter to the spirit of the 1997 Lisbon Recognition Convention, which is at the basis of the Bologna

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*professionisti*”. The same could be stated, for example, of architects, veterinary surgeons or nurses.

<sup>28</sup> In its judgment of 13 February 1985 (case 293/83), the ECJ held for the first time that a candidate to a higher art education institution had a right of access to education independent of any demonstration that he or she could derive other rights from the Treaty. In its judgment of 27 January 1986 (case 24/86), the ECJ enlarged the ambit of its remit, by affirming that university studies such as veterinary studies fell within the scope of the Treaty in so far as the final academic examination directly provides the required qualification for a particular profession, trade or employment or the studies in question provide specific training and skills needed by the student for the pursuit of a profession, trade or employment, even if no legislative or administrative provisions make the acquisition of that knowledge a prerequisite for that purpose. In its judgment of 12 June 1986 (joined cases 98, 162 and 258/85), the ECJ decided that no provision of Community law requires the member States to limit the number of students admitted to medical faculties by introducing a *numerus clausus* system. Recently, in its judgment of 13 April 2010 (case C-73/08), the ECJ ruled that Articles 18 and 21 of the TFEU preclude national legislation which limits the number of students not regarded as resident in Belgium who may enrol for the first time in medical and paramedical courses at higher education establishments, unless the national courts find that that legislation is justified in the light of the objective of protection of public health. Only with “solid and consistent data” could the Member State demonstrate that there was such a risk to public health. In the absence of this risk, the free movement of students requires ample opportunity for mobile students to gain access to university education.

<sup>29</sup> I refer evidently to the process started with the 1998 Sorbonne Joint Declaration on harmonisation of the architecture of the European higher education system, adopted by the four Education Ministers of France, Germany, Italy and the United Kingdom, which was followed by the 1999 Bologna Ministerial Declaration. At the outset, this process basically envisaged greater mobility of students between cycles of higher education (bachelor, master and doctorate) and easier transferability of professionals through diploma recognition. Most of the Bologna objectives are today to be found in Article 165 of the Treaty on the Functioning of the European Union, in spite of the fact that the Bologna process resulted from a procedure of regional intergovernmental cooperation and was not pursued in the form of a legislative measure by the Union.

<sup>30</sup> The 2003 Berlin Ministerial Declaration, which accepted that institutions need to be empowered to take decisions on their internal organisation and administration, was reinforced by the above-mentioned 2009 Lisbon Declaration of the European University Association.

<sup>31</sup> See the 2009 Leuven/Louvain-La-Neuve Ministerial Declaration and the 2011 Aarhus Declaration of the European University Association.

process<sup>32</sup>. From a wider perspective, this criterion goes against the States' obligation to make higher education equally accessible to all, on the basis of merit, as stated in Article 13 (2) (c) of the International Covenant on Economic, Social and Cultural Rights<sup>33</sup> and Article 26 (1) of the Universal Declaration on Human Rights<sup>34</sup>. The ultimate criterion for assessing candidates is their merit, not the market's needs. Finally, this criterion is fundamentally unfair, inasmuch as it impedes a new entrant to the market with an obstacle justified by the alleged needs of that market. A new entrant may succeed in making his or her way through ability and hard work, and may thus prosper where others do not. In fact, the unfortunate practical outcome of the current *numerus clausus* system has been to restrict competition between professionals in the health field and to keep the health market rigid and ineffective, dependent either on the State offer or on services with artificially high health fees<sup>35</sup>. For potential students, the sad result has been to drive them to study abroad, or at least those with the necessary means to do so<sup>36</sup>.

The arbitrariness of the legal regime as practised results from the simple fact that it has served no practical purpose other than to ensure the advantage of those professionals already working in the health sector. No better evidence of this purpose can be provided than the participation of

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<sup>32</sup> The Convention on the Recognition of Qualifications concerning Higher Education in the European Region, the so-called Lisbon Recognition Convention, was approved within the framework of the Council of Europe and before the start of the Bologna process, but the Bologna process has included ratification of this convention as one of its purposes. In fact, it has been said that the Lisbon Ratification Convention is the only legally binding instrument of the entire Bologna process. This Convention requires States Parties to recognise the qualifications issued by other Parties meeting the general requirements for access to higher education in those Parties for the purpose of access to programmes belonging to their higher education systems, unless a substantial difference can be shown between the general requirements for access in the Party in which the qualification was obtained and in the Party in which recognition of the qualification is sought. According to the Explanatory Report, the general principle in assessing whether there is a substantial difference between the two qualifications concerned should be that Parties and higher education institutions are "encouraged to consider, as far as possible, the merits of the individual qualifications".

<sup>33</sup> See also CESR General Comment No. 13, cited above: "According to Article 13 (2) (c), higher education is not to be "generally available", but only available "on the basis of capacity". The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience."

<sup>34</sup> This Article refers to the "merit", not to the "capacity" of candidates, but the meaning is the same: "higher education shall be equally accessible to all on the basis of merit".

<sup>35</sup> This diagnosis is not mine. It is the fruit of the detailed report of the Italian Anti-Trust and Competition Authority, of 21 April 2009.

<sup>36</sup> On the situation of Italian students who not enrolled abroad, citing financial insecurities as an obstacle to such enrolment in the years 2009/10, see Education, Audiovisual and Culture Executive Agency, "The European Higher Education Area in 2012: Bologna Process Implementation Report", 2012, Brussels, pp. 167-168.

professional associations in the task force that discusses and prepares the admission quotas, which constitutes a clear instance of conflict of interest<sup>37</sup>.

### Conclusion

Quoting from a statement of South African scholars against a governmental restrictive admission policy, Justice Frankfurter stated that “*It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.*”<sup>38</sup> In other words, institutional autonomy is a necessary condition for the individual freedom to provide for higher education and the individual right to higher education.

Both in their design and practice, the criteria established by the respondent Government for the *numerus clausus* system have proved groundless and even arbitrary in the light of these rights and freedoms. Hence, the interference with the applicant’s right to education is disproportionate, and Article 2 of Protocol No. 1 has been breached.

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<sup>37</sup> As the Italian Anti-Trust Authority also stressed in the above-mentioned report, referring to this situation with “*perplexità sotto il profilo concorrenziale... potrebbe essere intrinsecamente portatore di interessi confliggenti*”.

<sup>38</sup> In his famous concurring opinion in *Sweezy v. New Hampshire*, 354 US 234 (1957).