



Right to Education

UNESCO global thematic expert consultation - Rethinking merit Briefing note

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May 2022

To start, it is important to recall that international human rights law recognises the right to education for everyone based on the fundamental rights to equality and non-discrimination. States have the obligation to make all possible efforts to realise the right to education at all levels. While they have the obligation to ensure free primary education to all, at the other levels, the introduction of free education can be progressive, international human rights law recognising the financial constraints states may face in realising the right to education for all at all levels at the same time. However, let's stress that states have the immediate obligation to take steps toward the full realisation of free higher education. They must allocate the maximum of their available resources to this aim and progressively increase them. This needs to be highlighted and taken into consideration when rethinking the notion of 'merit'.

This term is used in the Universal Declaration of Human Rights (1948) which states in its article 26 that 'higher education shall be equally accessible to all on the basis of *merit*.' The UNESCO Convention against Discrimination in Education adopted later (1960), the International Covenant on Economic, Social and Cultural Rights (1966) and the Convention on the Rights of the Child (1989) use the term 'capacity'. The Cambridge Dictionary defines 'merit' as 'the quality of being good or deserving praise'¹ and 'capacity' as 'someone's ability to do a particular thing'². It would be interesting to look at the preparatory works of

¹ In French, the Larousse Dictionary defines '*mérite*' as '*ce qui rend quelqu'un (ou sa conduite digne d'estime, de récompense, eu égard aux difficultés surmontées*' ou '*l'ensemble des qualités intellectuelles et morales particulièrement dignes d'estime*'.

² In French, the Larousse Dictionary defines '*capacité*' as '*l'aptitude de quelqu'un dans tel ou tel domaine*'.

these treaties to see why the drafters chose these slightly different terms. In my view, 'capacity' seems to be more 'objective' than 'merit'. According to the UN Committee on Economic, Social and Cultural Rights, which gave an interpretation of the right to education as defined in the International Covenant on Economic, Social and Cultural Rights, 'the "capacity" of individuals should be assessed by reference to all their relevant expertise and experience' (General Comment 13 on the right to education, para. 19). Unlike primary and secondary level, 'merit' or 'capacity' is a condition to access higher education. As education becomes more specific, in-depth and complex at this level, it makes sense to ensure students have the necessary 'expertise and experience' to be able to follow the teachings.

However, in practice, this condition raises some challenges. The criteria to determine whether students have the capacity can be very selective, encompassing for instance entry exams, aptitude tests, interviews or selections based on previous grades. Yet, as there are existing inequalities in lower levels between students of different social and economic backgrounds for instance, this condition can be a huge barrier for students from vulnerable, marginalised or disadvantaged groups, while favouring the already privileged and perpetuating inequalities in society. In addition, 'merit' or 'capacity' should be the only condition to access higher education. Yet, in practice, the direct and indirect costs of higher education prevent students with the required 'expertise and experience' but limited financial resources to access higher education.

It is argued that the notion of 'merit' or 'capacity' was introduced to protect the right of individuals to higher education to avoid unjustified criteria being used to refuse access and therefore lead to discrimination³. However, as briefly described above, in practice, this criteria leads to the exclusion of some students already disadvantaged by their socio-economic backgrounds.

When developing guidelines on the right to higher education, it would be important first to give a definition of 'merit' and 'capacity' and clarify the purpose of this condition introduced at higher education. In my view, it should be clear that the only reason to condition access to higher education should be the aptitudes to follow the teachings. The assessment to determine whether a student is able

³ UNESCO. 2020. *Report: Making Higher Education more inclusive, SDG-Education 2030 Steering Committee*. UNESCO. Available at: <https://www.sdg4education2030.org/making-higher-education-more-inclusive-sdg-education-2030-steering-committee-july-2020>

to follow a particular teaching should be objective rather than competitive. Therefore, it should also be stressed that States must make all possible efforts to make higher education available to the number of students that have the 'capacity' and interest to pursue their education at this level. This includes their obligation to allocate the maximum of their available resources towards the progressive introduction of free higher education, particularly for the most disadvantaged financially. The notion of 'merit' / 'capacity' is meaningless if financial barriers prevent students from accessing higher education.

In addition, it would be essential to highlight the importance of taking into consideration the students' socio-economic backgrounds in any selective process, particularly when places are limited in order to avoid the reproduction of inequalities. The way of implementation can be left to the appreciation of states but the guidelines may provide some examples based on good practices⁴. It would be important to mention that this inclusive process should be done across all types of institutions, including the most prestigious ones - often the most expensive too.

Finally, the guidelines should also stress the importance of the quality of higher education, across all types of institutions, that should not diminish when students' enrolment expands, requiring states to provide additional funding.

⁴ For some examples, see the section on 'Rethinking merit' in UNESCO and Right to Education Initiative. 2022. *Right to higher education: unpacking the international normative framework in light of current trends and challenges*. To be published in May 2022.