

In Re: Court On Its Own Motion

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Court : Delhi

Decided On : Nov-06-2015

Judge : Pradeep Nandrajog & the Honourable Ms. Justice Mukta Gupta

Appeal No. : W.P.(C) No. 8973 of 2006

Judgement :

Pradeep Nandrajog, J.

1. The issue at hand is whether the Union Government can provide land free of cost to a Society formed with the object of providing school education, with 60% seats reserved for children of Group-A officers of the Union Government; finance the construction of a school building thereon and provide the required infrastructure to run the school. The school charging nearly 40% less fee from the children of Group-A officers of the Union Government vis-a-vis other children. This larger issue subsumes the sub-issue whether such a school can reserve a quota of 60% for the children of Group-A officers of the Union Government.

2. As is known to one and all, Group-A officers of the Union Government are the members of the Indian Administrative Service, Indian Revenue Service, Indian Police Service etc.

3. On the 7th Day of February, 1995, the wives of the then Cabinet Secretary, Secretary Ministry of External Affairs, Secretary Ministry of Commerce and ten other ladies, all of whom were the spouse of members of the Indian Administrative

Service, Indian Revenue Service, Indian Police Service and Indian Railway Technical Service, formed a Society named *THE CIVIL SERVICES SOCIETY*; having principal object to establish progressive schools in or outside Delhi *open to children of officers of the All India and Central Services*, with a clarification that if extra seats were available, children of officers of Public Sector and Non-Government Servants may also be admitted in the school(s).

4. The spouses of the ladies worked over time. The Cabinet Secretary, the Foreign Secretary, the Defence Secretary, the Secretary, Ministry of Commerce, the Secretary of Department of Urban Development, the Advisor (staff) Railway Board and nine other senior officers of the Union Government met on June 21, 1995, and on behalf of the Union of India took the decision that the Ministry of Urban Development shall allot 7.78 acres land in Chankyapuri to the Civil Services Society at a token cost of Rs. 1 with annual premium of Rs. 1. In principal decision was taken that through its various ministries, such as Defence, Railway and Do PT, the requisite fund would be made available to the Society to not only construct the school building but even purchase furniture and other equipment required. A commitment was made to make available Rs. 19 crores to the Society, and relevant would it be to note that nearly Rs. 10 crores was to remain as a corps fund. The affidavit filed on August 26, 2006 by Mr.R.Prem Anand, Under Secretary to the Government of India in the Ministry of Finance informs the Court that various Government agencies and/or Ministries donated Rs. 15.945 crores to the Society for setting up of the school.

5. The rationale for setting up the school, which has been named *SANSKRITI SCHOOL*, as disclosed in the affidavits filed by the Union of India and the Principal of the school is that Civil Services Officers, having transferrable jobs, find it difficult to admit their children in *Good Schools* *Elite Schools* . The two expressions in italics and bold have been lifted by us from the two counter affidavits filed. One by the Principal of the School and the other on behalf of the Union of India. An additional affidavit filed on December 03, 2013 on behalf of Sanskriti School informs the Court that 60% seats in the school are reserved for children of Central Government Group-A officer (through Civil Services Examination). 25% seats are reserved for children from the economically weaker

sections of the society as per guidelines issued by the Government of Delhi. Only 10% seats are available to the children of the rest of the society and 5% seats are reserved for the staff of the school. As per the affidavit, differential fee is paid by children of Central Government Group-A officers and the rest. The annual fee for the former for the year 2013-14 is Rs. 72,443/- and the later Rs. 1,12,960/-.

6. On the status of the society which has established Sanskriti School, it would suffice to note that the Civil Services Society has been established by the wives of the then serving Cabinet Secretary, Secretary Ministry of External Affairs, Secretary Ministry of Commerce and the wives of senior Group-A officers of the Union. As regards the school, as we have noted above the land was made available at a premium of Rs. 1 with ground rent of Rs. 1 per annum. Entire money required to construct the school building and provide the infrastructure was through public funds; corpus of Rs. 10 crores was created for interest income generated to be utilized in the running of the affairs of the school. We do not need to lift any veil because it is apparent on the record that the State has made available the land and the money to create a school which reserves 60% of its seats to the children of Group-A officers of All India and Central Services who enters service through the All India Civil Services Examination. They are the children of the Officers of the Indian Administrative Service, the Indian Revenue Service, the Indian Police Service and the Indian Railway Technical Service. Not all children whose parents are in Government service are the beneficiaries of the quota. The class-IV, class-III and class-II staff has been left out.

7. Bhartruhari in the *~Neethi Satakam*(First Century B.C.), emphasized the importance of education in the following words:

Education is the special manifestation of man;

Education is the treasure which can be preserved without the fear of loss;

Education secures material pleasure, happiness and fame;

Education is the teacher of the teacher;

Education is God incarnate;

Education secures honour at the hands of the State, not money.

A man without education is equal to an animal.

8. Prior to the age of Enlightenment in Europe, in the western world, education was considered primarily the responsibility of the parents and the church. Education as a matter of public concern is the product of the modern State. The French and the American revolutions gave a fillip to the process of the democratization of the education and moving away from its being the exclusive preserve of a particular social class. Public education was perceived as a means of realizing the egalitarian ideas upon which these revolutions were based.

9. Notwithstanding ancient texts, such as the one quoted by us above from Neethi Satakam; despite education being regarded as a pre-existing and natural right in every man and woman, it did not find a mention in the classic civil liberties instrument such as the English, *Bill of Rights* of 1689, the American *Declaration of Independence* of 1776 and the French *Declaration of the Right of Man* of 1789. However, the *Rights of Man* contained roots of the modern thought of inclusion “about equality, respect and decent education for all. The rise of socialism and liberalism in the 19th Century led nations to promote education as a matter of citizen's right and incorporate it in their Constitutions and legislations. The Constitution of the German Empire of 1849 had provisions relating to educational rights and the 1870 Education Act of England and Wales established a system of public education in the country. The *Varsailles Treaty* of 1919 was the first instance of international recognition of Right to Education to the Polish minorities as it is stated that they shall have an equal right to establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments. In the year 1924, the Declaration of Geneva under the auspice of the League of Nations recognized children's Right to Education by declaring that : The child must be given the means requisite for its normal development; the child that is backward must be helped and the child must be put in a position to earn its livelihood'. These principles later on, in the year 1959, formed the foundation of the Declaration of the Rights of Child, but before that in

the year 1948, the Universal Declaration of Human Rights, recognizing education as a right, stated : Everyone has the right to education. Education shall be free, at least at the elementary and fundamental stage. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit [Article 26(1)]. Article 2 of the Universal Declaration characterized the nondiscriminatory and equality-of-opportunity of the right to education by stating : everyone is entitled to all the rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'Earl Warren C.J. speaking for the U.S. Supreme Court in the decision reported as 347 US 483 (1954) Brown Vs. Board of Education observed : Today education is perhaps the most important function of State and local GovernmentsIt is the very foundation of the good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful if any child may reasonably be expected to succeed in life if he is denied the opportunity of an education'. The right to education and equality of opportunity for access to it was asserted once again in the U.N. Convention on the Rights of the Child which was adopted by the U.N. General Assembly on November 29, 1989. Article 28(1) of the Convention states : States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular : (a) make primary education compulsory and available free to all; (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and appropriate measures such as the introduction of free and offering financial assistance in case of need; (c) make higher education accessible to all on the basis of capacity by every appropriate means.The Salamanca Statement adopted following at the World Conference on Special Needs Education in Salamanca (Spain) in the year 1994 proclaimed that : regular schools with inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all.'

10. We would not be wrong to assert that at least two educational principles emerge from the series of U.N. Conventions: (i) the right to free elementary education, and (ii) the right to equality of educational opportunity.

11. Is there any inconsistency between the right to education and the compulsory nature of elementary education? The former gives a choice to exercise the right. The latter seems to impose compulsion on citizens. This seeming inconsistency is not real because compulsory elementary education is based on a notion that every person has an irrevocable entitlement to a period of education at public expense, implying therein that no person or body can prevent children from receiving basic education. This imposes an obligation on the State to ensure that children receive at least an elementary education in circumstances of parental neglect or ignorance.

12. In the Indian context, right to education developed during the freedom movement along with the demand for self-governance. In the year 1909 Gopal Krishna Gokhale introduced a Bill under the Indian Council Act of 1909, to make primary education compulsory and deserving of State funding. Regrettably, the Bill was defeated by a large majority. While addressing the legislature, Gokhale made the emotional observation that the issue would keep coming up again and again until all children realize their right to free and compulsory education. In 1937, at the National Education conference held at Wardha, the Father of the Nation : Mahatma Gandhi used all the moral powers at his command to persuade the Ministers of Education of the newly elected Congress governments in seven provinces to give priority to basic education under Nai Taleem of seven years and allocate adequate funds for this purpose. The Ministers responded that there was no money, in spite thereof, the Wardha Conference passed four resolutions, the first amongst which stated : That in the opinion of this Conference, free and compulsory education be provided for seven years on a nation-wide scale. This resolution was re-iterated at the 51st annual session of the Indian National Congress held at Haripura in February 1938.

13. India adopted its Constitution in the year 1950 making provisions for Fundamental Rights to equality, freedom from exploitation, religion, cultural and

educational rights of minorities and constitutional remedies. However, the right to free and compulsory elementary education was retained in Part-IV of the Constitution which incorporated the Directive Principles of State Policy. Article 45 as originally incorporated declared : . The State shall endeavour to provide, within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years.

14. The Fundamental Rights in the Constitution of India are close to the U.N.'s Universal Declaration on Human Rights with the most important fundamental right, impacting on the life of the people in India, being Article 21, which guarantees right to life and personal liberty'. It declares: No person shall be deprived of his life or personal liberty except according to procedure established by law'. This right is akin to the French concept of Right of Man, which draws from the principal that the people's life chances should not be restricted by irrelevant considerations. Education is key to assuring people's life chances'.

15. Article 21 of the Constitution of India has been interpreted and reinterpreted nnumber of times by the Supreme Court of India and its horizon has been constantly expanded keeping in view the march of times. From the point of view of education, the landmark decision would be the Constitution Bench judgment of the Supreme Court reported as (1993) 1 SCC 645 *Unni Krishnan , J.P. and Ors. vs. State of A.P. and Ors.* Holding that the provisions of Parts-III and IV of the Constitution of India are supplementary and complimentary to each other and that fundamental rights are but a means to achieve the goal indicated in Part-IV, the Supreme Court held that the fundamental rights must be construed in the light of the directive principles. From the said stand point, the first question approached by the Court was : Article 21 and Right to Education'. In an illuminating discussion commencing from para 166 of the opinion, terminating the reasoning in the conclusion in para 183, the Supreme Court held : We must hasten to add that just because we have relied upon some of the directive principles to locate the parameters of the right to education implicit in Article 21, it does not follow automatically that each and every obligation referred to in Part IV gets automatically included within the purview of Article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental

importance. As a matter of fact, we have referred to Articles 41, 45 and 46 merely to determine the parameters of the said right.

16. The logical corollary of the decision of the Supreme Court in *Unni Krishnan* case would be that free elementary education is an essential sovereign function of the welfare state because education is a cardinal component of human dignity. It took time for the legislature to respond, but the response came when Article 21A was inserted in Part III of the Constitution of India by the Constitution (86th Amendment) Act, 2000. Article 21A of the Constitution of India reads : *The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.* The Preamble to the Constitution of India evinces that amongst others, one essential sovereign duty of the State is to secure equality of status and opportunity and assuring the dignity of the individual.'

17. A question would therefore arise : Whether the introduction of Article 21A in the Constitution provides a renewed opportunity to reduce the increasing inequality in education at the elementary level so that the goals of social, economic and political justice, pledged in the Preamble of the Constitution are achieved. A literal reading of Article 21A of the Constitution of India explicitly reveals that the right to education has been recognized as a fundamental right. Is it implicit in the Article that the right to education includes the right to equality in education?

18. Articles 14, 15 and 16 of the Constitution guarantee nondiscrimination and equality before law. As noted above, the Preamble of the Constitution gives the direction in which the State must move i.e. to secure to all its citizens equality of status. Thus the principle of equality is strongly expressed in the Constitution and is also in consonance with the commitments made by India by virtue of being a party to a number of international instruments.

19. On the subject of equality in education, keeping in view the importance of education in character and nation building, we cannot but avoid to look at the signages which have guided in the location of the fertile soil of equality in education where the young minds are nurtured in the ethos of national integration

so that they become the balancing wheels of the social machinery.

20. Education is the foundation on which the society seeks to build its edifice of social harmony. It is the means through which one hopes to root out the divides that exists in society and integrate the country. To the question : what happens when the means to bring equality are inherently unequal? The answer is obvious. The social divide is widened and the nation remains divided.

21. Various commissions have highlighted that the current multilayered school system, be it in India or abroad, promotes and maintains the wide chasm that exists between the advantaged and disadvantaged. The privilege, who can afford to buy education, have access to the high-quality elite schools, while the poor and the marginalized are left to wallow in illequipped schools established by the municipalities, gram panchayats and Government. Many perceive that education has become a commodity. They believe that the system is inherently flawed, in that, the very means through which an egalitarian society is sought to be built is tailored in such a manner that it becomes a seat of, and a cause for, naturalising and legitimizing decisiveness and social segregation. The Report of the Education Commission (1964-66) also known as the Kothari Commission, laid emphasis on Common School System to provide education of an equitable quality to all children irrespective of their caste, creed, community or gender. In para 10.05 of the Report the Commission desired that a system of providing quality education at the school level be put into place so that no parent would ordinarily feel any need to send the child to any institution outside the system.

22. That takes us to the rationale for a Common School System. As per Kothari Commission, it promotes equality and social justice, it helps in nation-building, it creates a social capital which is essential for sustaining democracy because it brings different social classes and groups together and thus promotes the emergence of an egalitarian and integrated society. The Commission asserted that if the education system is to become a powerful instrument of national development in general, and social and national integration in particular, we must move towards the goal of a Common School System of public education.'

23. The origin of the Common School System could be traced to the philosophical foundation in the 19th century, concerned with attitudes and values rather than with the skills of literacy and numeracy. It was realised that at stake was the forging of a nation based not on principles of tyrannical control but one based on the informed consent of the government across the full gamut of religion, classes, language and ethnicities. The political core of the Common School Policies would be that through education common culture could be propagated among all classes, the circle of citizens could be broadened, as would the basis of the State. In the United States the idea gained momentum that the children of this country, of whatever parentage should be educated together as Americans, as made of one blood and citizens of the same free country “ educated to be one harmonious people. (emphasis added). Subsequently the idea of public education as a nation building was extended to cover the objective of forging and maintaining social cohesion and ensuring the security of the State. It was recognised that the institution of Common School System was not only a part of the State because it was imperiously wanted as such, for the common training of so many classes and conditions of people, because the disadvantage that accrues to the State is the loss of so many characters and so many cross ties of mutual respect and general appreciation. It was recognised that the propaganda of so many misunderstanding which weaken immensely the security of the State was on account of lack of a Common School System. To put it pithily, the emphasis is on building social capital. The Kothari Commission recognised that the existing school education system in India, instead of bringing the different classes and groups together is tending to increase social segregation and to perpetuate the widen class distinction. The Commission warned this is bad not only for the children of the poor but also for the children of the rich and the privileged groups since by segregating their children such privileged parents prevent them from sharing the life and experience of the poor and coming into contact with the realities of life and also render the education of their own children anemic and incomplete. The concept of a neighbourhood school emerged into the report.

24. There may be a difference in the fundamental premise on which the Common School System, as a means to equality in education, was conceived of in the United States vis-a-vis India. The thrust of providing formal schooling and quality

education for each and every child in the United States was with the goal of preventing internal strife and protecting the country's integrity by harmonizing the people as made of one blood, the thinking in India was premised primarily to bring equality by empowering the disadvantaged and giving their values and practices equal importance and to bridge the social divide.

25. We would only emphasise that the success of schooling is to be measured not alone by academic excellence but also by the equality which it creates simultaneously “ indeed one that recognises equity as the way to excellence. Thus inbuilt in the right to education would be the right to quality education.

26. Can these ideas be converted into law? Since as judges we cannot legislate, our task would be to look into the Constitution and guided by these ideas and in particular the decision of the Supreme Court in *Unni Krishnan's* case (supra), see whether the existing Articles of the Constitution are capable of being interpreted to give effect to these lofty ideals.

27. Forging of the nation being at stake, in the Indian context the Common School System cannot be restricted to create the children of the country as made of one blood and citizens of the same free country as one harmonious people, but must go beyond to embrace the principles of unity in diversity because of the unique composite culture of this great country, to which we would be eluding to hereinafter. The composite culture to which we would be referring to means the particular brand of culture that represents the rejection of uni-cultural regimentation or mono-cultural domination and positively re-affirms the value of pluralism and syncretism, as the viable, stable and desirable base for cultural efflorescence in a mixed society and plural polity, being the product of borrowing, sharing and fusing through process of interaction. What more relevant can anything else be in the creation of a harmonious people than this concept? None at all.

28. Social scientists recognize that the four key concepts of the study of societal development and transformation are : (i) Civilization, (ii) Culture, (iii) Nation and (iv) State. Conceived as circles, one visualizes the four concepts graphically *interwoven* and *overlapping* or as *intersecting* and *fragmenting*. These concepts

are collateral but not coeval, because culture and civilization have long time sequence. Nation formation and creation of a State have shorter time sequences.

29. Civilization emerges when technology is married to human values, culture as distinct from civilization, but as part of it, is the result of intellectual or spiritual aspects of collective life, covering beliefs, religion, philosophy, ideas, laws, customs, morals, arts, architecture, drama, dance, music and such aspects of individual's life which have personal and interpersonal values, ethnic norms, etiquettes and behaviour patterns.

30. India, a determinate territorial State, with the second largest population and the sixth largest territory in the world is a defined civilization belt. It represents a fascinating coalescence of culture, embodied in a distinct unified civilization “ part dead and part dying, but most significantly, vibrant, regenerative, adaptive and innovative in its large part. The greatest confluences of cultural strands, racial inter-mixing, cross-fertilization of religious ideas and secular thoughts have taken place in India. India comprises myriad streams of culture, about 16 major languages, 2000 dialects, a dozen ethnic groups, 7 religious communities fragmented into sub-sects and sub-castes that inhibit 68 socio-cultural sub-regions, and therefore, India exhibits a distinct eternal homogeneity and external identity. It is therefore not surprising that the composite culture in India originated in an environment of reconciliation rather than refutation; cooperation rather than confrontation; co-existence rather than annihilation. This explains the politically dominant Islamic strands, represented by Turko-Afghan and Central Asian tribes from Khwarism, Khorasan, Balkh and Bukhara culturally mixing with the socio-culturally ramified Hindu transitional substratum. We in India talk of the *˜Ganga-Jamuni thazib*(culture born out of the confluence of Ganga and Jamuna) and it includes 7 streams of influence : (i) *The Vedic vision*, imbued with a sense of tolerance and respect for the many paths of truth, and the essence of the philosophy of the *Bhagavad Gita*, that salvation is through action and duty well done without expectation of reward. (ii) *The traditions of Bhakti Marga*, with the emphasis being on love, as the exile principle of life and the love of God and the love of man as the means of a mystic vision and the unitive state for the attainment of peace, harmony and liberation in the present life and life thereafter.

(iii) *The humanistic concepts of Islam*, which include fraternity of human beings and charity towards the have-nots : The beneficent *Rahman* and the merciful *Rahim* attributes of God. (iv) The message of *sulhe-kul'*(peace for all) of the Muslim Sufi *silsilhas*(mystic orders), with focus on charity, fraternization of different communities. (v) *The elegance and ethos of the syncretic Indo-Muslim cultural values*, as manifested in social relations, etiquettes in daily life marked by gentility, restraint and deference towards elders; refinement in tastes, aesthetic and physical “ in poetry, crafts, culinary, household and lifestyle. (vi) *The cosmopolitanism of modern urban development*, to provide an incipient cultural form for the migrants of the rural hinterland into the cities during the period the western influence in India under the British was creating urban cities with different lifestyles, evincing a rise of the Indian urban professional. (vii) *The heritage of the Indian National movement*, for the liberation and re-construction of the Indian polity, free from the imperial rule.

31. National integration is the sine qua non of modernization. Intrinsic in the process would be a radical shift in the focus, and consequential the readjustment of the loyalties of the people. For unless fragmented groups, whose existence which is based on particular loyalties, do not break down with simultaneous superimposition of generalist loyalties to the total aggregation of the political community “ The Nation, national integration would elude. But since national integration presumes the existence of both unity and diversity; for if there is only one unity then integration is not necessary and if there is only diversity then integration is not possible. Obviously therefore, integration cannot be a process of conversion of diversities into uniformity. It has to be a congruence of diversities leading to a unity in which both the variations and similarities are maintained. It has to be remembered that national integration means and ought only to mean:

- (a) Cohesion, which is different than fusion;
- (b) Unity, which is different than uniformity;
- (c) Reconciliation, which is different than merger;
- (d) Agglomeration, which is different than assimilation;

(e) Solidarity, which is different than regimentation.

32. Therefore, in the Indian context, where forging of a nation is at a greater stake, the circle of citizens has to be broadened and the children of whatever parentage to be made of one blood and educated to be one harmonious people.

33. Article 14 of the Constitution reads: *The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.* Thus, Article 14 when telescoped into Article 21 of the Constitution would support the interpretation that all students between ages 6 and 14 must be treated equally by educational institutions with respect to their ability to access educational institutions and with respect to the quality of education they receive. There is plenty of case law in India addressing the issue of *affirmative action* in education. But the reverse issue i.e. of providing benefit to children of an elite segment of the society has not been addressed. We therefore review judgments in other nations.

34. The Fifth Amendment to the US Constitution states, in pertinent part, *no person shall be deprived of liberty of life, liberty or property, without due process of law.* The Fourteenth Amendment, by which the Fifth Amendment applies to the various states in US provides in pertinent part *nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* This clause is commonly known as the Equal Protection Clause of the US Constitution. The language of the Fourteenth Amendment of the US Constitution is near identical to that of Article 14 of the Constitution of India.

35. We begin our journey of comparison of Article 21-A of the Constitution of India with the Principles of *Equality of Education* under the US Constitution. The US Constitution does not mention education and therefore the US Supreme Court, in the decision reported as 411 US 1 (1973) *San Antonio Independent School District Vs. Rodriguez*, in a case concerning means of financing the public elementary and secondary schools in San Antonio in Texas observed that the Texas system does not operate to the peculiar disadvantage of any suspect class and that education is not among the rights afforded explicit protection under the US Federal Constitution. The court did not find any basis for saying it is implicitly so protected.

But in contrast we find that because of the insertion of Article 21-A in the Constitution of India the Right to Education has been made a Fundamental Right. The 'strict scrutiny' analysis principle adopted by the courts in US where Fundamental Rights are at stake or where classification involves race, religion and alienage/national origin as held in the decision reported as 551 US 701 (2007) *Parents Involved in Community Schools Vs. Seattle School District No.1* could be applied in India. Article VI of the US Constitution reads, in part, 'this Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding'. This language is similar to the jurisprudence in India i.e. that the Constitution of India is the supreme law of the land. We are noting the similarity because case law in the United States interpreting the Fourteenth Amendment of the US Constitution is premised on the notion that the Government and the institutions alike must follow the directives listed in the Constitution above all else. Therefore, cases in the United States discussing the Fourteenth Amendment in the context of equalizing educational access and quality would be highly relevant with respect to the issue before this Court. We have therefore considered some key observations in seminal US Supreme Court decisions and have found it appropriate to analogize to these cases, each of which is discussed below.

36. In the decision reported as 413 U.S. 189 (1973) *Keyes v. School District No. 1* ('*Keyes*'), the petitioners claimed that certain schools in Denver, Colorado, were racially segregated, and disfavored Denver's Hispanic population. Amidst several observations, the U.S. Supreme Court discussed the notion of what constitutes a *suspect class or classification* for the purposes of the Fourteenth Amendment. Specifically, the Court noted that where a group of people in society are similarly situated with respect to other groups, but are disadvantaged in some way (by virtue of certain immutable traits such like their minority status or socio-cultural stereotyping), they constitute a '*classification*'.

37. Likewise, in the decision reported as 347 U.S. 483 (1954), *Brown v. Board of Education* ('*Brown*'), the petitioners (African-American minors who were suing

through their legal representatives) from four U.S. states (Kansas, Delaware, Virginia, and South Carolina) claimed that schools segregated on the base of race deprived them of equal protection of the laws under the Fourteenth Amendment. In particular, the U.S. Supreme Court considered whether segregation of children in public schools solely on the base of their race (even though physical and tangible facilities between schools were equal) would deprive segregated students of the minority group (in this case African Americans) of equal educational opportunities. The Court held that such segregation did in fact deprive African Americans of equal educational opportunities. The Court further ruled that separate educational institutions are inherently unequal', given that similarly situated persons were treated differently (i.e. were denied equal educational opportunities and thus equal protection under the Fourteenth Amendment).

38. The observations in *Brown* and *Keyes* cases (supra) are instructive in the instant case. Sanskriti school has been promoted as a school primarily for the children of Group-A officers of the Union Government who join service through the Civil Services Examination. This situation is analogous to the scenarios in *Brown* and *Keyes* cases (where the issues involved segregation of White and African-American student populations). The very labeling of the school in question as a school for Group-A Union Government officers along with the fact that the school reserves 60% of its seats for the aforesaid category of children, posits such children as *separate* from other students. Although all other school-going students and, indeed, all children of individuals engaged in other branches/ sectors of the Indian Services, are arguably similarly situated, the school in this case create an arbitrary separation between the children of civil servants of Group-A officers and all other students. The school possesses no justifiable basis upon which to label Group-A Union Government officers as a *suspect class*'. No logical rationale distinguishes this class of persons from other individuals engaged in other branches of the Indian Services. Assuming *arguendo*, the justification entails provision of a stable schooling environment for the children of Servicemen and Servicewomen whose assignments fluctuate between different geographic locations in India, the justification is moot, because this is the predicament of all persons engaged in other branches of Indian Services. Thus, a classification that includes merely the children of Group A Union Government officers bears no

merit. In sum, the respondents' *separate* treatment of the aforesaid classification of children violates both the spirit of equal protection under Article 14 of India's Constitution and the spirit of equality of education under Article 21 A of the Constitution of India. We shall be delving more into this a little later.

39. In the decision reported as 551 U.S. 701 (2007) *Parents Involved in Community Schools v. Seattle School District No. 1* ("*Parents*'), the School District in Seattle, Washington, allowed students to apply to any high school in the District. The petitioners alleged that since certain schools often became oversubscribed when too many students chose them as their first choice, the District used a system of tiebreakers to decide which students would be admitted to the popular schools. The second most important tiebreaker was a racial factor intended to maintain racial diversity. The U.S. Supreme Court applied a *strict scrutiny* framework and found the District's racial tiebreaker plan unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Court acknowledged that it had previously held that racial diversity can be a compelling government interest in university admissions, but it ruled that that precedent did not govern *Parents*. The Court stated that unlike the cases pertaining to higher education, the District's plan involved no individualized consideration of students, and it employed a very limited notion of diversity ("*white and non-white*'). The Court further stated that the District's goal of preventing racial imbalance did not meet the Court's standards for a constitutionally compelling use of race: Racial balancing is not transformed from patently unconstitutional to a compelling state interest simply by relabeling it racial diversity. The Court then stated that the District's plans also lacked the narrow tailoring that is necessary for race-conscious programs. Next, the Court also held that the District's tiebreaker plan was actually targeted toward demographic goals and not toward any demonstrable educational benefit from racial diversity. Finally, the Court stated that District also failed to show that its objectives could not have been met with non-race-conscious means.

40. In sum, in *Parents*, the U.S. Supreme Court applied a strict scrutiny analysis, holding the District's confessed goal (of increasing diversity in the school district) was not compelling, since using race to eliminate racial imbalance is a circular goal that resulted in an extremely limited notion of diversity. Further, the means the

District employed to achieve its stated goal were not *narrowly tailored*. This is because race was being used as a factor in admissions despite the fact that race-neutral means were present.

41. Likewise, in the instant case, the school and the Union of India do not possess a *compelling* end. Reserving seats for a particular branch of the Indian Services disadvantages children of persons engaged in other branches of the Indian Services. Furthermore, the school which has been funded by public funds for its creation has not *narrowly tailored* its means, because a 60% quota creates a limited notion of diversity, and merely separates Group-A Union Government officers from an otherwise similar category of students. Moreover, the Union of India has failed to show that no alternative means were available by which the Union of India could have created a balancing between children of the aforesaid officers, children of persons in other branches of the Indian Services, and children of the general category.

42. Furthermore, in *Keyes* case, the U.S. Supreme Court ruled that it was clear that the Park Hill area schools in Denver, Colorado, were racially segregated, and disfavored Denver's Hispanic population. The Court also held that where the state government's intentional actions discriminate against a suspect class, it is the state's duty to eliminate from public schools all vestiges of state-imposed segregation. The Court further held that where a petitioner proves discriminatory intent and a causal relationship between the discriminatory intent and the impact and/or consequence of such intent, the burden is on the respondent to prove that its actions were not intentional, even if the actions did in fact cause the consequences being complained of.

43. The ruling in *Keyes* case is applicable in the case at issue because it emphasizes that the burden of proving the legitimacy of its actions rests with the respondent. Although *Keyes* involved an issue of race-based discrimination, to which U.S. courts apply the aforementioned strict scrutiny standard, the issue at hand is whether a school established through public funds may, through use of a quota, disproportionately favor children of an elite society. As discussed in the *Plyler's* case below, such an elite segment does not constitute a suspect

classworthy of the high, strict scrutiny analysis. However, this Court deems it appropriate to employ this high standard of scrutiny given that education in itself is a fundamental right in India. For this reason, we reiterate our previous observations regarding the respondents inability to uphold its heavy burden of proof, given the respondents lack of a compelling end as well as narrowly tailored means.

44. As in *Keyes* case, in the decision reported as 391 U.S. 430 (1968) *Green v. County School Board* ('*Green*'), the U.S. Supreme Court held that where the school board created a segregated school system, it was charged with the affirmative duty to take whatever steps were necessary to convert the segregated system into a unitary system. The Court further ruled that simply granting parents the freedom of choice to enrol their children in any school did not absolve the board of its on-going duty, and, additionally, also had the undesirable effect of placing the burden on parents and students, when in fact, the responsibility to create a unitary system lay entirely with the school board.

45. Thus, to reiterate, the findings in *Keyes* and *Green* emphasize that where, as in the instant case, a strict scrutiny analysis is involved, the burden of justifying the use of a particular means (such as a quota) that results in a discriminatory outcome rests squarely with the respondents.

46. To consider yet another case, in the decision reported as 457 U.S. 202 (1982) *Plyler v. Doe* ('*Plyler*'), the U.S. Supreme Court held that the Fourteenth Amendment forbids a state from discriminating against the children of illegal aliens. In reaching this conclusion, the Court noted that illegal aliens children do not comprise a suspect class in themselves, because they do not possess the immutable traits that tend to permanently disadvantage them in society. Yet, the Court noted the need to afford protections to minorities and marginalized segments of U.S. society. Further, the Court noted that education is not a fundamental right in the U.S. Concluding that the case did not involve a fundamental right or an overtly suspect class, the Court held that it must assess whether the state has a substantial goal for discriminating against children of illegal aliens, and whether the means adopted by the state are rationally related to

the stated goal. The Court further concluded that the state's principal argument, that the undocumented status of immigrants' children in itself establishes a rational basis for denying them benefits the state affords to other residents' children, was unpersuasive. For this reason, the Court held the state's actions to be a violation of the Fourteenth Amendment's mandate of equality before the law.

47. *Plyler* illustrates that education is not regarded as a fundamental right under the U.S. Constitution, and therefore U.S. courts employ the aforementioned rational basis framework where non-fundamental rights are concerned. However, given that education is a fundamental right in India, it appears to this Court that the strict scrutiny analysis mentioned in *Keyes* and *Parents* should be applied to the instant case. It is worth noting, however, that even if the Court adopted the rational basis framework, the respondents cannot be deemed to have met their burden under this less stringent analysis. This is because, as discussed previously, respondents can offer simply no legitimate basis for choosing to institute a quota given the facts at hand.

48. As a final observation, we reiterate that our findings are premised on the notion that the Constitution must form the final word of law in the nation. In the decision reported as 358 U.S. 1 (1958) *Cooper v. Aaron* ("*Cooper*"), , the U.S. Supreme Court held that under Article VI of the U.S. Constitution, the Constitution is the supreme law of the land, and states cannot therefore violate constitutional principles, one of which is equal protection of the laws under the Fourteenth Amendment. Given the above, the Court held that the state government's support for segregated schools in Little Rock, Arkansas, could not be squared with students' fundamental right to be granted equal education. The Court further ruled that the state could not claim it had no duty to follow the principle of granting the constitutional privilege of equal protection of the law to students of all races.

49. The ruling in *Cooper's* case is valuable in the instant case since the Constitution of India, akin to the U.S. Constitution, provides that the government and its instrumentalities are bound by the Constitution. While the court in *Cooper's* case found the respondent had violated the Fourteenth Amendment of the U.S. Constitution, in the present scenario, respondents' use of the aforesaid quota runs

counter to salient constitutional provisions: Article 14's promise of equality before the law and Article 21A's enumeration of education as a fundamental right. Thus, we maintain that the respondent must remediate this violation, and ensure that the school in question open its doors equally to all students; absent a legitimate justification for providing a special status to children of a mere segment of individuals in the Indian Services.

50. Besides, in India we have Kendriya Vidyalayas established by the Central Government all over India to cater to the educational needs of the Central Government employees who have transferable jobs. The justification given by the Union of India that it funded the establishment of Sanskriti school for wards of Group-A officers of the Central Government is that the existing Kendriya Vidyalayas in Delhi did not have sufficient seats to accommodate the wards of Group-A officers. Well, if this be so, another Kendriya Vidyalaya could have been established. The real motive to establish the school has emerged from the counter affidavits filed by the school and the Union of India. The two expressions noted by us in para 5 of our opinion which we have picked up from the counter affidavits filed by the school and the Union of India let the cat out of the bag. The reason is that Group-A officers of the Central Government were finding it difficult to admit their children in 'Good Schools' 'Elite Schools'. The contention that the Union of India has been making grants to other societies which have established schools is neither here nor there for the reason we do not know whether schools established by said societies had similar object of providing education or restricting education largely to a segment of the society; besides two wrongs do not make a right. Reliance by the Union of India on Rule 206 of the General Financial Rules, 2005 is misplaced for the reason the Rule permits the Union to give grant in aid to a person or a public body set up as an autonomous organization under a Statute. The issue at hand is : whether the Union of India can make available land free of cost and give money to a society to set up a school for an elite segment of the society. The larger issues concerning quality and equality in education is also not answered by the Union of India placing reliance upon the Rule in question. Reliance by the respondents on the decision of the Supreme Court reported as (1969) 2 SCC 228 *Kumari Chitra Ghosh and Anr. Vs. UOI and Anr.* Is misplaced for the reason said judgment recognize that the wards of Central Government

Employees posted in missions abroad would constitute a class by themselves. In the instant case respondents have failed to justify a quota restricted to children of Group-A officers of the Union of India who enter service through the Civil Services Examination. We repeatedly asked the question to learned counsel for the respondents as to what about the children of other Central Government Employees who have similar transferrable All India Service. There was no answer. The answer given to the question as to why the children of Group-A officers of the Central Government be not accommodated in Kendriya Vidyalayas, the response was that in the existing Kendriya Vidyalayas due to shortage of seats all children of the Central Government Employees could not be accommodated. If this be so, another Kendriya Vidyalaya could have been established on the land in question given free of cost to the Civil Services Society utilizing the funds given to the society to erect the school building and provide infrastructure. In any case, at the heart of the matter, is the creation of a school with 60% quota reserved for the children of the elite Group-A services of the Central Government without any rationale to treat them as a separate class entitled to the benefit of affirmative action. Reliance upon the decision reported as (2012) 6 SCC 1 *Society for Unaided Private Schools of Rajasthan Vs. UOI* is also misplaced because observations in the said judgment that good schools need to be established and at the same time non-performing or under performing schools should be weeded out are not relevant in the instant case. Our opinion is not against the Union Government creating good and quality schools. The opinion is against creating a good and a quality school with 60% quota reserved for an elite segment of the society.

51. We cannot but miss out the decision of the Supreme Court reported as (2011) 7 SCC 179 *Indian Medical Association Vs. UOI and Ors.* Confronted with 100% reservation in private educational institution managed by the Army Welfare Education Society, in the absence of any material shown to the Court that as a class members of the armed forces constituted a disadvantaged group, the Supreme Court highlighted the importance of equality in quality education by highlighting that exclusive communes for imparting knowledge hinder social transformation the observations in para 171 of the opinion bring out the importance of equality of status and opportunity in the context of education to

achieve intrinsic egalitarian and social justice aspects inscribed on many of the Fundamental Rights themselves. The reservation was struck down.

52. In the decision reported as (2008) 6 SCC 1 *Ashoka Kumar Thakur Vs. UOI* the Supreme Court highlighted the creation of quality institutions catering to the primary and secondary schooling needs of the socially and educationally disadvantaged groups, and the relevance of the said decision would be that whereas exclusive quotas could be justified as a part of affirmative action by the State, the reverse would be unconstitutional.

53. Hoping that the legislature would rise to the occasion in light of our present decision wherein we have brought out that the Constitutional scheme in India with the introduction of Article 21-A of the Constitution of India makes it a constitutional duty of the State to ensure equality in education and perhaps only possible through a Common School System and not merely by a lip service by providing schools lacking in equality and that the Indian Constitution does not recognize the principle of equal but separate, we bring the curtains down by declaring that the State cannot provide funds to any private individual to establish a school for an elite segment of the society. Unless on the principles of reverse discrimination a justification can be given to make available funds to a private individual which establishes a school for the underprivileged, there can be no State funding to a private individual in the field of education. As regards Sanskriti school we direct the Union Government to take an appropriate decision in light of the present decision and in particular whether the school can be made part of the existing Kendriya Vidyalaya Sangathan or alternatively in what manner the wrong can be rectified keeping in view the present decision. As regards Sanskriti school we simply have to note that the Civil Services Society which formed the school was established by wives of senior bureaucrats in the Government and the entire infrastructure to set up the school has been provided by the various ministries and instrumentalities of the Union Government, discharging an important public duty of providing education using State land and the State funds in its creation, the school would partake the character of the State and thus we quash the 60% quota reserved in Sanskriti School for children of Group-A officers of the Union of India who enters service through the Civil Services Examination.

