

**राज्यपाल की अपेक्षा कि नेता विरोधी दल नामित करने के संबंध में विधान सभा की नियम संबंधी  
समिति विचार-विमर्श करके उचित निर्णय लेगी**

**संविधान विशेषज्ञ डा० सुभाष कश्यप ने अपने अभिमत से अवगत कराया**

लखनऊ: 20 मई, 2017

उत्तर प्रदेश के राज्यपाल श्री राम नाईक ने उत्तर प्रदेश की नवगठित विधान सभा में नेता विरोधी दल को अभिजात करने के विषय पर विधान सभा में कल हुई संक्षिप्त चर्चा पर संतोष व्यक्त करते हुये अपेक्षा की है कि विधान सभा की नियम संबंधी समिति विचार-विमर्श करके इस विषय में उचित निर्णय लेगी। राज्यपाल का मानना है कि निवर्तमान विधान सभा अध्यक्ष द्वारा नवगठित विधान सभा में नेता विरोधी दल को अभिजात करना जनतांत्रिक सिद्धांतों के विरुद्ध है।

राज्यपाल ने कहा है कि सामान्य निर्वाचन के उपरान्त नवगठित विधान सभा में नेता विरोधी दल को पूर्व अथवा नवनिर्वाचित अध्यक्ष द्वारा अभिजात किये जाने के बारे में उत्तर प्रदेश में अब तक अपनायी गयी अलग-अलग परिपाटी के स्थान पर एक सुस्पष्ट, संविधानसम्मत व स्वस्थ लोकतांत्रिक परिपाटी स्थापित हो जैसा कि लोक सभा सहित देश के विभिन्न राज्यों की विधान सभाओं में भी अनवरत रूप से अपनायी जाती रही है। उन्होंने कहा है कि वर्ष 1957 से अब तक चली आ रही भ्रमपूर्ण स्थिति तथा अपनायी गयी अलग-अलग परिपाटी पर विराम लग सके और इस संबंध में उत्तर प्रदेश में भी एक सुस्पष्ट परिपाटी स्थापित की जा सके, जो लोकतंत्र और संविधान की भावना के अनुरूप हो।

श्री नाईक ने नेता प्रतिपक्ष को निवर्तमान विधान सभा अध्यक्ष द्वारा अभिजात करने के संबंध में देश के ख्यातिलब्ध संसदीय प्रक्रिया के विशेषज्ञ एवं पूर्व महासचिव (लोक सभा) डा० सुभाष सी० कश्यप से परामर्श प्राप्त किया था। डा० कश्यप ने अपने परामर्श में मुख्य रूप से निम्न बिन्दुओं को स्पष्ट किया है कि,

(1) राज्यपाल राज्य विधान मण्डल का अभिन्न अंग होता है। संविधान के अनुच्छेद 168 के अनुसार, राज्य विधान मण्डल राज्यपाल, विधान परिषद एवं विधान सभा से पूर्ण होता है। राज्यपाल संविधान के अनुच्छेद 175(2) के अंतर्गत राज्य के दोनों सदनों को समय-समय पर आवश्यकतानुसार अपना संदेश भेज सकते हैं।

(2) निवर्तमान विधान सभा अध्यक्ष द्वारा नेता विरोधी दल को अभिजात करना जल्दबाजी में लिया गया निर्णय है। निवर्तमान विधान सभा अध्यक्ष जो कि नव गठित विधान सभा का सदस्य भी न निर्वाचित हुआ हो, को नेता विरोधी दल को अभिजात करने का निर्णय नये विधान सभा अध्यक्ष के लिये छोड़ देना चाहिये था।

उल्लेखनीय है कि विधान सभा सचिवालय उत्तर प्रदेश (संसदीय अनुभाग) द्वारा 27 मार्च, 2017 को अधिसूचना जारी की गयी थी कि नवगठित 17वीं विधान सभा के लिये श्री राम गोविन्द चौधरी को नेता विरोधी दल के रूप में अभिजात किया गया है।

राज्यपाल ने 16वीं विधान सभा के विधान सभा अध्यक्ष द्वारा 17वीं विधान सभा के नेता विरोधी दल को मान्यता दिये जाने को असंवैधानिक एवं अलोकतांत्रिक पाते हुये 'भारत का संविधान' के अनुच्छेद 175(2) अंतर्गत नवगठित विधान सभा के विचारार्थ 28 मार्च, 2017 एवं 30 मार्च, 2017 को संदेश भेजे थे।

राज्यपाल ने विधान सभा को भेजे अपने संदेश में कहा था कि निवर्तमान विधान सभा अध्यक्ष द्वारा 16वीं विधान सभा के अंतिम कार्यदिवस 27 मार्च, 2017 को नवगठित 17वीं विधान सभा के लिए श्री राम गोविन्द चौधरी, सदस्य विधान सभा एवं नेता समाजवादी पार्टी को 27 मार्च, 2017 से नेता विरोधी दल के रूप में अभिजात करने हेतु लिए गए निर्णय के लोकतांत्रिक एवं संवैधानिक औचित्य के प्रश्न पर नवगठित विधान सभा विचार करे। उन्होंने यह भी कहा कि 1952 से अब तक गठित 17 विधान सभा में 1957, 1985 तथा 1997 में नेता विरोधी दल को अभिजात करने का निर्णय नवगठित विधान सभा अध्यक्ष द्वारा ही लिया गया है जबकि शेष 14 विधान सभा में ऐसा नहीं किया गया जो कि विधिसम्मत नहीं था।

राज्यपाल ने अपने दूसरे संदेश में विधान सभा के सदस्यगण का ध्यान उच्चतम न्यायालय द्वारा कतिपय प्रकरणों में समय-समय पर प्रतिपादित किये गये सांविधानिक विधि की ओर आकृष्ट करते हुये कहा था कि यदि पूर्व में कतिपय प्रकरणों में कुछ निर्णय संविधान अथवा विधि के प्रतिकूल लिया गया हो तो इस प्रकार के

असांविधानिक/अविधिक निर्णय को पुनः असांविधानिक/अविधिक निर्णय लेने हेतु न तो अनुसरणीय दृष्टान्त के रूप में प्रयुक्त किया जा सकता है और न ही ऐसे दृष्टान्त को संविधान/विधि की भावना के विपरीत लिये गये निर्णय को वैध ठहराने हेतु ही प्रयुक्त किया जा सकता है। दो गलत निर्णय को मिलीकर एक उचित निर्णय नहीं माना जा सकता है (two wrongs never make a right)। संविधान अथवा विधि के अन्तर्गत जो कार्य अथवा निर्णय प्रत्यक्ष रूप से नहीं किया जा सकता है उसे परोक्ष रूप से भी नहीं किया जा सकता है (what could not be done directly, could also not be done indirectly)।

जातव्य है कि 17 मार्च, 2017 को 16वीं विधान सभा का विघटन हो गया था तथा 22 मार्च, 2017 को राज्यपाल ने 17वीं विधान सभा हेतु प्रोटेम स्पीकर को नियुक्त किया था। नयी विधान सभा की प्रथम बैठक 28 मार्च, 2017 को होनी थी परन्तु इससे पूर्व ही 16वीं विधान सभा के अध्यक्ष द्वारा 27 मार्च, 2017 को विधान सभा सदस्य एवं नेता समाजवादी पार्टी श्री रामगोविन्द चैधरी को नेता विरोधी दल के रूप में अभिज्ञात किया गया था।

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नोट: डा0 सुभाष सी0 कश्यप से प्राप्त अभिमत साथ में संलग्न है।

अंजुम/ललित/राजभवन (193/32)

Fwd: DR. SUBHASH C. KASHYAP's Opinion

Inbox x

Ram Naik

12:23 PM (0 minutes ago)

to me

----- Original Message -----  
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To: Ram Naik <me@ramnaik.com>  
Date: May 6, 2017 at 12:20 AM  
Subject: DR. SUBHASH C. KASHYAP's Opinion

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OPINION  
( Confidential)

1.The Querist in this case is Hon'ble Shri Ram Naik, the Governor of Uttar Pradesh.

Opinion is sought on the Speaker of the previous Vidhan Sabha issuing orders recognising someone as the Leader of Opposition in the new house after election.

It may be stated at the outset that the OPINION hereby given is based strictly on the facts of the case and copies of documents provided by the Hon. Governor's Office.

FACTS

1. Facts of the case may be flagged as follows :

(i) At the recently concluded elections to the U.P. Vidhan Sabha, the erstwhile ruling (Samajvadi) party was reduced to a minority with majority of its candidates, including the then Speaker, having lost.

(ii) The sixteenth Vidhan Sabha of U.P. was dissolved on 17. 3. 2017. The newly elected seveteenth Vidhan Sabha was convened to meet on 28.3. 2017.

(iii) As early as on 22.3. 2017 itself, the Hon'ble Governor appointed a pro-tem Speaker to take over the office when it falls vacant and discharge its responsibilities till the election of the new Speaker by the House.

(iv) According to a press note issued by the Vidhan Sabha Secretariat on 27. 3. 2017, a member of the new House and the leader of the Samajvadi Legislature Party was recognised as the Leader of Opposition w.e.f. that date under the U.P. State Legislature (Emoluments and Pension of Members) Act, 1980.

(v) On 28.3.2017 and 30.3.2017, the Hon'ble Governor sent to the Vidhan Sabha two messages under article 175(2) of the Constitution asking the House to consider "whether the outgoing Speaker of the 16th Assembly should have recognised the LOP for the newly constituted 17th assembly or the LOP for the new/17th Assembly ought to have been recognised by the new Speaker" who was elected on 30. 3. 2017.

(vi) Past practice in the U.P. Vidhan Sabha in the matter of recognition of LOP by the outgoing or the new Speaker has not been consistent.

## DOCUMENTS

3.(i) Press Note issued by the Vidhan Sabha Secretariat announcing the recognition of a member of the new House as the Leader of Opposition in the 17th Vidhan Sabha on 27.3.2017 w.e.f. that date

(ii) Governor's Message under article 175(2) dated 28.3.2017

(iii) Governor's Message under article 175(2) dated 30.3.2017

(iv) An 'informal' note in support of the recognition of the LOP for the 17th Vidhan Sabha by the Speaker of the 16th Vidhan Sabha. (The note raises several questions in regard to the constitutional legitimacy of the Governor sending the two Messages under article 175(2) of the Constitution).

(v) U.P. State Legislature (Emoluments and Pension for Members Act, 1980 and subsequent Amendment Acts

(vi) U.P. State Legislature (Facilities for Leader of Opposition) Rules, 1981.

(vii) Governor's order appointing a member of the 17th Assembly as Speaker pro tem under article 180(1), 22.3.2017.

(viii) U.P. State Legislative Assembly, Rules of Procedure and Conduct of Business

## QUERIES

1. The Queries that arise may be formulated as follows :

(i) Whether the Governor can send a Message to the House under article 175(2) in the matter of recognition of LOP by the Speaker or he is barred from doing so because recognition of LOP is not connected to the conduct of business of the House ?

(ii) Whether the Governor's power under article 175(2) can be exercised only on the "aid and advice" of the Council of Ministers or the Governor can take the decision in his discretion ?

(iii) Whether the Governor, under article 175(2) can send a Message only in a matter pertaining to the business of the House and whether recognition of LOP is covered ?

(iv) Whether it is "constitutionally necessary" for a newly elected member to be recognised as LOP before commencing oath taking by the members and even before the election of the Speaker ?

(v) Whether it is in order for the Speaker of the dissolved Assembly to recognise the Leader of Opposition in the newly elected Assembly ?

## ANSWERS

2. To answer the queries seriatim :

(i) The Governor is not an outsider but an integral component of the State Legislature. The U.P. State Legislature consists of the Governor and the two Houses, viz. the Legislative Assembly and the Legislative Council. (Constitution of India, article 168).

Article 175(2) inter alia provides that the Governor may send messages to the House or Houses in respect of a pending Bill "or otherwise" and the House "shall with all convenient despatch consider" the matter. The term "or otherwise" is very wide and may cover any reasonable matter. If it is taken to be confined to matters of similar nature (ejusdem generis) and recognition of LOP is said to be barred from these messages on the ground of its not being connected with the conduct of the business of the House, it should suffice to draw attention to the Allahabad High Court judgement cited by the authors of the "informal" note themselves. What is not reproduced by them, however, is the portion which categorically lays down that recognition of LOP is "a function which relates to the conduct of business of the House". (Kailash Nath Singh v. Speaker AIR 1993 Allad.334). It is important to make a distinction between the procedure and proceedings of the House on the one hand and conduct of its business on the other. Thus, "when the Speaker accords recognition to a member of the House as LOP, he exercises power with respect to conduct of business of the House".

Even common sense would dictate that as an essential constituent part of the legislature, the Governor has the basic right to suggest "consideration" of any matter. Seeking consideration is not tantamount to interfering with the functioning of the House or its freedom to take any decision in the matter. All that article 175(2) provides for is consideration "with all convenient despatch". In the instant case also, the Governor asked only for consideration in the interest of building healthy and consistent traditions.

While interpreting article 175(2), the courts have gone so far as to hold that where the Governor while summoning the Assembly sends a message to the House prescribing the agenda, this has to be treated as a directive. No doubt, it is for the Speaker to preside over the sittings and transact the business but he cannot act contrary to the mandate issued by the Governor under article 175(2). It is the primordial duty of the Speaker as the holder of office under the Constitution to obey such a mandate and act in accordance with the itemised agenda therein ( K.A. Mathialagan v. P. Srinivasan, AIR 1973 Mad.371).

Analogous provision in respect of the President is article 86(2). When a message from the President for the House is received by the Speaker, he is required to read the message to the House and give necessary directions in regard to the procedure to be followed for the consideration of matters referred to in the message. In giving these directions, the Speaker is empowered to suspend or vary the rules to such an extent as may be necessary (Rule 23 of the Rules of Procedure and Conduct of Business). When the President wrote to the Speaker about a letter written by him to a Minister asking him to correct a statement made by him in the House, the Minister was obliged to clarify the position (LS Deb.,25.7.1989, cc.367-69).

It may be added that the Governor is entitled to expect early consideration of his message but each House of Legislature is master of its procedure ( art. 208) and to take decisions freely. The proceedings and procedure of the House are to be regulated by the Speaker/Presiding Officer. The Governor cannot constitute himself into a court of appeal over the acts of the Speaker or decisions of the House. The Constitution does not give to the Governor any authority to declare an act of the Speaker unconstitutional or to reverse a decision of the House on grounds of procedural irregularity etc. (See Subhash C Kashyap, Parliamentary Procedure, Universal, New Delhi, 3rd Edn., 2014, Chap. 8 and Constitutional Law of India, Universal, Lexis-Nexis, New Delhi, 2nd Edn., 2015, Vol. 2, pp.1000-01).

(ii) Article 163 of the Constitution provides for a Council of Ministers to aid and advise the Governor in the exercise of his functions except in so far as he is required to act in his discretion. The "informal" note tries to make the point that in article 175(2), the Governor is not stated to be required to act in his discretion. It is true that like the President, the Governor is expected to be only a constitutional head largely acting on the aid and advice of the Council of Ministers. But, apart from matters in which a Governor may be specifically required by the Constitution to act in his discretion, there are many areas in which a Governor has inevitably to act on his own and without the aid and advice of the Council of Ministers. Under article 159, every Governor has to take an oath to preserve, protect and defend the Constitution. He is, therefore duty bound to keep an eye on whether the Government of the State is being carried on in accordance

with the Constitution. In case of failure of constitutional machinery, he has to make a report to the President and sometimes may have to recommend promulgation of President's Rule under article 356. Obviously, this cannot be done on the advice of the Council of Ministers. Similarly, under article 200, when a Bill passed by the two Houses is presented to the Governor for his assent and he decides to reserve the Bill for the consideration of the President, he, verily, may not be acting on the advice of the Council of Ministers. Also, under article 164, it is one of the functions of the Governor to appoint the Chief Minister. Can he do so on the advice of the out-going cabinet and CM who may have lost in a vote of no-confidence or at the general election? Such instances can be multiplied where the Governor has necessarily to act in his discretion without it being mentioned specifically. It is conceivable that a Governor, in his discretion, may also find it necessary to send some message for the consideration of the House. It is not known whether in the instant case, the Governor was acting on the advice of the Council of Ministers or in his discretion. Perhaps, it can be presumed that he was acting on such advice. In any case, article 163(2) and (3), as a matter of abundant caution, make it clear that "if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion." Also, "The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court. While in the case of President, it was clarified by an Amendment that in the discharge of his functions, he shall act on the aid and advice of the Council of Ministers, quite significantly, no such amendment was made in respect of the Governor.

(iii) Please see (i) above. As stated, the message may relate to any matter which the House may reasonably be expected to consider. But, in any case, appointment of LOP is very much a fit case as it is connected with the conduct of the business of the House.

(iv) There is nothing in the Constitution or in any law or rule that makes it obligatory to have a member recognised as the Leader of the Opposition before oath-taking by the members



of a newly constituted House after the election. So far as precedents and past practices in this regard are concerned, in U.P. these have varied and there has been no consistency. Actually, article 188 requires every member before taking his seat being administered an oath by the Governor or his appointee.

It certainly makes no sense to insist that LOP in the new House must take oath and be in position even before the Speaker is elected and assumes office. The normal procedure is that after assuming office, the Speaker receives requests for recognition of parties and then the Leader of the largest party in opposition is appointed as LOP. In the case of Lok Sabha, it is laid down that recognition of a party only follows a request made for the purpose. On recognition of a parliamentary party, an announcement is made by the Speaker in the House and information is published in the Bulletin. The same is done in respect of a member recognised as LOP.

Even though, in the instant case, there would have been no difference in substance because the same member would have been appointed, it was only proper that the function of recognition of LOP in the new House was performed by the Speaker of the House. The Speaker of the dissolved House continuing in office only as a caretaker had no authority over the members or matters of the new House.

(v) The point made in the "informal note" that the Speaker of the 16th Assembly in U.P. may be considered to have continued till 30.3.2017 has no legal validity. Article 179 is very clear. It lays down that a member holding the office of the Speaker shall vacate his office if he ceases to be a member of the Assembly provided that on dissolution of the House, he shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution.

The facts are that the Speaker of the 16th Assembly lost the election and ceased to be member. He was not elected to the 17th Assembly. He should have immediately vacated the office of the Speaker but for the proviso which required his staying in office "until immediately before the first meeting of the Assembly after the dissolution". Dissolution came on 17.3. 2017. The new House was summoned to meet on 28.3.2017. The first meeting of the new House was on

28.3.2017. In the morning of the 28th, therefore, the Speaker of the 16th Assembly vacated the office of Speaker and the Speaker pro tem took over and continued until the new House elected its Speaker on 30.3.2017. It would be most incongruous to hold that during 28-30 March, there were two Speakers co-existing - Speaker pro tem and the Speaker of the dissolved House - or that the latter could be considered to be a legitimate holder of the office during that period. Also, it cannot be said that meetings of the House began only with the address of the Governor as apart from oath-taking by members, the election of the Speaker had also been accomplished during the period.a

It is true and well-settled that after the election and the constitution of the new Assembly, the Leader of the largest party in opposition having the requisite numbers, is recognised as LOP by the Speaker. But, quite clearly this power vests only in the Speaker of the concerned Assembly and a caretaker Speaker of an earlier Assembly cannot exercise any such power over members of the new Assembly. Even from the common sense angle, it is unthinkable to regard it as legitimate for the Speaker of a dissolved Assembly to interfere in the affairs of the new Assembly by appointing one of its members as LOP. Constitutionally as also in terms of parliamentary principles, it is impermissible. If anywhere such a practice has been followed in the past, it needs to be corrected and healthier traditions established. No doubt, in parliamentary practice, past precedents have great value but these cannot override constitutional provisions, juridical prudence and ordinary sense. None of the cases cited in the "informal note" have any pronouncement to the contrary. It has to be remembered that all references to the Speaker have to be to the Speaker of the concerned House only and not to the caretaker Speaker of the dissolved Assembly.

While concluding that the Caretaker Speaker of the dissolved House was obviously ill advised to act in unwarranted haste and without legitimate authority to recognise the LOP in the new House, it needs to be stressed that initiative in the matter should have better come from the Speaker of the new House whose authority was transgressed. It was for him to take remedial action. However, now that two messages have been sent by the Governor raising valid points, it may be most

advisable to place them before the House so that appropriate guidelines for future are laid down by the House.

Sd.Subhash  
5-6 May, 2017

C.

Kashyap

Sent from my iPad

OSD to Hon'ble Governor Uttar Pradesh.