

Minutes of the Forty Ninth Meeting of the Constitutional Council held on 26th February 2024 at 11.30 a.m. in the Hon. Speaker's Conference Room

Present:

Hon. Mahinda Yapa Abeywardana, M.P., Speaker & Chair of the Constitutional Council

Hon. Dinesh Gunawardena, M.P., Prime Minister

Hon. Sajith Premadasa, M.P., Leader of the Opposition in Parliament

Hon. Nimal Siripala de Silva, Attorney at Law, M. P.

Hon. Sagara Kariyawasam, Attorney at Law, M. P.

Hon. Kabir Hashim, M. P.

Dr Prathap Ramanujam

Dr (Mrs) Dilkushi Anula Wijesundere

Dr. (Mrs) Dinesha Samararatne

Mr. Dhammika Dasanayake, Secretary-General to the Constitutional Council

Mr Hansa Abeyrathne, Assistant Secretary-General, Parliament of Sri Lanka

1. The Hon Kabir Hashim, M. P. joined the meeting through video conferencing facilities.
2. At the request of the Council, Hon Sanjay Rajaratnam, PC, Attorney-General, Mr Nerin Pulle, PC, Additional Solicitor General and Ms Kanishka de Silva Balapatabendi, Deputy Solicitor General attended the meeting.
3. **Discussion with the Hon. Attorney-General regarding the Cases filed in the Supreme Court against the Council**

The Hon Attorney-General briefed the Council that eight (08) Fundamental Rights Cases have been filed in the Supreme Court against the Constitutional Council citing its members as respondents. He informed that seven (07) of the above Cases relate to the appointment to act in the post of the Inspector-General of Police and the said Cases would be taken up to be considered to grant leave to proceed the following day. The Hon Attorney-General further informed that the remaining Case which relates to the non-approval of the recommendation of the Hon President to appoint Hon N. B. P. D. S. Karunaratne, the incumbent President of the Court of Appeal as a Judge of the Supreme Court, would be mentioned before Courts on 7 March 2024 and would be fixed for leave to proceed after the Notices are issued.

Seven (07) Cases relating to the appointment to act in post of the Inspector-General of Police

The Hon Attorney-General informed that limited objections have been filed by the Secretary-General to the Constitutional Council submitting requisite records of the Council and the Secretary to the President relating to the recommendation made to the Council, in respect of the aforesaid seven Cases. He further informed that Mr Romesh de Silva who is appearing for Mr Deshabandu Tennakoon had forwarded his objections as well.

He noted that the Hon Chair had informed him through the letter dated 30 January 2024 that three (03) members of the Council would retain counsels on their behalf hence he would only appear for the Hon. Speaker and the Chair of the Constitutional Council, Hon. Prime Minister, Hon. Nimal Siripala de Silva, Hon. Sagara Kariyawasam, Dr Prathap Ramanujam and Dr (Mrs) Dilkushi Anula Wijesundere as requested. He further noted that the observations of the said Respondents in respect of the seven (07) Cases would be required without delay.

Case relating to the non-approval of the recommendation of the Hon President to appoint Hon N. B. P. D. S. Karunaratne, the incumbent President of the Court of Appeal as a Judge of the Supreme Court (SC/FR/35/2024)

The Hon Attorney-General informed that observations in respect of the Case SC/FR/35/2024 have been sought from the Hon Chair of the Constitutional Council as well as the Secretary-General, to which responses are yet to receive.

Referring to the decision of the previous meeting of the Council, the Secretary-General explained that the Council agreed to discuss with the Hon Attorney-General whether the Council could be represented by the Hon Attorney-General prior to the submission of observations.

4. Discussion with the Hon. Attorney General in respect of retaining private Lawyers and payment of their fees

Referring to the decision of the Cabinet of Ministers which was discussed during the previous meeting of the Council on obtaining legal representation from private Bar for litigations filed against State institutions, Hon. Sagara Kariyawasam inquired the Hon Attorney-General about the procedure to be followed by the members of the Council if they wish to be represented by private Counsels in cases filed against the Council where members are cited as respondents. The Hon Attorney-General stated that the said decision of the Cabinet of Ministers has to be followed in that regard. The Hon. Sagara Kariyawasam further inquired whether the Hon Attorney-General could appear on behalf of the Council in the event a recommendation of the Hon President was not approved by the Council where the Hon President and the Council take different views. Mr Nerin Palle informed that the Attorney-General is constitutionally mandated to represent the President in such cases and further informed that the Attorney-General could appear for the Council only if the reason could be justified by the Council. He informed that the Attorney-General could decide on the same upon considering the observations of the Council in respect of such cases. On inquiry by Dr. (Mrs) Dinesha Samararatne whether there would be any conflict of interest in such an event, the Hon Attorney-General informed that they would take a holistic view on the Case and make the decision on representing the Council after considering the observations of all the members of the Council. Ms Kanishka de Silva Balapatabendi too informed that they would require the observations of the members of the Council to confirm the position as to whether the Hon Attorney-General could appear on behalf of the members of the Council in such matters.

Referring to the Rules of the Council, the Hon Sagara Kariyawasam inquired whether the Council should give reasons even if a recommendation of the Hon President is approved by the

Council when the Rules of the Council state otherwise. The Hon Attorney-General stated that it would require to state as to the reasons for approval or disapproval when observations are submitted.

Dr. (Mrs) Dinesha Samararatne informed that she held a different view from the decision of the Council hence she retained a private counsel but she was of the view that dissent should also be represented. The Hon Attorney-General informed that if she could agree with the limited objections filed by the Secretary-General they could appear on her behalf on matters pertaining to the said Cases in future. On inquiry by the Secretary-General, the Hon Attorney-General informed that the objections have to be filed by each Respondent separately.

Referring to the Case SC/FR/35/2024 the Hon Nimal Siripala de Silva stated that the Council had a divided decision which was also indicated in the Minutes. The Hon Attorney-General informed that he could confirm his position as to whether he could appear on behalf of the members of the Council upon considering the observations of the members of the Council regarding the Case. At the request of the Hon Attorney-General, the Council instructed the Secretary-General to forward the Minutes of the meeting which considered the recommendation of the Hon President to appoint Hon N. B. P. D. S. Karunaratne, the incumbent President of the Court of Appeal as a Judge of the Supreme Court.

The Council thanked the Hon Attorney-General and the other officials from the Attorney-General's Department for their presence and they left the meeting at 12.15 p.m.

The Hon Leader of the Opposition joined the meeting thereafter at 12.25 p.m. He informed that he met the Hon Attorney-General on his way to the venue of the meeting and he was informed that the observations of the Respondents have not yet been sent to the Hon Attorney-General. The Secretary-General briefed the Hon Leader of the Opposition about the discussion had with the Hon Attorney-General and regarding the submission of observations by each respondent.

5. Consideration of the Minutes of the meeting held on 19.02.2024

Dr. (Mrs) Dinesha Samararatne referring to the paragraph 4 of Item no 3 of the Minutes, stated that the Minutes should include that the Notices of application SC/FR/35/2024 were received by them on the same day that the matter was taken up at the Court. She further noted that the Minutes should also record that the Council noted that the Minutes of the meeting held on 30 January 2024 were attached to the said petition.

Dr (Mrs) Dinesha Samararatne stated that the word 'defend' in line no 5 of paragraph 3 of Item no 3 of the Minutes should be replaced with the word 'present'.

The Council confirmed the Minutes of its forty eighth meeting held on 19.02.2024 subject to above amendments.

Dr Prathap Ramanujam expressed his concern that the Minutes tabled at the last meeting had been shared with external parties even prior to that meeting. He emphasized that he guarantees that the three members of the Council who are not Members of Parliament did not share it and the Hon Leader of the Opposition has also guaranteed that neither himself nor the Hon Kabir Hashim shared it. He highlighted the requirement for decorum in Council and stated that the Secretary-General should be responsible for the same as the guardian of the said documents. The Secretary-General informed that the Minutes were circulated among the members of the Council prior to the meeting as it was done at the previous instances and he guaranteed that the Secretariat did not share the Minutes with any other party.

6. Consideration of the draft Report of the Constitutional Council

Dr Prathap Ramanujam requested further time to consider the draft of the second report of the Council and it was agreed.

7. Any other business

i.) Consideration of the communication from the Hon President regarding the appointment of the Inspector-General of Police

The Hon Chair tabled a letter sent by the Hon President with ref no: PS/CSA/00/2/16/ii dated 25 February 2024 which was received around 9.50 a.m. this morning, seeking approval of the Council for the recommendation to appoint Mr. T. M. W. D. Tennakoon, Senior Deputy Inspector-General of Police (IGP) to the post of the Inspector General of Police w. e. f. 29 February 2024. He stated that the post of IGP should not be kept vacant hence an appointment should be made, to maintain law and order in the country.

Dr Prathap Ramanujam inquired whether the above appointment would be a contempt of Court when the appointment of the nominee to act in the post of the IGP has already been challenged in the Supreme Court. The Hon. Nimal Siripala de Silva and the Hon. Sagara Kariyawasam were of the view that the appointment under consideration would not be a contempt of Court since no stay order has been issued by Court with regard to considering this appointment.

Dr (Mrs) Dinesha Samararatne noted that the seven petitions with regard to the appointment of Mr T. M. W. D. Tennakoon to act in the post of the IGP would be taken up in Courts the next day to consider leave to proceed. She was of the view that the consideration of the appointment should be delayed until the decision of the courts on the next day, considering the seriousness of the allegations and as it is a matter of law and order in the country.

The Hon. Nimal Siripala de Silva stated that there is no legal impediment to decide on the appointment of the IGP and pointed out the significance of this appointment to ensure the national security and public order in the country. The Hon Sagara Kariyawasam referring to an allegation mentioned in the petition, to which the Court has ordered compensation, stated that the petitioner of the said petition had not mentioned Mr Tennakoon however, an affidavit has been filed by a 3rd party referring to him. He was of the view that the judgment on the said petition

has been made based on the 3rd party affidavit. Accordingly, the Hon Sagara Kariyawasam stated that he is not in agreement for not considering this appointment based on the said Order.

The Hon Leader of the Opposition stated that he does not agree with the nomination. He stated that circumstances have not changed since the last decision to disapprove the recommendation of the Hon President to appoint the same nominee to act in the post of IGP, hence he does not approve the recommendation of the Hon President to appoint Mr T. M. W. D. Tennakoon to the post of the IGP. The Hon. Kabir Hashim informed that he holds the same position as at the instance in which the Hon President recommended the nominee to act in the post of IGP and he does not approve this recommendation to appoint the same nominee as the IGP.

The Hon Nimal Siripala de Silva stated that he approves the recommendation of the Hon President. The Hon Sagara Kariyawasam stated that he does not observe any issue in the performance of duties by the nominee while he was acting in the post of the IGP. He was of the view that if the Council decides to delay its decision owing to the petitions filed and pending in Courts, it would set a bad precedent for similar future appointments. Hence, the Hon Sagara Kariyawasam stated that he approves the recommendation of the Hon President. The Hon Prime Minister stated that he approves the recommendation of the Hon President. Dr (Mrs) Dilkushi Anula Wijesundere inquired the possibility to delay the consideration of a decision of the Council until the decision of the Courts on the next day and the Hon. Sagara Kariyawasam stated that even if a single Case is granted with leave to proceed, it would take a considerable time till the conclusion and merely relying on a petition would not be prudent. Dr (Mrs) Dilkushi Anula Wijesundere was of the view that Mr T. M. W. D. Tennakoon is extending an appreciative service while acting in the post of IGP, to eradicate drug trafficking and underworld activities and therefore, she approves the recommendation of the Hon. President.

Dr Prathap Ramanujam was of the view that the Council should delay its decision on the recommendation, until the conclusion of the said Cases and stated that he abstains from making any decision on the recommendation of the Hon President. Dr Prathap Ramanujam and Dr (Mrs) Dinesha Samararatne reiterated that the Council should delay its decision at least until the decision of the Courts on the said Cases on granting leave to proceed. Dr (Mrs) Dinesha Samararatne stated that it would be prudent to obtain the opinion of the Hon. Attorney-General on the legality of considering a matter when there is a similar case pending in Courts. She stated that she abstains from making any decision on the recommendation of the Hon President and would submit reasons for the same in writing.

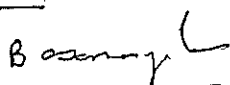
As of the above, the recommendation of the Hon President to appoint Mr T. M. W. D. Tennakoon, Senior Deputy Inspector-General of Police was approved by four (04) members, disapproved by two (02) members and two (02) members abstained from making any decision. The Secretary-General brought to the notice of the Council of the requirement stipulated in Article 41E(4) of the Constitution and, the Council noted that the approval or the disapproval of the recommendation of the Hon President has not been supported by at least five (05) members of the Council as required in the said provision.

The Hon. Sagara Kariyawasam was of the view that the Council should either approve or disapprove the recommendation and the Constitution does not provide for abstention. The Hon

Leader of the Opposition and Dr (Mrs) Dinesha Samararatne were of the view that the members should have the liberty to abstain. Dr (Mrs) Dinesha Samararatne was of the view that the Council should seek clarification from the Hon Attorney-General on the question of abstention. The Hon Leader of the Opposition agreed with the same. The Hon Sagara Kariyawasam was of the view that it would be advisable to seek clarification from the Hon Attorney-General whether a member could abstain from making a decision, as a matter of policy.

The Hon Chair and the Hon Prime Minister stated that the Council should inform the Hon President about the position of the Council on the recommendation made by the Hon. President.

8. The Council adjourned at 1.15 p.m. *sine die*.



Dhammika Dasanayake
Secretary-General to the Constitutional Council

Parliament of Sri Lanka,
Sri Jayewardenepura, Kotte.
26 February 2024