



**Stakeholder Information Submission
to the Global Alliance of National Human Rights Institutions (GANHRI)**

for

The Special Review of the Human Rights Commission of Sri Lanka (HRCSL)

Submitted: 19 February 2020

Submission by: The Asian NGO Network on National Human Rights Institutions (ANNI)

Contact:

Ms. Shanna Priangka Ramadhanti
NHRI Programme Officer
Asian Forum for Human Rights and Development (FORUM-ASIA)
S.P.D Building 3rd Floor, 79/2 Krungthonburi, Khlong Ton Sai,
Khlong San Bangkok, 10600, Thailand
Email: shanna@forum-asia.org

About the Asian NGOs Network on National Human Rights Institutions (ANNI):

The Asian NGOs Network on National Human Rights Institutions (ANNI) was established in December 2006. It is a network of Asian non-governmental organisations and human rights defenders working on issues related to National Human Rights Institutions (NHRIs). ANNI has members that are national organisations from all over Asia. ANNI currently has 33 member organisations from 21 countries or territories. The work of ANNI members focuses on strengthening the work and functioning of Asian NHRIs to better promote and protect human rights as well as to advocate for the improved compliance of Asian NHRIs with international standards, including the Paris Principles and General Observations of the Sub-Committee on Accreditation (SCA) of the Global Alliance of NHRIs (GANHRI). The Asian Forum for Human Rights and Development (FORUM-ASIA) has served as the Secretariat of ANNI since its establishment in 2006. <http://l.forum-asia.org/ANNI>

Introduction

This stakeholder information is submitted by the Asian NGO Network on National Human Rights Institutions (ANNI) requesting a Special Review of the Human Rights Commission of Sri Lanka (HRCSL). The submission is focused on recent developments in Sri Lanka that threatens to undermine the independence and effective functioning of the HRCSL. Key among these are the political changes following the presidential and parliamentary elections in the country and the recent adoption of the 20th Amendment of the Constitution. Moreover, the submission assesses how the recent developments are counter to the recommendations made by the Sub-Committee on Accreditation (SCA) in May 2018, specifically on issues of independence and selection and appointment. Given the serious implications of these developments on the independence and effectiveness of the HRCSL outlined in this submission, ANNI requests the GANHRI-SCA to conduct a Special Review, in accordance with the Article 16.2 of Global Alliance of National Human Rights Institutions (GANHRI) Statute, to re-evaluate the HRCSL's A Status in the upcoming SCA session.

Background of Human Rights Commission of Sri Lanka

The HRCSL was established through the HRCSL Act No. 21 in 1996¹ to give weight to Sri Lanka's commitment in protecting human rights as a member of the United Nations (UN), and to perform the duties and obligations imposed on Sri Lanka by various international treaties. This includes the commitment to maintain the standards set out under the Paris Principles in 1993.

Although the HRCSL was established by an Act of the Parliament, it received little government support. The HRCSL was given constitutional recognition only in 2001, through the enactment of the 17th amendment to the Constitution. The amendment requires that the President seeks approval from the Constitution Council when appointing and removing the Chair and members of the Commission.

According to civil society organisations, the commission was created under international pressure and to prove that the government conformed to international human rights law, not because of the government's robust commitment to human rights. This resulted in the institution being rendered powerless and struggling with untrained staff and limited funding.²

However, in 2015 there was a significant political change in the country with the formation of a national unity government with cross-party support and was ostensibly committed to democratic reforms, human rights, accountability, and reconciliation. Aftermath of this election saw the appointment of a new set of Commissioners who started to bring about change. The Commission increased its activities and engagement on human rights issues. For instance, on 1 January 2016, the Commission recommended the government to abolish the death penalty, as the very first act of the new Commission.³

The strong advocacy on human rights and the subsequent independent work of the commission has resulted in it being upgraded again to an 'A' status by the Global Alliance of National Human Rights Institutions- Sub Committee on Accreditation (GANHRI-SCA) in May 2018.⁴ In a time when political actors' support for human rights appear to be instrumental and transient, HRCSL has been consistent and unwavering in its messaging and advocacy of human rights. Although it has not been able to address all the grievances sent to it, and state actors do not follow its recommendations at times, the resilience and consistency of messaging by the Commission has been remarkable.

Political Change and Adoption of the 20th Amendment to the Constitution of Sri Lanka

2019 was a turbulent year for Sri Lanka and it has had an impact on the political, economic and human rights landscape of the country. The Easter Sunday terrorist attacks of April 2019, which

¹ Human Rights Commission of Sri Lanka, Act No. 21 in 1996, 21 August 1996, [Hereinafter HRCSL Act], available at: <http://hrctl.lk/english/ACT/english.pdf>.

² Human Rights in South Asia: an Agenda for the Next Decade (Law and Society Trust, July 2001, Page 47.

³ ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, 'Sri Lanka: Reviving amid Challenges,' 2017, p. 148, available at: <https://www.asiapacificforum.net/resources/2017-anni-annual-report/>.

⁴ GANHRI Sub-Committee on Accreditation Report, Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), May 2018, p. 35, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Report%20May%202018-Eng.pdf>.

killed 277 people, has resulted in increased intercommunal violence and discrimination against Muslim minorities, while the security measures introduced in the aftermath of the attacks impose serious restrictions on fundamental freedoms, in particular the right to freedom of expression. However, the most significant change was the election in November 2019 of Gotabaya Rajapaksa, evidence of whose culpability for grave human rights violations in the last stages Sri Lanka's bloody civil war is well-documented, as the President of the country. According to the recent report of the Office of the High Commissioner for Human Rights on promotion of reconciliation, accountability and human rights in Sri Lanka, the developments following November 2019 elections "threaten a return to patterns of discrimination and widespread violations of human rights experienced in past decades."⁵ The report further expresses concern that the developments since November 2019 elections "have fundamentally changed the environment for advancing reconciliation, accountability and human rights in Sri Lanka, eroded democratic checks and balances and civic space, and reprised a dangerous exclusionary and majoritarian discourse."⁶

One of the main changes that negatively transformed the human rights and democratic landscape in Sri Lanka over the year is the adoption of the 20th Amendment to the Constitution on 22 October 2020. The 20th Amendment to the Constitution of Sri Lanka was passed in the Parliament with a two-thirds majority. The Amendment reverses several democratic reforms introduced in 2015 with the adoption of 19th Amendment and significantly expands the scope of the presidential and the executive powers. The Amendment primarily reinstates the 18th Amendment,⁷ except for three changes:

- The terms of the President and the parliament have been reduced to five years
- The two-term limit for the President to be elected into office has been reinstated
- Right to information remains in the Fundamental Rights chapter under Article 14 A

The Amendment has increased the power of the Executive President in several ways:

1. The President can appoint Ministers without being required to act on the advice of the Prime Minister and enjoys the power to determine the number of Ministers, assign subjects and functions to Ministers, and hold any Ministry.
2. The President is to appoint and remove officials of the judiciary, high posts and independent commission, including the HRCSL.
3. The Amendment has also abolished the Constitutional Council and re-established the Parliamentary Council. The Parliamentary Council will most likely to consist of MPs from only the political party or alliances to which the Prime Minister and Leader of the Opposition belong. In addition, the President would only seek observation of the Parliamentary Council in making appointments to the judiciary, high posts, and independent commissions, including HRCSL. Hence, this would mean that the decision of the Parliamentary Council has no binding affect, and that the President may disregard such observations.
4. Under the Amendment, the President can dissolve the Parliament at any time after one year from the General Elections (except in a few limited circumstances). The President can also dissolve Parliament before the completion of one year, if the President is requested to do so by resolution signed by at least half the MPs.
5. It would revert back to the position where the President is immune from both civil and criminal proceedings. As such, citizens will no longer be able to file Fundamental Rights Applications against the President.

The Amendment has also brought about changes to the legislative process. The 19th Amendment raised the period between a Bill being placed on the Gazette and the Bill being presented in the Parliament to two weeks—allowing the public enough time to challenge the Bill in Supreme Court based on its constitutionality. With the

⁵ A/HRC/46/20 (27 January 2021)

⁶ A/HRC/46/20, paragraph 2

⁷ <https://indianexpress.com/article/explained/sri-lankas-constitutional-changes-and-why-its-tamil-polity-is-worried-6585419/>

recent Amendment, this has reduced this period to one week, which reduces the duration of the period where the public is noticed of a proposed law before it can be passed in the Parliament.

Independence

The SCA in its report concerning the HLRCSL's accreditation in May 2018 has noted that "neither the Constitution nor the Law explicitly provide for independence of the HRCSL⁸". The previous members of the HRCSL have advocated for constitutional safeguards to ensure the independence of the Commission. However, with the recent adoption of the 20th Amendment, this has reversed such efforts and instead, it has threatened the independence through the changes to the selection and appointment process.

In addition, the current Government has shown, among others, to proactively interfere in ongoing investigations by other independent institutions and criminal trials to prevent accountability for past crimes⁹. This is alarming as similar fears loom over the Commission, significantly impacting the functioning of the Commission to be able to implement its mandates effectively and independently.

Selection and Appointment Process

The downgrading of the HRCSL's accreditation status to 'B' by the Global Alliance of NHRIs Sub-Committee (GANHRI-SCA) on Accreditation in 2007 was a result of many factors: including political interference in the independence of the HRCSL.¹⁰ A crucial step towards strengthening the Commission came with the 19th Amendment to the Constitution in 2015 that restored its independence, especially in terms of the appointment of Commissioners.

In keeping with the 19th Amendment to the Constitution¹¹ and the HRCSL Act,¹² the President on the recommendation of the Constitutional Council appointed the new Chairperson and members to the Commission on 21 October 2015. As stipulated in the 19th Amendment, recommendations for appointment of commissioners by the Constitutional Council¹³, a 10-member body, of which three seats are reserved for civil society representatives¹⁴, ensured a degree of independence as well as civil society participation in the appointment process.

With the recent adoption of the 20th Amendment, the selection and appointment process has been reversed back and would severely compromise the independence and the credibility of the HRCSL. The abolition of the Constitutional Council and the reinstatement of the Parliamentary Council composed exclusively of politicians with powers to only make observations, enables political interference in the process and limits the broad participation of civil society. In addition to this, the selection and appointment process is highly controlled by the President, as the President could simply disregard observations made by the Parliamentary Council and select and appoint officials at the President's own discretion.

The SCA in its accreditation report in 2018 also stated that the HRCSL should ensure the selection and appointment process to¹⁵,

- Publicise vacancies broadly;
- Maximise the number of potential candidates from a wide range of societal groups and educational qualifications;
- Promote broad consultation and / or participation in the application, screening, selection and

⁸ <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Report%20May%202018-Eng.pdf>

⁹ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26695&LangID=E>

¹⁰ https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/2007_October%20SCA%20Report.pdf

¹¹ Article 41 (B) of the 19th Amendment to the Constitution states, "No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendation of the Council."

¹² Section 3(2), HRCSL Act.

¹³ See Article 41A(1) of the 19th Amendment to the Constitution. Accordingly, the Constitutional Council comprised of the Prime Minister, the Speaker, the Leader of the Opposition of the Parliament, one parliamentarian nominated by the President, five persons; two parliamentarians and three civil society representatives nominated by the Prime Minister and the leader of the Opposition, and one parliamentarian from political parties other than those represented by the Prime Minister and the Leader of the Opposition.

¹⁴ "Parliament approves three non-MP nominees to Constitutional Council", 22 September 2015, <https://parliament.lk/en/news-en/view/1079?category=6>.

¹⁵ <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Report%20May%202018-Eng.pdf>

- appointment process;
- Assess applicants on the basis of pre-determined, objective and publicly-available criteria; and
- Select members to serve in their individual capacity rather than on behalf of the organization they represent.

In the recent selection and appointment process concluded in December 2020 by the President, it was evident that the process was not conducted in a transparent and participatory manner. The Government did not advertise the vacancy, did not spell out the criteria of assessment and made these appointments in a very secretive manner. The President appointed the new chair, Jagath Balasuriya, who was the Minister of National Heritage in the previous Rajapaksa government and has served as the acting Governor of the Central Province. He is also reportedly a close family relative of the Rajapaksa family and a Sri Lanka Produjana Peramuna (Rajapaksa's political party)¹⁶ organizer of the Kegalle district.¹⁷ The President has also elected four other commissioners¹⁸ with limited experience and expertise in human rights.

The recent of the OHCHR on Sri Lanka further expresses concern that "the new appointment process undermines the credibility and independence of the Commission."¹⁹ A recent joint statement on 5 February 2021 by nine special procedure mandates of the UN Human Rights Council echoes these concerns.²⁰ The assessment by mandate holders of the government's follow up to their recommendations suggests that "the Human Rights Commission (HRCSL) is no longer independent of the executive branch of the Government since its members are now directly appointed by the President – this [is] in breach of the international standards for human rights institutions set by the Paris Principles. "Such provisions have effectively placed the HRCSL at risk of losing its A accreditation status with the GANHRI""²¹ In this context, and given the serious concerns about the independence and effectiveness of the commission following the changes to selection and appointment process, Asian NGO Network for National Human Rights Institutions (ANNI) request the GANHRI-SCA to conduct a special review of the re-evaluate the status of the HRCSL.

¹⁶ <https://english.theleader.lk/news/979-a-pro-rajapaksa-politician-appointed-to-lead-the-human-rights-commission-of-sri-lanka>

¹⁷ <https://english.theleader.lk/news/979-a-pro-rajapaksa-politician-appointed-to-lead-the-human-rights-commission-of-sri-lanka>

¹⁸ The four commissioners are Dr. M.H Vijitha Nanayakkara, Ms. Anusuya Shanmuganathan, Dr. M.H. Nimal Karunasiri and Mr. H.K Navaratne Weraduwa.

¹⁹ A/HRC/46/20, Paragraph 24

²⁰ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26725&LangID=E>

²¹ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26715&LangID=E>