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**THE POLITICS OF CONSTITUTIONAL INTERPRETATION BY
JUDGES IN SRI LANKA: A CRITICAL EXAMINATION**

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A Constitution is a documentation of the founding faiths of a nation and the fundamental directions for their fulfillment. Therefore, an organic, not pedantic, approach must be adopted in interpreting the Constitution. The healing art of harmonious construction, as opposed to the tempting game of hairsplitting argumentation, promotes the rhythm of the law⁶. The courts, being the last Bastion of hope when it comes to protecting the rights and the wellbeing of the people,⁷ must be independent of any outside pressure and undue influence if it is to discharge its functions properly.

The Supreme Court of Sri Lanka, which is the ultimate court of the country, has the sole power to interpret the Constitution⁸. Given this role of the Supreme Court, it is of utmost importance to have an independent judiciary in the country. As a country with an executive presidential system, Sri Lanka should have a system of checks and balances to make sure that the three branches of the government do not impede one another's functionality. The party system of the country has made sure that the President has the final say when it comes to the legislature's decision-making capabilities, and this

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⁶ *Fatehchand Himmattal & Others v State Of Maharashtra* (1977) Mah LJ 205

⁷ *Sugathapala, Mendis and another v. Chandrika Bandaranaike Kumarathunga and Others* (2008) 2 Sri L R 339

⁸ Article 125(1) of the Sri Lankan Constitution declares that, The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution.

makes it even more important for the courts to be free of any unwanted interventions by outside parties.

In theory, political neutrality of the judges refers to the state where they are in no way influenced by their own or outside political views and desires when making judicial determinations. J.A.G. Challenging this idea, Griffiths argues that judges are in no sense politically neutral and that they make political decisions which are influenced by outside political pressures.⁹

As a result of the politicization of the judiciary, the certainty of the law loses its vigilance, and the executive branch of the country becomes autocratic. This situation could be seen in Sri Lanka during the recent past when the executive became the prosecutor and the judge.

In a democratic country run by a presidential system, the independence of the judiciary is of utmost importance to protect the rule of law and uphold the values of the Constitution. In order to ensure that the Constitution is interpreted in a manner that the values embodied in the Constitution are upheld, the judiciary needs to be free of political pressure, and this has not been the case in Sri Lanka where for too long and on too many occasions the judiciary has been largely politicized.

The objective of this research is to find out how the politicization of the judiciary has affected the interpretation of the Constitution in light of the value-coherent method of interpretation and explore ways in which this politicization could be eliminated. This is a qualitative research study based on an analysis of primary and secondary sources with a focus on judicial interpretations.

The idea of the politics of the judiciary has been a topic of discussion in Sri Lanka as far as the interpretation of the Constitution is concerned. This has particularly been the case with regard to the interpretation of the

⁹ Griffiths, John Aneurin Grey. 1997. *The Politics of The Judiciary*. 5th ed. London: Fontana.

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some serious dilemma with regard to India threatening the sovereignty of the country. The Provincial Council system, which India had forced on Sri Lanka, was never improved by the judiciary through its interpretations of the Fundamental Rights Chapter, which was for the first time made justiciable by the 1978 Constitution. The best example of the politics of the Sri Lankan judiciary was showcased in the rather controversial decision of the *In re the Thirteenth Amendment to the Constitution*¹⁰. Here the scale was tipped in favor of the Amendment by a five-to-four majority where it had initially been held at four-four-to-one until Justice Colin Thome concurred with the Amendment at the last moment. Here the Supreme Court in its most important decision with regard to the interpretation of the Constitution failed to appreciate the effects of the Provincial Council system, which had been introduced by the Thirteenth Amendment. Here the Supreme Court faced extreme political pressure from the Executive President who himself at the time was in a dilemma with regard to India threatening the sovereignty of the country. The Provincial Council system, which India had forced on Sri Lanka, was never improved by the judiciary through its interpretations of the three lists included in the Ninth Schedule to the Constitution, which defined the legislative powers assigned to the Central Government and the Provincial Councils. Over the past twenty years or so, the judiciary has mostly circumvented the legislative powers of the Provincial Councils in interpreting this Schedule.

Not only has the politicization of the judges hindered the Fundamental Rights jurisprudence, it has also affected the functionality of the Provincial Council system in a negative manner. This is mainly due to the reluctance on the part of the judiciary to allow the legislative competence of the Provincial Councils in interpreting the legislative powers of the same.¹¹ In addition, the judiciary has also allowed the Central Government to control the affairs of the Provincial Councils through the Governor.¹² At the

¹⁰ (1987) 2 Sri L R 312

¹¹ *Re Transport Board Statute of the North-Eastern Provincial Council* S.C No 7/89 (Spl)

¹² *Premachandra v Jayaweickrama* (1994) 2 Sri L R 90

same time, the removing of the Chief Justice via an impeachment¹³ and the sanctioning of party cross-overs¹⁴ point to the extent to which the Sri Lankan judiciary has been guided by specific political agendas.

The politics of the Sri Lankan judiciary has also made a humongous impact, and a bad one at that, on the Fundamental Rights Chapter. Here, the judiciary has shown a reluctance in its early days of Fundamental Rights jurisprudence to give a meaningful interpretation to the Fundamental Rights granted under Chapter III of the Constitution. The political pressure exerted on the judiciary by the respective governments has resulted in such a situation¹⁵.

One prominent example that sheds light on the politics of the judiciary in the early days of the Fundamental Rights jurisprudence relates to the interpretation given to Article 12 (1) of the Constitution, which relates to non-discrimination. The requirement that the judiciary itself introduced that the victim prove that he/she has been discriminated against entailed the possibility of the conclusion that the others who had been in similar positions previously were victims of discrimination, as well.¹⁶ Here, the overall attitude of the Supreme Court was determined by the political pressure exerted and absorbed by the judiciary itself where the requirement was not to expand the newly granted justiciable Fundamental Rights, as to do so would have been to overburden the government of the time.

The *Supreme Court's determination on the Divineguma Bill*¹⁷ states that Constitutional Provisions should be understood and interpreted with an

¹³ S.C. Reference No. 31201 2 C.A. (Writ) Application No. 35812012

¹⁴ *Sarath Amunugama v UNP* (2000) 1 Sri LR 172 *Rohitha Bogollagama v UNP* (Unreported)

¹⁵ *Somawathie V. Weerasinghe and Others* (1990) 2 Sri LR 121. *Visuvalingam and Others V. Liyanage And Others* (1983) 1 Sri LR 203, *Nallaratnam Singarasa V. Attorney General* SC Spl (LA) No 182/99, ILDC 518 (LK 2006), *Peter Leo Fernando V. The Attorney General and Two Others* (1985) 2 Sri LR 341

¹⁶ *Elmore Perera V. Major Montague Jayawickara* (1985) 1 Sri LR 285

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Executive at that time was not receptive to it for several reasons. It led to the then Chief Justice to be impeached and removed from office. The internal politics of the judiciary resulted in the Supreme Court making a decision with regard to the impeachment process without taking into consideration the overall context of the issue, thus paving the way for the removal of the Chief Justice via a Parliamentary Select Committee.

The politics of interpretation on the part of the judges of the Supreme Court has resulted in a loss of faith amongst the people in the judiciary system as a whole. Due to this present state of uncertainty, the rule of law has severely been undermined, and this has led to the demise of the Bastion of last hope, which is the judiciary.

Given that the judiciary, particularly the Supreme Court, is both the sole interpreter and the guardian of the Constitution, it should be made free of political pressure, and every endeavor must be made to prevent it from becoming politicized. In order to have an independent judiciary, the appointments, transfers, removals and suspensions of the justices should be handled by an authority where the Executive plays only a nominal role. The 18th Amendment to the Constitution granted the Executive the power to appoint and remove the justices of the Supreme Court. The 19th Amendment to the Constitution has curtailed this power of the Executive. Irrespective of this change, the Executive still has a substantial say in the appointment and removal of the judges.

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Taking into consideration the developments with regard to the judiciary of the country, the Parliamentary Sub-Committee on the Judiciary recommends that some express provisions be incorporated into the Constitution in order to guarantee and secure the principle of judicial independence. In this respect, the Constitution of South Africa provides good guidance.¹⁸ In terms of Article 165, it is provided that "the Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice", that "no person or organ of state may interfere with the functioning of the courts" and that "organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."¹⁹

Some 20 years ago, J.A.G. Griffiths pointed out that politics of the judiciary is an unavoidable reality. This is very much the case in countries without written Constitutions. However, Sri Lanka being a country that has a written Constitution, every effort must be taken to ensure that those who interpret the Constitution must be free from any political pressure that hinders them from discharging their duties.

¹⁸ Available at < <http://english.constitutionalassembly.lk/images/pdf/02-Judiciary-stel.pdf>>

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