Constitutional Supremacy of Courts: Analytical Essay on Problems with Justification

There are recent existing theories challenging constitutional supremacy of courts adopting positions which grant privilege to courts, though not supreme in a very fundamental role of shaping rights in the Constitution. This discussion explores and focuses on the privileges of court shielded by the Constitution, exclusively in the protection of issues such as individual rights but not purporting justifications of other properties of constitutional orders. The theories of constrained judicial review are the ones which probably seem to adopt this intermediate stand in granting Canadian courts privileged roles in rights adjudication, though not supreme.

This constrained judicial review greatly varies from judicial supremacy, as well as legislative supremacy. In some way, the theories of constrained judicial review are opposed to legislative supremacy as they support the courts having advantaged status in the interpretation of the constitution. They also reject judicial supremacy in assertions maintaining that judicial constitutional privileges must be constrained, thus heavier constitutional obligations dedicated strictly to non-adjudicative institutions such as the executive or the legislature . This article is diverse as it develops both negative and positive arguments revolving this court advantages. For such theories, the critical part of the prevailing justifications of the so-called constrained reviews of the courts of justice whilst providing innovative justifications should be looked in to.

The fundamental justification for constrained judicial review cannot be based in consequentialist or instrumentalist interests, like in cases of the alleged major decisions made by constrained judicial review systems. It is therefore recommended that the justification be based on what is labelled as the right to a hearing. Distinctively, there is the strong right to hearing which calls for judicial supremacy and weak right to hearing which calls for constrained judicial review. The debates among judicial supremacy advocates together with constrained theories advocates should be perceived as a debate relating to scope and nature to the hearing right. However, we are bound to leave the debate on the subject open but provide a method of determining under which conditions the constrained judicial review may adequately appear protective of the right to hearing, as guided by the Canadian constitution .

Furthermore, in recent years the constrained constitutional review has gained prominence in the aspect that the famous constitutional writers seem to disagree with assertion of judicial supremacy, thus favouring forms of constrained review of constitution. This is done by maintaining the real understanding and analysis of American constitutional law together with its historical background, revealing how courts must not have the final mandate on the meaning of the United States constitution. This is because it relates to the rights of individual case and “the people”, or other branches of government participating in the interpretation of the constitution as it is in the Canadian jurisdiction .

The advocates of constrained review rest their case either on the view that constrained review is instrumentally superior to either judicial supremacy or legislative supremacy, or on the grounds that although judges could also be better in identifying constitutional meaning. Legitimacy-based considerations dictate weakening the supreme constitutional privileges of the courts and granting them a privileged, but not supreme role, in interpreting the Constitution .

Both the instrumental and legitimacy-based arguments are questionable in essence, as the instrumental considerations raised by advocates of constrained review are too speculative and contested, whilst the legitimacy-based arguments cannot support constrained review. If legitimacy-based considerations were to challenge the constitutional supremacy of courts, such considerations also need to challenge constrained review. Under both judicial supremacy and constrained review, constitutional interpretations by judges are privileged, and if legitimacy-based considerations are sound, they preclude judicial privileges in both cases . Therefore, normal justifications for constrained review are not strong enough.

Instead, the view that the sole compelling justification for either strong review or constrained review is the right of the petitioners, that their grievance be heard under the right to a hearing, is one which is defendable. The important privileges underlying the powers of the courts aren't the privileges of the courts, but the privileges of petitioners. The courts are simply the sole entities which will provide petitioners with a right to a hearing, and protecting this right is the ultimate justification for review. Then, courts are the institutional medium for the proper to a hearing. This is often true with reference to strong and constrained review. Yet, while both constrained and powerful review honour the proper to a hearing strong review endorses a demanding interpretation of this right. Strong review is both less compromising and more demanding in insisting on the first significance of the grievance and therefore, the hearing upon that grievance.

Thus, strong and constrained review differ within the weight they provide to individual grievances, as strong review gives a prominent role to the individual grievance. The individual grievance, and therefore the attempts to deal with the grievance, are the principal centre of the adjudicative process. In contrast, constrained review takes under consideration the grievance, but grants it a less prominent role. By providing a chance for an individual to boost their grievance during court, it honours the proper to a hearing. Yet, by weakening the powers of the court to make a decision, it attenuates the load of the grievance and its importance. This has important implications because it suggests the way to evaluate systems of constrained review. Systems of constrained review have to be set so that such grievances trigger a real reconsideration of the choices giving rise to the grievance. Someone who features a grievance needs to be ready to challenge legislation and trigger a process during which their grievance is taken seriously by the polity.

In conclusion, this article examines the validity and soundness of constrained review. Specifically, it establishes that in contrast to the dominance view, the case for both strong and constrained review is grounded in the fact that courts, by guaranteeing a right to a hearing, facilitate the voicing of the grievances of those who believe.