

CONSTITUTIONAL REVIEW OF LEGISLATION IN COMPARATIVE PERSPECTIVE: INDIA AND MAURITIUS

Supremacy, Standing and the Architecture of Judicial Control

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ABSTRACT

This article compares the constitutional review of legislation in Mauritius and India. It argues that although both jurisdictions rest on the same foundational premise — constitutional supremacy displacing parliamentary sovereignty — they have produced radically divergent regimes of access and interpretation. The Mauritian model, textually confined by the phrase “in relation to him” in section 17(1) of the Constitution and by the “interests affected” requirement in section 83(1), has been authoritatively construed by the Judicial Committee of the Privy Council as furnishing a personal remedy for personal prejudice and as inhospitable to public interest litigation. The Indian model, by contrast, has been transformed by judicial creativity: Articles 32 and 226 have been read to permit representative standing, epistolary jurisdiction and suo motu cognisance. The article assesses which model is preferable, examines the concentrated and diffuse models of review, evaluates the a priori control practised in France and the concrete/abstract review of the German Bundesverfassungsgericht, considers whether the Privy Council appeal remains an asset or an anachronism, and concludes with proposals for the Mauritian Constitutional Review Commission established in 2026.

Keywords – legislation, Constitution

I. INTRODUCTION

Two constitutions drafted within two decades of each other, both in the shadow of the Westminster model, both for plural post-colonial societies, both establishing constitutional supremacy and a justiciable bill of rights, have produced systems of constitutional adjudication that could scarcely be more different. India’s Supreme Court has become, by common consent, among the most powerful and interventionist constitutional courts in the world.^[1] The Supreme Court of Mauritius has exercised its constitutional jurisdiction with a restraint that its critics describe as excessive and its defenders as principled.

The divergence is not primarily attributable to judicial temperament, though temperament plays a part. It is substantially textual. This article’s central contention is that the Mauritian Constitution contains standing provisions that are, on their face, more restrictive than their Indian counterparts, and that the Privy Council has construed them restrictively in terms that leave little interpretive room for manoeuvre. Reform of Mauritian access to constitutional

justice cannot therefore be achieved by judicial development alone. It requires textual amendment — which is precisely what the Constitutional Review Commission established under the Constitutional Review Commission Bill (No. VI of 2026) is now positioned to recommend.

The argument proceeds in twelve parts, examining in turn the theoretical foundations of review, the textual architecture of both constitutions, the law of standing, interpretive method, *suo motu* jurisdiction, the institutional question of which court reviews, the timing and abstraction of review in the French and German models, the role of the Judicial Committee, and finally the case for a specialised constitutional jurisdiction in Mauritius.

II. THE THEORETICAL BASIS: SUPREMACY OF THE CONSTITUTION AGAINST SOVEREIGNTY OF PARLIAMENT

2.1 The Diceyan Inheritance and Its Displacement

The orthodox English position, canonically stated by Dicey, is that Parliament may make or unmake any law whatever, and that no person or body has the right to override or set aside its legislation.^[2] Judicial review of primary legislation is, on this account, a category error: the courts are Parliament's agents in interpretation, not its supervisors.

Both India and Mauritius have decisively rejected this position, and both have done so textually rather than by judicial assertion. This distinguishes them from the United States, where *Marbury v Madison* inferred the power of review from the logic of a written constitution rather than from any express grant.^[3] Where the constituent power has spoken expressly, the counter-majoritarian difficulty identified by Bickel is substantially attenuated: the court invalidating a statute is not asserting supremacy over the legislature but enforcing a hierarchy that the constituent power itself established.^[4]

2.2 The Kelsenian and American Models

Cappelletti's foundational comparative taxonomy distinguishes the American (diffuse, concrete, *a posteriori*, *inter partes*) model from the Kelsenian (concentrated, abstract, potentially *a priori*, *erga omnes*) model of constitutional adjudication.^[5] India is a modified American model: review is exercised by the Supreme Court and by all High Courts, and increasingly, through Article 141, with *erga omnes* effect. Mauritius is a hybrid — concentrated in the Supreme Court but exercised through ordinary concrete litigation and *a posteriori* only. France, until the reform of 2008, was the purest expression of the *a priori* model; Germany combines abstract and concrete review with the individual constitutional complaint.

III. THE MAURITIAN ARCHITECTURE: SECTIONS 2, 17, 83 AND 84

3.1 Section 2: The Supremacy Clause

Section 2 provides that the Constitution is the supreme law of Mauritius and that any other law inconsistent with it is void to the extent of the inconsistency. The formulation is standard in the Commonwealth export model and does two things: it establishes the hierarchy, and it prescribes the consequence — voidness, and voidness only to the extent of inconsistency, thereby importing a principle of severance.

What section 2 conspicuously does not do is confer jurisdiction, identify a court, or specify who may invoke it. It is a rule of validity, not a rule of access. That work is done by sections 17, 83 and 84, and it is there that the Mauritian difficulty resides.

3.2 Section 17: Enforcement of the Protective Provisions

Section 17(1) provides that where any person alleges that any of sections 3 to 16 has been, is being or is likely to be contravened in relation to him, that person may apply to the Supreme Court for redress, without prejudice to any other lawfully available action. Section 17(2) confers original jurisdiction on the Supreme Court to hear such applications and to make such orders, issue such writs and give such directions as it considers appropriate — subject to a proviso that the court shall not exercise those powers if satisfied that adequate means of redress are or have been available under any other law.

Three features are decisive.

First, the standing formula. The words “in relation to him” are the textual hinge of the entire Mauritian law of constitutional access, and are examined in Part VI below.

Second, the exhaustion proviso. The requirement that constitutional redress be unavailable where adequate alternative means exist establishes the constitutional remedy as residual. This is a significant point of contrast with India, where Article 32 is itself a fundamental right and the existence of alternative remedies is a discretionary factor rather than a jurisdictional bar.

Third, the remedial breadth. Section 17(2) is generously drafted — orders, writs and directions as the court considers appropriate. The Mauritian limitation is therefore emphatically one of *access*, not of *remedy*.

Once through the door, the Supreme Court’s remedial armoury is comparable to the Indian.

3.3 Section 83: Constitutional Questions Outside Chapter II

Section 83(1) provides that where any person alleges that a provision of the Constitution other than Chapter II has been contravened, and that his interests are being or are likely to be affected by such contravention, that person may apply to the Supreme Court for a declaration and relief. Section 83(2) confers jurisdiction to determine such questions and to make declarations, subject to a proviso that no declaration shall be made unless the court is satisfied that the interests of the applicant, or of a party to other proceedings, are being or are likely to be affected.

The architecture is thus bifurcated: Chapter II rights are enforced under section 17; all other constitutional provisions — separation of powers, the electoral provisions, the service commissions, the finance provisions — are litigated under section 83. Both routes are gated by a personal interest requirement, section 83’s being expressed as interests “being or likely to be affected.” The proviso to section 83(2) is particularly notable: it converts the standing requirement from a threshold condition into a continuing constraint on the making of a declaration.

3.4 Section 84: The Reference Procedure and the Debarment of Inferior Courts

Section 84 provides for the reference of constitutional questions arising in subordinate courts to the Supreme Court where the question involves a substantial question of law. The subordinate court may refer of its own motion and must refer if a party so requests, and it must dispose of the case in accordance with the Supreme Court’s decision.

The consequence, and it is fundamental, is that constitutional review in Mauritius is concentrated. The District, Intermediate and Industrial Courts cannot determine constitutional validity; they can only refer.

This is a Kelsenian feature grafted onto a Commonwealth structure, and its merits are

assessed in Part IX.

The Indian Architecture: Articles 13, 32, 226, 141 and 143

4.1 Article 13: The Supremacy Rule

Article 13(1) renders pre-constitutional laws void to the extent of inconsistency with Part III; Article 13(2) prohibits the State from making any law abridging fundamental rights and renders such law void to the extent of contravention. Article 13(3)(a) defines “law” expansively to include ordinances, orders, bye-laws, rules, regulations, notifications, customs and usages.

Article 13 performs the same function as section 2 of the Mauritian Constitution, but with two differences of significance. It is confined in terms to Part III rights, other constitutional limits operating through the federal distribution of legislative competence under Article 246 and the Seventh Schedule. And it is addressed to “the State,” expressly defined in Article 12, which has permitted a substantial jurisprudence on the reach of fundamental rights into bodies performing public functions.

4.2 Article 32: The Heart and Soul

Article 32(1) guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of Part III rights. Article 32(2) empowers the Court to issue directions, orders or writs, including the prerogative writs. Article 32(4) provides that the right shall not be suspended except as otherwise provided by the Constitution.

The drafting is transformative in three respects that repay comparison with section 17 of the Mauritian Constitution.

First, Article 32 is itself a fundamental right, situated within Part III. Ambedkar described it in the Constituent Assembly as the article without which the Constitution would be a nullity — its very heart and soul.^[6] Section 17 of the Mauritian Constitution is a procedural provision located in Chapter IX, not among the protected rights of Chapter II.

Second, and critically, Article 32(1) contains no personal-nexus formula. It does not say “in relation to him.” It confers a right to move the Court for the enforcement of the rights conferred by Part III — not for the enforcement of *his* rights. This textual silence is the space within which the entire Indian jurisprudence of representative standing was built. The contrast with the Mauritian text is the single most important finding of this article.

Third, “appropriate proceedings” is open-textured, and was read to encompass a letter addressed to a judge.^[7]

4.3 Article 226: The High Courts

Article 226 confers on every High Court power to issue writs for the enforcement of fundamental rights and for any other purpose. The phrase “any other purpose” makes the High Court jurisdiction wider in subject-matter than that of the Supreme Court under Article 32, extending to ordinary illegality. Its territorial reach is defined by the location of the authority or the accrual of the cause of action.

The consequence is that constitutional review in India is diffuse at the level of the superior judiciary — the Supreme Court and twenty-five High Courts — while remaining unavailable to subordinate courts, which may not declare a statute unconstitutional. India is therefore not a fully diffuse system on the American model; it is a superior-court diffuse system.

4.4 Articles 141 and 143

Article 141 makes the law declared by the Supreme Court binding on all courts, supplying the erga omnes effect that a pure inter partes model lacks. Article 143 permits the President to refer a question of law or fact of public importance to the Supreme Court for its advisory opinion — a limited abstract jurisdiction, though the Court may decline to answer and its opinion is not strictly binding.^[^8] Mauritius has no equivalent advisory jurisdiction, which is a genuine gap.

Which Textual Model Is Better?

The comparison must be conducted on identified criteria rather than by preference. On four criteria the assessment diverges.

Access. India is unambiguously superior. Article 32 is a right, not a procedure; it contains no personal-nexus requirement; alternative remedies do not bar it.

Clarity of jurisdictional allocation. Mauritius is superior. The Chapter II / non-Chapter II bifurcation between sections 17 and 83 is analytically clean, and section 84 produces a coherent concentration of constitutional determination. The Indian overlap between Articles 32 and 226, together with the special leave jurisdiction under Article 136, has generated a docket problem of a magnitude that Mauritius has been spared.^[^9]

Protection of the constitutional text against amendment. India is superior, though not textually. The basic structure doctrine developed in *Kesavananda Bharati* subjects constitutional amendments themselves to substantive review.^[^10] Mauritius relies instead on graduated amendment thresholds under section 47 — although the Privy Council’s decision in *State of Mauritius v Khoyratty*, holding that an amendment removing bail jurisdiction from the courts engaged the democratic-state guarantee and the separation of powers, gestures toward something functionally analogous.^[^11] Remedial adequacy. Broadly equivalent. Section 17(2) of the Mauritian Constitution and Article 32(2) are both drafted expansively.

The overall assessment is that the Indian text is the better instrument for a jurisdiction that wishes constitutional rights to be enforced by courts at the instance of those who cannot enforce them for themselves; the Mauritian text is the better instrument for a jurisdiction that wishes constitutional adjudication to remain disciplined, bilateral and confined. The choice between them is a choice about the role of courts, not a technical drafting question — and the Mauritian Commission should approach it as such.

IV. LOCUS STANDI IN MAURITIUS: THE “IN RELATION TO HIM” PROBLEM

6.1 The Authoritative Construction

The decisive authority is *Mirbel and others v The State of Mauritius* [2010] UKPC 16. Four Mauritian landowners challenged the National Residential Property Tax introduced by the Finance Act 2006, alleging contravention of sections 3 and 8. The Supreme Court upheld a plea in limine litis that they lacked standing. Before the Board, counsel invoked the relaxed approach to standing in United Kingdom judicial review and the more generous Indian approach to constitutional standing.

Lord Phillips rejected the analogy in terms that leave little room for judicial development. Section 17(1), the Board held, affords an additional or alternative remedy to a person contending that his own Chapter II rights have been or are likely to be infringed. It supplies a personal remedy for personal prejudice, and is not an appropriate vehicle for a general challenge to legislation or administrative action brought in the public interest — a conclusion the Board drew directly from the phrase “in relation to him.” The Board added that the Supreme Court had repeatedly emphasised the point, citing *Tengur v Ministry of Education and*

Scientific Research as exemplifying the distinction between a section 17(1) claim and a claim for judicial review.^[^12]

The appeal was nonetheless allowed, on the narrow basis that the pleadings, properly read against the amended tax, did aver liability to pay it — and that a frontal attack on an entire taxing statute does personally prejudice those liable under it, even if they are, as the Board put it, in the same position as everyone else paying the tax.^[^13]

6.2 The Analytical Significance

Mirbel repays close reading because it establishes three propositions of enduring importance. First, the restriction is textual, not merely doctrinal. The Board grounded its conclusion in the words “in relation to him.” A subsequent Mauritian court wishing to liberalise standing under section 17 would have to depart from that construction — which, given the Privy Council’s position in the appellate hierarchy under section 81, is not realistically available. This is why Mauritian public interest litigation requires constitutional amendment and cannot be achieved judicially.

Second, the Board maintained a firm distinction between constitutional redress and judicial review. In Mauritius, ordinary judicial review of administrative action operates under the Supreme Court’s supervisory jurisdiction and applies a *sufficient interest* test that is materially more relaxed than section

17. Litigants have therefore had an incentive to characterise constitutional grievances as administrative law claims — a distortion produced by the standing rule rather than by the merits.

Third, the Board was not unsympathetic to the underlying complaint. It observed that the standing objection appeared to be a pleading point and deprecated the treatment of pleadings as a tactical game.^[^14] The tenor is of a court applying a restriction it did not choose.

6.3 The Remaining Openings

Section 17(1) is not hermetically sealed. Its proviso permits an application to be made on behalf of a detained person by another. The words “is likely to be contravened” permit anticipatory challenge. And section 83’s “interests... likely to be affected” formula has, on some readings, slightly more elasticity than section 17’s, since “interests” need not equate to legal rights. These are real but narrow openings, and none of them yields a public interest jurisdiction.

V. LOCUS STANDI IN INDIA: FROM AGGRIEVED PERSON TO PUBLIC INTEREST

7.1 The Liberalisation

The Indian departure from the traditional rule was deliberate, self-conscious and judicially engineered. Its principal architects were Bhagwati and Krishna Iyer JJ, and its foundations were laid in a short sequence of cases between 1976 and 1982.

In *Mumbai Kamgar Sabha v Abdulbhai Faizullabhai*, Krishna Iyer J signalled that procedural technicality should not defeat substantive justice.^[^15] In *Fertilizer Corporation Kamgar Union v Union of India*, the Court articulated the case for widening standing where public wrongs are alleged.^[^16] The decisive statement came in *S.P. Gupta v Union of India*, where Bhagwati J held that where a legal wrong is caused to a person or determinate class who by reason of poverty, helplessness, disability or socially or economically disadvantaged position cannot approach the court, any member of the public acting bona fide may move the

court.[¹⁷]

People's Union for Democratic Rights v Union of India applied this to the conditions of construction workers engaged for the Asian Games.[¹⁸] *Bandhua Mukti Morcha v Union of India* established that a letter could be treated as a writ petition and that the Court could appoint commissioners to investigate facts — the epistolary and investigative jurisdictions.[¹⁹] *Sunil Batra v Delhi Administration* had already treated a prisoner's letter as a petition.[²⁰] *Hussainara Khatoon v State of Bihar* produced the release of thousands of undertrial prisoners.[²¹]

7.2 The Theoretical Account

Baxi's characterisation of this development as Social Action Litigation rather than public interest litigation remains the most acute analysis: he argued that the Indian phenomenon was not the American public interest law model transplanted, but a distinctive judicial response to mass deprivation, in which the Court reconstituted itself as a forum for the disadvantaged after the legitimacy damage of the Emergency.[²²]

Cappelletti had earlier identified the general problem of vindicating diffuse interests through courts designed for bilateral disputes.[²³]

The post-Emergency legitimisation thesis is important for the comparative argument.

India's liberalisation of standing was a response to a specific institutional crisis — the Court's capitulation in *ADM Jabalpur*[²⁴] — and Sathe, Mehta and Robinson have each argued that PIL functioned as an instrument of institutional recovery.[²⁵] Mauritius has experienced no equivalent legitimacy rupture, which is one reason the pressure for liberalisation has been weaker.

7.3 The Critical Literature

An honest comparative treatment must engage the substantial Indian critique of PIL, because a Mauritian reform that imports the doctrine uncritically will import its pathologies.

Bhuwania's argument is the sharpest: that PIL dispensed with adversarial procedure, evidence and pleadings, and produced a jurisdiction in which the Court acts on impression, with the poor increasingly the *objects* rather than the beneficiaries of litigation — most starkly in slum demolition and street vendor cases.[²⁶] Others have documented the class capture of PIL by middle-class environmental and urban-amenity claims.[²⁷] The Supreme Court itself has repeatedly warned against abuse: in *Balco Employees' Union* it cautioned against PIL as a vehicle for challenging policy,[²⁸] and in *State of Uttaranchal v*

Balwant Singh Chauhal it issued detailed directions requiring verification of credentials and discouragement of publicity and private-interest litigation masquerading as public interest.[²⁹] *Subhash Kumar v State of Bihar*, while expanding Article 21 to encompass a right to a wholesome environment, warned in the same breath against personal grudges litigated as public causes.[³⁰]

The lesson for Mauritius is that PIL requires gatekeeping designed in from the outset, not retrofitted after two decades of abuse.

VI. INTERPRETIVE METHOD: PURPOSIVE GENEROSITY AGAINST TEXTUAL RESTRAINT

8.1 The Commonwealth Doctrine

The governing principle for Commonwealth bills of rights derived from the Westminster

export model was stated by Lord Wilberforce in *Minister of Home Affairs v Fisher*: such instruments call for a generous interpretation avoiding the austerity of tabulated legalism, suitable to give individuals the full measure of the fundamental rights referred to.^[^31] Lord Diplock reinforced this in *Attorney-General of The Gambia v Momodou Jobe*.^[^32] Both are binding persuasive authority in Mauritius.

The Mauritian record in applying them is uneven. In *Matadeen v Pointu*, the Privy Council reversed a Supreme Court that had read a general equality principle into sections 1 and 3 with reference to the Declaration of the Rights of Man and Article 26 ICCPR, holding that the anti-discrimination guarantee was confined to the enumerated grounds in section 16 and that other equality questions were for the legislature.^[^33] Lord Hoffmann's reasoning is impeccably orthodox and expressly acknowledges that the arguments are not all one way — but the outcome was a textualist confinement of the equality guarantee at precisely the moment the Supreme Court had attempted expansion.

Not all Mauritian constitutional jurisprudence is restrictive. *Ahnee v Director of Public Prosecutions* engaged seriously with freedom of expression in the contempt context. ^[^34] *Mohit v Director of Public Prosecutions* held that the DPP's discretion is not immune from review, an important extension of constitutional accountability to a guarantor office.^[^35] *Madhewoo v The State of Mauritius* subjected the biometric identity card scheme to constitutional privacy analysis, with the Supreme Court invalidating the retention and storage of fingerprint data.^[^36] And in 2023 the Supreme Court held section 250 of the Criminal Code unconstitutional to the extent that it criminalised consensual same-sex acts between adult males in private, reading the provision down rather than striking it out.^[^37]

8.2 The Indian Method

The Indian trajectory ran in the opposite direction. *A.K. Gopalan* adopted a compartmentalised, literal reading of Articles 19, 21 and 22.^[^38] *Maneka Gandhi v Union of India* overruled that approach, holding that the procedure contemplated by Article 21 must be fair, just and reasonable, and integrating Articles 14, 19 and 21 into a mutually reinforcing “golden triangle.”^[^39] The consequences have been enormous:

Article 21 has since been read to encompass livelihood, health, education, shelter, a clean environment, dignity, and privacy.^[^40] The Court has also drawn on unincorporated international law to fill legislative gaps, most famously in *Vishaka v State of Rajasthan*.^[^41]

8.3 Assessment

The Indian approach is more generous but less predictable; the Mauritian more disciplined but less protective. Barak's account of purposive interpretation offers the reconciling framework: purpose is derived from the text and its context, not substituted for it, and a purposive court remains a court applying law rather than making policy. ^[^42] The criticism properly directed at some Indian jurisprudence is not that it is purposive but that it has at times been purposive without textual anchorage.

The recommendation for Mauritius is not that its judges should emulate Indian expansiveness, but that the *Fisher* principle should be given statutory or constitutional expression as an interpretive directive — as several modern Commonwealth constitutions have done — so that generosity of construction is a legal obligation rather than a judicial disposition.

VII. SUO MOTU CONSTITUTIONAL REVIEW

The Indian Supreme Court's practice of taking cognisance on its own motion, typically on

the basis of newspaper reports or letters, has produced significant interventions: prison conditions, environmental degradation, and most recently the pandemic response in *In Re: Distribution of Essential Supplies and Services During Pandemic* and the migrant labour proceedings of 2020.^[43]

Whether Mauritius should emulate this requires careful separation of three distinct things. *Suo motu* cognisance of executive inaction is the most problematic. A court that initiates proceedings compromises the appearance of impartiality, since it becomes complainant and adjudicator; it acts without the benefit of adversarial argument; and it has no institutional means of prioritising among the infinite number of matters it might notice. Bhuvania's critique bears directly here.^[44]

Suo motu reference of a constitutional question arising in litigation before the court is different and unobjectionable. Where a court is seised of a case and a constitutional question is necessary to its determination, the court should be able to raise it whether or not the parties have pleaded it, subject to hearing them. Section 84 already permits a subordinate court to refer of its own motion. This is the version of the Indian practice that Mauritius should adopt and formalise, and it should be extended to the Supreme Court's own proceedings.

Institutional referral by a guarantor body is the third and, in the author's assessment, the best route. Rather than a court initiating proceedings, the National Human Rights Commission, the Equal Opportunities Commission or the Ombudsman should be given standing to refer constitutional questions to the Supreme Court. This achieves the systemic-issue benefit of *suo motu* jurisdiction while preserving the adversarial structure and the court's impartiality.

VIII. WHICH COURT REVIEWS? CONCENTRATION, DIFFUSION AND THE SECTION 84 DEBARMENT

10.1 The Mauritian Position

Constitutional review in Mauritius is concentrated in the Supreme Court. Subordinate courts must refer under section 84. The advantages are consistency, avoidance of forum shopping, and the concentration of scarce constitutional expertise. The disadvantages are delay — a reference suspends the substantive proceedings — and, more subtly, the removal of constitutional consciousness from the courts where most citizens actually appear. A District Court magistrate who cannot decide a constitutional question has a reduced incentive to identify one.

10.2 The Indian Position

India's superior-court diffuse model, operating through Article 226 across twenty-five High Courts alongside Article 32, produces far greater access. Its costs are equally clear: doctrinal fragmentation until the Supreme Court settles a question, and an unmanageable caseload. Robinson's empirical work documents the resulting institutional strain.^[45]

10.3 Assessment

Mauritius is a jurisdiction of 1.2 million people with a single Supreme Court. Full diffusion would be inappropriate. But the current position is unnecessarily rigid, and two reforms are available: a constitutional division within the Supreme Court, which the 2026 Bill contemplates in the related form of a new Court of Appeal;^[46] and a power in subordinate courts to apply settled constitutional jurisprudence that is, to give effect to a proposition already authoritatively determined — while retaining the reference requirement for novel questions. This preserves consistency while removing the absurdity of a magistrate being obliged to refer a question the Supreme Court has already answered.

IX. A PRIORI AND A POSTERIORI, ABSTRACT AND CONCRETE: THE FRENCH AND GERMAN MODELS

11.1 France

Before 2008, French constitutional review was exclusively a priori and abstract: the Conseil constitutionnel examined statutes after adoption but before promulgation, on referral by the President, the Prime Minister, the presidents of the two chambers or, following the 1974 reform, sixty deputies or sixty senators.^[^47] The constitutional revision of 23 July 2008 introduced the question prioritaire de constitutionnalité, effective March 2010, permitting a litigant to raise the unconstitutionality of a statutory provision in the course of proceedings, subject to filtering by the Conseil d'État or the Cour de cassation.^[^48] France thereby moved from a purely a priori to a mixed system — an important datum, because it represents a considered judgment by a mature constitutional democracy that a priori review alone is insufficient.

The theoretical accounts of Stone Sweet and Rousseau explain why: a priori review produces a “juridicised” legislative process in which anticipated constitutional objections shape drafting, but it cannot address unconstitutionality that emerges only in application.^[^49]

11.2 Germany

The Bundesverfassungsgericht exercises a notably complete jurisdiction: abstract review at the instance of the federal government, a Land government or a parliamentary minority; concrete review by reference from an ordinary court which considers a statute unconstitutional; and the Verfassungsbeschwerde, the individual constitutional complaint available to any person alleging violation of basic rights by public authority after exhaustion of remedies.^[^50]

The individual complaint is the feature most relevant to the Mauritian debate. It constitutes the overwhelming majority of the Court's docket, is subject to an admissions procedure operated by three-judge chambers, and has produced a constitutional culture of unusual depth.^[^51] Crucially, it demonstrates that wide individual access and disciplined adjudication are compatible, provided the filtering mechanism is robust. This is the direct answer to the objection that liberalising Mauritian standing would flood the Supreme Court.

11.3 Assessment for Mauritius

A priori review has a specific attraction for Mauritius: it would permit constitutional defects to be identified before enactment, avoiding the disruption of post hoc invalidation. But it carries two serious costs. It requires a body empowered to review legislation that no litigant has challenged, which in a small polity risks politicisation; and, as the French experience demonstrated over thirty-four years, it leaves applied unconstitutionality unremedied.

The recommendation is therefore for a limited a priori jurisdiction operating alongside, not instead of, existing a posteriori review — an advisory reference on the model of Article 143 of the Indian Constitution, exercisable by the President on the advice of Cabinet and, importantly, also on the requisition of a specified minority of the National Assembly. The minority trigger is the essential feature, since it is what makes the French mechanism a genuine check rather than an instrument of the majority.

X. The Judicial Committee of the Privy Council: Asset or Anachronism?

Appeals lie from the Supreme Court of Mauritius to the Judicial Committee under section 81. The question whether this remains desirable is genuinely balanced, and the argument is often

conducted badly on both sides.

The case for retention is substantial. The Board supplies a tier of review wholly insulated from domestic political pressure — a consideration of real weight in a small society where judicial appointment, professional life and political life are closely interconnected. It brings comparative expertise across Commonwealth constitutions. Its Mauritian jurisprudence has not been uniformly restrictive: *Khoyratty* protected the separation of powers against constitutional amendment, *Mohit* subjected prosecutorial discretion to review, and *Mirbel* itself allowed the appeal. And its judgments are systematically published and freely accessible, which is more than can be said for the full corpus of Mauritian Supreme Court decisions.

The case against is equally serious. There is a legitimacy objection to final constitutional interpretation for a republic being conducted by judges appointed in the former colonial metropole. There is a distance objection: as *Matadeen* arguably illustrates, the Board may be less attuned to local constitutional culture than the domestic court. There is a cost and access objection, since a Privy Council appeal is available in practice only to the well-resourced. And Barbados, Guyana, Belize and Dominica have all transferred final appellate jurisdiction to the Caribbean Court of Justice, demonstrating that the transition is achievable.^[52]

Is it better than the Indian arrangement? The comparison is not like-for-like. India's Supreme Court is both the apex constitutional court and the final appellate court, which produces institutional coherence and democratic legitimacy at the cost of having no external check — and the Emergency demonstrated what follows when an unchecked apex court capitulates. Mauritius has an external check but a dependent one. Neither arrangement is unambiguously superior; the Mauritian model trades legitimacy for insulation, and the Indian trades insulation for legitimacy.

The author's assessment is that the Privy Council appeal should be retained for the present but should cease to be the sole guarantee of constitutional independence. The correct sequencing is to strengthen domestic institutions first — a constitutional division, transparent judicial appointment through a cross-partisan body, comprehensive law reporting — and to revisit the Judicial Committee question once those are in place. Abolishing the external check before building the internal one would be the worst of both worlds.

XI. SHOULD MAURITIUS ESTABLISH A SEPARATE CONSTITUTIONAL COURT?

Four models present themselves.

The status quo plus a constitutional division of the Supreme Court. Lowest cost, lowest disruption, no new appointment mechanism required, preserves the Privy Council appeal. This is what the 2026 Bill's contemplated Court of Appeal within the Supreme Court most closely approximates.

A specialised constitutional court on the German or South African model. Confers institutional prestige and permits appointment criteria distinct from the ordinary judiciary. But Ferreres Comella's analysis suggests that the case for a specialised constitutional court is strongest in civil law systems with a career judiciary trained in codal application and lacking a tradition of judicial law-making.^[53] Mauritius has a mixed legal system with a common law procedural tradition and an appellate judiciary experienced in constitutional adjudication. The Kelsenian rationale is therefore substantially weaker here.

A Conseil constitutionnel on the French model. Not recommended. Its historical

composition, including former Presidents of the Republic as members of right, and its origins as an instrument of executive discipline over Parliament make it a poor template. France itself has moved steadily toward juridification of the body.

A hybrid: constitutional division plus advisory reference plus liberalised standing. This is the author's recommendation, developed in Part XIV.

The decisive practical consideration is scale. A separate constitutional court for a population of 1.2 million risks either underemployment or the drawing of the ablest judges away from the general jurisdiction. The functional objectives — expertise, expedition, prestige, consistency — can be achieved through a division without the costs of a separate institution.

XII. RECOMMENDATIONS FOR THE CONSTITUTIONAL REVIEW COMMISSION

1. Amend section 17(1) to add a public interest limb, alongside the existing personal-prejudice route, permitting application by a person acting in the public interest or on behalf of a person or class unable to approach the court by reason of poverty, disability or disadvantage. The Kenyan formulation in Articles 22 and 258 provides a tested Commonwealth model.^[^54]
2. Amend section 83(1) correspondingly, since separation of powers and electoral violations are precisely the category where no individual can readily show personal interest.
3. Build the filter in from the start. Adopt a permission stage on the German admissions model, statutory criteria on the *Balwant Singh Chauhal* pattern requiring verification of the applicant's bona fides and credentials, and a costs regime that protects genuine public interest litigants while deterring the vexatious.
4. Confer referral standing on guarantor institutions — the NHRC, the Equal Opportunities Commission and the Ombudsman — as the disciplined alternative to suo motu jurisdiction.
5. Enact an interpretive directive codifying the *Fisher* principle of generous construction.
6. Introduce a limited advisory jurisdiction on the Article 143 model, triggerable by the President and by a specified minority of the National Assembly.
7. Establish a constitutional division of the Supreme Court rather than a separate constitutional court.
8. Permit subordinate courts to apply settled constitutional jurisprudence, retaining the section 84 reference for novel questions.
9. Retain the Privy Council appeal for now, while building the domestic institutional capacity that would make its eventual replacement safe.

CONCLUSION

The comparison between Mauritius and India yields a conclusion that is both simple and consequential: the divergence between the two systems of constitutional review is primarily a matter of constitutional text, and only secondarily a matter of judicial disposition. Article 32 of the Indian Constitution confers a right to move the Court for the enforcement of Part III rights; section 17(1) of the Mauritian Constitution confers a right to apply where a right has been contravened *in relation to him*.

Everything else follows from those eleven words, and the Privy Council said so expressly in

Mirbel.

This has a direct implication for the reform debate. Those who criticise the Mauritian judiciary for insufficient boldness are, in substantial part, criticising it for applying the constitution it was given. The Supreme Court cannot create a public interest jurisdiction that section 17 forecloses and the Judicial Committee has held to be foreclosed. The remedy lies with the constituent power.

But the Indian example should be received critically rather than admiringly. Social action litigation gave India a jurisprudence of extraordinary reach, and it also gave India a court with an unmanageable docket, a doctrine of standing so relaxed that its own judges have repeatedly had to police it, and a body of critical scholarship arguing that the poor have too often become the objects rather than the beneficiaries of judicial solicitude. Mauritius has the opportunity, rare in constitutional design, to adopt a reform with forty years of another jurisdiction's experience of its failure modes already documented. The design task is to capture the access gains while building in, from the first day, the filters that India built only after two decades of abuse.

The 1968 Constitution gave Mauritius supremacy without access. The task of the present reform cycle is to supply the access without surrendering the discipline.

FOOTNOTES

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11. *Marie Jean Nelson Mirbel and others v The State of Mauritius and others* [2010] UKPC 16 [26], citing *Tengur v Ministry of Education and Scientific Research* [2002] SCJ 48, [2002] MR 166.

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13. *ibid* [11], [18].
14. *Mumbai Kamgar Sabha v Abdulbhai Faizullabhai* (1976) 3 SCC 832.
15. *Fertilizer Corporation Kamgar Union v Union of India* (1981) 1 SCC 568.
16. *S.P. Gupta v Union of India* 1981 Supp SCC 87.
17. *People’s Union for Democratic Rights v Union of India* (1982) 3 SCC 235.
18. *Bandhua Mukti Morcha* (n 7).
19. *Sunil Batra v Delhi Administration* (No 2) (1980) 3 SCC 488.
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30. *Balco Employees’ Union v Union of India* (2002) 2 SCC 333.
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32. *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) 328–329.
33. *Attorney-General of The Gambia v Momodou Jobe* [1984] AC 689 (PC) 700. [^33]: *Matadeen v Pointu*
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35. *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 (PC).
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40. A.K. Gopalan v State of Madras AIR 1950 SC 27.
41. Maneka Gandhi v Union of India (1978) 1 SCC 248.
42. See Olga Tellis v Bombay Municipal Corporation (1985) 3 SCC 545 (livelihood);
43. Unni Krishnan v State of Andhra Pradesh (1993) 1 SCC 645 (education); Vellore Citizens
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