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Clerks of Constitutional Courts / Supreme Courts

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A. Introduction

1. In a globalized world, the caseload of constitutional courts and supreme courts is increasing along with the complexities and difficulties of constitutional questions. In contrast, the number of apex court judges is modest: it varies between five (eg Equatorial Guinea and Senegal) and 19 (Russia). The average number is nine. It is not difficult to imagine that someone must assist judges in preparing for cases beyond administrative case management offered by court clerks (→ *judges at constitutional courts / supreme courts*). Therefore, it is not surprising that the development in the role of law clerks is observed worldwide. Their roles are not written in the constitution but have developed through customs and traditions (later some of them were put into statutes). Therefore, it may be controversial when law clerks seem to engage in the process of legal decision-making by assisting judges in drafting a judgement concerning important constitutional questions, writing a draft of the judgement (eg Rehnquist), or providing more radical ideas by which an apex court judge can be influenced (eg Ward and Weiden 241). For example, law clerkship in the United States ('US') Supreme Court has a long history and high reputation, but it has recently been facing criticism (eg Ward and Weiden). Moreover, a similar system is spreading around the world, particularly in common law system countries, which heavily rely on the resources of young law graduates.

2. In other countries, there is a different model of clerkship in which law clerks are internally recruited from the judiciary or a legal entity in a broader sense. Another interesting aspect is that considering the globalization of constitutional law, there is an internationalization of law clerkship as some courts such as the → *Supreme Court of Israel (Beit Ha Mishpat Ha Elyon)* and the → *Constitutional Court of South Africa* recruit foreign law clerks. Both courts often cite foreign laws and precedents (Groppi and Ponthoreau). Some European and international courts are now flourishing, but others, such as the → *European Court of Human Rights (ECtHR)*, are heavily burdened by the astronomical caseload (presently 270 lawyers support 47 judges). How to support judges who have a heavy caseload with accountability and legitimacy is a common judicial challenge. Taking into account the globalization of apex courts and legal education in general, this article explores the significance of, and challenges for, law clerks by comparing similarities and differences of law clerkships across the world (for some comparisons see Kenny; Rogowski and Gawron; Young).

B. The Origin of the Law Clerk

3. A law clerk is a person who assists the judges in their judicial work, including case analysis, research of legal issues, constructing reasoning, and/or writing a first draft. The types of law clerks are diverse based on each country's legal system, tradition, history, and education. Some came into existence from an individual judge's initiative. Others have a more organizational arrangement. The differences reflect the method of recruitment, qualifications, range of functions, status, and term. The scale of the law clerk system also varies by country.

4. There are roughly two models as follows: the first paradigm being when recent graduates from law schools are hired for a rather short term such as one year (or two) to support an individual judge (Model A). A famous example is the US Supreme Court. This practice began in 1882 by Justice Gray, who employed a recent graduate from Harvard Law School and paid the salary himself (he had initiated this practice when he was the Chief Justice of the Massachusetts Supreme Court in 1875). The 1922 Appropriation Act (US) enabled each judge to hire one law clerk at an annual salary of up to US\$3,600, and in 1924, the Congress made law clerk positions at the Court permanent (Hall 185). The second

paradigm is the one in which junior judges or permanent staff attorneys who have an experience in being practice support judges for a longer period are hired (Model B).

5. Models A and B differ in the extent to which the law clerk is a substantial and permanent component of the court. With regard to Model B, they are full time junior judges or lawyers with experience. There is no doubt that full time junior judges are a part of the judiciary, including the apex courts. In the case of experienced lawyers, if they can work for a longer period they are more likely to be a part of the court. In Model A, it is rather difficult to consider them as a permanent and therefore crucial part of the court. However, the opposite has definitely been known to happen (Baier and Ward and Weiden).

6. Apart from law clerks, the secretariat and its secretaries (or registrars) play an important role in administration of the court. Some countries' secretaries are senior officials or even professional judges. Therefore, they have influences on the administrative policy of the court including promotion and training of the judges, arrangement of the post of judges, or business management as a whole.

C. Recruitment

7. Model A recruits candidates from outside the judiciary for a short period (typically one year) from recent young law graduates (typically in their mid-20s) with very limited experience in practice. Open recruiting occurs when job qualifications are publicized on the courts' websites. In countries like India, online recruiting is gaining popularity due to the high number of applications. In Model B, recruiting happens more internally although some courts open the door to prosecutors, practitioners, law professors, and high ranking public servants. Candidates are more likely to be mature (in their 30-40s) and openness and transparency varies based on specific courts.

8. Early recruitment in the US Supreme Court was based on a personal relationship between a justice, Justice Gray, and his half-brother, John Chipman Gray, a Harvard Law School professor, who selected Harvard honour graduates for one-year terms for Justice Gray and his successor, Oliver Wendell Holmes. This practice was gradually adopted by other justices with some variations. As caseloads increased, the number of law clerks also increased. Presently, each justice can have as many as seven assistants, ie four law clerks, two secretaries, and one messenger (the Chief Justice can have another extra law clerk). Justices select their own clerks. They differ significantly with respect to when they select their clerks. Therefore, it is often recommended that an applicant should apply early enough to all nine justices to enhance their chances. Applicants usually send a cover letter, CV, a writing sample, transcript, and recommendation letters from their law school faculty (more than three is recommended). Many major US law schools have an office to support applicants with manuals and detailed web pages (the number of law clerks accepted by the judges of the Federal Supreme Court is very good publicity for law schools). It is now common that applicants have clerkship experience in a lower court for a year before applying to the Supreme Court. Each justice receives roughly 250 to 300 applications per year (Hall 185). Justices select roughly six to nine applicants whom they (and law clerks) interview, and then choose one.

9. Canada also has a similar system and publishes a Law Clerk Program each year to recruit law clerks (there is a deadline for submission). For the period 2017-2018 (one year), 27 positions of law clerks to the Chief Justice and Puisne Judges of the → *Supreme Court of Canada (Cour suprême du Canada)* are open. Law clerks are engaged as a term employee within Canada's public service and as such receive benefits and conditions of employment. The annual salary is C\$64,505. An applicant may apply to the Chambers of the Chief Justice of Canada by sending (1) a cover letter addressing all requirements stated; (2) a curriculum vitae; (3) official transcripts of marks obtained in all post-secondary studies, including law

school and any other post-graduate courses; and (4) four letters of reference (one of these references may be from the present dean of the faculty where the applicant obtained his or her degree) addressed to the Chambers of the Chief Justice of Canada.

10. The system of the High Court of Australia has elements of both the US and Canadian systems. In Australia, a law clerkship is termed an associateship. An applicant who wants to apply for an associateship with a particular judge should write directly to him or her. An applicant who is interested in working for any one of the judges, without any preference, should write to the chief executive and principal registrar, who raises the applicant's interest at a meeting with the judges. There are no specific closing dates for applications, but it is common for the judges to appoint their associates two or three years in advance. There are more than 200 applications for potential vacancies and competition is very strong.

11. The → *Supreme Court of India* began to hire law clerks in the 1990s. Currently, each judge can have two law clerks (Chandrachud 73 and 85). An application has to be registered online, and an applicant cannot apply to individual judges. However, an informal path exists whereby an individual can write to a judge individually when he or she is not necessarily compatible with the formal qualifications but knows the judge personally or even does not know the judge but belongs to the same geographic region or city and speaks the same native language as the judge (Chandrachud 84).

12. The Supreme Court of Israel recruits foreign law clerks and national law clerks for conducting legal research and drafting opinions to be used in the adjudication of pending cases on the Supreme Court docket. According to the president of the Court, the reason is that the State of Israel, a relatively young country, has a comparatively small body of jurisprudence, and the Court often looks to the American, Commonwealth, and European precedent. Therefore, it solicits foreign candidates trained in the American, Commonwealth, or European legal tradition to work in the capacity of a foreign clerk. The influence of international precedents is also shown in the frequent citation of foreign law by the Court (see Groppi and Ponthoreau).

13. In South Africa, it was the Constitutional Court that, for the first time, installed law clerkship for citizens (for one year) and foreigners (for a minimum period of six months and up to one year). The latter category has a special programme, the 'German trainee lawyer programme'. Each judge has two South African law clerks and may have one foreign law clerk. All applications are considered by all the justices of the Court, and as such applicants should not indicate a preference to work for a specific justice. South African applications should only be submitted electronically (by email) to the Constitutional Court. South African law clerks receive a uniform salary of R252,144.00 per annum plus 37 per cent in lieu of benefits, which amounts in total to R345,437.28 per annum (US\$24,180). Foreign law clerks are not remunerated, so it is recommended that they seek their own funding to cover all their expenses and traveling costs.

14. Judicial assistants in the United Kingdom ('UK') Supreme Court differ slightly from other common law system countries in that the jobs are filled by a solicitor, barrister, or advocate qualified in one of the UK jurisdictions, who has completed a training contract or pupillage by the start of their appointment. There will be seven available posts accepting applications in January 2017.

15. An example of Model B is the German Constitutional Court. Again, there is no clause on law clerks in the constitution, but the Rules of Procedures of the Federal Constitutional Court state ‘the legal assistants support the judges, to whom they are allocated, in the office business’ (section 13). Each judge has three legal assistants for which every judge has a right of appointment. Judges who were formerly university law professors tend to provide an opportunity to their law students. Other judges obtain referrals from certain state justice administrators or the Court president, or they rely on personal recommendations often made by legal assistants. Every judge develops his or her own selection method (Rogowski and Gawron 199).

16. Another Model B example is the Constitutional Court of the Republic of Korea (→ *Constitutional Court of Korea*). The president of the Court appoints constitutional research officers (40 persons or less) through a resolution of the Council of Justices after serving three years as an assistant constitution research officer, taking into account his or her service records. The assistant constitution research officer will be appointed by the president of the Constitutional Court through a resolution of the Council of Justices. They are considered public officials in special service and receive treatment comparable to judges of ordinary courts (Constitutional Court of Korea 15-16).

17. The → *Supreme Court of Japan (Saikô saibansho)* follows Model B in a narrow sense. It appoints judges of the district courts who have had about 15 years’ judicial experience as law clerks. They keep their status as judges after their appointment. The appointment mechanism is internal and the selection criterion is not publicized. There are about 40 law clerks at present.

D. Qualification/Selection Criteria

18. When a clerkship has been developed based on a custom, its qualifications are not public. On the contrary, when the instalment is recent and established by the institution itself, the required qualifications are documented and published on the institution’s website.

19. In the US Supreme Court, the selection criterion is not public, but the practice shows that law clerks came from renowned law schools (law schools from which the present judges of the Supreme Court graduated are Harvard (4), Yale (3), or Columbia (1)), graduated at the top of their class, and have clerked in a lower federal court for at least one year (Hall 185). As the competition is severe and a trusting relationship between a law clerk and judge is important, it is crucial to have a strong recommendation letter from a person who knows the justice.

20. In contrast to the US, other common law system countries provide qualification details and job conditions on their court’s website. For example, in Canada, applicants need a Bachelor of Law or Juris Doctor from a recognized Canadian university or its equivalent. Although a preference is given to Canadian citizens, persons with permanent resident status in Canada or a work permit for Canada may apply. The selection criteria require proficiency in one official language, and subsequently, candidates are selected for further assessment based on a combination of criteria including the following aspects: letters of recommendation, academic background and record, language skills, and range of experience. Appointment is conditional and based on the willingness of the candidate to undergo and successfully pass a security clearance at Level II as well as to sign and abide by a confidentiality and conflict of interest declaration.

21. In Australia, applicants must have graduated with first class honours and preferably must have research experience. It is also preferable that they have an experience of working for a law firm, university, or another court. They must be an Australian citizen to be eligible for employment with the High Court, and satisfactory criminal and medical checks are required.

22. In India, applicants must have a graduate degree in law, or have a Bachelor's degree in law (including an integrated degree course in law) from any school, college, university, or institution established by law in India, and be recognized by the Bar Council of India for enrolment as an advocate. They must have computer proficiency including retrieval of desired information from various search engines. They must be an Indian citizen and must not be below the age of 18 years and above 27 years on the date of the receipt of the application. A clerkship is a full time job and incompatible with a practicing advocate or being engaged/appointed elsewhere on an honorarium or payment basis. A candidate should not have been involved in any criminal case. Applicants must have absolute integrity, honesty, and good moral character, qualifications about which they will submit certification by up to two persons at the time of the interview. Indian law students can graduate law school at the age of 23, so the average law clerk in India is younger than the average law clerk elsewhere. Selection shall be made on the basis of a written test and an interview. Priority may be given to a candidate from a prestigious national law school as law clerks often graduated from the country's elite law schools (Chandrashud 80 and 83).

23. In South Africa, an applicant must have an LLB (or equivalent) or should be in their final year of study for such a degree and have an interest in subjects related to constitutional law. The required skills are as follows: knowledge of and the ability to apply legal principles, concepts, and procedures; familiarity and experience in the use of a variety of legal research sources, including electronic sources; excellent English language and writing skills; computer proficiency; analytical skills; drafting skills, including the ability to write clearly and concisely and under pressure; the ability to plan work and manage conflicting priorities; and the capacity to work independently and in a team setting.

24. In Germany, legal assistants are recruited from experts with experience in a specific legal field. The majority of them have been judges at lower specialized courts. They are typically around 30-40 years old. Other requirements include specialized knowledge in some area of law such as tax, as well as good character, prior achievement, and flexibility (Rogowski and Gawron 12-13).

25. In South Korea, constitutional research officers must fall under any of the following categories: a person who is qualified as a judge, a public prosecutor, or an attorney-at-law; a person who has been in a position equal to or higher than an assistant professor of law in an accredited college or university; a person who has been engaged in legal affairs for five or more years as a public official of Grade IV or higher in the state agencies, such as the National Assembly, the Executive, or courts; a person who has obtained a doctorate in law and engaged in legal affairs for five or more years in the state agencies, such as the National Assembly, the Executive, courts, or the Constitutional Court; and a person who has obtained a doctorate in law and engaged in legal affairs for five or more years in an accredited research institute, such as a college or university as stipulated by the Constitutional Court Rules.

26. In Japan, law clerks are chosen from among junior judges with an approximate experience of 15 years, but the court's selection criteria are not made public. If a judge is appointed as a law clerk, he or she is considered the brightest among his or her colleagues.

E. Term

27. Under Model A, courts recruit law clerks for a short period (typically one year but possible to extend another year), while those following Model B tend to offer a longer tenure. For example, German legal assistants work around three to four years, and it is common to move to a higher level of the judiciary afterward; the Japanese system is similar. Model B law clerks can spend a significant part of their professional career in that role (Rogowski and Gawron 13-14). Moreover, because the majority of them are career judges spending a substantial length of time at the Constitutional Court, and they then go on to become higher, their career path is more stabilized. In South Korea, the term of office of constitution research officers of the Constitutional Court is ten years, but a consecutive appointment may be permitted, with the age limit set at 60 years. In the Supreme Court of Japan, clerks work for two to four years and are then transferred to other district courts. A few of them later become the Chief Justice of the Law Clerks at the Supreme Court.

F. Function/ Duties

28. The characteristics and, to some degree unique, functions of law clerks at the apex courts: are screening important constitutional cases to admit appeal, researching relevant materials (particularly comparative law), and helping judges draft a judgment (including writing a first draft). The first function is particularly important with respect to the present situation of caseload. The second function is crucial for the apex courts which have dealt with constitutional questions for which comparative constitutional legal knowledge is very relevant. The third and last aspect is more controversial.

29. In order to fulfil the three functions, law clerks review case records, research legal questions, categorize essential information, and summarize petitions. The judges rely on law clerks' summaries and recommendations in the case-filtering process, which enables the judges to concentrate on the most important constitutional questions. Law clerks also assist the justices in the preparation of written opinions (Hall 185-6). It is often observed that law clerks and judges establish close personal relationships. It has become a tradition that law clerks keep their judge's working habits, personal opinions, and attitude toward peers confidential (Hall 186). Recent empirical studies, including interviews with former law clerks, reveals 'inside' information (eg Ward and Weiden; Woodward and Armstrong).

30. In Canada, a law clerk, under the direction of the judge for whom the clerk works, shall research points of law, prepare memoranda of law, and generally assist the judge in court work.

31. In Australia, a judge's associate assists the judge in conducting legal research and preparing judgments. He or she also performs a range of court-related duties in chambers and in-court duties in proceedings.

32. In India, the duties of law clerks include preparing a brief summary of fresh admission matter (this is considered the main job), preparing a synopsis of regular hearing matters, sitting in the court during a hearing of regular matters and noting down all the arguments, carrying out research work that would assist the judge in preparing draft judgments, assisting the judge to prepare speeches and academic papers, and performing any other duties as directed by the judge. The experience of a law clerk varies depending on the judge to whom one is assigned. Many clerks and judges established a close relationship (Chandrachud 91). Communication with other judges to whom the clerk is not assigned and among law clerks is limited.

33. In South Africa, the primary responsibility of the law clerks is to assist the judges in performing their duties. Specific responsibilities may vary between chambers, but include the following aspects: writing analytical summaries of written argument or evidence and assessing arguments with regard to academic legal literature and case law; carrying out detailed research on particular topics; preparing pre-hearing memoranda, media summaries, and opinions as well as identifying key issues in matters to be heard; assisting the judge in court; taking detailed notes of oral argument during hearings; assisting the judge in court-related work such as committees, organizational work, and international human rights work; cite-checking draft judgments before delivery; participating in various clerks' committees; administration of court papers and case management; and public relations.

34. In the UK judicial assistants support the justices of the Supreme Court by conducting research in connection with appeals and summarizing applications for permission to appeal.

35. German legal assistants are in charge of pre-screening petitions, preparing constitutional complaints to be discussed in chambers and for research, and preparing a draft of the judgment. They also help in the process of writing a dissenting opinion by the judge. However, they are not admitted to participate in the judges' deliberations, which restrains the influence of legal assistants.

36. In South Korea, constitutional research officers assist justices in the preparation of judgments by researching and investigating information concerning the adjudication of cases including oral hearings and examinations.

37. In Japan, law clerks read case records and submit reports to judges to help them screen cases. It is speculated that a draft of a judgement is typically written by a law clerk, although it is not officially admitted. Law clerks will also often write the commentary for cases important enough to be published in a law report or journal citing the judge's sources in the commentary.

G. Career after the Law Clerkship

38. The clerkship at the apex court can lead to a prestigious legal position afterwards. In the US, after a clerkship many clerks moved to large law firms with good salary offers. Some move to the Justice Department (often in the solicitor general's office). Several law clerks have become law school professors. Many law clerks later became federal appellate or district judges, members of Congress, or cabinet secretaries in the government. Six law clerks became justices of the Supreme Court (Byron White, John Paul Stevens, William Rehnquist, Stephen Breyer, John Roberts, and Elena Kagan). A Supreme Court clerkship is a valuable addition to the clerk's CV. In Canada, many law clerks have gone on to play a leading role in the legal profession. On the contrary, a clerkship at the Supreme Court of India is not necessarily very prestigious. The top-class law students usually do not seek clerkships because the remuneration is poor (about US\$450 a month), and it is considered a lower job than jobs at a law firm. The major motivation for applicants to seek a clerkship seems to be the possibility of increasing their chances of acceptance at an overseas graduate course (Chandrachud 86). Career judges or practitioners tend to go back to their previous position but are likely to be promoted to a higher court later. For example, Japanese law clerks often return to one of the district courts. Some of them return to the Supreme Court to be appointed a chief law clerk in their late 50s, with the possible next step being a Supreme Court judge (there are seven examples).

H. Evaluation/Criticism

39. It is undeniable that law clerks across many countries play an important role at the apex courts. There are broad similarities among common law system countries, which are based on the judicial system that judges are appointed from a larger autonomous body of attorneys (or barristers and solicitors). The position is beneficial for law clerks, who are just at the beginning of their career (in Model A) or in the middle of it (in Model B), to enhance personal and professional development and improve research and writing skills. It is also beneficial for the judges of the apex courts in terms of mitigation of caseload and the possibility of obtaining fresh ideas.

40. There are, however, some issues to be dealt with. First, annual change of law clerks under Model A makes it impossible to establish institutional memory (Hall 186). Second, how influential are they in the decision-making process? How far are the clerks, who are not under democratic control, involved in the decisive process of controversial constitutional questions? If they are involved to a great extent (and there is a speculation that some judgments are actually written by law clerks), is it democratically legitimate? Some judges emphasize that it is judges, not law clerks, who decide the case. This is clear in the case of the German Constitutional Court where the legal assistants may not participate in the deliberations among judges. On the other hand, other judges rather take for granted the substantial involvement of law clerks. Third, how fair and appropriate is the appointment process? Fourth, in a recruitment system, where an individual judge can choose a candidate, how influential are the judge's personal values and opinions in selecting the candidate? Fifth, more transparency is necessary to deal with the above questions, while also bearing in mind that a certain degree of confidentiality is necessary to nurture open conversation between judges and law clerks. Further and wider empirical comparative research is needed, beyond the clerkship system in the US about which several books and articles exist.

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