LAW CLERKS' ORIGINS AND THEIR DUTIES

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I INTRODUCTION

In the first exposition on law clerks and their role in South Africa, the learned contributing authors of a work that surveys the South African judiciary,[1] Corder and Brickhill, contend that unlike in the United States of America whence the modern institution of law clerks originated, the 'role of law clerks has received very little, *if any*, attention in South Africa.'[2]

This article argues, to the contrary that the role of law clerks in South Africa has actually received plentiful attention both relatively recently[3] and in the past, but to be fair, these accounts are typically found in anecdotal, biographical and reminiscent works.[4] Nevertheless, it is to Corder and Brickhill's beckoning that this article responds. Like in America, quite a number of current[5] and former prominent South African judges had

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[1] C Hoexter & M Olivier (contributing editors) *The Judiciary in South Africa* (2014). Cf earlier works on the judiciary in South Africa most notably: H Corder *Judges at Work: The role and Attitudes of the South African Appellate Judiciary 1910–50* (1984); CF Forsyth *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950–80* (1985); and AE van Blerk *Judge and Be Judged* (1988).

[2] H Corder & J Brickhill 'Constitutional Court' in Hoexter & Olivier (note 1 above) 369–374. (My emphasis.)

[3] B Wunsch 'Treating Judges Properly' (2000) 13(1) *Advocate* 33. See also generally, A Price & M Bishop (eds) and G Bradfield (general editor) 'A transformative Justice: Essays in Honour of Pius Langa' 2015 *Acta Juridica*, the most recent South African *festschrift* in honour of the country's late nineteenth Chief Justice with contributions predominantly by his former clerks, admittedly published after Corder & Brickhill (note 2 above).

[4] See the Hon CP Bresler *Tilt the Sack* (1965), ch 9 entitled 'Apprenticeship with the Judges'; I Goodman *Judges I Have Known* (1969), ch 17 entitled 'Clerk to Chief Justice', and M Diemont *Brushes with the Law* (1995).

[5] For instance, Judge Fayeeza Kathree-Setiloane, who clerked for Justice Yvonne Mokgoro in the inaugural Constitutional Court in 1995, Judge Violet Phatshoane who was a judge's researcher at the Supreme Court of Appeal in 1996, Judge Mokgere Masipa, who clerked in the Labour Court and Labour Appeal Court from 1998 to 2000 and Judge Susannah Cowen, who clerked for Chaskalson P (later CJ) in the Constitutional Court from 1999 to 2000.

clerkship backgrounds,[6] revealing as it does the early existence of the institution in the South African superior courts[7] under the interchanged appellations – judge's clerk, judge's secretary or registrar – over the years. That, however, was well before the *formalisation* of the institution by the 1995 Constitutional Court's adoption of the institution of law clerks – which largely resembles the United States Supreme Court model.[8] The Constitutional Court's employment of law clerks for a single year also has its origins in the US Supreme Court's model derived from that court's year-round court term which, by law, begins on the first Monday in October and lasts until the first Monday in October of the next year, during which approximately 5 000 to 7 000 new cases are filed at the court.[9]

This article begins with an attempt at defining the term 'law clerk' followed by a discussion of the origins of the institution of law clerks in the United States of America. This is followed by a brief discussion of the form the institution took in its formative years in the South African superior courts having had a similar evolution to the development of the institution in the United States of America. The article then looks at the process of selecting and appointing law clerks (law researchers) to the Supreme Court of Appeal, and their duties and responsibilities. Lastly, the article deals with what is expected of law clerks in South Africa and the qualities that they must possess and cultivate to be successful.

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[6] See Corder (note 1 above) 25–33; table 1 below setting out a biographical summary of former judges of appeals' careers before their appointments as judges. See also Forsyth (note 1 above), figure 1 at 8–11; AA Roberts *A South African Legal Bibliography* (Pretoria 1942), and the works cited in note 4 above in respect of Justices Bresler, Tindall and Diemont.

[7] The term 'superior court' is adopted from the Superior Courts Act 10 of 2013 (which came into effect on 23 August 2013).

[8] Corder & Brickhill (note 2 above) 370 note that 'under the guidance of Arthur Chaskalson, it was agreed that judges of the Constitutional Court would, *like many of their counterparts around the world*, have the use of clerks. It is the only court in the country to have law clerks for all judges.' (My emphasis.) In fact, according to the website of the Constitutional Court, each Constitutional Court judge has two South African law clerks and may have one foreign law clerk, which model of having up to three clerks per judge most closely resembles that of the US Supreme Court. See the Constitutional Court website at *http://www.constitutionalcourt.org.za* (accessed 27 February 2015).

[9] See US Supreme Court website at *https://www.supremecourt.gov/about/courtatwork.asp*x (accessed 20 October 2023).

II WHAT IS A LAW CLERK?

Genevieve Coonan notes that, '[p]ersons familiar with American law will instantly recognise the term [law clerk] as connoting those shadowy *individuals who are trained in the law to assist judges in researching legal opinions.*'[10] This description captures two universal features for the role of modern law clerks, namely (a) individuals trained in law, and (b) who assist judges with research.

In most expositions and commentaries on law clerks, including when judicially considered, the tendency has been to describe them in relation to their role within the judicial process.

Law clerks may be defined as the learned or professional assistants of judges, who provide judges with independent research on discrete points of law for cases before the courts. In the United States of America, studies have shown law clerks to be influential in the formation of court decisions.[11] Law clerks also assist the judges in the judgment-writing process.

So, unlike the clerk of court, 'staff clerk' or 'courtroom deputy' in other jurisdictions, who are permanent administrative court staff with statutorily defined duties,[12] law clerks assist judges in their preparation for hearings and in the decision-making process. Law clerks thus assist their judges in core judicial functions. Law clerks are usually recent law graduates who performed at or near the top of their class or are recently admitted lawyers with some legal practice experience. They fill this coveted, prestigious and unique apprenticeship[13] before pursuing further successful legal careers.

In the first judicial consideration on the role of clerks in America, the Fifth Circuit Court of Appeals in *Fredonia Broadcasting Corp*[14] held as follows in the context of the obvious impropriety of the involvement of

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[10] G Coonan 'The Role of Judicial Research Assistants in Supporting the Decision-making Role of the Irish Judiciary' (2006) 6 *Judicial Studies Institute Journal* 171 at 173 (my emphasis).

[11] See *Parker v Connors Steel Co*, 855 F.2d 1510, (11th Cir.1988) 1525. See also L Baum *The Supreme Court* 6 ed (1998) 20, where the learned author notes that 'of all members of the support staff [of the US Supreme Court], law clerks have the most direct impact on the Court's decisions.'

[12] See section 11 of the Superior Courts Act 10 of 2013 and section 13 of the Magistrates' Courts Act 32 of 1944. See 5 *Lawsa* 3 ed (2013) paras 17 and 180; and 3(2) *Lawsa* 2 ed (2006) para 479. For more on these officers in America see S Flanders & J Goldman 'Screening Practices and the Use of Para-judicial Personnel in the U.S. Courts of Appeals: A Study in the Fourth Circuit' in M Tonry & RA Katzmann (eds) *Managing Appeals in Federal Courts* (1988) 641–656.

[13] Corder & Brickhill (note 2 above) 370.

[14] *Fredonia Broadcasting Corp v RCA Corp,* 569 F.2d 251 (5th Cir. 1978).

a former clerk in litigation which he had come upon during his clerkship stint for the trial judge (at 255):

> *In order fully to appreciate the role of a law clerk and to evaluate the taint of impropriety that occurred in this case, we consider it appropriate to note briefly the role of law clerks in our judicial system. . . . The law clerk has no statutorily defined duties but rather performs a broad range of functions to assist his judge. A judicial clerkship provides the fledgling lawyer insight into the law, the judicial process, and the legal practice. The association with law clerks is also valuable to the judge; in addition to relieving him of many clerical and administrative chores, law clerks may serve as sounding boards for ideas, often affording a different perspective, may perform research, and may aid in drafting memoranda, orders and opinions. (Footnote omitted.)*

The learned judge went on to say the following at 256:

> *This general knowledge and experience is an invaluable asset to the law clerk and his subsequent utilization of the knowledge is to be encouraged. See generally K. Llewellyn, The Common Law Tradition: Deciding Appeals, 321–23 (1960). A law clerk, by virtue of his position, is obviously privy to his judge's thoughts in a way that the parties cannot be. We are not holding that a former law clerk may never practice before the judge for whom he clerked. Such a holding would clearly be unwarranted and would cast an undue burden on the law clerk. Moreover, it would hinder the courts in securing the best qualified people to serve as law clerks. What is offensive here is that the district judge seemed to countenance the notion that the law clerk could improperly use the specific knowledge gained from working with him on this particular case. The impartiality of a trial judge is seriously open to question when the judge refuses to recuse himself after being made aware that his former law clerk is actively involved as counsel for a party in a case in which the law clerk participated during his clerkship.*

Post-*Fredonia*, the circuit courts described law clerks in *Hall v Small Business Administration* as 'sounding boards for tentative opinions' of the judges they serve and confirmed that clerks are 'privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.'[15] In *Oliva v Heller*[16] it was stated that '[l]aw clerks are simply extensions of the judges at whose pleasure they serve.' In *In re Allied-Signal Inc*,[17] it was found that 'the relationship of clerk to judge itself is close enough that one might find an appearance of undue influence' where

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15 *Hall v Small Business Administration*, 695 F.2d 175 (5th Cir. 1983) 179.

16 *Oliva v Heller*, 839 F.2d 37 (2d Cir. 1988) 40.

17 *In re Allied-Signal Inc, et al, Petitioners*, 891 F.2d 967 (1st Cir. 1989).

there existed 'a fairly close relation between clerk and party'. Supporting this notion that an apprehension of bias extends to clerks due to their proximity to the decision-making process of the courts, in *Parker v Connors Steel Co*,[18] the court unequivocally held: 'We recognise the importance that some law clerks play in the decisional process and it is for this reason that a clerk is forbidden to do all that is prohibited to the Judge.'

III HISTORICAL BACKGROUND

By all notable accounts,[19] the modern institution of judicial clerkship was conceived and introduced by Justice Horace Gray when, as Chief Justice of the Massachusetts Supreme Judicial Court, he began – using his own funds[20] and of his own accord – from 1875,[21] the practice of annually employing a graduate from his *alma mater* Harvard Law School, to assist him with his chamber work. Gray's uncharacteristic yet original appellation for his chamber assistant was 'secretary'.[22]

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[18] *Parker v Connors Steel Co* (note 11 above) 1525.

[19] See *Fredonia Broadcasting Corp* (note 14 above). See also PR Baier 'The Law Clerks: Profile of an Institution' (1973) 26 *Vanderbilt Law Review* 1125–1177; FM Coffin *On Appeal: Courts, Lawyering, and Judging* (1994) 71; JG Kester 'The Law Clerk Explosion' (1995) 3 *The Long Term View: A Journal of Informed Opinion* 20; CE Stewart 'From the President' in *The Bencher* (the magazine of the American Inns of Court) September/October (2014) 2; MC Miller 'Law Clerks and their Influence at the U.S. Supreme Court: Comments on Recent Works by Peppers and Ward' (2014) 39 *Law & Social Inquiry* (journal of the American Bar Foundation) 741–757. Also see the Federal Judicial Center website on the history of the Federal Judiciary, court officers, staff and law clerks at *http://www.fjc.gov/history/home.nsf/page/admin_03_11.html* (accessed 19 June 2015). Cf JB Oakley & RS Thompson *Law Clerks and the Judicial Process: Perceptions of Qualities and Functions of Law Clerks in American Courts* (1980) 11 fn 2.12, where it is suggested that it might have actually been Professor John Chipman Gray who first conceived the idea.

[20] Coffin (note 19 above) 71.

[21] Although Justice Gray assumed office at the helm of the Massachusetts Supreme Court as Chief Justice in 1873, it was only two years later, in 1875, overwhelmed by both the judicial and administrative duties of his office, that with the help of his half-brother he obtained a law clerk to assist him in his chamber and judicial administrative workload and responsibilities. See *(b) Invention of innovation, opportunity and circumstance* below.

[22] Baier (note 19 above) 1130, where the learned author notes that 'clerkship owes its earliest appellation, "secretary," to the terminology of Justice Gray.'

(a) The father of modern judicial clerkship[23]

Horace Gray Jr was born in Boston on 24 March 1828 to an affluent family of shipping merchants.[24] He graduated from Harvard College in 1845 at the age of seventeen after which he travelled extensively in Europe where he is said to have been 'reviewing scenes already familiar to his mind from his wide reading and exhaustive study of history and general literature'.[25] He then returned home to enter Harvard Law School in 1848. According to Hampton Carson,[26] after Gray graduated from the Harvard University Law School in 1849, '[h]e subsequently read law under the direction of Judge Lowell,[27] and obtained admission to the Bar in 1851.'[28] He was appointed an Associate Justice of the Supreme Judicial Court of Massachusetts. He was promoted in 1873, to be Chief Justice of that same court, succeeding Chief Justice Reuben Chapman when the latter retired.[29]

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[23] Snyder prefers to make Justice Gray an ancestor of the institution by calling him 'the grandfather of the modern clerkship' implying that either Justice Brandeis or perhaps Professor Frankfurter was the father of the institution. See B Snyder 'The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts' (2010) 71 *Ohio State Law Journal* 1149–1243 at 1155.

[24] R Bloom 'The Origin of the Supreme Judicial Court Law Clerk System' on the Law Clerk's Society of the Supreme Judicial Court website at *http://sjclawclerks.socialaw.com/about-us/law-clerk-history/* (accessed 19 June 2015).

[25] *Horace Gray, Jr.* 182 Mass. 613 (1903).

[26] HL Carson *The Supreme Court of the United States: Its History and its Centennial Celebration* (1892) 524–527.

[27] John Lowell (1824–1897) was a ninth generation Lowell and second generation American federal judge from that prominent American family. He graduated from Harvard College in 1843 with a Bachelor of Arts degree (AB) and obtained his postgraduate law degree from Harvard Law School in 1845. He was admitted to the Bar in 1846 and commenced to practise law from 1846 to 1865, during which time he was also editor of the *Monthly Law Reporter* from 1856 to 1860. On 11 March 1865, he was nominated by President Abraham Lincoln to a seat on the US District Court for the District of Massachusetts, and he left that court for another judicial appointment to the US Circuit Courts for the First Circuit in December 1878. He resigned from the latter court in May 1884 after he had served on the bench for a combined period of 20 years when he returned to private practice in Boston where he practised law until his death in May 1897. See DR Lowell *The Historic Genealogy of the Lowells of America from 1639 to 1899* (1899) 218–219.

[28] Carson (note 26 above) 525. It is important to note that Justice Gray served his legal apprenticeship reading in a sitting judge's chambers, as his experience there must have played a role in inspiring his conception of the institution when he became chief justice.

[29] Carson (note 26 above) 525.

Justice Gray had an exceptional judicial career and reputation, both as a Massachusetts State judge, during which period he scribed opinions which can be found in 43 volumes of the *Massachusetts Reports*,[30] and when he became an Associate Supreme Court Justice from January 1882 and for the succeeding twenty years.[31] His opinions while in that court are contained in 81 volumes of the *U.S. Supreme Court Reports*.[32]

However, it was during Gray's chief justiceship that he hired young Louis D Brandeis,[33] who later became a successful Boston attorney[34] and thereafter was appointed as an Associate Justice of the US Supreme Court from 1916 to 1939.[35] Brandeis had made it abundantly clear even then that 'a prototype of the modern law clerk [had] existed in Gray's chambers.'[36] In letters to his friends and family in his first week of working for Gray, Brandeis wrote:

> *My position with the Ch.J is pleasanter than my fondest hopes had pictured. None of the unpleasant peculiarities for which Judge Gray is noted have appeared in my intercourse with him. His arrogance and impatience are apparently the judicial wig & gown, for off the bench, there is no sign of them. On the contrary, he is the most affable of men, patiently listening to suggestions and objections & even contradiction. I have worked with him daily since Tuesday and have enjoyed most of the mornings keenly. Our mode of working is this. He takes out the record & briefs in any case, we read them over, talk about the points raised, examine the authorities' arguments – then he makes up his mind if he can, marks out the line of argument for his opinion, writes it, & then dictates it to me.*

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30 Carson (note 26 above) 525–526.

31 Bloom (note 24 above).

32 Carson (note 26 above) 525–526.

33 Brandeis had written about his acceptance of this position to his Harvard classmate Walter Bond Douglas, saying: 'I have accepted a position with Ch. Justice Gray as his Secty & Assistant which gives me a salary about $500 – does not take very much of my time, will be very instructive and is deemed by Bradley Thayer & Langdell very valuable as a stepping stone. Most of the work for the C.J. falls in summer so that it will not interfere with the practice.' As noted by Snyder, Brandeis said this as he in fact clerked and practised simultaneously. See Snyder (note 23 above) 1159.

34 TC Peppers *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (2006) 44–45. See also WH Rehnquist *The Supreme Court* (2004) 110.

35 MI Urofsky *Louis D. Brandeis: A Life* (2009) 39–48.

36 A Ward & DL Weiden *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York, 2006) 33–34.

> *But I am treated in every respect as a person of co-ordinate position. He asks me what I think of his line of argument and I answer candidly. If I think other reasons better, I give them; if I think his language is obscure, I tell him so; if I have any doubts I express them and he is very fair in acknowledging a correct suggestion or disabusing one of an erroneous idea.*
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> *In these discussions & investigations I shall learn very much. Many beautiful points are raised and must be decided. The Ch. Justice has a marvellous knowledge of Mass. decision[s] & Statutes and I expect much advantage in this respect.*[37] *(My emphasis.)*

Brandeis clerked for nearly two terms until Gray was elevated to the US Supreme Court. Gray himself having benefited from the 'dualistic legal training' of a formal law school education and an apprenticeship of 'exacting study with Judge Lowell'[38] which '[t]horoughly trained and equipped'[39] him through reading law[40] in a sitting judge's chambers, it was therefore natural for him to *refine* this early apprenticeship into the modern law clerk institution.[41] Gray therefore did not completely invent the institution. He after all apprenticed with Judge Lowell and there are some suggestions that the formation of the institution is attributable to the Bar traditions of devilling and employing a junior, but it is on the *modern* institution of law clerks that this contribution focuses.

'Before Gray, judges hired non-lawyers for stenographic and administrative duties.'[42] But, it was Justice Gray – 'always a more methodical worker than a quick one'[43] – who first requested his clerks to draft opinions for cases, 'although the drafts were only used to stimulate Gary's own writing.'[44] He had been a 'scholar of note, able to hold his own

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37 Snyder (note 23 above) 1159.

38 *Horace Gray, Jr.* (note 25 above).

39 *Horace Gray, Jr.* (note 25 above).

40 'Reading the law' seems to have been a common apprenticeship for most young aspirant lawyers of Gray's time, preceding entry to the Bar. See Ward & Weiden (note 36 above) 26–28.

41 Ward & Weiden (note 36 above) 29. These learned authors acknowledge despite their thesis on the origins of the institution of law clerks that '[i]t is interesting to note that the originator of the law clerk was also the first justice to graduate from law school and read the law as an apprentice. Gray graduated from Harvard Law School in 1849 and then read the law with Judge John Lowell and at the firm of Sohier and Welch. It may be that Gray's dualistic legal training – formal law school education coupled with experience as an apprentice – influenced and coloured his use of the law clerk.'

42 Snyder (note 23 above) 1157.

43 Oakley & Thompson (note 19 above) 11.

44 This came from Williston's recollections of his clerkship with Gray noted by Ward & Weiden (note 36 above) 33–34, where it is further noted that,

intellectually with his clerks, and so to sift through their ideas and to adopt what he felt to be useful without the development of dependence.'[45] Gray's model of clerkship broke new ground and it was innovative. It earned him due credit for modernising the institution through its present mainstay hallmarks as he:[46]

(a) hired recent law graduates for a one-year term rather than on a permanent basis;[47]

(b) relied on the recommendations of a law professor to select his clerks, thereby opening another avenue for symbiotic relations between the bench and academia; and

(c) not only relied on his clerks for secretarial work such as taking dictation but also for substantive input on his opinions.

But what exactly caused Justice Gray to retain bright and promising law graduates from his *alma mater* out of his own pocket? Was the institution a coping mechanism devised by Justice Gray in 'response to the increasing workload' to make his judicial work manageable? Or was it the Justice's urge to mentor young talent, given Carson's[48] narrative that Gray was 'ambitious to preserve the precious stores of knowledge' and keen to inspire 'others to emulate his example'? The answer seems to lie somewhere in a combination of all these influences. Ward and Weiden argue that the law clerk institution was not a response to the growing workload of the court, but that it instead 'reflected the legal apprenticeship/mentor model of legal education that had been imported from England'.[49] It is not clear why the

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'Gray also debated [with] his clerks regarding the cases before the Court, and [he] expected the clerks to defend their views.' This usage of clerks as correctly noted by Ward and Weiden 'foreshadowed the way in which law clerks later developed.'

[45] Oakley & Thompson (note 19 above) 13.

[46] Oakley & Thompson (note 19 above) 13.

[47] This preference also followed by Holmes and Brandeis of appointing recent graduates as noted by Dean Acheson was due to the belief 'that these young men, fresh from the intellectual stimulation of the law school, brought them [ie the judges] constant refreshment and challenge . . . more useful in their work than the usual office aides.' See Ward & Weiden (note 36 above) 34. The employment of a law clerk for a period of one year specifically, is suspected to be due to the single, common, and annual court term of the US courts. According to the US Supreme Court website 'The Term of the Court begins, by law, on the first Monday in October and lasts until the first Monday in October of the next year.' See the US Supreme Court website at *http://www.supremecourt.gov/about/briefoverview.aspx* (accessed 28 August 2015).

[48] Carson (note 26 above) 525–526.

[49] Ward & Weiden (note 36 above) 26. The learned authors further note at the same place that: 'The traditional English model of legal training involved,

learned authors perceive these influences as mutually exclusive as opposed to being congruent. It nevertheless begs a closer look into the specific conditions under which Justice Gray worked.

(b) Invention of innovation, opportunity and circumstance

It is not surprising that the institution of law clerks was specifically conceived by Gray in 1875 within an appellate court setting of the Massachusetts Supreme Judicial Court,[50] in the same year in which the Massachusetts legislature had deemed it necessary to increase the number of the Supreme Judicial Court justices to seven. This was in response to the rising appellate courts' caseload, which had been described as a 'tidal wave of cases' which had 'hit' the entire United States at the time,[51] as result of the American 'industrial revolution, the spread of railroads, rapid developments in corporate and tort law, and population growth.'[52]

Bloom notes that the reason Gray resorted to obtaining chamber assistance in the form of a law clerk was that he had assumed an overwhelming caseload and that:

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first, obtaining a general education followed by a lengthy period of time "reading the law" at one of the Inns of Court. Then, a period of further apprenticeship in the office of a barrister ensued. . . .[E]arly American legal training followed the English model, although there was no American equivalent to the Inns of Court. In America, the apprentice model typically required an undergraduate education, although this was not uniformly practiced or required, followed by a substantial period reading the standard legal treatises and commentaries as an apprentice to a practicing attorney.'

[50] According to the court's website, the Massachusetts Supreme Judicial Court, which was originally called the Superior Court of Judicature, was established in 1692 laying claim to being the oldest appellate court in continuous existence in the western hemisphere. It is said to be the Commonwealth's highest appellate court and it consists of a chief justice and six associate justices appointed by the governor with the consent of the executive council. Importantly, the court sits *en banc*, hearing appeals on a broad range of criminal and civil cases from September through May. Single justice sessions are held each week throughout the year for certain motions pertaining to cases on trial or on appeal, bail reviews, Bar discipline proceedings, petitions for admission to the Bar, and a variety of other statutory proceedings. The associate justices sit as single justices each month on a rotation schedule, at *http://www.mass.gov/courts/court-info/sjc/about/* (accessed 23 June 2015).

[51] Bloom (note 24 above).

[52] Bloom (note 24 above).

> *Not only was he writing almost twenty-five percent of the court's opinions, but also he was presiding over trials (torts, divorce, contract, and capital crimes) that were still part of the Supreme Judicial Court's jurisdiction. The new chief justice needed help. In 1875, he turned to his half brother, John Chipman Gray, a professor at Harvard, to recommend a recently graduated and highly ranked Harvard Law School student to fill a new one-year position that Grey called "secretary" . . . [it] was none other than Louis D. Brandeis.*[53] *. . . Gray paid his law clerk out of his own pocket.*[54]

When he resigned his seat as Chief Justice of the State of Massachusetts to take his seat as an Associate US Supreme Court Justice in 1882, he continued the custom of appointing law clerks for a year's term relying on his half-brother, Professor John Chipman Gray[55] to select the clerk for the year,[56]

> *Gray brought his innovative clerkship to the U.S. Supreme Court from 1891 to 1902 and remained ahead of his time. Upon Gray's death in 1903, only his successor on both courts, Oliver Wendell Holmes Jr., had adopted his clerkship model. This next clerkship innovator was one of Gray's former clerks, Louis Brandeis.*[57]

Ward and Weiden[58] explain that it was the Supreme Court's increasing workload that crystallised the creation of the institution of law clerks and the concomitant pressures associated with such increased workload that led to the increase in the number of clerks over time.

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[53] Brandeis finished his legal studies at Harvard in record time with an average grade of 97 per cent, a record said not to have been broken in his lifetime. One of his classmates, William E Cushing said of Brandeis: 'My friend Brandeis is a character in his way – one of the most brilliant legal minds they have ever had here. . . . The professors listen to his opinion with the greatest deference. And it is generally correct.' Urofsky (note 35 above) 30–31.

[54] Urofsky (note 35 above) 30–31.

[55] Professor Chipman Gray was an outstanding scholar and passionate law teacher who managed to practise while also teaching through what he described as his 'very peculiar and very fortunate' relations with his partners in practice, yet in no small part due to 'his fortunate and peculiar mental gifts and methods of work'. Due to his passion for teaching law he had 'once thought of giving up practice for the same reasons which led him to decline the highest judicial office.' See ER Thayer, S Williston & JH Beale 'John Chipman Gray' (1915) 28 *Harvard Law Review* 539–549 at 543.

[56] Coffin (note 19 above) 71.

[57] Snyder (note 23 above) 1158.

[58] Ward & Weiden (note 36 above) 21–53.

(c) Formal adoption of law clerkship and development of the institution

Justice Felix Frankfurter,[59] while a professor at Harvard Law School (1914–1920), undertook to select bright young final-year students to serve as clerks to various Supreme Court Justices in Washington DC.[60] According to Kester, the institution of judicial law clerks was eventually formalised in 1886, when on the recommendation of the then US Attorney-General, Mr AH Garland, Congress authorised to each justice a 'stenographic clerk', described by Garland as 'a secretary or law clerk, to be a stenographer'[61] and to 'assist in such clerical work as may be assigned to him.'[62] At an annual salary of $1 600,[63] clerks were then the entire support staff-complement of Supreme Court justices[64] through the enactment of the Sundry Civil Act of 4 August 1886.[65]

Following this statute, Supreme Court Justices Blatchford, Harlan and Matthew joined Gray by promptly hiring their first clerks, followed the next year by Justices Lamar and then by Bradley, Miller and Chief Justice Fuller who appointed clerks for the 1888 term.[66] But even then, Gray used his clerks more innovatively than his colleagues, in a manner he had envisaged for inter alia 'reviewing newly filed cases, discussing opinions by other justices, engaging in vigorous colloquy on opinions, and drafting memoranda.'[67]

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[59] See American Legal Manuscripts from the Harvard Law School Library: *The Felix Frankfurter Papers* (1986).

[60] Coffin (note 19 above) 71.

[61] Coonan (note 10 above) 173. Coonan, citing the *Annual Report of the Attorney General of the United States of the Year 1885* at 43, notes the recommendation thus motivated by the Attorney-General: 'It would greatly facilitate the business of the Supreme Court if each justice was provided by law with a secretary or law clerk, to be a stenographer, to be paid an annual salary sufficient to obtain the requisite qualifications, whose duties shall be to assist in such clerical work as might be assigned to him.'

[62] Kester (note 19 above) 20.

[63] Coonan (note 10 above) 174.

[64] Kester (note 19 above) 20.

[65] Ward & Weiden (note 36 above) 24.

[66] Ward & Weiden (note 36 above) 24.

[67] Bloom (note 24 above). Ward and Weiden quote generously with approval from Samuel Williston's 'Horace Gray' in WD Lewis (ed) *Great American Lawyers* (1971) 137, that Gray's 'colleagues generally appointed as their clerks stenographers and typewriters, but Gray continued his practice of securing each year a member of the graduating class from the Law School . . . Before Saturday morning, therefore, Judge Gray would take up the week's budget of cases with his secretary, whose

Despite its legislative adoption by Congress, in its early years, the institution still fell short of taking its current form.[68] Kester notes that clerks had mainly messenger duties 'because in those days the Supreme Court met in the Capitol, and the Justices' chambers were in their homes scattered around Washington.'[69] One clerk was apparently even recommended for his skills as a barber.[70] It was Justice Oliver Wendell Holmes, Jr who stayed the course in the development of the institution, keeping alive his predecessor Gray's vision of appointing law clerks from top-ranking graduates for single terms.[71] At the time of Holmes' retirement

duty it was to have given them a study requisite for a mastery of the essential facts and of the authorities cited in the briefs. In doing this he would generally make his secretary state the points of the case as best he could before he himself would say much, but before the discussion closed the conclusions of the tyros were severely tested. . . . Often he would ask his secretary to write opinions in these cases, and though the ultimate destiny of such opinions was the waste-paper basket, the chance that some suggestion in them might be approved by the master and adopted by him, was sufficient to incite the secretary to his best endeavour.' See Ward & Weiden (note 36 above) 29.

68 Kester (note 19 above) 20.

69 Kester (note 19 above) 20.

70 Kester (note 19 above) 20.

71 Bloom (note 24 above). Bloom notes that when Wendell Holmes, Jr, joined the Supreme Judicial Court in 1882, the judges there were overwhelmed with work and when he joined the US Supreme Court, he continued Gray's practice of employing a new honour graduate from Harvard each year, like Gray, relying on the recommendations of Professor John Chipman Gray, and later he relied on the advice of Felix Frankfurter for his clerk of the year. Oakley & Thompson also note that:

> 'Fortunately for the survival of Justice Gray's clerkship motif, Justice Gray's successor on the Supreme Court was another Chief Justice of the Massachusetts Supreme Judicial Court, Oliver Wendell Holmes, Jr. While it not appear that Holmes had employed law clerks during his twenty years as a Massachusetts justice, he was an old friend of John Chipman Gray. Within three years of taking his seat in Washington, Holmes was taking annual honour graduates of the Harvard Law School as his law clerks, selected by Professor Gray. When Gray died in 1915, young Professor Felix Frankfurter of the Harvard Law School was asked by Holmes to take Professor Gray's place as procurer of clerks, and Louis Brandeis made the same request when he joined the Court in 1916.' (Footnotes omitted.)

Oakley & Thompson (note 19 above) 16.

at the advanced age of 90 in 1932,[72] the institution of law clerks had become entrenched in the federal judicial system.[73]

In their exposition of the development of the institution of law clerks over the years, Ward and Weiden[74] identify distinct 'regimes' within which the role of law clerks significantly changed from its rudimentary origins.

They note that originally the duties of law clerks were primarily secretarial in nature. This was during the period 1882–1918, which they appositely call the 'secretary regime'.

This period, they say, gave way to the 'research assistant regime' (1919–1941) signified by the conferment of greater responsibility to clerks which entailed opinion editing and research duties for their respective justices.

Later on, as the learned authors note, the increasing caseloads of the Supreme Court Justices further transformed the role of law clerks into the so-called 'junior associate regime' (1942–1969). It was during this period that law clerks were given the added responsibility of being 'active decision maker(s)'. In addition to rendering editorial and research assistance, clerks in this period scrutinised the increasing numbers of *certiorari* petitions, wrote bench memos which analysed cases and made recommendations, and they contributed more substantially to the judgment or opinion-writing process of the court.[75]

Finally, in the contemporary regime (1980–present) mystically named the 'sorcerers' apprentices regime', law clerks are said to be even more influential in the gate-keeping process by which petitions are accepted or rejected for review by the court. Of particular significance is the increased

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[72] *Oliver Wendell Holmes, Jr.* 298 Mass. 575 (1937).

[73] *Oliver Wendell Holmes, Jr.* (note 72 above). Wichern notes that Congress passed the Appropriation Act in 1922 to authorise each Supreme Court Justice to employ one clerk each at an annual salary of $3 600, but it was not until 1924 that the law clerk position became permanent in the Supreme Court. State courts also adopted that institution and due to the increased caseload of the Supreme Court the number of clerks was increased. See NJ Wichern 'A court of clerks, not of men: Serving justices in the media age' (1999) 49 *Depaul Law Review* at 624. Oakley and Thompson note that the period 'from 1919 to 1939 also saw law clerks blossom at less exalted courts. Congress supplied a law clerk to each federal circuit judge in 1930 and to selected district judges in 1936. By 1933, law clerks were employed by the courts of last resort of California, Illinois, Massachusetts, New Jersey, New York, Oklahoma, and Pennsylvania; and by 1942, almost half the States provided law clerks for their courts of last resort.' Oakley & Thompson (note 19 above) 18.

[74] Ward & Weiden (note 36 above) 21–53.

[75] Ward & Weiden (note 36 above) 23.

use of the *certiorari* pool, in respect of which process each participating justice's chambers is given a share of the *certiorari* petitions and is responsible for writing a memo on each of them to be shared with the other chambers. According to Ward and Weiden, although this practice enhances efficiency by reducing duplication across the chambers, it has the concomitant effect of reducing the likelihood of independent review by more than one clerk (and more than one justice's chambers). The 'sorcerers' apprentices regime' is also marked by increased reliance by the US Supreme Court Justices on clerks for opinion-writing functions. Although, as Ward and Weiden acknowledge, there is considerable variation across chambers as to exactly how the justices use their clerks, on average, law clerks are more likely to write first (and sometimes final) drafts of opinions and do so with less and less supervision by their justices.[76]

Coffin corroborates Ward and Weiden's observation in noting that a century ago the duties of law clerks may very well have been confined to 'checking citations, correcting galley proofs, preparing research memoranda on specific questions of law, and running errands', but today the duties of a law clerk have become more involved. Coffin adds that, 'Justice Gray, the creator and first sponsor, probably used his clerks in a more spacious and challenging manner.'[77] Celebrated scholar, Samuel Williston wrote the following of his tenure as law clerk to Justice Gray in 1888 –

> *I would also frequently be asked to write an opinion on the cases that had been assigned to the Judge. I do not wish, however, to give the impression that my work served for more than a stimulus for the judge's own mind. He was a careful man and examined cases for himself, and wrote his own opinions; my work served only as a suggestion.*[78]

Coffin's own suspicion is that if young Williston served up an admirable piece of work, Gray would not consider it degrading to borrow generously from it, neither is it a deplorable notion considering the mutually beneficial relationship between the clerk and judge.

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[76] See Ward & Weiden (note 36 above) ch 6 at 237–250.

[77] Coffin (note 19 above) 72.

[78] S Williston *Life and Law* (1940) 92. According to Williston, Gray employed clerks exclusively as sources of inspiration and criticism (at 92–93). It is further noted that, quite unusually for the elders of the land in those times, Gray had a genuine interest in and respect for his clerks' views, which he expected them to bring to bear on the court's problems with the latest theories brewing at the Harvard Law School (at 93).

(d) Contemporary law clerk institution in the USA

More than a century after Gray's time, the US judiciary, through the Federal Judicial Center,[79] has compiled a *Judicial Writing Manual*, the first edition of which was published in 1991, proposing the following limited functions for clerks:

- *limiting* clerks to research, bench memos, editing, cite-checking, and commenting on the judge's drafts;
- assigning clerks to write first drafts in routine cases *only*;
- assigning clerks the task of *rewriting* the judge's first draft in even the most complex cases.[80]

In a subsequent edition of the manual, judges are no longer restricted in their usage of clerks.[81] Now, '[t]he process the judge uses depends on his or her own work habits and style and on the capabilities of the law clerk.'[82] With the *caveat*: 'No matter how capable the clerk, the opinion must always be the judge's work.'[83] This strong admonition undoubtedly responds to the view that clerks are excessively influential in the judicial process.[84]

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[79] The Federal Judicial Center is the research and education agency of the US federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States. By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the US Courts and seven judges elected by the Judicial Conference. For more information on the Center see its website at *http://www.fjc.gov/* (accessed 1 July 2015).

[80] Federal Judicial Center *Judicial Writing Manual* (1991) 10–11.

[81] See Federal Judicial Center *Judicial Writing Manual: A Pocket Guide for Judges* 2 ed (2013) 10–11 *http://www2.fjc.gov/sites/default/files/2014/Judicial-Writing-Manual-2D-FJC-2013.pdf* (accessed 23 June 2015). In *In re Allied-Signal Inc, et al, Petitioners* (note 17 above), the court had also held that 'individual judges must enjoy considerable independence in deciding precisely how to use their law clerks, for "bureaucratizing" the law clerk system with too many rules and regulations or too much appellate court supervision would threaten the flexibility that permits that system to speed the resolution of cases.'

[82] *Judicial Writing Manual* (note 81 above).

[83] *Judicial Writing Manual* (note 81 above).

[84] Justice William O Douglas is said to have been one of the most vocal critics of the institution of law clerks (Ward & Weiden (note 36 above) 245). He recalled that: 'Under Earl Warren the demand for more law clerks continued. There were to be four, instead of three, for the Chief, and three, instead of two, for the Justices. One day when the matter was discussed at Conference I made a countermotion to abolish all law clerks. 'For one year,' I pleaded, "why don't we experiment with doing our own work? You all might like it for a change." My proposal was met by

Coffin, a former US Court of Appeal judge of over 41 years' standing,[85] for part of which he was Chief Justice of the First Circuit, asserted that 'the demands on a judge's time make it critically important to use law clerk assistance with maximum effectiveness.'[86]

In yet another useful work compiled by the Federal Judicial Center, the *Law Clerk Handbook*, currently published in its second edition, outlines the duties of clerks as follows:

> *Law clerks have no statutorily defined duties; they carry out their judges' instructions. Because each judge decides cases in an individual manner and has developed work habits over the course of a professional career, no two judges use their clerks in precisely the same manner. You must become familiar with your judge's style and work cooperatively with the other members of the chambers staff so that, as a team, you effectively assist the judge in fulfilling his or her judicial responsibilities.*[87]

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a few smiles but mostly stony silence.' WO Douglas *The Court Years, 1939–1975: The Autobiography of William O. Douglas* (1980) 172.

[85] See P Pitegoff 'The legacy of Judge Frank M. Coffin' (2011) 63(2) *Maine Law Review* 385–390 at 386. Mr Justice Coffin was born 11 July 1919 and died 7 December 2009. Pitegoff notes that Frank Coffin was educated in Lewiston and went on to earn degrees from Bates College, Harvard Business School, and Harvard Law School. He clerked for Judge John D Clifford, Jr, in the Maine US District Court, served as corporation counsel in Lewiston, and engaged for several years in private practice. His commitment to public service spanned a wide-ranging career, including naval service in the Pacific during World War II, a role as Democratic state party chairman and a leader (with Senator Edmund S Muskie) in reinvigorating Maine's Democratic Party in the 1950s, and an unsuccessful candidacy for Governor of Maine in 1960. He held positions as a member of Congress (1957–1961), Managing Director of the Development Loan Fund and Deputy Administrator of the Agency for International Development (1961–1964), and US Representative to the Development Assistance Committee of the Organization for Economic Cooperation and Development in Paris (1964–1965). He was appointed to the United States Court of Appeals by President Lyndon B Johnson in 1965, and served as Chief Judge from 1972 to 1983. Judge Coffin assumed Senior status in 1989 and retired from the bench in 2006.

[86] Coffin (note 19 above) 73.

[87] SA Sobel (ed) *Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges* 2 ed (2007) 1 *https://public.resource.org/scribd/8763855.pdf* (accessed 27 February 2015). Wichern notes that clerks are bound not only by the Rules of Professional Conduct (1995), but also by the Code of Judicial Conduct (1990) and the more stringent Code of Conduct for Law Clerks (1989). See Wichern (note 73 above) 628.

This accords with the judicially considered role of law clerks in the earlier quoted[88] *Fredonia* case.[89] Ward and Weiden note that lately, Supreme Court clerks receive a formal orientation and 'a "*Supreme Court Law Clerk Manual*" covering court-wide administrative matters, and [they] are held to their own code of conduct drafted by the justices'.[90]

These expositions underscore the role and position of law clerks in America. Karl Llewellyn,[91] whose learned work was cited with approval in *Fredonia,*[92] wrote:

> *I should be inclined to rate it as Frankfurter's greatest contribution to our law that his vision, energy, and persuasiveness turned this two-judge idiosyncrasy into what shows high possibility of becoming a pervasive American legal institution.*[93]

So pervasive has the institution become, that in the US alone there are over two thousand law clerks serving federal judges and over six hundred other clerks serving bankruptcy judges and magistrates.[94] The institution of law clerks has since been adopted throughout the world. Alan Paterson, giving an exposition of the institution in England where the designation for the institution is 'judicial assistants', observes that this institution has been adopted in the 'common law jurisdictions and beyond.'[95]

The importance of law clerks to the judicial function and process cannot be overemphasised. Sir Phillips has described the unsatisfactory conditions under which some judicial officers work, which he encountered during the course of his career spanning over 60 years. He attributes delays in the delivery of judgments, as notably due to the lack of law clerks or research assistants as aides to judges among other things.[96] These same sentiments were expressed some ten years before Sir Phillips by a former South African Judge of the High Court, Mr Justice Basil Wunsch in an article

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88 See the quoted dictum from *Fredonia* under 'II WHAT IS A LAW CLERK?' above.

89 569 F.2d 251 (5th Cir. 1978) 255–256.

90 Ward & Weiden (note 36 above) 21–22.

91 See AL Corbin 'A tribute to Karl Llewellyn' (1962) 71(5) *Yale Law Journal* 805–812.

92 *Fredonia Broadcasting Corp* (note 14 above) 256.

93 Coffin (note 19 above) 71, in which is cited Karl Llewellyn *The Common Law Tradition* (1980) 321.

94 Coffin (note 19 above) 72.

95 A Paterson *Final Judgment: The Last Law Lords and the Supreme Court* (2013) 247.

96 Sir Fred Phillips, CVO, QC *The Modern Judiciary: Challenges, Stresses and Strains* (2010) 12.

tellingly titled 'Treating judges properly'. In it Judge Wunsch identifies remuneration, support staff, notably including law clerks, and libraries as indispensable resources for the proper functioning of the judiciary. He asserted that '[t]o function efficiently and productively judges must be equipped with adequate resources. The lack of them can undermine the quality of judicial work or, at least, impose undue strain on those who have to perform it.'[97]

IV LAW CLERKS IN SOUTH AFRICA

From the preceding analyses it is not inconceivable that for judges, particularly in the superior courts and at appellate level, to discharge their important function, they require support staff whatever their designation, duties and however the judge prefers to make use of such para-judicial staff complement or whatever the qualifications or competencies of such staff. What is clear is that the judicial function and the judicial process make it necessary for judges to have chamber assistants. Like their American counterparts, South African judges of the mid-nineteenth to early twentieth century also enjoyed the use of assistants – the rudiments of the law clerk institution – even during the modest formative years of the superior courts of South Africa. Mindful of the 'troublesome' appellation of early clerks,[98] much of the literature surveyed in this regard is biographical and reminiscent, yet helpful for tracing the genesis of law clerks in South Africa.[99]

It is indeed so that the bulk of judicial work in South Africa is carried out by district and regional magistrates, which includes difficult conceptual work in family law, criminal law, and commercial matters. However, magistrates – whose workload, and expansive duties are hardly acknowledged and yet are at the coalface of the administration of justice – are regrettably not given law clerk or research assistance. Hopefully, research assistance will, with time also be extended to the magistrates' courts.

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[97] Wunsch (note 3 above) 33.

[98] Coonan (note 10 above) 172. Ward & Weiden (note 36 above) 30–31.

[99] It should be noted that these are in fact the prime sources of information on the institution as it was noted by the authors of the first elaborate work on the use of law clerks in America: 'Finally, it should be noted that what we know of Gray and his law clerks is derived almost exclusively from the same sort of source as is most of our knowledge about the clerkship practices of subsequent Supreme Court Justices: the rose-tinted reminiscences of a former law clerk.' Oakley & Thompson (note 19 above) 13. See also L Blackwell QC MC *Are Judges Human?* (1962) 17.

(a) Reminiscent historical background

The following tabular outline of past prominent South African judges with 'clerkship' backgrounds is revealing of the rudimentary early existence of the institution of law clerks in South Africa:[100]

TABLE 1

The Architects of the South African Mixed System
Past South African Judges with clerkship backgrounds

Judge	*Clerkship*	*Post-Clerkship*	*Judgeship*	*Marked attributes*
John Stephen Curlewis (1863–1940)	Registrar Office Kimberly (1887)	Transvaal Bar	*Transvaal Supreme Court* (1903–1924) *Judge President, Transvaal* (1924–1927) *Judge of Appeal* (1927–1936) *Chief Justice* (1936–1938)	He was 'unbelievably meticulous' in his attention to detail, and he had a 'plaintive and querulous nature'.

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[100] SD Girvin 'The Architects of the Mixed Legal System' in R Zimmerman & D Visser (contributing editors) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 95–139. See also notes 4 and 6 above. See also many other judges with clerkship backgrounds who sat perennially as Judges of Appeal in Forsyth (note 1 above) 8–11. Compare these with the backgrounds of US Supreme Court Justices in a similar table in Baum (note 11 above) 64–65, reflecting the Supreme Court Justices of 1997. Four of the ten justices were former clerks, for example, Justices William H Rehnquist (Supreme Court clerk, 1952–1953), John Paul Stevens (Supreme Court clerk, 1947–1948), Ruth Bader Ginsburg (Federal district court law clerk, 1959–1961), and Stephen G Breyer (Supreme Court clerk, 1964–1965). See biographies of the current Justices of the Supreme Court on the court website *http://www.supremecourt.gov* (accessed 31 August 2015).

Judge	*Clerkship*	*Post-Clerkship*	*Judgeship*	*Marked attributes*
Tielman Johannes Roos (1879–1935)	Judge's Clerk to Curlewis J (1902)	Attorney Transvaal Bar MP (1915) Justice Minister (1924)	*Judge of Appeal* (1929–1932) *Returned to politics*	He had been brilliant at the Bar but focused his energies on politics and became a better politician than lawyer. He is one of only two judges who have been appointed to the AD directly from the Bar. He is said to have been using the AD as a safe refuge to plan his return to politics and his 'cavalier treatment' of the court was not well received.
Benjamin Arthur Tindall (1879–1963)	Private Secretary Sir Rose-Innes CJ (Transvaal) (1902)	Cape Bar Transvaal Bar Reporter for Transvaal Supreme Court Silk (1919)	*Transvaal Provincial Division* (1922–1937) *Judge President, TPD* (1937–1938) *Judge of Appeal* (1938–1949)	He was said to be a 'quick, conscientious and indefatigable worker' who would 'bring a thorough knowledge of Roman-Dutch law and highly developed legal mind to bear on the many difficult and intricate legal problems which call for decision by the Transvaal judiciary'.

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Judge	*Clerkship*	*Post-Clerkship*	*Judgeship*	*Marked attributes*
FP (Toon) van den Heever (1894–1956)	Clerk to Gregorowski J and then Gutsche J (SWA) (1919–1921)	Windhoek Bar Law Advisor to Union Government (1921–1926) State Attorney (1931–1933)	*South West Africa* (1933) *Judge of Appeal* (1948–1956)	Centlivres CJ expressed in his memoire that – 'Toon will always be remembered in legal history as an ardent exponent of the principles of Roman-Dutch law. He had an uncanny knowledge of those principles and the sources from which they sprang. Being an accomplished linguist, he was able to refer with ease to all the great writers on Roman-Dutch and Roman law.'
Oscar Hendrik Hoexter (1893–1970)	Clerk to J de Villiers JP (TPD) (1916)	Bloemfontein Bar Silk (1929)	*South West Africa* (1938) *Judge of Appeal* (1949–1963)	He is remembered for his judgment in *Radebe*[101] often cited as proof of the judiciary's 'colour-blindness'. He refused the Chief Justiceship twice, in each case because Schreiner JA was senior to him.

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[101] *Radebe v Hough* 1949 (1) SA 380 (A).

Judge	*Clerkship*	*Post-Clerkship*	*Judgeship*	*Marked attributes*
Newton Ogilvie Thompson (1904–1992)	Registrar to Sir Malcolm Searle, JP (CPD) (1925)	Cape Bar Silk (1944)	*Cape Provincial Division* (1949–1958) *Judge of Appeal* (1958–1971) *Chief Justice* (1972–1974)	During his practice at the Bar, he earned a reputation as 'one of its hardest-working and most conscientious members.' As puisne judge he was known for being conscientious. During his term as Chief Justice, 'he proved a fine administrator'.
Frans Lourens Herman Rumpff (1919–1992)	Clerk to Maritz J (TPD) (1935–1938)	Pretoria Bar (1938) Silk (1951)	*Transvaal Provincial Division* (1953–1961) *Judge President, TPD* (1959–1961) *Judge of Appeal* (1961–1974) *Chief Justice* (1974–1982)	In *Administrateur, Natal v Trust Bank van Afrika Bpk*[102] he extended the Aquilian principle to claims for pure economic loss, and equally in *Minister van Polisie v Ewels*[103] he extended delictual liability for omissions.[104]

[102] *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).

[103] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

[104] Corbett CJ further remarked in Mr Justice Rumpff's memory that –

'He had a great love for, and clear insight into our original sources of law the Roman and Roman-Dutch law without being dogmatic or fanatical about them. He endeavoured to apply the true principles of our common law and to sift and remove foreign inclinations in our administration of justice incompatible with our legal system. He nevertheless appreciated the value of a comparative approach to legal problems and to that extent, has time and again, made the effort to seek solutions in the jurisprudence of England and Western Europe.' (My translation.)

M Corbett 'Chief Justice Frans Lourens Herman Rumpff' (1992) 109 *South African Law Journal* 684.

Leslie Blackwell QC MC gives the following explanation of the role of law clerks in the South African setting, necessitating generous citation:[105]

> *To every judge there is appointed a registrar. . . . He is a combination of private secretary, A.D.C. [aide-de-camp], and court registrar. As the latter he spends much of his time in court relieving the official registrar, and in doing so carries out the usual functions of a registrar – swearing-in of witnesses, receiving and registering exhibits as they are handed in, attending to witnesses and their fees, and making out punishment warrants for the Judge's signature. . . .*
>
> *As secretary he types out the judge's judgments, attends to his not very heavy correspondence, and interviews occasional callers. If the judge needs to refer to law books he fetches them from the library. On circuit he travels with the judge in his coach, acts throughout as registrar, and arranges the social functions. Very often he drives the judge's car, possibly does little errands for his wife, and makes himself generally useful.*
>
> *Most registrars are advocates, already qualified, or still in course of study. Those who are already qualified come to gain experience and court atmosphere before commencing practice. They sit in court day after day, seeing how cases are conducted, learning the art of cross-examination, seeing how a judge . . . should be handled. They get to know the judges personally, and many of the advocates and attorneys, so that when they start they are not entire strangers to the profession.*
>
> *A registrar is not a civil servant, and his pay by modern standards is meagre. . . .*
>
> *My registrars would come and go, staying with me from six to twelve months, sometimes longer. Most of them would leave to go to the Bar, and many of them today are in good practice. Some of our best-known judges started their legal life as a judge's registrar. . . . I would never take as a registrar a young man who was not a budding advocate. Service as registrar should be to an advocate what an internship is to a medical student, a short trial run on the practical side of the profession before commencing to practise.*
>
> *. . . I did not often keep them for more than twelve months for at times there is not much to do, and the life of a judge's registrar, if too prolonged can become a demoralising one. I have often wished that in my early days I had been able to do a twelve months' service with one of the old-time judges, instead of starting at the Bar without any training or experience. The appointment of the registrars lies with the judge himself, and there is usually a fair amount of competition for the job. They fill a very useful function . . . I have followed the careers of my registrars with interest, I think of their service with me with pleasure; nice boys all of them.*

The judges of the pre-Union colonies and thereafter those of the Union of South Africa were trained in the best traditions of the early English Bar. 'Names like Menzies and Cloete, Watermeyer and [Lord] de Villiers

[105] Blackwell (note 99 above) 77–79.

come to mind, to mention only a few of the giants of old'[106] and 'great departed'.[107] Epitomising these architects who administered justice and developed South African law in the earliest days is none other than Lord Henry de Villiers (1842–1914),[108] Chief Justice of the Cape Supreme Court-turned-first Chief Justice of the Union of South Africa upon its establishment in 1910. As a judge of first instance in the Cape, Lord de Villiers was known for his application of equity above the predetermined letter of Roman-Dutch law.[109] To his credit, it has been said that South Africa in 1873 needed puisne judges 'to lay down the law on each case as it arose, justly, systematically, rapidly' just as he did.[110] True to his Victorian training, his learned biographer, Professor Walker notes that:[111]

> *Even late in life he held that a judge might well be swamped in an inky sea of jurisprudence. 'You and Judge ——,' he once said to a colleague whose library he had been inspecting, 'read too many books. What you want is to get hold of a good conception of justice and apply it.'*

With such views and judicial idiosyncrasies, it is obvious that the law clerk institution as we understand it had no place under Lord de Villiers' administration of justice at the helm the Cape colony, later the Union judiciary. Whilst registrars or judges' secretaries have always been part of the superior courts of the colonies and Union of South Africa,[112] the *role* of officials in those positions in South Africa, evolutionarily speaking, must have taken a similar progression to that which was taken in the United State of America.[113] For instance proofreading being one of

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[106] BA Tindall (editor and contributor of introduction) *James Rose Innes: Chief Justice of South Africa, 1914–27* (1949) 336.

[107] Tindall (note 106 above).

[108] E Kahn 'Lord de Villiers' (1978) 95 *South African Law Journal* 430.

[109] EA Walker *Lord de Villiers and His Times: South Africa 1842–1914* (1925) 82.

[110] Walker (note 109 above) 82. Professor Walker notes that Lord de Villiers' 'outstanding characteristics as judge were his extraordinary intuitive perception of the side on which equity lay and his determination to find a way out, if the letter of the law seemed likely to do injustice. . . . With him substantial justice and equity came first, the letter of the law second.' Walker (note 109 above) 83.

[111] Walker (note 109 above) 83.

[112] For example Sir Rose-Innes notes regarding the establishment of the AD: 'We [ie himself and Sir William Solomon] had . . . shared the services of a secretary – Captain Euan Christian – our relations with him may be gathered from the fact that he was wont (so we heard) to refer to us as his twins. We surrendered him to Lord de Villiers, partly because it meant promotion, and partly because it seemed right that the Chief Justice should have a first-class secretary.' Tindall (note 106 above) 244.

[113] See '*(c) Formal adoption of law clerkship and development of the institution*' above.

the main duties of law clerks today, and Sir John Wessels' judgments having been self-admittedly 'peppered with mistakes in quotations and citations,'[114] that notwithstanding, AA Roberts KC was Sir Wessels' clerk who edited Sir Wessels' book on contract.[115] This and the fact that the autobiography of Sir John Kotzé is replete with anecdotes about his 'registrar' Rider Haggard's adventures on circuit court and that Mr Haggard (later Sir Haggard) was commended for all things recreational but nothing of legal substance,[116] resonates with the initial usage of clerks in America under Ward and Weiden's 'secretary regime'.

Former judge of appeal, Justice Marius Diemont in his autobiography, *Brushes with the Law*, himself having been a judge's clerk primarily to Mr Justice EF Watermeyer,[117] gives the following insight into the role of judges' clerks in South Africa during the 1920s:

> *After I graduated from the university I became registrar to Mr Justice E.F. Watermeyer. That meant I was his full-time clerk or secretary. I sat in court with him, typed his judgments, stopped troublesome attorneys and disappointed litigants from wasting his time – I was the watchdog. I also went on circuit with him and looked after his welfare in the coach. I was fortunate. Judge Watermeyer was an outstanding judge; he later became Chief Justice. . . .*
>
> *Judge Watermeyer, or 'Billy' as he was known to the Bar, was a considerate man. When I went to work for him I did not even know what a warrant was, or a petition for that matter. I could type with only two fingers and even then not accurately. The first civil judgment I typed for my judge set out the arguments*

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[114] E Kahn *Law, Life & Laughter Encore: Legal Anecdotes & Portraits from Southern Africa* (1999) 286, where the anecdote is appositely entitled 'No proofreader'.

[115] Kahn (note 114 above) 285.

[116] Sir John Kotzé *Biographical Memoirs and Reminiscences* (1934) 458–488 at 465, where Sir Kotzé notes: 'Haggard often bagged some fine blue-breasted korhaan' and 'this genial, high-spirited and romantic young man, bred and educated as befits a gentleman's son, proved himself to be an excellent cook!' Sir Kotzé (at 487–488) dismissed Sir Haggard's description of an execution as 'dramatic', 'wholly imaginary', 'unfounded reflect', 'pure romance, and not in keeping with fact' with a further disparaging explanatory footnote at 488.

[117] Mr Justice Ernest Frederick ('Billy') Watermeyer was appointed to the Cape Provincial Division on 16 June 1922 to 1937. He was then appointed to the Appellate Division as a Judge of Appeal on 15 October 1937 and became the ninth Chief Justice of South Africa from 1943 until his retirement in 1950. He was the last South African Privy Councillor, 'a champion of Roman-Dutch law with a keen analytical mind' and was renowned as a most brilliant 'all-rounder' in our judicial history. See 'Mr Justice Watermeyer' (1923) *South African Law Journal* 99, with portrait; 'The new Chief Justice' (1943) 60 *South African Law Journal* 429; 'The Rt. Honourable EF Watermeyer' (1950) 67 *South African Law Journal* 332.

> *why the plaintiff should fail, but in the final paragraph I left out a critical 'not'. Happily the fault was spotted before the judgment in favour of the wrong party was read in court. This lapse from grace was not as serious as one committed by a brother registrar who went on circuit to Beaufort West with Judge Van Zyl. The judge found Piet Klaase, the accused, guilty and sentenced him to six months' imprisonment for theft, the sentence to be suspended for 12 months on good behaviour. The following day Judge Van Zyl carried out a routine prison inspection. 'I have seen you before,' he said, stopping in front of Piet Klaase. 'Ja, Baas gave me six months yesterday for theft, but said I need not go to prison.' The warrant was sent for when it was established that the judge's clerk had been inattentive or asleep and had not heard that the sentence was to be suspended. Piet Klaase was freed and went on his way rejoicing.*[118]

Mr Justice Diemont describes the valuable experience he gained during his clerkship as follows:

> *I learned more in the ten months that I sat in court as a judge's clerk than I had in the previous ten years of my life. I saw life from every angle; I heard cases of importance and cases of no importance at all; I listened to strange cases, to dramatic cases, to dull cases. Each and every one of them enthralled me, which was good. However unimportant the case may seem to the world, to the parties concerned it could be the most vital moment of their lives. I watched witnesses trying to tell the truth and witnesses trying to lie, all facing with less or more success cross-examination that was skilled or seemingly stupid. I saw keen intellects challenge opponents of equal intellect. I saw drama in every form. I watched it all with absorbed interest and to this day, after almost 20 years at the Bar and almost 30 years on the Bench, I confess that it is an interest I have never lost.*
>
> *I knew when I left Judge Watermeyer that I had chosen the right profession.*[119]

The eclectic usage of clerks and the versatility they had to embrace as well as the role's warm and human side and the often lasting relationships which develop between clerks and judges is evident from Mr Justice Diemont's account. He reveals that he once had to act as an Afrikaans interpreter for the benefit of the unilingual Mr Justice Sutton in a civil suit:

> *Surprisingly few of my colleagues were bilingual. I learned this years before when I went on circuit as a judge's clerk. Judge George Sutton*[120] *was doing the*

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118 Diemont (note 4 above) 25–26.

119 Diemont (note 4 above) 26.

120 Mr Justice George Gerhard Sutton (1880–1950) was appointed to the Cape Provincial Division Bench on 15 February 1929. In 1946 he became Judge President of that Division until 1948. WP Schreiner was his uncle (making him cousins with Mr Justice Oliver D Schreiner) and he married Mr Justice EF Watermeyer's sister, Agnes Gertrude Watermeyer. See 'Mr Justice

> *southwestern circuit and the novelty of travelling in the judge's coach appealed to me greatly. The judge was an eccentric man, talkative, nervy and given to repeating himself and sometimes making tactless remarks in court, but I grew to like him. He was a good lawyer and a kind man. After he retired we became friends, and I was always given a warm welcome at his home, particularly if I had a little legal gossip to tell him.'*[121]

Mr Justice Bresler notes in his book that '[i]n those days [1920–1924] an applicant who wished to apply for the position of Registrar . . . had to be in possession of at least one degree, and it was more than an implied term of his engagement that he would proceed to his LLB in order to practise at the Bar, for which this experience in court was regarded as a useful form of preparation'.[122]

(b) The modern South African clerkship

Close to a century since Mr Justice Diemont's clerkship, Judge Basil Wunsch of the High Court underscored the importance of adequate staff resources for judges when he said:[123]

> *I speak of my own court. Each judge has a registrar or clerk. The annual salary of mine is R37 427. Her other benefits could increase this to about R52 000. The annual package of a competent dictation (not the most senior) typist employed by attorneys in Sandton is over R90 000. Often, registrars are law students. They are, generally speaking, not able to type dictated judgments and even manuscript judgments that are not very simple. Whatever I want typed, such as letters and brief memoranda, I write out in longhand and usually have to correct at least once. Between 32 judges who are on duty at any time (that is, excluding those on circuit duty) we have no pool typist for dictated or manuscript judgments. However, her work is not confined to judgments. It embraces also, subject to the typing of judgments enjoying priority, other documents arising*

Sutton' (1929) 46 *South African Law Journal* 383–286, with portrait; Kahn (note 114 above) 266–267.

121 Diemont (note 4 above) 68–69.

122 Bresler (note 4 above) 73. The learned judge went on to note: 'Continued typing of judgments, and of observing procedure, enabled one to acquire some knowledge, not perhaps of over much positive law, but of pitfalls which were to be avoided. . . . Apart from the advantage of the description I have referred to, almost daily association with a judge would do much to enlarge and enrich one's mind. There was another type of advantage, namely that of being able to observe the leaders of the Bar, although much of their eminence tended at times to baffle rather than instruct, but the impress of these great personalities of Bench and Bar has never been completely dimmed.'

123 Wunsch (note 3 above) 33–36.

from judges' official duties, typing work for judges' clerks relating to their duties and for the office of the registrar. She compiles and types the list of judges and their secretaries with their office telephone numbers and the list of judges' vehicles with registration numbers for the security personnel. She also types the registrar's personnel list and telephone numbers of the different officers. So that generally there is a long wait after you submit a judgment for typing. . . .

Judge Wunsch noted by contrast to the position in the High Court that –

. . . Each justice of our Constitutional Court has two research clerks. They are law graduates who serve terms of a year. Their responsibilities include: preparing the judge's papers in each case doing detailed research on particular topics preparing pre-hearing memoranda (identifying the key issues in matters to be heard) preparing draft text for judgments assisting the judge in Court assisting the judge with court-related work (writing speeches, committee work) assisting the judge with other work (organisational work, committees, international human rights work) and administrative work. They also review judgments written by their principals. This latter task involves not only proofreading but also cite-checking. This includes: reading a case cited to ensure that the reference or quotation is proper authority for the proposition for which it is cited ensuring that an authority cited is still good law – that is has not been overruled or modified ensuring that cited material has not been taken out of context and that paraphrases accurately reflect the cited authority. An overseas donor has provided funds for the engagement of six research clerks to be shared by the members of the Supreme Court of Appeal and they are already functioning. The Land Claims Court has two research clerks and each judge of the Labour Appeal Court has an associate whose functions are similar to those of a research clerk. I hope that this programme will be extended to other courts. The benefits to judges with heavy case loads and to the public to ensure the accuracy of the contents of judgments are obvious. The Witwatersrand Local Division has, for example, a heavy appeal workload. There are appeals to a full bench (the practice of directing appeals to a full bench rather than the SCA is gaining momentum all the time) against judgments of a single judge and weekly an average of about 25 appeals from judgments in the magistrates' court in criminal and civil cases. Appeals in criminal cases are likely to decrease since the introduction of section 309B into the Criminal Procedure Act, but then there are likely to be large numbers of petitions for leave to appeal where magistrates have refused leave. In many cases the appellants in criminal cases are not represented and no heads of arguments are filed. There are about 25 reviews of judgments in criminal cases in the magistrates' court every week. Often the record in appeals are very bulky. The assistance of graduate clerks, not only to undertake research and to assist with and review judgments, but also to sift appeal records to identify the material documents and issues would be of great value.

The inaugural Constitutional Court of South Africa under the leadership of its first President (later Chief Justice) Arthur Chaskalson[124] was the first and only South African court to have law clerks assigned to all its individual judges – 'like its counterparts around the world' as pointed out by Corder and Brickhill.[125]

Subsequent to the Chaskalson court's adoption of the employment of clerks, law clerks have since been appointed to the Supreme Court of Appeal and all the respective divisions of the High Court of South Africa. However, the Constitutional Court is the only court in which each judge is assigned two clerks, while the Chief Justice and Deputy Chief Justice are entitled to three clerks each.[126]

(c) Constitutional Court

The Constitutional Court 'occupies a special place'[127] at the apex of the judicial authority of South Africa. It consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.[128] Unlike the Supreme Court of Appeal, it sits *en banc* in all cases it hears[129] and a matter

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[124] The late Mr Chief Justice A Chaskalson (24 November 1931–1 December 2012) was the first President of the Constitutional Court of South Africa from 1994 to 2001 and Chief Justice of South Africa from 2001 to 2005. See K O'Regan 'In Memoriam: Arthur Chaskalson' (2014) 132 *South African Law Journal* 461–473; and G Budlender 'Tribute to Arthur Chaskalson' (2013) 29 *South African Journal on Human Rights* 1–5.

[125] Corder & Brickhill (note 2 above) 370.

[126] Corder & Brickhill (note 2 above) 369–371.

[127] Chaskalson P used these and the following words in *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 55 to describe the court:

> 'It was established as part of that order as a new Court with no links to the past, to be the highest Court in respect of all constitutional matters and, as such, the guardian of our Constitution. It consists of eleven members and, unlike other courts, sits *en banc*, which ensures that the views of all its members are taken into account when decisions are made.The Constitution contains special provisions dealing with the manner in which the Judges of this Court are to be appointed and their tenure which are different to the provisions dealing with other judicial officers. It has exclusive jurisdiction in respect of certain constitutional matters and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts.' (Footnotes omitted.)

[128] Section 167(1) of the Constitution.

[129] Corder & Brickhill (note 2 above) 376. K O'Regan 'The Constitutional Court: A Judge's Perspective' in Hoexter & Olivier (note 1 above) 409. See also

before it '*must* be heard by at least eight judges.'[130] It is the highest court of the Republic,[131] with a 'plenary jurisdiction as the final court of appeal in all matters.'[132] It has great testing powers including whether Parliament or the President has discharged constitutional obligations.[133]

Corder and Brickhill note that, '[a]pproximately 24 clerks out of several hundred applicants – typically young graduates or recently qualified practising lawyers – are selected annually for a one-year clerkship in the chambers of one of the eleven judges of the court.'[134] Clerks in the Constitutional Court receive competitive salaries which are 'comparable to the salary paid to first-year candidate attorneys in South Africa's largest law firms.'[135] Law clerks at the Constitutional Court sign confidentiality agreements.

Brickhill, a practising member of the Bar, served as retired Constitutional Court Justice Kate O'Regan's clerk in 2004. Corder, on the other hand is a prominent public law Professor. He said that he would have seized the opportunity to be a law clerk had it been available to him in his time.[136] The learned authors highlight the following duties of law clerks in the Constitutional Court of South Africa:

> *To the extent that clerks review the work product of the judges, make edits regarding grammar, word choice and sentence structure, their potential influence relates to stylistic matters. But the clerks also have the opportunity to influence the judges substantively on questions of constitutional doctrine and the manner in which a particular judge exercises her vote.*
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> . . .

C Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *South African Journal on Human Rights* 509 at 521–522.

130 Section 167(2) of the Constitution.

131 Section 167(3)*(a)* of the Constitution.

132 Corder & Brickhill (note 2 above) 362 and 376–377. Following the Constitution Seventeenth Amendment Act, 2012 which came into effect on 22 August 2013, section 167(3) para *(a)* of the Constitution was amended to widen the jurisdiction of the Constitutional Court from being 'the highest court in all constitutional matters' to simply being 'the highest court of the Republic'; para *(b)* imposes three requirements for the court's plenary jurisdiction.

133 Corder & Brickhill (note 2 above).

134 Corder & Brickhill (note 2 above) 370.

135 Corder & Brickhill (note 2 above).

136 See Professor Hugh Corder's transcribed record of his interview in the Wits University Constitutional Oral History Project done on 4 January 2012 at *http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-C16-001-jpeg.pdf* (accessed 22 August 2015).

> *Generally speaking, the duties of the court clerks consist of chamber duties, duties not related to court, and public and community relations. Chamber duties include the administration of court papers and case management, the drafting of memoranda on all new applications lodged with the court, producing pre- and post-hearing memoranda, drafting media summaries, preparing, editing, researching and cite-checking judgments, and generally assisting the judge in court. . . .*[137]

Corder and Brickhill hasten to further note that –

> *. . . the above duties are, of course, subject to the demands made by an individual judge. Each chamber has its own quirks, personalities, rules, practices and traditions. In any event, a 'cert pool' of sorts operates at the court to deal with new applications. For each week of the court term, one of the 11 judges is the appointed duty judge [who together with her chambers are] . . . responsible for monitoring all documents lodged with the court and communicating with the other members of the court where a request is made.*[138]

An elaborate process is followed in the Constitutional Court for editing draft judgments 'in accordance with the court's house style,' whereby clerks are allocated individual paragraphs of the judgment to check.[139] In this regard and also taking into consideration preferences of individual judges, Justice O'Regan explained the following about the role of law clerks in the process of producing a judgment in the Constitutional Court and in her chambers specifically:

> *The role of law clerks in judgment-writing varies from chambers to chambers. All clerks are involved in cite-checking, which is a thorough process that takes several days and includes a read-through of the judgment by the clerks. For the rest, the involvement of law clerks varies. In my chambers, the law clerks would often be asked to write a memorandum on a particular legal issue, or assist with footnotes on the draft judgment.*[140]

Professor Crayton of the University of North Carolina-Chapel Hill, a beneficiary of the Constitutional Court's foreign clerks programme, clerked for Chief Justice Sandile Ngcobo in 2003. He attested to the enriching experience he gained in that court thus –

> *For me, the job was the professional experience of a lifetime. Having clerked in the American federal court system, the Court offered an exciting opportunity to think critically about many of the rules and principles of law that I obtained in the United States. Evident in the Court's handling of its case load is a*

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137 Corder & Brickhill (note 2 above) 369–371.

138 Corder & Brickhill (note 2 above) 370.

139 Corder & Brickhill (note 2 above) 373.

140 O'Regan (note 129 above) 410.

> *creativity of thought in using constitutional interpretation to promote social change. That creativity is understood as a virtue among the Judges, and I think that this consensus invokes a special collegiality within the institution and the highest respect from those parties whose disputes are resolved by the Court. The hallmark of the Court is that virtually all of the work is a product of collaboration among the Judges, the clerks and the administrative staff. As South Africa moves further in its effort to achieve its goal of development and transformation, the Court will be a diligent guardian to assure the protection and promotion of the Constitution.*[141] *(My emphasis.)*

(d) Supreme Court of Appeal

The Supreme Court of Appeal (SCA) is the successor to the Appellate Division established in 1910 when the Union of South Africa formed.[142] In accordance with the Seventeenth Constitutional Amendment of 2012, the SCA now functions as an intermediate court of appeal hearing appeals from the High Court in all matters in which leave to appeal to the SCA has been granted in terms of section 17 of the Superior Courts Act 10 of 2013. The court comprises the President and Deputy President of the SCA and a number of judges of appeal determined by an Act of Parliament.[143] The composition of the justices of appeal who sit in the SCA changes each term.[144] Presently there are 26 positions in the SCA which are filled by permanent and acting justices of appeal including the SCA President and Deputy President. The court sits in panels of five or three judges of appeal, depending on the nature of the appeal. The composition of the panels differs for each case.[145]

The duties of law clerks in the SCA are very similar to those highlighted by Corder and Brickhill regarding law clerks at the Constitutional Court – with the exception being that in the SCA, a pool of not more than six law clerks, officially known as 'law researchers' who are appointed on a permanent basis, serve all 26 of the judges of appeal (including acting judges) on an availability basis, where editing judgments takes precedence

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[141] See D Globalizado 'Work On! Constitutional Court of South Africa Invites Applications for Foreign Law Clerks' 19 January 2014 blog available at *http://ilg2.org/2014/01/19/work-on-constitutional-court-of-south-africa-invites-applications-for-foreign-law-clerks-rolling-deadline/#more-4328* (accessed 25 August 2015).

[142] See the section on 'About the court's position in the justice system' on the website of the Supreme Court of Appeal at *http://www.justice.gov.za/sca* (accessed 25 August 2015).

[143] 'About the court's position' (note 142 above).

[144] 'About the court's position' (note 142 above).

[145] 'About the court's position' (note 142 above).

over all other clerk duties. Ordinarily, judgments are checked for style, grammar, authorities and substance by individual researchers with the general turnaround time of 24 hours. The law clerk who was responsible for checking the judgment is further required to prepare a media summary on the judgment. Due to the proportionally smaller pool of law clerks available in the SCA, research on issues arising in appeals pending in the court is confined to being undertaken during recess when the judges of appeal are preparing for the forthcoming term.

Between two and three judges of appeal are responsible for the shortlisting of applicants and for interviewing and managing them. As part of their employment, law researchers in the SCA are require to undergo a standard state security clearance facilitated by the Office of the Chief Justice and State Security Agency.[146]

SCA law researchers at the SCA also receive competitive salaries at the public service salary level 9, and their employment benefits include a pension contribution and medical aid contribution. They occupy a common office with an open plan in which their workstations are arranged in a manner that facilitates consultation and discussion with each other, especially for collaborative tasks. Save for the understandable and inevitable preferences of some judges because of the synergy that naturally develops between judges and law researchers, they are available to all judges of appeal.

SCA law researchers further assist the judges of appeal with extra-curial work such as the preparation of lectures, conference papers and speeches on legal themes or contributions to academic works provided that the researchers do not have other work related to the court's work.

The point has been made by a former member of the SCA, Mr Justice Edwin Cameron, a retired Justice of the Constitutional Court, that the establishment of the SCA dating back to the establishment of the Union of South Africa, retains many proprietary practices which have been observed and retained through the years for the efficient running of the court.[147] In this context, the law researcher is a relatively recent addition to the staff complement of the court.[148] Before the employment of law researchers in the SCA, the court staff had always been composed of the judges' secretaries, ushers, the registrar and administrative clerks in

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[146] Presumably so do law clerks and law researchers throughout the South African superior courts.

[147] E Cameron *Justice: A Personal Account* (2014) 17–18.

[148] See also the above extensive quote from Justice Wunsch in terms of which he notes that: 'An overseas donor has provided funds for the engagement of six research clerks to be shared by the members of the Supreme Court of Appeal and they are already functioning.' See Wunsch (note 3 above) 36.

the latter's office. Traditionally, the editing of draft judgments of the SCA was done by the judges of appeal themselves as part of their collaborative and 'collegial deliberation'[149] and it remains so.[150] In his acceptance address on the occasion of the conferment of the LLD *honoris causa* by Rhodes University on 6 April 1990, Chief Justice Corbett said the following in this regard:

> *We always sit in panels of five, or sometimes three, and we work together as a team – and, I think, a very happy, well-adjusted team at that. Every judgment that is delivered by the Court, that generally appearing under the name of an individual judge, represents an amalgam of the ideas, ingenuity, legal knowledge and expertise, humanity and wisdom of every member of the panel. And in every case the composition of the panel varies. So I thank you for honouring my judicial colleagues in this way. Speaking purely of them, I believe that the honour is well deserved.*[151]

The practice for reviewing draft judgments has since been spelt out in the court's *Judgment Style Guide*[152] adopted by the members of the court and revised from time to time. It is particularly useful for the acting judges of appeal who change from term to term. The *Judgment Style Guide* provides, inter alia, that 'judgments should be circulated both in hardcopy and electronically. Prior to circulation all references *must* be checked by one of the researchers.' It goes on to prescribe that 'Corrections or suggestions should be sent to the scribe [ie the writing judge] either in marked hard copy or electronically' adding that law researchers should 'Check with the scribe as to his or her preference.'

The comprehensive expectations for and responsibilities of law researchers in the SCA are spelt out in their performance agreements which they are required to sign and adhere to with quarterly monitoring and reporting. The agreement places different weighting expressed in percentages on their different duties styled 'key result areas' (KRAs).

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149 See Corder & Brickhill (note 2 above) 373, quoting Justice O'Regan.

150 PM Nienaber 'Producing a Judgment in the Appellate Division' in E Kahn (ed) *The Quest for Justice: Essays in Honour of Michael McGregor Corbett Chief Justice of the Supreme Court of South Africa* (1995) 285–303.

151 E Kahn 'Michael McGregor Corbett – Gamaliel Redux' in E Kahn (note 150 above) 39.

152 Compare with the US *The Bluebook: A Uniform System of Citation*, published currently in its twentieth edition, which prescribes the most widely used legal citation system in the US. For a history on this reference guide see C Hurt 'The Bluebook at Eighteen: Reflecting and Ratifying Current Trends in Legal Scholarship' (2007) 82 *Indiana Law Journal* 49 at 51–52.

The review and editing of judgments is prioritised above all duties both in practice and undertaking with a 30 per cent KRA weighting in terms of which the following are performance prescripts and corresponding attainment indicators:

(a) Thorough proofreading of draft judgments ensuring there are no stylistic, syntactical or grammatical errors.

(b) Cite-checking of judgments both against the record and ensuring citations are correct.

(c) Checking the judgment for substantive errors and suggesting amendments where necessary.

(d) Effecting changes to judgments where necessary.

(e) Ensuring the judgment complies with the requirements and prescriptions of the *Style Guide*.

(f) Drafting of media summaries for the purposes of posting [them] on the Supreme Court of Appeal website and for distribution to the media.

Research is given an equal KRA weighting of 30 per cent with corresponding performance measures including tracing and sourcing authorities for judges from various sources both physically and electronically such as law reports, textbooks, etc.

The 'agenda setting' case-flow management and administrative role is managed by the President of the court with the assistance of the Deputy President and has been explained and described in detail by Chief Justice Corbett.[153] It involves the compilation of the court *bulletin* and *roll* which entails reading the parties' filed practice notes and drafting summaries as well as the roll, which are reviewed and checked by law researchers. This is also a very important duty which carries a KRA weighting of 20 per cent in the performance agreements of law researchers.

Sitting in court during the hearing as acting registrar to record time for argument of each party is part of the duties of a law researcher, important for taxation purposes.

Finally, to a lesser extent, law researchers in the SCA are expected to assist the court staff and law researchers or law clerks from other courts as part of their KRAs with a weighting of ten per cent.

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[153] Nienaber (note 150 above) 288–290.

(e) High Court

In accordance with section 166*(c)* of the Constitution and section 6(1) of the Superior Courts Act 10 of 2013, South Africa has a single High Court consisting of several Divisions.[154] Each Division of the High Court consists of a Judge President and one or more Deputy Judges President, each with specified headquarters within the area under the jurisdiction of that Division, and so many other judges as may be determined under section 6 of the Superior Courts Act.

The narratives given by Justices Diemont, Bresler and Wunsch quoted above still hold sufficiently true of the role of law clerks in the High Court.

Judges of the High Court have law clerks who assist them with administrative tasks. They often read the papers or sit through the trial and are thus fully involved in the case from beginning to end. This law clerk earns a competitive salary and can spend up to three years with a judge. They therefore have the ear of the judge and may therefore influence decision-making to the extent that law researchers are simply unable to.

In addition, approximately 15 years ago, the High Court Divisions across the country also employed law researchers who perform similar functions to law researchers in the SCA. Large divisions such as the Gauteng Division of the High Court, Johannesburg, have up to seven law researchers. Since most of them are law graduates or have completed an LLM degree or articles of clerkship, they also assist the judge with research and editing judgments.

V THE CHARACTER AND QUALITIES OF A LAW CLERK

For the benefit of posterity, this collated exposition of the modern institution of law clerks is concluded with the expected character of a prospective law clerk. The author is regularly approached by prospective law clerks for pointers in preparation for an interview.

Since law clerks discharge an important para-judicial function, the qualities required for those that assume this role are justifiably onerous and must be seen and treated with the seriousness the role deserves.

[154] There is a Division of the High Court for each of the nine provinces of the country. See in this regard the *Renaming of High Courts* 2014 (3) SA 319.

Given their duties and expectations upon them, law clerks must be fit and proper.[155] They must have as good as possible a 'polishing hand'[156] and a firm command of language.[157] They must have a passion for learning and aspire 'to preserve the precious stores of knowledge,'[158] espouse intellectual honesty;[159] have an insatiable hunger for knowledge and perfect techniques

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[155] They must have unimpeachable integrity. In terms of the principle in *Fredonia Broadcasting Corp* (note 14 above) 255, and other cases – *R v Sussex Justices, Ex parte McCarthy* [1923] All ER Rep 233; *R v Essex Justices, Ex parte Perkins* [1927] All ER Rep 393; *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958 (5th Cir. 1980) 968; *Hall v Small Business Administration* (note 15 above); *Hunt v Am Bank & Trust Co of Baton Rouge*, 783 F.2d 1011 (11th Cir. 1986) 1016; *Oliva v Heller* (note 16 above); *Parker v Connors Steel Co* (note 11 above); *In re Allied-Signal Inc, et al, Petitioners* (note 17 above); *Vaska v State*, 955 P.2d 943 (Alaska 1998); and *Doe v Cabrera* (DC) unreported civil action no 14-1005 (RBW) of 30 September 2015 – clerks must be careful not to later become involved in litigation in cases about which they acquired intimate knowledge during their clerkship, which principle in any case finds universal application in respect of all counsel.

[156] C Visser 'Ellison Kahn' in C Visser (contributing ed) *Essays in Honour of Ellison Kahn* (1989) 8–10, where it is inter alia said in a tribute to that great professor that he 'checks for accuracy [of] every reference in a manuscript submitted to him, he brings it into house style, and he makes such editorial changes as he considers necessary for the purposes of accuracy, clarity and grammatical correctness.' Herman also notes that the 'clerk as editor eliminates any errors of punctuation and grammar, and will indicate authorities that ought to be included in or deleted from the draft. Suggestions for re-organisation of the reasons or for reworking difficult passages are made. Many hours are spent reading and rereading draft judgments with painstaking care, searching for errors and formulating improvements.' See MJ Herman 'Law Clerking at the Supreme Court of Canada' (1975) 13 *Osgoode Hall Law Journal* 279 at 285.

[157] See Rt Hon Lord Alfred Denning MR *The Discipline of Law* (1979) 5; A Scalia & BA Garner *Making Your Case: The Art of Persuading Judges* (2008) 61. See also BA Garner *Legal Writing in Plain English: A Text with Exercises* 2 ed (2013).

[158] See first quotation from Carson under *(a) The father of modern judicial clerkship* above (Carson (note 26 above) 525–526). Lord Denning advises that, 'As a pianist practices the piano, so the lawyer should practise the use of words, both in writing and by word of mouth.' Denning (note 157 above) 7.

[159] Clerks must guard against plagiarism. Most importantly, clerks must not be guilty of what Justice William H Rehnquist intimated in an article he wrote as a young Arizona attorney and former law clerk to Justice Robert H Jackson that ideologically liberal law clerks might be manipulating the review of petitions for *certiorari* and tricking their more conservative justices into voting in a more liberal fashion. See WH Rehnquist 'Who Writes Decisions of the Supreme Court' *U.S. News & World Report* 13 December 1957 issue. See also *In re Allied-Signal Inc* (note 17 above), where the court held 'few knowledgeable people would expect

for editing judgments[160] and research.[161] They must be acquainted with the available legal research resources[162] and be proficient at locating the law with relative ease and efficiency.

A law clerk must be possessed of a critical, analytical and unassuming mind. And due to their service to justice, they must have a genuine deference for the judicial process and the tenets of our constitutional democracy founded on the rule of law, the separation of powers and judicial independence. In light of their position – privy to the inner workings of courts – they must gladly assume the cloak of anonymity in service of the judges and courts which they serve with an unfaltering sense of duty. And they must be discreet pertaining to all confidential information they come upon during their service.[163]

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that it would ordinarily cause most law clerks to actually commit the serious ethical breach of seeking to influence a judge improperly.'

[160] As it has been asserted that, 'A well-trained law clerk, especially one who has had considerable law journal experience, can aid his judge in polishing the language of opinions and in spotting ambiguities and other slips that may return to plague the court later. Even a judge who is a precise and clear drafter can use an editor, for the best of us can be misled by our own words and feel sure that what is crystal clear to us is equally clear to all who read.' (See Herman (note 156 above) 285.) Since a very important part of the law clerk's job is assisting judges to edit judgments, it is helpful if they read up on the subject-matter of judgment writing. See for instance MM Corbett 'Writing a Judgment' (1998) 115 *South African Law Journal* 116; H Gibbs 'Judgment Writing' (1993) 67 *Australian Law Journal* 494; F Kitto 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787; and MD Kirby 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691.

[161] SR Elias & Nolo legal editors (eds) *Legal Research: How to Find & Understand Law* 16 ed (2012); see also W Putman & J Albright *Legal Research, Analysis, and Writing* 3 ed (2013). Due to our system of *stare decisis,* law clerks ought to keep abreast of judgments of the Constitutional Court, Supreme Court of Appeal, and further, in light section 39(3) of the Constitution, they must be aware of notable judgments of the apex courts of comparable foreign jurisdictions such as the Supreme Court of Canada, UK Supreme Court and US Supreme Court etc.

[162] Primarily they must be familiar with resources (physical and electronic) of primary sources of law such as legislation and case-law and their location through citation, chronology or subject-index, and test whether they are still good law ie, whether they are still in force, through the use of annotations and the noter-up. See T du Plessis 'Legal Research in a Changing Information Environment' 2007 (10) *Potchefstroom Electronic Law Journal*.

[163] *Doe v Cabrera* (note 155 above) *https://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2014cv01005/166741/89* (accessed 6 October 2015).

Ward and Weiden note that –

> *[C]lerks often had time to themselves to read and study on their own. Holmes once summoned a clerk, who was reading a novel in the next room, to discuss a case. When the clerk suggested the justice consider a particular precedent he had read while at Harvard, Holmes responded, 'Do you think you might spare me a moment from your cultivated leisure to look out that citation?'*[164] *(My emphasis.)*

Court recess offers such necessary time for clerks unto themselves. The coinciding Constitutional Court and SCA terms[165] leave close to seven months of recess. For clerks these are ordinary working days with the notable difference that judges are away preparing for the ensuing term. This is the time when judges usually require detailed research on discrete points of law. However, there is generally less pressing work for clerks which allows for self-study and leisure reading – the 'cultivated leisure'[166] of which Justice Holmes spoke.

To keep sharp minds, law clerks must use this time wisely and constructively for unhurried specific and general preparation for the ensuing court terms through organised reading of important authorities. The common and useful recurring themes for revision are expositions on the construction of documents, evidence and procedure, knowledge of the landmark cases and the important framework principles in private and public law. As research assistants to the judges possessed of a fine common sense and knowledge of human nature, clerks would also do well to broaden their general knowledge by reading broadly and keeping abreast with current affairs. They ought to also consider keeping their ear on the ground or fingers on the pulse of reactions (general, scholarly or judicial)

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[164] Ward & Weiden (note 36 above) 35.

[165] The terms are: 15 February–31 March, inclusive; 1 May–31 May, inclusive; 15 August–30 September, inclusive; and 1 November–30 November, inclusive in terms of rule 2(1) of the Rules regulating the conduct of the proceedings of the Supreme Court of Appeal of South Africa promulgated under GN R1523 of 27 November 1998 (and amended by GN R979 of 19 November 2010, GN R191 of 11 March 2011 and GN R113 of 15 February 2013) and rule 2.1 of the Constitutional Court Rules promulgated under GN R1675 in *GG* 25726 of 31 October 2003. See *https://www.judiciary.org.za/index.php/judiciary/superior-courts/superior-court-terms?download=11088:court-terms-2023* (accessed 19 September 2023).

[166] This term seems to have been coined by the Anglo-Irish playwright Oscar Wilde (1854–1900) in his *The Soul of Man Under Socialism* 2 ed (1900) 38, when he said that '*cultivated leisure* . . . is the aim of man – or making beautiful things, or reading beautiful things, or simply contemplating the world with admiration and delight, machinery will be doing all the necessary and unpleasant work.'

to the judgments of the court they serve. However they choose to spend this valuable time, clerks must recognise the necessity to sharpen and maintain their skills, upon which judges and the accuracy of the judicial process in the courts they serve depend.

To all the above mentioned relating to the required character in clerks must be added '[m]aturity, stability and congeniality'[167] especially because of the inevitable 'competitive dynamic'[168] they work within. As to skill, it should be abundantly clear from the detailed duties of law clerks that they are expected to be intelligent, resourceful, have proven writing abilities and an ability to communicate well.

As pointed out by Corder and Brickhill, judicial work and by inference the clerkship calling sets a high premium on confidentiality because, other than colleagues on the bench, judges can else speak only to their clerks about matters they have been seized with.[169] To drive this home, regard must be had to the US Supreme Court written Code of Conduct for Law Clerks adopted on 3 March 1989, which still finds application today. It stipulated that:

> *The law clerk owes the Justice and the Court complete confidentiality, accuracy, and loyalty. The Justice relies upon the law clerk's research in reaching conclusions on pending cases. The Justice relies on confidentiality in discussing performance of judicial duties, and the Justice must be able to count on complete loyalty.*
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> . . .

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[167] These attributes were sought after in the clerks recruited by Justice Sandra Day O'Connor. She explained that 'One thing I do look for is the person who has the ability to remain unruffled and get along.' Quoted in Ward & Weiden (note 36 above) 66–67.

[168] Having clerked for Justice O'Regan in 2004, Jason Brickhill noted the following during this transcribed interview forming part of the *Constitutional Court Trust Oral History Project, AG3368* of the Witwatersrand University Historical Papers research archive at *http://www.historicalpapers.wits.ac.za* (accessed 14 August 2015), regarding his experience –

> 'In terms of the dynamics, it's a complicated collection of people and a lot of people come into the Court with all sorts of success behind them, and there are a lot of large egos and there's a sense of competitiveness also. People competing for the attention of their own judge, competing to impress other judges, competing to outperform the other clerks. So there's a competitive dynamic. But there's also a supportive one. So we would often . . . you know, if you run into sticky issues you would debate them with other people, and a lot of my time, I remember, was spent trying to work out solutions to problems, or answers to problems, with my fellow clerks.'

[169] Corder & Brickhill (note 2 above) 374.

> *The relationship between a Justice and a law clerk is essentially a confidential one. A law clerk should abstain from public comment about pending or impending proceeding in the Court. A law clerk should never disclose to any person any confidential information received in the course of the law clerk's duties, nor should the law clerk employ such information for personal gain. The law clerk should take particular care that Court documents not available to the public are not taken from the Court building or handled so as to compromise their confidentiality within chambers or the Court building in general.*[170]

The US Federal Judicial Center has made a stellar job compiling a very useful *Law Clerk Handbook,*[171] the second edition of which was released in 2007. The handbook details expectations for a law clerk in the US judicial setting from which much can be adapted from that refined guidebook for South African law clerks.

[170] Quoted in Ward & Weiden (note 36 above) 16–17.

[171] See Sobel (note 87 above) at ix, preface.