

**LAW CLERKS AND ACCESS TO JUDGES: A COMPARATIVE REFLECTION ON THE RECRUITMENT PROCESS OF LAW CLERKS IN INDIA**

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*This article deals with the institution of clerkship and its recruitment process in the Supreme Court of India through a comparative lens. It analyses the factors which make the clerkships worthwhile in Australia, Canada, South Africa, the United Kingdom and the United States to argue that an important job profile like clerkship should have a transparent, accessible and inclusive recruitment process so that there is equality of opportunity. Using the framework of the recruitment process in these countries to cull out broader parameters, a scrutiny of the existing recruitment scheme in India has been done to highlight the flaws in the current scheme of things. Learning from the best comparative*

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*practices, the article proposes a new recruitment policy for law clerks at the Supreme Court of India.*

## INTRODUCTION

Every year, the Supreme Court of India hires young law graduates on a contract basis for “*Law Clerk-cum-Research Assistants*” to assist judges in their work. Each law clerk is required to work for an individual judge. In the legal profession, the term “*law clerk*” does not refer to any clerical or secretarial job, as maybe perceived by someone outside the profession. This term is related to a specific work assignment, which requires giving assistance to the concerned judge in terms of research, writing and so on. Countries like India and South Africa seem to have borrowed the nomenclature from the United States (“**US**”) and Canada, where the term “*law clerk*” has been in prevalence for almost a century and a half. As I note in a subsequent part of this article, in the United Kingdom (“**UK**”), the nomenclature used is “*Judicial Assistants*”, and similarly, the courts in Australia offer a number of positions of judge’s “*Associates*” each year. Notwithstanding the difference in nomenclatures across countries, the work profile is similar.

Since the Supreme Court of India has been entrusted with a clear mandate to defend the Constitution and is also the highest court of appeal,<sup>2</sup> its judges play a major role in maintaining constitutional standards and administering justice in a democracy.<sup>3</sup> As a result, young law clerks assisting the judges of the Supreme Court directly in their work also contributes to the administration of justice vicariously. Though the courts are sometimes perceived as closely guarded institutions, the functionalities of the courts have been thrown open to young law graduates because of the clerkship scheme.

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<sup>2</sup> INDIA CONST. arts. 131–143.

<sup>3</sup> Tarunabh Khaitan, *The Indian Supreme Court’s Identity crisis: A Constitutional Court or A Court of Appeals?*, 4 INDIAN L. REV. 1 (2020).

While hiring law clerks on a short-term contract basis is approximately only two decades old in India, it has been in place in the US since the 1880s.<sup>4</sup> As a result, there has been a fair amount of attention given to the “*role and influence of law clerks at the Supreme Court of the United States*”,<sup>5</sup> as compared to the discourse in India. In 2014, lawyer and scholar Abhinav Chandrachud published “*one of the first scholarly studies of the clerkship experience on the Supreme Court of India*”.<sup>6</sup> Drawing from the interviews of twenty-eight law clerks and interns who had worked for judges in the Supreme Court of India, Chandrachud presented a broader picture of the institution of clerkship in the country’s Apex Court. At the same time, in a pending suit, the existing clerkship recruitment process of the Supreme Court of India was found to be unconstitutional by the Delhi High Court.<sup>7</sup> Consequently, the Supreme Court of India prepared a revised clerkship scheme<sup>8</sup> (dated January 8, 2015), which laid down detailed guidelines for engaging law clerks—including the recruitment process, the responsibilities of law clerks, among other things.<sup>9</sup> Since Chandrachud’s article, no scholarly attention has been paid to the development of judicial clerkship in India, particularly in the revised scheme.

In this article, I compare the revised clerkship scheme of the Supreme Court of India with the formal clerkship process of apex courts of Australia, Canada, South Africa, the UK, and the US, with a specific focus on the recruitment process. I have chosen these countries for two reasons: *First*, the Supreme Court of India has increasingly placed reliance on jurisprudence produced by these countries. *Second*, these countries have a long record of a formal clerkship process, unlike India. In doing so, I argue

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<sup>4</sup> Mark C. Miller, *Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward*, 39 LAW & SOCIAL ENQUIRY 741(2014).

<sup>5</sup> *Id.* at 741. Scholars have often studied to what impact have law clerks been able to influence the decision-making of the judges at the SCOTUS.

<sup>6</sup> Abhinav Chandrachud, *From Hyderabad to Harvard: How US Law Schools Make it Worthwhile to Clerk on India’s Supreme Court*, 21 INT’L J. LEGAL PROF. 73, 79 (2014).

<sup>7</sup> Phaguni Nilesh Lal v. The Registrar General, Supreme Court of India & Anr., (2014) 206 D.L.T. 674 (India).

<sup>8</sup> *Revised Scheme For Engaging Law Clerk-Cum-Research Assistants On Short Term Contractual Assignment In The Supreme Court Of India*, SUPREME COURT OF INDIA (Jan. 8, 2015), [https://main.sci.gov.in/pdf/cir/2015-01-08\\_1420713261.pdf](https://main.sci.gov.in/pdf/cir/2015-01-08_1420713261.pdf) [hereinafter *Revised Scheme for Engagement of Law Clerks, 2015*]. A formal scheme to hire law clerks in the Supreme Court in India.

<sup>9</sup> *Id.*

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that the recruitment process for clerkships in the Supreme Court of India needs to be reformed to make the process more accessible and inclusive for most graduates. For the article, I sought inputs, experiences, and feedback from a number of law clerks, interns, law professors, and court staff of different countries familiar with the application process in those countries. The scope of the article is limited. I shall generally be dealing only with apex constitutional courts in different countries<sup>10</sup> and not the subordinate courts wherein clerkship has percolated. The article does not analyse the demographic/socio-educational profiles of past law clerks or the hiring patterns of different judges in India.

Furthermore, in countries like Australia, the US and the UK, the nomenclature used for judges is “*Justices*”. India, Canada, and South Africa use the term “*Judges*”. In this article, I have used both the terms—a “*Judge*” or a “*Justice*”—interchangeably.

The first part of the article compares a few aspects of the clerkship culture in different countries with that of India: nature of work, number of law clerks, salary and perception about clerkships. It highlights that despite considerable differences with other countries, clerkships remain an important job profile in India for many fresh law graduates. A natural corollary would be that the recruitment process to hire clerks considers all those factors, which can provide equal opportunity to this job profile. The second part explains the recruitment process in Australia, Canada, South Africa, the UK, and the US and culls out the key factors that shape this process. These key factors (such as accessibility) can act as parameters to scrutinise the existing clerkship scheme in India. The third part describes the evolution of the clerkship recruitment process in India and points out several concerns which have made clerkships inaccessible to many since its inception. The fourth part proposes a new recruitment scheme to make the process accessible and inclusive.

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<sup>10</sup> The details about clerkship recruitment in Canada, India, South Africa, and the UK are available on their court websites. For the US, I have relied upon written work and inputs from former law clerks.

## WHAT MAKES CLERKSHIPS WORTHWHILE?

### A. NATURE OF WORK

In the US, not all matters filed in the Supreme Court are listed in open court for a hearing. The judges of the Supreme Court of the United States (“SCOTUS”) decide together which cases would be approved for hearing and then sit *en banc* to adjudicate the issue.<sup>11</sup> Law clerks play an important role in reviewing the thousands of petitions for *certiorari* that come before the SCOTUS each year.<sup>12</sup> This means that they are required to read all the material related to a case and then write a “memo”<sup>13</sup>/note for their judge or for the SCOTUS, which allows the judges to avoid reading petitions that appear to have no merit or raise no important issues for the SCOTUS. A law clerk’s standard work for their judge also generally includes writing bench memos on the cases that the SCOTUS has accepted for a full review, helping the judges to prepare possible questions for oral arguments, doing legal research, writing the first drafts of opinions, and working on editing and polishing the final drafts of judgments.<sup>14</sup> This much responsibility is expected of law clerks, as they already have invested in seven years of education (a four-year undergraduate and a third-year law degree), apart from work experience, before working in the SCOTUS.

The websites of the apex courts of Canada, Australia, the UK, South Africa and India mention the role and responsibilities undertaken by the law clerks/judicial assistants. In Canada, while working under the direction of the judge to whom a law clerk is assigned, it is required of law clerks to “*research points of law, prepare memoranda of law, and generally assist the Judge in the work of the Court*”.<sup>15</sup> Judges’ associates in Australia are “*employed as part of the*

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<sup>11</sup> Miller, *supra* note 4, at 743.

<sup>12</sup> *Id.*

<sup>13</sup> In judicial work, a “memo” is a brief written note or outline, of a particular case or document for the purpose of aiding the judge to go through particular important points for future reference.

<sup>14</sup> Adam Bonica et al., *Legal Rasputins? Law Clerk Influence on Voting at the US Supreme Court*, 35 J. L. ECON. & ORG. 1, 5 (2019).

<sup>15</sup> *Law Clerks Program*, SUPREME COURT OF CANADA (July 22, 2020), <https://www.scc-csc.ca/empl/lc-aj-eng.aspx#sec11> [hereinafter *Canada Law Clerks Program*].

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*chambers staff of a particular judge*".<sup>16</sup> They are supposed to "provide legal research, in-court duties and other support for that judge".<sup>17</sup>

The clerkship scheme of the Supreme Court of India requires law clerks to prepare a brief summary of fresh admission matters, prepare a synopsis of regular hearing matters, research on legal points in the preparation of draft judgments, and assist the judge in preparing speeches and academic papers.<sup>18</sup> Generally, a judge requires a brief note of just one page for matters to be heard. Since the Court sits in different benches of two-three judges, each bench typically "decides between 30 and 60 admission matters in a day, with hearings often lasting no more than a few minutes for a case".<sup>19</sup> With this much burden, a brief note prepared by a law clerk can save a judge's time to avoid reading each page on the file.

Judicial assistants/law clerks in the UK and South Africa are entrusted with certain responsibilities in addition to the tasks performed by judicial assistants/law clerks in India, the US, Australia and Canada. Apart from the key work of preparing bench memos (short notes summarising applications for permission to appeal) each week and researching on relevant issues as a judge would like, a judicial assistant in the UK is also required to draft press summaries (a concise synopsis of a judgment that the court is about to hand down) "in a language which non-lawyers can comprehend in conjunction with UK SC Head of Communications".<sup>20</sup> A judicial assistant is further expected to assist with the UK "Supreme Court's

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<sup>16</sup> *Judges' Associates*, FEDERAL COURT OF AUSTRALIA (July 23, 2020), <https://www.fedcourt.gov.au/about/employment/associates> [hereinafter *Australian Federal Court Judge's Associates*].

<sup>17</sup> *Id.*

<sup>18</sup> *Revised Scheme for Engagement of Law Clerk-cum-Research Assistants on Short-term contractual assignment in the Supreme Court of India*, SUPREME COURT OF INDIA (Feb. 22, 2019), [https://main.sci.gov.in/pdf/other/2019-02-22\\_1420713261.pdf](https://main.sci.gov.in/pdf/other/2019-02-22_1420713261.pdf) [hereinafter *Revised Scheme for Engagement of Law Clerks, 2019*].

<sup>19</sup> Khaitan, *supra* note 3, at 4.

<sup>20</sup> *Terms and Conditions: Judicial Assistants to the Justices*, UNITED KINGDOM SUPREME COURT, (July 22, 2020), <https://webmicrosites.hays.co.uk/documents/4856148/4856273/TERMS+AND+CONDITIONS.pdf> [hereinafter *UK Supreme Court Terms and Conditions for Judicial Assistants*].

*communication and educational activities as required throughout the year*” and liaise with “*all staff in the Supreme Court Registry as necessary*”.<sup>21</sup> Similarly, in South Africa, a law clerk makes case summaries, cite-checks draft judgments before delivery and helps the judge prepare public lectures and speeches. A law clerk is also required to make “*media summaries*” and assist the judge in the Court and “*case-calling and ensuring that the oral hearings take place with propriety and efficiency*”.<sup>22</sup> Other major responsibilities of a law clerk in South Africa include: assisting the judge in court-related administrative work and international human rights work; aiding with “*administration of Court papers, case management and public relations*”; “*conducting tours of the Court and the artworks collection for each judge’s visitors*”; and helping with Court’s “*outreach and public education program*”.<sup>23</sup> A law clerk is further required to take part in clerks’ committees.

Thus, in every country, though there are few common broad deliverables, the exact duties and responsibilities of each law clerk are determined by the hiring/allotted judge. Specific responsibilities may vary among chambers. It must, however, be noted that in the UK and South Africa, where the top-most constitutional courts are new in existence as compared to the US, the role of judicial assistants/law clerks seems broader, more institutionalised, and improvised as per country-specific requirements.

## **B. THE NUMBER OF CLERKS/ASSISTANTS**

In the SCOTUS, the Chief Justice is authorised to hire five clerks, the eight Associate Justices are authorised to hire four clerks each and retired judges may hire one law clerk each.<sup>24</sup> Normally, to attract the best talent, judges hire law clerks “*well before their clerkship begins, typically at the beginning of the prior judicial term or earlier*”.<sup>25</sup> The hiring schedule may differ from judge to judge.<sup>26</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> Constitutional Court of South Africa, *About Law Clerks*, CONSTITUTIONAL COURT OF SOUTH AFRICA (July 22, 2020), <https://www.concourt.org.za/index.php/law-researchers/about-law-clerks> [hereinafter *South African Constitutional Court Law Clerks*].

<sup>23</sup> *Id.*

<sup>24</sup> Miller, *supra* note 4, at 742.

<sup>25</sup> Bonica et al., *supra* note 14, at 5.

<sup>26</sup> WILLIAM REHNQUIST, THE SUPREME COURT 231–232 (First Vintage ed., 2002) (Former SCOTUS Chief Justice William Rehnquist in Chapter XII titled “*Certioraris: Picking the Cases to be Decided*” describes his hiring process in some detail on pages).

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In Canada, applications are invited for thirty-six positions of law clerks to the nine judges of the Supreme Court of Canada, *i.e.* four law clerks for each judge.<sup>27</sup> In the UK, applications are invited for up to eleven temporary posts, which means each Justice gets one candidate roughly.<sup>28</sup> The system in the Constitutional Court of South Africa provides that each judge has two South African law clerks, paid for by the State, and may, in addition, have a foreign law clerk who is self-funded.<sup>29</sup>

When the Supreme Court of India first revised the clerkship scheme, the Chief Justice and each judge of the Supreme Court was entitled to have services of a maximum of two law clerks.<sup>30</sup> This number was later increased to three.<sup>31</sup> Subsequently, with the administrative order dated June 5, 2019, the Chief Justice and other judges can now have a maximum of four paid law clerks—a maximum of 136 law clerks in the Supreme Court of India.<sup>32</sup>

### C. SALARY

Law clerks in the US receive a generous annual salary for their one-year contract. The law clerks are paid an amount of \$74,872 as an annual salary.<sup>33</sup> Currently, the annual starting salary for a law clerk at Washington State Supreme Court is \$70,632.<sup>34</sup> One notable perquisite now, which did not exist thirty-four years ago, is that law firms pay a \$425,000 bonus for SCOTUS clerks who sign on with them for a minimum of a year or two, which does not include the starting salary for a first-year legal associate, about \$200,000.<sup>35</sup> This may be because judges of the SCOTUS have life

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<sup>27</sup> *Canada Law Clerks Program*, *supra* note 15.

<sup>28</sup> *UK Supreme Court Terms and Conditions for Judicial Assistants*, *supra* note 20.

<sup>29</sup> *South African Constitutional Court Law Clerks*, *supra* note 22.

<sup>30</sup> *Revised Scheme for Engagement of Law Clerks, 2015*, *supra* note 8.

<sup>31</sup> This happened during my tenure as a Law Clerk at the Supreme Court of India.

<sup>32</sup> *Revised Scheme for Engagement of Law Clerks, 2019*, *supra* note 18.

<sup>33</sup> Terry Baynes, *The Secret Keepers: Meet the U.S. Supreme Court Clerks*, REUTERS (July 29, 2020), <https://www.reuters.com/article/us-usa-healthcare-court-clerksidUSBRE85D17120120614>.

<sup>34</sup> Washington Courts, *Supreme Court-Clerkships* (July 22, 2020), [https://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/?fa=atc\\_supreme.clerkship](https://www.courts.wa.gov/appellate_trial_courts/supreme/?fa=atc_supreme.clerkship).

<sup>35</sup> Inputs through email (dated June 9, 2020) by Michael Klarman, Professor at Harvard Law School (on file with the author).



tenure, and someone who worked with them in the past would be quite helpful for law firms in future.

Moreover, SCOTUS clerkships are also a feeder to American academia, mostly as Assistant Professor or Fellow, where starting salaries are around \$130,000 annually (probably more).<sup>36</sup> In Canada, the annual salary is currently set at \$74,122.<sup>37</sup> Besides, a fixed amount to assist with relocation from any point in Canada to Ottawa and return is provided.<sup>38</sup> Judicial assistants in the UK are paid £36,500 per annum (around \$45,875), which will be paid monthly in arrears.<sup>39</sup> South African law clerks receive a uniform salary of about Rs. 300,000 (around \$18,000) a year.<sup>40</sup> Associates in the High Court of Australia are paid an annual AUD 74,070 (around \$53,000), plus 15.4% superannuation.<sup>41</sup>

Compared to this, the law clerks in India have generally been paid less. Law clerks at the Supreme Court of India were not paid initially,<sup>42</sup> later a monthly stipend from the Consolidated Fund of India was allotted to them.<sup>43</sup> From the term 2007-08, law clerks were paid an honorarium of Rs. 20,000 monthly, which was later hiked to a stipend of Rs. 25,000 per month, from September 2010 onwards.<sup>44</sup>

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<sup>36</sup> Inputs through email (dated June 14, 2020) by Rohit De, Associate Professor at Yale (on file with the author).

<sup>37</sup> *Canada Law Clerks Program*, *supra* note 15.

<sup>38</sup> *Id.*

<sup>39</sup> *UK Supreme Court Terms and Conditions for Judicial Assistants*, *supra* note 20.

<sup>40</sup> *South African Constitutional Court on Law Clerks*, *supra* note 22.

<sup>41</sup> High Court of Australia, *Applying for an associateship with a Justice of the High Court of Australia*, HIGH COURT OF AUSTRALIA, (July 29, 2020), <https://www.hcourt.gov.au/employment/applying-for-an-associateship-with-a-justice-of-the-high-court-of-australia>.

<sup>42</sup> Chandrachud, *supra* note at 6, at 79.

<sup>43</sup> INDIA CONST. art. 146 cl. 3 (It provides as follows: “*The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund*”).

<sup>44</sup> Kian Ganz, *Supreme Court judicial clerkship stipends hiked to Rs 25k; Attractive enough?*, LEGALLY INDIA (July 22, 2020), <https://www.legallyindia.com/the-bench-and-the-bar/breaking-sc-nlu-pref-in-judicial-clerkships-unconstitutional-says-delhi-hc-20131216-4192>.

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Subsequently, this amount was increased to Rs. 30,000 per month, and then with effect from January 2018, the amount was fixed at Rs. 50,000 per month. Pursuant to the order dated July 23, 2019 passed by the then Chief Justice of India (“CJI”), the monthly stipend for law clerks has been raised to Rs. 65,000 (approximately \$10,500 annually).<sup>45</sup> In a further comparison, the High Courts in India pay much less to the law clerks.<sup>46</sup> Contrary to this, top-tier law firms in India pay more to a fresh law graduate of leading National Law Universities (“NLUs”). According to a survey, a first-year associate receives annually up to Rs. 1.82 million (around \$24,300) in a top-tier firm.<sup>47</sup>

### D. PERCEPTION

Clerkship at the SCOTUS is considered the most prestigious job any law graduate can get. Former law clerks can often be found in the “*top echelons of politics, business, academia, and the law*”.<sup>48</sup>

In Canada, law clerks are engaged as “*term employees within the federal Public Service*” and as such are entitled to the “*same benefits and conditions of employment as term employees*”.<sup>49</sup> Similar to the US, a clerkship at the Supreme Court of Canada is considered “*one of the most educational and auspicious experiences for early-career lawyers*”.<sup>50</sup> Judicial assistants in the UK Supreme Court are

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<sup>45</sup> See the heading “*Consolidated Stipend*” at *Revised Scheme for Engagement of Law Clerks, 2015*, *supra* note 8.

<sup>46</sup> The monthly stipend for law clerks at different High Courts (for which information is publicly available) is as follows: Delhi High Court: Rs. 35,000 (earlier Rs. 25,000); Bombay High Court: Rs. 20,000; Allahabad High Court: 15000 per month (earlier Rs. 12,500); Madras High Court: Rs. 30, 000 (earlier Rs. 10,000 in 2017); Gauhati High Court: Rs. 20,000; Gujarat High Court: Rs. 20,000; Karnataka High Court: Rs. 16,500; Patna High Court: Rs. 30,000; Uttarakhand High Court: Rs. 20,000; Rajasthan High Court: Rs. 30,000.

<sup>47</sup> Kian Ganz, *2016 Law Firm Salary Surveys Bonanza: Find Out If You're Over- Or Under-paid*, LEGALLY INDIA (July 29, 2020), <https://www.legallyindia.com/law-firms/law-firm-salaries-2016-00011130-8145>.

<sup>48</sup> Miller, *supra* note 4, at 743.

<sup>49</sup> *Canada Law Clerks Program*, *supra* note 15.

<sup>50</sup> Loran Scholars Foundation, *Clerking at the Supreme Court of Canada*, LORAN SCHOLARS FOUNDATION (July 22, 2020), <https://loranscholar.ca/supreme-court-of-canada-clerks/>.

considered as “*civil servants*” and are given “*optional membership of the Principal Civil Service Partnership Pension Scheme/or Partnership Pension, an interest-free season ticket/bike loan, corporate membership to Benenden Healthcare*”.<sup>51</sup> Similarly, in Australia, the associates of the judges are “*employed on a non-ongoing basis at the Australian Public Service Level 4 for a period of approximately 12 months*”.<sup>52</sup>

One of the benefits of clerking at the Constitutional Court of South Africa is that law clerks, who are South African citizens, become eligible to apply for the scholarships offered by the Court for pursuing an LL.M. degree in an approved foreign university.<sup>53</sup> Currently, two scholarships are offered by the Constitutional Court Trust: the Ismail Mahomed Fellowship and the Franklin Thomas Fellowship, which cover travel, tuition and living expenses.<sup>54</sup>

Unlike these countries, clerkships on India’s Supreme Court, as Chandrachud pointed out, are generally “*considered to be of significantly lower value by the local legal profession and teaching market in India*”.<sup>55</sup> According to him, the law graduates have often pursued clerkships in the Supreme Court of India to strengthen their profile to get admission into an advanced law degree (usually an LL.M.).<sup>56</sup> However, a few candidates in recent years applied for a clerkship/internship after already having a post-graduate degree from abroad. Moreover, a clerkship tenure has also been a great learning experience for many law clerks, both in terms of the content and practice of law. Besides getting an opportunity to understand the thought process of a judge, a law clerk gets to observe in-depth how the Supreme Court functions and witness the style of arguments of different advocates. As several short pieces written by former law clerks indicate, many have

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<sup>51</sup> *UK Supreme Court Terms and Conditions for Judicial Assistants*, *supra* note 21.

<sup>52</sup> *Australian Federal Court Judge’s Associates*, *supra* note 16.

<sup>53</sup> *South African Constitutional Court on Law Clerks*, *supra* note 22.

<sup>54</sup> Constitutional Court of South Africa, *Scholarships from the Court*, CONSTITUTIONAL COURT OF SOUTH AFRICA, (July 22, 2020), <https://www.concourt.org.za/index.php/law-researchers/scholarships-from-the-court>.

<sup>55</sup> Chandrachud, *supra* note 6, at 73.

<sup>56</sup> *Id.* (Abhinav Chandrachud further argued that the US law schools treat clerkships in the Supreme Court of India to be as important as a clerkship in the SCOTUS is, and this benefits the applicants from India in getting an admission to LLM programmes in the US).

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developed a close personal bonding with the judge they worked for.<sup>57</sup> Similarly, in the US, former law clerks often refer to their judge as a “mentor” and describe the relationship as “personal” and “intimate”. Some stories talk about the “kindnesses” that their judges did for them over the years.<sup>58</sup>

### E. INFERENCE

The factors which make the clerkships worthwhile in other countries are different from those in India. Law clerks in the Supreme Court of India are neither provided with additional benefits like scholarships in South Africa nor are considered civil servants as in the UK and Canada. They are neither paid high salaries nor is the job considered as prestigious in the profession and academia as in other countries. Moreover, while several studies<sup>59</sup> have been done in the US tracing the influence and career trajectory of law clerks, such a study has never been done in India, even after two decades since the inception of clerkship culture. However, the fact that clerkship in India gives the opportunity to work with the judges of India’s Apex Court and attracts fresh graduates for other mentioned factors, it becomes necessary to study the recruitment process. It would be imperative to analyse whether clerkships are accessible.

### RECRUITMENT PROCESS: A COMPARATIVE FRAMEWORK

Law clerks in every country are generally appointed for one year.

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<sup>57</sup> Vishruti Sahni, *Justice Madan B. Lokur: The Epitome of Goodness*, Livelaw (July 22, 2020), <https://www.livelaw.in/justice-madan-b-lokur-the-epitome-of-goodness/>; Interview by LiveLaw with Anurag Bhaskar, *My Harvard Degree is Symbolic of the Aspirations of Millions of Marginalized People: Anurag Bhaskar*, Livelaw (July 29, 2020), <https://www.livelaw.in/interviews/interview-my-harvard-degree-is-symbolic-of-the-aspirations-of-millions-of-marginalized-people-anurag-bhaskar-145710>; Ashita Alag, *Justice Deepak Gupta: The Humane Judge*, Livelaw (July 22, 2020), <https://www.livelaw.in/columns/justice-deepak-gupta-the-humane-judge-156323>.

<sup>58</sup> Miller, *supra* note 4, at 748.

<sup>59</sup> *Id.* See also Bonica et al., *supra* note 14.

Applicants for the position of judge's associate in the High Court of Australia are required to write directly to the judge in whose chambers they would like to work while including a cover letter addressed to the judge along with their curriculum vitae (“CV”) and a copy of the academic transcript. The contact details for judges' chambers can be found on the Court's website. Some judges like to advertise vacancies on the Court website. However, others do not. Few judges may take an interview before finalising the applicant. One can also send a general application (without any preference for a judge) to the Court registry, which will then forward it to each judge.<sup>60</sup> As a matter of etiquette, an applicant accepts the position as an associate with the judge who makes the first offer to the applicant. Generally, there is no deadline for sending the applications, however, “*it is common for the Justices to appoint their associates two and three years in advance*”.<sup>61</sup> An application should specifically indicate the years the applicant would be available for employment. It is expected that an applicant would have graduated with first-class honours and preferably has “*research experience (and often experience working for a law firm or university or another court)*”.<sup>62</sup>

In the US, for the thirty-seven clerkship positions for the SCOTUS available each year, about a thousand people apply.<sup>63</sup> A decentralised application system has been put in place for the purpose of hiring clerks.<sup>64</sup> Every judge has a fixed hiring schedule and pattern every year. For instance, Justice Elena Kagan usually hires right after the term of the SCOTUS ends annually. The SCOTUS does not send out any formal notice that it is hiring clerks. It is universally known that they hire new clerks for every term. Professors and law school clerkship offices are probably the most important sources of information about the application process.<sup>65</sup> In practice, there is a two-step process to get selected as a SCOTUS clerk. An applicant generally does a clerkship with a lower federal

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<sup>60</sup> High Court of Australia, *supra* note 41.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Stephanie F. Ward, *Lucky 36: What It Takes to Land a Supreme Court Clerkship*, ABA JOURNAL (July 22, 2020), [https://www.abajournal.com/news/article/podcast\\_monthly\\_episode\\_31](https://www.abajournal.com/news/article/podcast_monthly_episode_31).

<sup>64</sup> I am grateful to Professor Michael Klarman (Harvard Law School) and Cole Carter (former law clerk at SCOTUS) for sharing the insights about the SCOTUS clerkship process.

<sup>65</sup> *Id.*

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court judge before he applies to the SCOTUS. A candidate is required to send the application directly to the Justice with whom they intend to clerk.<sup>66</sup> The application includes a CV, writing sample, transcript and letters of recommendation. The letters of recommendation from popular law school professors and lower federal court judges play a crucial role in the entire process. The SCOTUS Justices accept applications throughout the year.<sup>67</sup> After receiving the applications, each Justice short-lists applications and calls a few of the applicants for interviews and thereafter selects their final set of law clerks. Contrarily, at the lower level, several federal courts' judges in the US have signed up on a web-based system called the Online System for Clerkship Application and Review (“**OSCAR**”), which allows users to easily manage every aspect of the hiring process.<sup>68</sup> As the website of OSCAR indicates, judges use OSCAR to advertise clerkship vacancies and inform applicants of hiring practices and schedules. Applicants use OSCAR to find clerkship and staff attorney positions that fit their specific career goals and to research judges' hiring practices and schedules. Moreover, a system like OSCAR allows the applicants to create and submit applications all in one location. Similarly, the Washington State Supreme Court notifies about the vacancies of clerkships with different judges, along with the application requirements and mailing details, at one place on its website.<sup>69</sup>

It can be seen that except for the SCOTUS, all the apex courts in other countries have provided details about the entire recruitment process on their websites. This makes the information accessible to everyone. Besides, one's CV, writing samples, cover letter, and letters of recommendation are mandatory requirements for every application. Work experience adds an additional advantage for applicants. Interviews test the ability of candidates to work as a team, among other skills. In Australia and the US, judges have been given complete discretion to hire their own law clerks. While this maintains an element of choice and preference for both the judge and the

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> The website of OSCAR is at: <<https://oscar.uscourts.gov/home>>.

<sup>69</sup> The website mentioned here is: <[https://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/?fa=atc\\_supreme.clerkship](https://www.courts.wa.gov/appellate_trial_courts/supreme/?fa=atc_supreme.clerkship)>.

candidate, concerns have often been raised regarding the opaqueness of the system, lack of diversity, and hiring patterns of the judges. For instance, most of the recruited law clerks at the SCOTUS are graduates from Harvard and Yale.<sup>70</sup> Even a progressive judge like Justice Ruth Bader Ginsburg hired only one African American law clerk in her long tenure on the SCOTUS.<sup>71</sup> However, this makes the entire process of clerkship recruitment subject to the hiring pattern of a judge and is thus accompanied by the suspicion of hiring candidates only from certain law schools.<sup>72</sup> On the other hand, there is a formal system in Canada to ensure that there is fair representation from marginalised communities among law clerks. The Supreme Court of Canada has been vocal about providing an inclusive and barrier-free selection process and work environment. A better recruitment process may be the one that balances all these factors: accessible process, timely recruitment, element of choice, fair representation, academic excellence, analytical skills and so on.

The Supreme Court of Canada advertises the law clerk selection process through “*a job advertisement posted both on the Court’s website and in a database of the Canada Public Service Commission in October of each year*”.<sup>73</sup> Only persons holding Canadian citizenship or having permanent resident status in

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<sup>70</sup> From 2010–18, 78 of the 310 clerks on the U.S. Supreme Court came from Harvard Law School, the most number of clerks of any school. Yale Law School had the second representation with 74 clerks, meaning that Harvard and Yale combined for 151 clerks—almost half of all Supreme Court clerks. There are, of course, exceptions like Justice Clarence Thomas, who “*hired from 23 different law schools since 2005, with one-third of his clerks coming from schools outside the Top 10 on the U.S. News and World Report rankings*”; See Sloan (2017); Aidan F. Ryan, *A Well-Worn Path: Navigating the Road to Judicial Clerkships*, THE HARVARD CRIMSON (July 22, 2020), <https://www.thecrimson.com/article/2018/5/1/clerkships-feature/>.

<sup>71</sup> Paul Butler, *Ruth Bader Ginsburg Can Learn Something from Brett Kavanaugh*, THE WASHINGTON POST (July 29, 2020), [https://www.washingtonpost.com/opinions/ruth-bader-ginsburg-can-learn-something-from-brett-kavanaugh/2018/10/15/b8974a86-cd77-11e8-a360-85875bac0b1f\\_story.html](https://www.washingtonpost.com/opinions/ruth-bader-ginsburg-can-learn-something-from-brett-kavanaugh/2018/10/15/b8974a86-cd77-11e8-a360-85875bac0b1f_story.html).

<sup>72</sup> Tony Mauro, *Supreme Court Clerks Are Overwhelmingly White And Male. Just Like 20 Years Ago*, USA TODAY (July 22, 2020), <https://www.usatoday.com/story/opinion/2018/01/08/supreme-court-clerks-overwhelmingly-white-male-just-like-20-years-ago-tony-mauro-column/965945001/>.

<sup>73</sup> Email response (dated July 27, 2020) by Remi Samson, who worked as Senior Legal Officer and Director of the Law Clerk Program for the Supreme Court of Canada (on file with the author).

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Canada or a work permit for Canada may apply for a clerkship.<sup>74</sup> Applications made by persons who are not Canadian citizens are accepted only if there are insufficient qualified applicants who are Canadian citizens.<sup>75</sup> All clerkship applications are required to be submitted to the chambers of the Chief Justice of Canada on the contact details mentioned on the Court website by a fixed date in January, every year.<sup>76</sup> The candidates must attach a cover letter, a CV, official transcripts from law school(s), and four letters of reference, including one from the current dean of the faculty where the candidate obtained their law degree. These letters of reference attesting to the candidate's academic excellence, effective interpersonal skills, ability to work under pressure and ability to work as part of a team may be included with the candidate's application or sent separately by the persons who have agreed to forward references.<sup>77</sup> Candidates are also asked to complete and submit an online application form. They are then selected for further assessment based on a combination of criteria, including language proficiency, letters of recommendation, academic excellence, ability to work as part of a team, ability to work under pressure, effective interpersonal skills, and range of experience—legal and otherwise.<sup>78</sup> Those selected for an interview will be contacted and will be asked to provide two writing samples. Based on the writing samples and Skype interviews conducted by the judges of Court, the candidates are finalised before the end of March every year.<sup>79</sup>

This gives judges “*a considerable amount of flexibility in deciding how best to organise their own chambers, according to their own needs*”.<sup>80</sup> The Supreme Court of Canada is also conscious of having a fair representation of marginalised communities. In their applications, candidates can indicate “*if they belong to any of the groups designated under the Employment Equity Act, S.C. 1995, c. 44, i.e. women, aboriginal peoples, persons with disabilities and members of visible minorities*”.<sup>81</sup>

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<sup>74</sup> *Canada Law Clerks Program*, *supra* note 15.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Samson, *supra* note 73.

<sup>80</sup> *Id.*

<sup>81</sup> *Canada Law Clerks Program*, *supra* note 15.



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On the website of the Court, it has been noted that the Canadian Supreme Court is “committed to achieving equitable representation of all employment equity designated groups throughout the organisation” and to “developing inclusive, barrier-free selection processes and work environments”.<sup>82</sup>

In the UK, applicants are required to upload a detailed application form on a web portal prescribed by the UK Supreme Court before the end of March every year. Besides providing a CV, an applicant is required to submit academic and employment history in chronological order, along with grades/other achievements.<sup>83</sup> Any gaps in employment/education should be explained. Applicants are further needed to submit a supporting statement, showing clearly how they meet the criteria for the role, including the following skills: analytical ability, communicating and influencing, making effective decisions, delivering at pace, and working together.<sup>84</sup> One should also explain the reasons for applying, and how, if successful, the role of judicial assistant would fit with their overall career path. After an applicant is short-listed for an interview, they would be required to submit references at a later stage.<sup>85</sup>

Appointments of South African law clerks and foreign law clerks at the Constitutional Court of South Africa are ordinarily made in the month of May of the preceding year, for the following year, which may be from January to December or July to June.<sup>86</sup> The applications must be submitted to the registrar of the Constitutional Court by hand, post or electronically on the contact address given on the website by no later than March 31.<sup>87</sup> The application must include proof of a law degree, a motivational cover letter, a full CV, certified copies of academic records, an example of written work, names, and contact details of two references (one academic and one professional); and references regarding working experience (if applicable). Based on the application, applicants are short-listed, and some may be

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<sup>82</sup> *Id.*

<sup>83</sup> *How To Complete Your Application Form*, UNITED KINGDOM SUPREME COURT (July 22, 2020), <https://webmicrosites.hays.co.uk/documents/4856148/4856273/HOW+TO+COMPLETE+YOUR+APPLICATION+FORM.pdf>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *South African Constitutional Court on Law Clerks*, *supra* note 22.

<sup>87</sup> *Id.*

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called for a one-on-one interview with judges who have specific recruitment requirements.<sup>88</sup>

The Supreme Court of India has been hiring law clerks for more than two decades and has been changing the recruitment process with time. It must be analysed whether the Court has incorporated the essential parameters of developing an accessible, barrier-free, and inclusive selection process, as could be derived from practices of other countries, which have a long and formal experiment with clerkships.

### SUPREME COURT OF INDIA'S RECRUITMENT PRACTICE

#### A. INITIAL RECRUITMENT PROCESS IN SUPREME COURT OF INDIA

The recruitment of law clerks in the Supreme Court of India began with an informal process. With the cultural exchange that happened after the liberalisation of 1991, graduates of newly established specialised NLUs<sup>89</sup>—the first one being established at Bangalore in 1987—made efforts to adopt the American style clerkships in the Supreme Court of India.<sup>90</sup>

Chandrachud found the early years (the mid-1990s onwards) of “*the recruitment process for law clerks on the Supreme Court of India ad-hoc, informal, and unpredictable*”.<sup>91</sup> There was no information available in public whether one could apply as a law clerk. Some law clerks got the job by writing directly to the judge hoping that the application would be noticed by the judge.<sup>92</sup> The culture of recruiting law clerks was just in its nascent stage at that time.

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<sup>88</sup> *Id.*

<sup>89</sup> The NLUs were established from the late 1980s with the aim to revitalize the legal profession by making law an attractive profession.

<sup>90</sup> Chandrachud, *supra* note 6, at 86.

<sup>91</sup> *Id.* at 95.

<sup>92</sup> *Id.*

Later, the process was institutionalised in a restricted and exclusive manner.<sup>93</sup> The Supreme Court Registry, *i.e.* the administrative side of the Court under the control of the Chief Justice, started soliciting applications for clerkships from only a handful of NLUs. Pursuant to the order dated July 2, 2002 passed by the then CJI, B.N. Kirpal, “*suitable law graduates from various National Law Schools; such as Bangalore, Bhopal, Jodhpur, Calcutta and Hyderabad*” were law clerks.<sup>94</sup> This happened with the Registry sending out a notice to these select institutions, which would then forward students’ applications based on Cumulative Grade Point Average (“**CGPA**”). By the order dated August 27, 2002, the CJI directed the Registry of the Supreme Court to not entertain applications directly from students of these NLUs. In the event an application was sent directly, the Registry was directed to notify the applicant that they were required to secure a recommendation from the concerned NLU before they could be considered for engagement as a law clerk.<sup>95</sup> The Registry short-listed the applications received from these NLUs and called the candidates to interview before a panel of judges. The selected law clerks were then allotted to judges based on seniority, *i.e.* the candidate with the highest qualifying marks would be allotted to the senior-most judge and so on. This meant that in 2002, an applicant had to fulfil two basic conditions before being considered for the post of law clerk: first, they had to be a graduate of one of these five law universities, and second, their application had to be endorsed by the concerned university.

The said practice was followed by another order dated November 4, 2004, whereby the then CJI R.C. Lahoti framed guidelines to formalise this system for the engagement of law clerks.<sup>96</sup> On December 15, 2005, a proposal was mooted in the Supreme Court that another category of “*prominent Law Colleges/Institutes conducting five-years Law degree course*” should be created and that the candidates found suitable from this list can be put on “*wait-list*” and considered in case there are not enough suitable

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<sup>93</sup> In its judgment in *Phaguni Nilesh Lal v. The Registrar General, Supreme Court of India*, (2014) 206 D.L.T. 674 (India), a Single Judge Bench of the Delhi High Court noted how clerkship selection process in the Supreme Court of India developed from 2002 to 2013.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

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candidates from the five NLUs.<sup>97</sup> CJI YK Sabharwal, vide order dated December 16, 2005, constituted a committee of judges of the Supreme Court to look into this issue and make suitable recommendations.<sup>98</sup> Consequently, an administrative order was passed by the then CJI Sabharwal on February 15, 2006 to add four law colleges in the “*stand-by-category*”.<sup>99</sup> As this order came, several other NLUs were also established in different states.<sup>100</sup> The committee of judges, therefore, recommended that all the NLUs be empanelled for consideration of their students for selection as law clerks. The then CJI K.G. Balakrishnan, by order dated January 28, 2009, passed an administrative direction to this effect.<sup>101</sup> Subsequently, another order dated March 3, 2009 was issued by the CJI, which approved a set of guidelines to consider applicants from only a total of eighteen law schools, in which there were twelve NLUs, four colleges in “*stand-by-category*”, and two colleges in the other approved category.<sup>102</sup> This meant that if suitable candidates from twelve NLUs were not found, the Supreme Court Registry would consider the graduates from the other six colleges. Apart from the one candidate allotted from these select universities, each judge was also given the discretion to take one more law clerk of their choice from any law school in India.<sup>103</sup> Access to this backdoor entrance was still not available in the public domain. It may be for these reasons that the practice of recruiting law clerks only from eighteen colleges was challenged in 2013 by a student who did not belong from the Registry’s approved list of colleges.

### B. DELHI HIGH COURT JUDGMENT

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> For instance, Dr. Ram Manohar Lohiya National Law University, Lucknow was established by an Act passed by the Government of Uttar Pradesh in December 2005. National Law University, Delhi was established in the year 2008 by the Delhi Legislature. Currently, there are 23 NLUs in India.

<sup>101</sup> *Phaguni Nilesb Lal*, (2014) 206 D.L.T. 674.

<sup>102</sup> *Id.*

<sup>103</sup> Chandrachud, *supra* note 6, at 78.

Phaguni Nilesb Lal, a student at the Army Institute of Law, Mohali (Punjab), had applied for a clerkship position for the year 2013-14. The Supreme Court Registry did not consider the application because her college was not empanelled with the Court, and her college did not forward her application. Aggrieved, Phaguni challenged the clerkship recruitment process before the Delhi High Court.<sup>104</sup> A single judge bench of Justice Rajiv Shakdher heard the matter. In its defence, the Registry argued that since there are a large number of law colleges and universities in India (around nine-hundred at that time),<sup>105</sup> a method of “*short-listing*”, *i.e.* applicants from only approved institutions, was put in place due to administrative convenience and limited funds available at its disposal.

In its judgment,<sup>106</sup> the single judge bench noted that the impugned criteria of empanelling only a few law schools at the initial stage leads to the creation of a “*privileged category*”, which keeps a “*large section of both, meritorious and needy law graduates out of the fray or zone of consideration*”. Justice Shakdher further underlined that the existing clerkship process did not keep a “*room for those sociologically and economically deprived, and educationally handicapped, due to absence of requisite facilities in their respective alma maters*”. The court held that the argument of “*administrative convenience*” presented by the Supreme Court Registry “*cannot trump the mandate*” of Article 14 of the Constitution. Therefore, the existing clerkship recruitment process was held to be illegal and unconstitutional. It was held that each judge may choose a law clerk of his choice from a pool of candidates who have applied.<sup>107</sup> Since the application process for that year was already undertaken, the High Court directed that the Supreme Court Registry consider the application of the petitioner for the remaining term.

### C. REVISED CLERKSHIP SCHEME

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<sup>104</sup> *Phaguni Nilesb Lal*, (2014) 206 D.L.T. 674.

<sup>105</sup> This figure was mentioned in the affidavit filed by the Supreme Court Registry in the case.

<sup>106</sup> *Phaguni Nilesb Lal*, (2014) 206 D.L.T. 674.

<sup>107</sup> *Id.* The Court held: “*That said the concerned Judge with whom a LCRA [Law Clerk-cum-Research Assistant] is to be attached will ultimately have a say in the matter. The concerned Judge would necessarily have a pool of eligible LCRAs available with him/her from which he /she could choose a particular LCRA for attachment*”.

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The Supreme Court Registry decided to file an appeal, against the decision of the single judge bench, before a division bench of the High Court. While this appeal was still pending, the Supreme Court, on its administrative side, revised the selection process on January 8, 2015. It issued a “*Revised Scheme for Engagement of Law Clerk-cum-Research Assistants on Short-term contractual assignment in the Supreme Court of India*”.<sup>108</sup> The scheme provided that law clerks (candidates not above twenty-seven years as on the last date of receipt of applications) would be engaged for judges for a contract of one year. This period may be extended to such period as considered appropriate by the concerned judge with whom a law clerk is attached (Guidelines No. 3 & 7).<sup>109</sup>

A detailed selection process (Guideline No. 11)<sup>110</sup> was laid down, according to which an advertisement would be published by the Registry in January every year, inviting online applications. In order to short-list applications, a national level competitive exam<sup>111</sup> based on multiple-choice questions (a test of general knowledge, aptitude, and basics of only a few law subjects) would be conducted in four cities (Delhi, Mumbai, Bengaluru, Kolkata), with a requirement of minimum qualifying marks as sixty per cent. The short-listed candidates would then be called for an interview with a committee of judges for final selection. Based on the recommendations of the committee, the CJI would form a panel of approved law clerks and allot them to different judges on the basis of seniority.

The scheme also provided that the CJI and each judge may hire one other law clerk as “*candidates of choice*” (Guideline No. 4),<sup>112</sup> *i.e.*, candidates who are still considered worthy by the judge even though they did not appear for the exam or could not qualify. Like the earlier process, a judge of the Supreme Court could have two law clerks: one “*necessarily*” from the

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<sup>108</sup> *Revised Scheme for Engagement of Law Clerks, 2015, supra* note 8.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> The exam comprised of two sections. While the first section included fifty questions related to General English and General Aptitude/Awareness, the second comprised of questions relating to Indian Constitution, Indian Penal Code, Criminal Procedure Code, Civil Procedure Code and Indian Evidence Act etc.

<sup>112</sup> *Revised Scheme for Engagement of Law Clerks, 2015, supra* note 8.

approved panel of the Registry and one through their discretion. From July 2018 onwards, the number of total clerks for each judge was increased to three, out of which two could be “*candidates of choice*”.<sup>113</sup> This discretion was further expanded by an order dated June 5, 2019, passed by then CJI Ranjan Gogoi. Guideline No. 4 has been amended to provide that each judge, including the CJI, can have four law clerks, out of which three could be “*candidates of choice*”.<sup>114</sup>

However, vide order dated January 16, 2020 passed by CJI S.A. Bobde, it was decided that the CJI, “*if so considers appropriate, may direct the Registry not to invite applications in any particular year*” (amended Guideline No. 11), *i.e.* the clerkship exam may be called off for any particular year.<sup>115</sup> Would this mean that the judges can hire all four law clerks at their discretion? Probably, yes.

#### **D. CONCERNS REGARDING THE SELECTION PROCESS IN INDIA**

The recruitment process was started by giving institutional preferences to certain institutions. Initially, candidates from only five NLUs were considered. Even when the number of approved institutions was raised to eighteen, these institutions comprised only an exceedingly small fraction of all India's law graduates. In the Registry's own admission before the Delhi High Court, there were more than nine hundred law colleges in the entire country. This would naturally lead to complaints that the process was exclusive and denied candidates from other law schools an equal opportunity to even apply for clerkships. Getting selected for a clerkship can only happen when one gets a chance to apply. The institutional barrier of limiting clerkships to only certain institutions (initially five, and later eighteen) was exclusive and discriminatory for students from institutions other than the approved eighteen. The Delhi High Court rightly struck down the restrictive recruitment process.

An important issue that was not discussed either in the Delhi High Court judgment or in any scholarly work or general commentary is the centralised

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<sup>113</sup> This happened during my tenure as a Law Clerk at the Supreme Court of India.

<sup>114</sup> *Revised Scheme for Engagement of Law Clerks*, 2019, *supra* note 18 (the scheme includes a footnote mentioning the June 5, 2019 update).

<sup>115</sup> *Id.*

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role played by the Supreme Court Registry in recruiting law clerks.<sup>116</sup> Through the Registry, the Supreme Court performs its administrative functions, with the CJI as the top authority. The administrative powers include managing day-to-day activities within the Apex Court. Can the Registry, in the administrative capacity of the Court, hire law clerks for individual judges without their choices? In a few other countries (mentioned before), it does. Should not the candidates be also a preference for a judge? As discussed before, the selected candidates were allotted based on the seniority of judges. What if a judge wanted to interview their candidate? Since the clerkship role is one where the individual judge has to have confidence in the candidate, it has to be reconciled with an accessible administrative process. It does not create an exclusive pattern of hiring by individual judges, as can be seen in the SCOTUS.

Moreover, despite its public nature, the clerkship policy framed<sup>117</sup> by the Supreme Court of India neither provides for any reservation nor any other method to ensure a diverse representation. In several sectors, the constitutional provisions of reservation (or quotas) have ensured adequate representation of socially marginalised communities. One might argue in an extreme scenario that clerkship is a contractual job, and hence reservation will not apply. Even in that scenario, the Supreme Court of India has not taken any other measure or given assurance like its Canadian counterpart to ensure a fair representation to candidates from marginalised communities. It is also difficult to assess the performance of the Court on this aspect in practice, as there has not been a single study on the general profiles of law clerks.

One would have expected that after the restricted recruitment process being held unconstitutional, the Supreme Court would have come up with

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<sup>116</sup> I am thankful to Rohit De (Associate Professor of History, Yale University) for pointing out this issue to me.

<sup>117</sup> INDIA CONST. art. 146 cl. 2. It provides : “*Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose: Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President*”.



a transparent and inclusive recruitment process, where there would be a flow of necessary information. The Registry took a step towards this end and allotted its funds (in the revised clerkship scheme) to conduct a multiple-choice questions-based examination to select a set of candidates.<sup>118</sup> One may argue that since the clerkship is a research and writing-oriented job, merely a basic test of general knowledge, aptitude, and basics of only a few subjects was not the right method to select law clerks. As one former law clerk had proposed in 2012, “*it would be better if the candidates are also required to send writing samples*” as this would be “*an effective method for testing the applicant’s familiarity with a particular topic as well as the ability to defend one’s views*”.<sup>119</sup> This could have been an apt criterion for short-listing in the open competition, as is also done in other countries. Despite not adopting this criterion, the fact that the Registry had opened access for clerkships to graduates of all law schools was, in any case, a welcome step.

Furthermore, in the interview round in past years, questions have been asked to applicants about their publications in order to check their research and writing skills.<sup>120</sup> It was the Registry, which was once again selecting one law clerk for the judges. However, each judge was provided with the discretion to remove the law clerk allotted by the Registry within one month of appointment if they were not satisfied with the law clerk’s work performance. At the same time, the judge would be bound to choose “*a suitable incumbent*” candidate left on Registry’s panel, “*but without interviewing with him/her*”.<sup>121</sup>

The allotment through exams based on seniority also meant that a law clerk selected by the Registry did not have the discretion to give a preference to work with a particular judge. To respect a judge’s choice, a balance seems to have been done in the revised clerkship scheme in 2015. The Registry reserved one slot (now three) for a “*candidate of choice*” for each judge. As discussed earlier, in countries like Australia, the US, *et cetera* the judges hire

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<sup>118</sup> *Revised Scheme for Engagement of Law Clerks, 2015, supra* note 8.

<sup>119</sup> Sidharth Chauhan, Clerkships in the Indian Supreme Court: Some Reflections and Suggestions, CRITICAL TWENTIES (July 22, 2020), <http://www.criticaltwenties.in/lawthe-judiciary/clerkships-in-the-indian-supreme-court-some-reflections-and-suggestions>.

<sup>120</sup> This point is based on my conversations with a few candidates who appeared in the clerkship exam.

<sup>121</sup> *Revised Scheme for Engagement of Law Clerks, 2015, supra* note 8.

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candidates of their choice. Nevertheless, there is an institutionally accessible practice where the process of applying is made abundantly clear. The hiring practices and schedules of a judge are generally known. In Canada, South Africa, and the UK, all necessary details of applying for a clerkship/judicial assistantship are mentioned on the court websites. In some courts (like the Washington State Supreme Court in the US), a judge places a notification on the website whenever there is a vacancy of law clerks in his office and prescribes the deadline as well as the postal/email address for sending applications (including documents like a CV and writing sample.).

Given that there was no information made available by the Supreme Court Registry in India regarding the process of selection of “*candidates of choice*” by judges, this led to informational opaqueness. As a result, only those candidates who would know judges personally, or had interned in the Supreme Court before, or had contact with previous clerks/interns, or knew someone in the Registry staff, or had family connection with the judge, would easily be able to get information about the vacancies of “*candidate of choice*” and the method of applying in the offices of respective judges.<sup>122</sup> If thousands of students start calling the Registry’s landline number for this purpose, it may become a bit difficult for it to handle. Several applicants gather contact information of judges’ offices by contacting previous/current law clerks on social media platforms.

What would happen in a scenario when only a handful of candidates (much less than required) qualify for the exam conducted by the Registry? For the year 2017–18, this is exactly what happened—the candidates who got selected through the exam were less than ten.<sup>123</sup> Consequently, the judges hired candidates from a pool of law graduates who had applied to their offices directly.<sup>124</sup> However, what if the judges already selected all law clerks

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<sup>122</sup> In my own experience, I had to call the landline number of the Registry several times to get the contact details of the office of the judge to whom I wanted to apply for internship.

<sup>123</sup> The list was released on the Supreme Court’s website.

<sup>124</sup> I was one of such candidates who had applied directly to a particular judge, and was selected eventually.

as “*candidates of choice*”, even while the Registry was conducting the exam for that particular year? This happened for the year 2019–20. I spoke to two such candidates who, including a few others, had been selected as law clerks through the examination route, yet they were not made to join in that year by the Registry, citing “*unavailability of vacancies currently*”.<sup>125</sup> This is problematic on four counts. *Firstly*, a false hope was given to the applicants that they had been selected and would be required to join. The efforts, time, and resources invested by such applicants were completely wasted. *Secondly*, it also led to a wastage of time of three judges of the Supreme Court who had conducted the interview of candidates who had qualified the written examination. Even if just one day was spent in conducting interviews of candidates who were eventually not made to join, the loss of time of the judges, considering the large pendency of cases,<sup>126</sup> was precarious. *Thirdly*, it reflected an overall lack of clarity regarding the selection process of law clerks. *Fourth*, it was a clear violation of the existing clerkship scheme.

Furthermore, the Supreme Court Registry did not conduct any exam for the year 2020–21. There was no public advertisement that could state that the exam would not be conducted this year. However, a soft copy of the revised clerkship scheme (w.e.f. January 16, 2020) was uploaded on the Supreme Court website, which provides that the CJI may direct the Registry not to conduct the exam in any particular year.<sup>127</sup> This step was taken even before the COVID-19 pandemic hit the Indian soil.<sup>128</sup> Since there was no exam conducted, most of the judges hired all the law clerks from a pool of candidates who had applied to them individually. Few judges hired candidates based on parameters similar to those in other countries: cover letter, writing sample, CV, and personal interview. However, since the hiring schedule and process of each judge is not open

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<sup>125</sup> Despite continuous inquiry over several months, the candidates received no clear information from the Registry. One such candidate described her experience as “*being ghosted by the Registry*”. The names of the candidates were present in the list of law clerks released by the Registry on its website for that year.

<sup>126</sup> As on March 1, 2020, there are 60,469 cases pending before the Supreme Court of India; See <https://main.sci.gov.in/statistics> (last visited on July 22, 2020).

<sup>127</sup> *Revised Scheme for Engagement of Law Clerks*, 2019 *supra* note 18 (the scheme includes a footnote mentioning the 16 January 2020 update).

<sup>128</sup> The first case of COVID-19 India was reported in the State of Kerala on January 30, 2020.

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to common knowledge, only candidates who would have been able to secure access through networks (as I have already pointed out) would have been able to apply. Those students or graduates who would have been waiting for the exam notification would be completely unaware about when a particular judge opened their slot for hiring or if there is a vacancy.

Lastly, the Registry conducted a physical exam for clerkship for 2021–22 in four cities, with candidates travelling from different cities during the COVID-19 pandemic. However, one week before the exam, as the second COVID-19 wave hit India, the rules of the admit card for the exam stated that anyone who was COVID-19 positive would not be eligible to appear or even be allowed entry at the Examination Centre. Neither was the exam postponed for a few days nor was any alternative provided to candidates who got infected with COVID-19 during that period.<sup>129</sup>

All these flaws and inconsistencies with the recruitment process indicate that the Supreme Court has consistently followed *ad-hocism*, accompanied with non-transparency.

### **PROPOSED RECRUITMENT PROCESS**

One starting temporary step to address the opaqueness around the recruitment system in India is that the Supreme Court Registry provides the details of clerkship hiring by judges on its website, on a separate webpage. The apex courts of several countries have provided the details about the entire recruitment process on their websites.<sup>130</sup> As a result, all the interested graduates get to know about the opportunity. After the candidates apply, the judges shortlist the applications and call a few candidates for an interview for the final selection. For instance, on the website of the Washington State Supreme Court, there is a page that lists the clerkship vacancies for each judge and the method of applying. Likewise, in India, it is better to institutionalise the entire process of judges

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<sup>129</sup> One such candidate, a graduate of Jindal Global Law School, shared his disappointing experience with me. The pattern of the exam could also have been changed (with a focus on research skills), given the pandemic situation.

<sup>130</sup> See the second and third sub-headings of this article.

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hiring their own law clerks. The Registry can create a page on the Supreme Court website, where it could give details about the hiring process followed by different judges, including contact details (official email).

However, some may apprehend that this discretion may lead to an exclusive hiring pattern, as in the US. The tendency of most SCOTUS judges to hire clerks mainly from the five big law schools has been a subject of criticism.<sup>131</sup> Moreover, what about ensuring a fair representation to marginalised communities as it is done in Canada? Also, what about ensuring due gender representation?

To make the system accessible, efficient, and inclusive on paper and in practice, a new system may be evolved by the Supreme Court Registry based on a teleological model. For clerkships, it is important to test the analytical, research, writing, team spirit, and other skills. Therefore, one's CV, writing samples, cover letter/personal statement, and/or prior work experience may be considered as the criterion on which a candidate must be assessed. Given the high number of cases that the judges of the Supreme Court of India hear and decide every day, it may not be possible for every judge to read such detailed applications of all candidates. A panel consisting of academics/directors of the law clerk program (like in Canada) may be constituted by the Registry to short-list the applications for interview every year. An online application system could be created on the webpage where the interested candidates can be asked to submit their CV, writing sample, cover letter and other requisite documents. Candidates can be asked to list their preference for judges in a list of sequence.

Like in the Supreme Court of Canada, applicants can be asked to indicate their social background (like caste or religion) in order to ensure that a proper representation (with a mandatory minimum percentage/due reservation) can be taken into consideration before short-listing candidates. Once an application along with documents is submitted, the proposed panel/office can scrutinise the applications if they meet the minimum standard criteria and create a short-list. From there, if a judge

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<sup>131</sup> Todd Peppers, *The Best and The Brightest Clerks: Why the Justices Should Look Beyond Harvard and Yale*, THE NATIONAL LAW JOURNAL (July 22, 2020), <https://www.law.com/nationallawjournal/2019/09/23/the-best-and-the-brightest-clerks-why-the-justices-should-look-beyond-harvard-and-yale/?slreturn=20210824135116>.

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wants to interview his candidates, the panel can short-list a certain set of candidates from the applications, which have shown a preference for that judge in their application. This would also give an element of choice to a judge. If a judge desires, the panel can finalise all the four candidates for him after doing interviews, based on the hiring criteria provided by the judge. In case a candidate gets acceptance from more than one judge (if a candidate listed more than one judge as a preference and got short-listed for an interview with the judges), they would also have the choice to go finally with a judge of their preference.

Since in the Indian Supreme Court, few judges retire almost every year and thereby new judges are inducted throughout the year, judges who retire during July–December usually prefer existing clerks to continue.<sup>132</sup> These judges who do not want to recruit any new clerk may indicate this so that candidates do not apply for their chambers. If a judge who has been appointed to the Supreme Court after the date of application wishes to have a law clerk, the Registry can either provide them with candidates (whose judge retired) or can put out a new notification/advertisement on the online application website.

The proposed system will ensure that all the interested students and graduates have relevant information about the recruitment process in one place. The process is a combination of the criteria which courts in other countries have adopted. An LLM application from a top law school outside India is also finalised in this manner. Those graduates/students, who do not generally get to know about vacancies in a judge's office because of lack of information in public, would also be able to apply if this system is institutionalised with a crystallised flow of information. A judge would be able to choose the best candidates while also having a large pool of applications. An open process may attract the best talents to apply. This would benefit the judges too. A similar process may be adopted by High Courts as well. Moreover, competent law clerks trained in the modern

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<sup>132</sup> If the judge retires and there is still time left in completion of tenure of a law clerk, then as per the current practice, the law clerk is kept in the pool of the Registry, and assists it in research work.

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educational atmosphere may assist the judges in technological changes that have been happening.

Since its inception, the clerkship hiring process at the Supreme Court of India has been restrictive. It is high time that the Court makes it accessible to everyone. It can also take the opportunity to set out an example before other countries by ensuring that the clerkships reflect due representation.