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REPORT

THE ORGANISATION OF THE WORK OF LAW CLERKS AS SUPPORT FOR DECISION-MAKING BY CONSTITUTIONAL COURT JUDGES IN IRELAND

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INTRODUCTION

Law clerks can play an important and valued role within a legal system. In researching legal topics and lending assistance in whatever way is necessary, they provide a much needed support facility for the judiciary. However, the boundaries of their role within a legal system can often become blurred[1] and this can sometimes cause them to encroach upon the judicial function. As Richard Posner noted in his famous article "The Jurisprudence of Skepticism", some modern judicial opinions all too often "reflect the reading of the law clerks rather than the judges".[2] In spite of this, most commentators agree that in general the advantages brought about by a system of clerking far outweigh the potential for its abuse.[3] These advantages can be seen in a number of different jurisdictions, including America, Canada and the United Kingdom. Since 1993 Ireland has also reaped the benefits of a modified system of clerking. In that year, the Research Assistants scheme was introduced, the function of which is to aid the Irish judiciary in "legal research generally and the difficult task of preparing their judgments".[4] It is the purpose of this paper to examine in greater detail the work carried out by Research Assistants, how that work is organised and the potential role that Research Assistants could play in supporting the decision-making process of constitutional courts in Ireland.

WHAT IS A "LAW CLERK"?

Before examining the work that Research Assistants carry out and, more specifically, the nature of the support they lend to the decision-making process of constitutional courts, we must first ascertain precisely what a "law clerk" is and, in turn, whether Research Assistants fit into that definition. Persons familiar with American law will instantly recognise the term as connoting those shadowy individuals who are trained in the law to assist judges in researching legal opinions. However, in many other corners of the globe different terminology is used to describe such persons. For example, in the United Kingdom they are known as Judicial Assistants and in Australia, the term used is Judicial Associate. Indeed, there has been much confusion in the past, in both Canada and America, surrounding use of the term "law clerk". As Baier points out,

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[1] Gertz describes clerks as "boundary-spanners", a position which he argues places them in a unique position to exercise discretion and influence decision-making – see Gertz, "Influence in Court Systems: The Clerk as Interface" (1977-1978) 3 *Just. Sys. J.* 31, at 32. This idea has also been echoed by Jacob – see Jacob, "Courts as Organisations" in Boyum and Mather, eds., *Empirical Theories about Courts* (1983). He argues that:

> "Almost every organisation is found to possess an informal structure that is no entirely consonant with the formal one. In almost every organisation, some of those who are nominal inferiors exert influence and power over nominal superiors."

[2] Posner, "The Jurisprudence of Skepticism", (1988) 86 *Mich. L. Rev.* 827, at 865. Kester has similarly argued that, "Once an institution that supplied mentors to instruct bright graduates, the clerkship has grown into a corps of post-adolescent mandarins, Judges for a Year after the fashion of *Queen for a Day*" – see Kester, "The Law Clerk Explosion*"* (1983) 9 *Litigation* 20, at 20.

[3] For an excellent discussion as to why this is so, see Mahoney, "The Second Circuit Review - 1986-1987 Term: Foreword: Law Clerks: for better or for worse?" (1988) 54 *Brooklyn L. Rev.* 321. Lord Woolf has also argued that there is a greater danger of something being overlooked by judges who are overstretched and unsupported than if they have clerks to ensure that nothing is missed – see "Bringing the court up to speed" (1996) 146 *New Law Journal* 1769.

[4] Byrne and McCutcheon, *The Irish Legal System* (4th ed., Butterworths, 2003), at 112.

> "the question just what to call the law clerk has always been troublesome. The terms 'secretary' and 'clerk' suggest a typist or file clerk, and at one time there may have been good reason to use this designation since the tasks in the beginning were indeed on the secretarial side."[5]

Herman has also noted that:

> "Other appellations include 'law assistant', 'research aid' and 'legal assistant'. The official title at the Supreme Court of Canada is 'legal secretary', but the phrase 'law clerk', although a misnomer, is widely used, probably because it conveys a sense of institutional tradition."[6]

Thus, when ascertaining whether a particular sector of the legal community falls within the category of "law clerk", it is important to avoid getting too caught up in the formalities accompanying that phrase. One should instead focus on the functions and duties of such persons. With that in mind, this paper examines the role played by law clerks in both the American and Canadian courts, as well as that played by Judicial Assistants in the UK.

America

In America the introduction of clerical help was brought about as a direct result of the increased workload the Supreme Court faced at the time and the associated delays in judicial action. The first official reference to the idea of employing assistants for the Supreme Court justices surfaced in 1885 when Attorney General A. H. Garland suggested in his Annual Report that:

> "[i]t 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."[7]

On August 4, 1886, Congress acted upon this recommendation, providing for a "stenographic clerk" for each justice of the Supreme Court at a salary of $ 1,600 a year.[8] However, these "stenographic clerks" had more in common with legal secretaries than they did with law clerks in existence today. It was not until 1919 that Congress decided to provide for the latter[9] and, in spite of some initial reluctance to utilise this facility, by 1939 all members of the Supreme Court were making good use of both assistants.[10]

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[5] Baier, "The Law Clerks: Profile of an Institution" (1973) 26 *Vand. L. Rev.* 1125, at 1130.

[6] Herman, "Law Clerking at the Supreme Court of Canada" (1975) 13 *Osgoode Hall L. J.* 282.

[7] See Mahoney, "The Second Circuit Review - 1986-1987 Term: Foreword: Law Clerks: for better or for worse?" (1988) 54 *Brooklyn L. Rev.* 321, at 325, citing *Annual Report of the Attorney General of the United States for the Year 1885*, at 43.

[8] Act of Aug. 4, 1886, ch. 902, 24 Stat. 222, 254.

[9] Act of July 19, 1919, ch. 24, 41 Stat. 163, 209; Act of May 19, 1920, ch. 214, 41 Stat. 631, 686-87.

[10] See Newland, "Personal Assistants to Supreme Court Justices: The Law Clerks" (1961) 40 *Oregon L. Rev.* 299, at 303.

Since then, the number of clerks has continued to increase which is unsurprising in light of the fact that no limits are set by statute on the numbers to be employed. Instead, a general provision for each court authorizes the hiring of law clerks and the number of clerks to be employed is set in line with the annual judicial appropriations act.[11] Currently, Supreme Court justices are entitled to four law clerks, Circuit Court judges to three and District Court judges to two.[12] Furthermore, it should be noted that the ratio of clerks to Circuit Court judges in the courts of appeals is actually four to one, if one counts the attorneys that make up each circuit's central staff.[13]

In spite of the great increase in the number of clerks, there is no definitive legislative statement of what their role entails. Although the Federal Judicial Center has attempted to define the role of the law clerk in its publication *The Law Clerk Handbook*, its definition is rudimentary to say the least. It states that:

> "The law clerk is an assistant to the judge and has no statutorily defined duties. Rather, the clerk serves at the direction of the judge and performs a broad range of functions. Clerks are usually assigned legal research, drafting, editing, proof-reading, and verification of citations. Frequently, clerks also have responsibility for library maintenance, document assembly, service as courtroom crier, and some personal errands for the judge. Clerks often attend conferences in chambers with the attorneys in a case and also engage in conferences and discussions with the judge regarding pending cases."[14]

There is however a logical explanation for the difficulty in defining precisely what it is law clerks do and that is that their functions vary from judge to judge. In addition, the uniquely personal nature of the relationship between clerk and judge[15] and the "code of confidentiality"[16] which surrounds it contributes even further to the dearth of concrete evidence describing their duties and functions. It is perhaps unsurprising therefore that the best source of information on

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[11] See Kester, "The Law Clerk Explosion*"* (1983) 9 *Litigation* 20, at 22.

[12] *Supra*, at 22.

[13] See Posner, *The Federal Courts: Crisis and Reform* (1985), at 103.

[14] Dileo & Rubin, *Law Clerk Handbook: A Handbook for Federal District and Appellate Law Clerks* § 1.100 (1977). This statement has also been echoed by the courts – see *Fredonia Broadcasting Corp. v. RCA Corp.*, 569 F.2d 251, 255 (5th Cir. 1978), where it was said that "[t]he law clerk has no statutorily defined duties but rather performs a broad range of functions to assist his judge."

[15] The existence of which the numerous articles written by American clerks in tribute to their judges attests to – see, for example, Koeltl, "Judge Weinfeld – A Law Clerk's Tribute" (1980) *Ann. Surv. Am. L.* [xxix]; *Greenberg, "*Justice Daniel J. O'Hern: A Law Clerk's Tribute" (1999-2000) 30 *Seton Hall L. Rev.* 1062; *Graglia, "*In Memoriam: Warren E. Burger – His First Law Clerk's Fond Memories of a Gracious Gentleman" (1995-1996) 74 *Tex. L. Rev.* 231 ; *Franzese,* "The Learned Justice Handler: Fond Reflections of a Former Clerk" (1999-2000) 30 *Seton Hall L. Rev.* 734.

[16] Wright argues that "preserving the confidentiality of judges' work has been an 'honoured tradition amongst law clerks' " – see Wright, "Observations of an Appellate Judge: The use of Law Clerks" (1973) 26 *Vand. L. Rev.* 1179, at 1189, fn. 3. For an interesting discussion on the merits and disadvantages of this code of confidentiality, see Abramson, "Should a clerk ever reveal confidential information?" (1979-1980) 63 *Judicature* 361.

the role and function of clerks within the American justice system comes from the judiciary[17] and the clerks[18] themselves.

For example, in the case of *Hall v. Small Business Administration*,[19] the court described clerks as:

> "sounding boards for tentative opinions and legal researchers who seek the authorities that affect decisions. Clerks are privy to a judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be."[20]

In *Oliva v. Heller*[21] it was asserted that:

> "the work done by law clerks is supervised, approved, and adopted by the judges who initially authorized it. A judicial opinion is not that of the law clerk, but of the judge. Law clerks are simply extensions of the judges at whose pleasure they serve."[22]

Indeed, Mahoney has argued that:

> "a large part of a clerk's functions in America is to do the legwork on a given case; spot the most important issues, summarize the arguments, give an impression of which arguments are most persuasive, and thus identify the aspects of a case that should have an impact on the final decision. With this assistance, the judge can get to the heart of the case and be prepared to highlight the most important issues at oral argument or at a conference afterwards. A clerk performing such functions renders a valuable service, but it is hardly the equivalent of decision making. After cases are argued, it is the judge who casts the vote on a tentative disposition, based partly upon a clerk's impressions and recommendations, but more dis-positively upon the judge's review of the briefs and related materials, oral argument, and, ultimately, his own conclusions. Is this a usurpation of decision making? I would suggest that the law clerk's role is better described as 'decision-enhancing.' "[23]

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[17] Of which, it must be said, Judge Mahoney's article is a very useful example – see Mahoney, "The Second Circuit Review - 1986-1987 Term: Foreword: Law Clerks: for better or for worse?" (1988) 54 *Brooklyn L. Rev.* 321. Also see Wright, "Observations of an Appellate Judge: The use of Law Clerks" (1973) 26 *Vand. L. Rev.* 1179.

[18] See for example Armstrong & Woodward, *The Breathren: Inside the Supreme Court* (1979); Boskey, "Mr Chief Justice Stone" (1946) 59 *Harv. L. Rev*. 1200; Medor, "Justice Black and his Law Clerks" (1962) 15 *Ala. L. Rev.* 57; Crowley, "Reflections of a Law Clerk" (1998) 48 *Syracuse L. Rev.* 1473.

[19] 695 F.2d 175 (5th Cir. 1983).

[20] *Ibid.*, at 179. Support for the latter proposition may be found in Worthen, "Shirt-Tales: Clerking for Byron White" (1994) *Brigham Young U. L. Rev.* 349.

[21] 839 F.2d 37 (2d Cir. 1988).

[22] *Ibid.*, at 40.

[23] Mahoney, "The Second Circuit Review - 1986-1987 Term: Foreword: Law Clerks: for better or for worse?" (1988) 54 *Brooklyn L. Rev.* 321, at 329. William Rehnquist, who clerked for Justice Robert Jackson before becoming a Supreme Court Justice and later Chief Justce, advocated a similar approach, stating that:

> "an ideal clerk ought, in most aspects of his official capacity, to mirror as best he can the mind of the justice for whom he works. There is room for sensibly presented differences of opinion when

Of course, whether this is in fact true remains a controversial issue and continues to be debated. For example, Chief Justice Rehnquist once wrote that clerkship influence did exist, particularly on the court's handling of petitions for certiorari, and furthermore, that because of the "political outlook of the group of clerks that [he] knew, its direction would be to the political left' ".[24] Justice Clark also noted (quoting Justice Jackson) that:

> "A suspicion has grown at the bar that the law clerks ….. constitute a kind of junior court which decides the fate of certiorari petitions. This idea of a law clerk's influence gave rise to a lawyer's waggish statement that the Senate no longer needs to bother about confirmation of justices but needs to confirm the appointment of law clerks."[25]

In any event, even if it was the case that law clerks played an active role in the judicial decision-making process, whether this is still the case today is open to speculation, due in part to the shroud of secrecy which envelopes much of the profession.

One thing that is certain however is that the duties of the average American law clerk are many and varied. They include performing a substantial amount of legal research, preparing bench and leave memoranda, drafting orders and opinions, proof-reading the judge's orders and opinions and generally assisting the judge during courtroom proceedings. Bench memoranda (otherwise known as leave memoranda where leave is sought) are designed to provide the judge with a brief factual and procedural history of a case, a summary and analysis of the arguments raised by counsel in their briefs and a recommendation as to the disposition of the case. In order to aid writing such documents, sometimes clerks may be asked to attend court and observe a case in progress as this is widely believed to lend a greater understanding of the issues involved and the significance of the case in general.

Although clerks may also have to draft opinions, if the system is working properly this should not involve them having any input into the substance of the opinion itself.[26] Where an individual judge is sitting, he or she should come to a determination alone and where a court of more than one judge is sitting, a judicial conference will be held in private. Judges will then discuss with their clerk the general direction and shape that the draft opinion is to take, although usually prior collaboration on the case will be intensive enough to provide a fairly clear preview of the opinion.

> the lines of dispute are clearly drawn and in the open but there is no room for the clerks deliberate use of his position as research assistant to champion a cause to which his justice does no prescribe. It would be an extraordinary reflection on the Justices, the clerks and the law schools if there were many deliberate, conscious departures from this ideal standard by clerks. I know of none…." – see Rehnquist, "Who writes decisions of the Supreme Court" (1957) 74 *US News and World Report* 74-75.

[24] See Rehnquist, "Who Writes Decisions of the Supreme Court?"*, U.S. News & World Reporter*, Dec. 13, 1957, at 74. Also see Rehnquist, "Another View: Clerks Might 'Influence' Some Actions"*, U.S. News & World Reporter*, Feb. 21, 1958, at 116; Rogers, "Do Law Clerks Wield Power in Supreme Court Cases?"*, U.S. News & World Reporter*, Feb. 21, 1958, at 114; Brown, "The Bright Young Men Behind the Bench"*, U.S. News & World Reporter*, July 12, 1957, at 45; Bickel, A., *Politics and the Warren Court* (1965).

[25] See Clarke, "Internal Operation of the United State's Supreme Court" (1959) 43 *J. Am. Jud. Soc*. 45, at 48.

[26] Mahoney, "The Second Circuit Review - 1986-1987 Term: Foreword: Law Clerks: for better or for worse?" (1988) 54 *Brooklyn L. Rev.* 321, at 327.

In addition to these general duties, law clerks working in the appellate division must also assist judges by processing emergent motion applications, proof-reading published opinions and maintaining chambers' libraries. Those clerks working for Assignment Judges handle the same work as other trial court law clerks but also assist in processing emergent matters. Trial Court law clerks may perform legal research, draft, edit and proof-read legal correspondence, maintain judges' libraries, handle document assembling, attend conferences with attorneys and judges, attend training in mediation and mediate small claims cases and perform related assigned duties. In general it may be said that each justice determines what tasks to assign to his or her law clerk.

Canada

Although proposals for the introduction of law clerks in Canada were made as early as 1948, it was not until 1968 that the position was established, partly in response to the Supreme Court's heavy workload and partly due to the success of clerks in the American courts.[27] Although the scheme that was approved in 1968 originally envisaged one clerk being appointed to each Justice of the Supreme Court, this number was expanded in 1983 to two and then again to three in the same year.[28] The Federal Court of Appeal and the Federal Court can also now engage law clerks, with the number currently employed standing at 42 (approximately 12 for the Federal Court of Appeal and 30 for the Federal Court).[29] Furthermore, each judge of every other court, except those with supernumerary status, has a law clerk. Supernumerary judges share law clerks.[30]

As in many other jurisdictions, the amount and nature of the work performed by Canadian law clerks can vary depending upon the demands of the judge to which they are assigned. For example, a judge may wish their clerk to assist them in the preparation of a speech or paper to be delivered or to proof-read and check the citations in an article which they wish to publish.[31] However, at their very basic the functions of the average Canadian law clerk are quite similar in many ways to those of their American contemporaries and include preparing legal memoranda on court files prior to the hearing of the case, researching specific legal issues and editing judgments. The areas of law to which Canadian law clerks are exposed include administrative law, Crown liability, intellectual property, admiralty, immigration, income tax, human rights and environment law.

United Kingdom

In 1997, Lord Justice Otton, with the strong backing of the then Master of the Rolls, Lord Woolf, set up the Judicial Assistant scheme, loosely based on the US system of law clerks, with the aim of reducing the backlog of litigant-in-person cases at the Court of Appeal.[32] The scheme began with six trainee solicitors and pupil barristers appointed on a part-time basis

[27] Snell and Vaughan, *The Supreme Court of Canada: The History of the Institution* (University of Toronto Press, 1985), at 223.

[28] McInnes, Bolton and Derzko, "Clerking at the Supreme Court of Canada" (1994) 32 *Alberta L. Rev.* 58, at 61.

[29] See the Federal Court of Canada's website at http://www.fct-cf.gc.ca/about/lawclerk/lawclerk_e.shtml.

[30] See the Federal Court of Canada's website at http://www.fct-cf.gc.ca/about/lawclerk/lawclerk_e.shtml.

[31] McInnes, Bolton and Derzko, "Clerking at the Supreme Court of Canada" (1994) 32 *Alberta L. Rev.* 58, at 70.

[32] See Lindsay, "First judicial assistants arrive at Appeal Court", *The Lawyer*, January 21, 1997; MacCallum, "Judicial Assistants – Courting appeal – for budding lawyers a spell at the Court of Appeal is an unrivalled way to learn court procedure", *The Law Society Gazette*, 25th January, 2001.

every court term. Each was assigned to a Lord or Lady Justice with whom they worked closely during their appointment. The scheme has also now been extended to the House of Lords. Unfortunately, as it is still virtually in its inception, there is little material surrounding the nature of the work carried out by Judicial Assistants nor is there any statutory document delimiting the scope of their powers or duties. That said, from what little material there is available, one thing is certain – their work is very similar in many ways to that carried out by law clerks in America and Canada. However, having regard to the fact that the inspiration for the scheme was the US clerking system, this is hardly surprising.[33]

At first, the scheme largely concentrated on the backlog of litigant-in-person cases, but it now covers the whole range of the court's work, with Judicial Assistants working for individual judges.[34] The work may be divided into two categories – work specific to the judge to which a Judicial Assistant is assigned and work relating to pending cases. The former type of work, depending on the judge involved, accounts for roughly half an assistant's time and includes carrying out research, assisting with speech-writing and various administrative tasks. Some judges work more closely with their assistants than others, some even to the extent of asking their assistant to sit with them in their chambers.

The remainder of an assistant's time is spent on pending cases. The work involves ensuring that the correct papers have been submitted, sorting the relevant information and preparing "bench memoranda". These are summaries of the history of the case, the previous decisions and the grounds of appeal to be heard.[35] These are then passed on to the judges who will hear the case, reducing the amount of time they have to spend familiarising themselves with the issues, which is invaluable having regard to the increasing pressures on judges to process cases quickly.

THE ROLE AND FUNCTION OF THE RESEARCH ASSISTANT IN IRELAND

Having examined the work carried out by "law clerks" in other jurisdictions, we must now address the issue of whether Research Assistants play a similar role within the Irish legal system. In order to do so, we must first ascertain the precise nature of the work which they carry out.

Writing Memoranda in response to Queries

Most of the work carried out by Research Assistants consists of compiling memoranda in reply to what are known as "queries". In essence, these are requests made by judges to have a particular area of the law researched, be it in light of the circumstances of a particular case or otherwise. The substance of the resulting memoranda can vary greatly from judge to judge and will depend upon the limits of the query. A judge may wish to have a very precise and discreet

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[33] Of course that does not mean that the two systems are alike in every way. As has been noted of the judicial assistants scheme in *The Court of Appeal Civil Division: Review of the Legal Year 2003-2004* (HMO publications, 2004):

> "The scheme is not at all a simulacrum of the North American Law Clerks system. That is because the continuing orality of the English appellate procedure and the difficulties the court has encountered in enforcing even the present modest rules as to early delivery of skeletons and bundles impedes early preparation of the appeals either by the assistants or the court itself."

[34] See "How to get inside a judge's head", *The Times*, 16 Oct 2001.

[35] It seems that this can often make up much of the workload of a judicial assistant – see Hickman, "Career Breaks: Occupational Therapy", *The Law Society Gazette*, 11 March 2004.

area of the law researched, while on other occasions the query may be of a much more general nature. For example, in order to be better prepared for a conference or seminar that they may be attending, a judge will often request a brief general overview of the law in a particular area. On the other hand, where the facts of a case appearing before them are particularly complex, the memorandum can, by extension, become quite lengthy.

The substance of a memorandum will also be affected by the decision-making preferences of the judge in question. For example, where a judge has already decided the result of a particular case, they may ask that additional research be carried out in order to bolster even further the reasoning behind their decision. On the other hand, where an atypical set of circumstances comes before the court, a judge may find themselves totally unfamiliar with the applicable law and will request that a memorandum be drafted setting it out. In this regard, it must be noted that research carried out in response to queries is not limited to the common law. Research Assistants may be requested to research any topic, from the procedure to be followed during a criminal trial to the constitutionality of a domestic statute. Memoranda can straddle a myriad of different areas of the law, including constitutional law, tort law, contract law, criminal law, the law of evidence, the law of practice and procedure, land law and conveyancing, judicial review and European law.

Preparing Bench Memoranda

Although most Research Assistants would not be familiar with the phrase "bench memorandum", they are most certainly familiar with the concept. They are often required to write memoranda setting out a brief history of the case while also summarising and analysing arguments raised by counsel. Where requested by the judge, such memoranda will also include a conclusion as to the outlook of the case. Occasionally, in order to better facilitate this task, the requesting judge may also recommend that the Research Assistant attend court and observe the case in progress. As in America, it is thought that this allows for a greater understanding of the issues involved. It should be noted that a significant number of bench memorandum are written every year summarising the facts and arguments made by prisoners in habeas corpus applications. In 2005 alone the Research Assistants' office wrote bench memoranda in relation to 17 such applications.

Proof-reading

Once a judge has finished writing their judgment, they can send it to the Research Assistant's office in order to be proof-read. Proof-reading consists of:

- checking for typographical, spelling, grammatical or punctuation errors;
- verification of the accuracy of citations or quotations from legislation and case law and other material;
- pointing out obvious errors with a view to clarifying the meaning of the judgment *e.g.* an error in syntax that might make the meaning of a sentence ambiguous.

In addition to this, Research Assistants must also check that the judgment accords with the *Proof-reading Guidelines*. These are a set of rules outlining the manner in which case law, legislation, books, journals, newspapers, governmental reports, dates, numbers and even capital letters may be referred to in the text. The *Guidelines* are intended to ensure that mistakes or misunderstandings are not repeated and, with that purpose in mind, reference can be had to them to resolve any confusion about matters of format or style.

Summarising Cases

During each legal term, the Research Assistants will summarise all the High Court and Supreme Court judgments which have been delivered. "Summarising" involves reducing each case to a concise paragraph. Each paragraph contains a number of key words which, upon brief perusal, give an instant, albeit somewhat limited, understanding of the decision. These paragraphs are then collated into a handout, sub-divided into the relevant legal topics and sent out to all members of the judiciary. The topics in each handout can vary from year to year but have, in the past, included Arbitration, Asylum, Conflicts of Law, Constitutional Law, Conveyancing, Contract Law, Criminal Assets Bureau, Employment Law, Law of Evidence, Extradition, Family Law, Judicial Review, Land Law, Personal Injuries, Planning and Development Law and Practice and Procedure.

Compiling Bench Books

Bench books are, in essence, indexed folders containing all the relevant source material on a particular topic. They can also sometimes contain a general overview of the law, usually written by the Research Assistant who is compiling the Bench Book. Source material can include cases, legislation, statutory instruments and practice directions. The Research Assistants' office holds a significant number of bench books which can be photocopied and compiled at the request of any judge. Bench books can deal with any topic, including:

- the law on extradition;
- the law on asylum and immigration;
- the law on sentencing;
- the law on the restriction of directors under s. 150 of the Companies Act, 1990;
- the law on delay in sexual offence cases;
- the law relating to video link evidence, and;
- the law relating to drunk driving under the Road Traffic Acts.

Research Assistants are constantly discussing the possibility of drafting new bench books for judges and many are compiled as a result of the frequency with which a particular type of query surfaces. Feedback from members of the judiciary is also very helpful and in this regard it must be said that the weekly meetings held throughout the year with two senior members of the judiciary are invaluable.

Writing Handbooks

Handbooks serve to provide guidance and assistance to members of the judiciary when carrying out their duties in court. Handbooks which have been written by Research Assistants include:

- Conducting Criminal Jury Trials;
- The Equal Treatment of Persons in Court;
- The District Court Road Traffic Offences Handbook.

The two primary aims that one must keep in mind when writing a handbook are brevity and accessibility. Unlike bench books, they should not contain any source material but rather should set out the pertinent law with a view to affording the judge a better understanding of how to deal with a particular scenario when it arises.

Carrying out Extra-Judicial Work

In addition to all of the above, Research Assistants are also sometimes required to carry out extra-judicial activities on behalf of members of the judiciary. For example, they may have to write speeches or articles for judges or provide them with source material to enable them to better carry out these tasks themselves. Where judges have to attend conferences, be it simply as a lone delegate or as chairperson, Research Assistants may be requested to provide them with a brief overview of the law or copies of the relevant source material. The issues discussed at such conferences in the past and for which Research Assistants have carried out research include:

- Anti-Social Behaviour Orders;
- The Role of Judicial Review in Ireland, England and America;
- The Court of Criminal Appeal;
- Procedural Pitfalls that judges of the lower courts can fall into during Criminal Trials;
- Whether the Irish education system institutionalises privilege.

Research Assistants are also occasionally asked by various different European organisations to fill in questionnaires on legal topics for the purpose of discussing the results at colloquiums. Such topics have included:

- Case management, the Judge's role during trials and Alternative Dispute Resolution methods;
- The training and specialisation of members of the Judiciary in Environmental law;
- The Supreme Court and the Preliminary Reference procedure;
- The operation of the Hague Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters of 15 November, 1965;
- Justifications and characteristics of Entities competent to resolve labour and social security disputes;
- Criteria limiting Human Rights in the Practice of Constitutional Justice;
- The Independence of the Judicial Power;
- Strengthening the Judicial Protection of Children.

Research Assistants can also act as liaison officers between certain organisations and members of the judiciary and are sometimes asked to attend conferences as the latter's representative.

Conclusion

Having examined the nature of the work carried out by Research Assistants, it is clear that it is very similar in many ways to that carried out by law clerks in both America and Canada, as well as Judicial Assistants in the United Kingdom. Although the substance and type of every judicial query dealt with by these different categories of persons may vary, the nature of the work is, in essence, the same. They all carry out research on different legal topics, write bench memoranda and proof-read judgments. In light of this fact, there is little doubt that Research Assistants fall within the category of "law clerk" adopted for the purposes of this paper.[36]

[36] Indeed, this assertion has been made elsewhere – see *The Report of the Committee on Judicial Conduct and Ethics* (Pn 9449, 2000), at 49.

ORGANISATION OF WORK OF RESEARCH ASSISTANTS

The question which now falls to be addressed is how the work of Research Assistants is "organised". In this regard, it should first be noted that each year, the Courts Service employs 10 Research Assistants on a one year basis[37] and also appoints a Senior Research Assistant from amongst the previous year's pool to be in charge.[38] The Research Assistants' offices are located in the new Judges' Library on the second floor of Aras Uí Dhalaigh in Dublin City and they are available both during and outside of term to deal with research queries from any member of the Irish Judiciary. Research Assistants have access to all the resources of the Judges' Library, as well as a wide range of electronic resources, including lexis-nexis, firstlaw, justis, heinonline and butterworths online.

It must be noted that unlike American law clerks, Research Assistants are not assigned individually to each judge. Instead, all requests come into the Research Assistants' offices and are then assigned to a Research Assistant to deal with. The manner in which the work of the Research Assistants office is organised depends primarily upon the channel of communication through which it is received. For example, most requests are made over the phone. A phone call will either be placed directly to an Assistant or placed to the Senior Research Assistant, who will then decide which Assistant will carry out the task at hand. Their decision will be influenced in part by the distribution of work at that point in time and in part by the area of expertise of each Assistant. It should also be noted that in certain circumstances a judge may request that a Research Assistant be sent over to their chambers to discuss the matter in greater detail. Requests can also be faxed or emailed to the office and again, the assignment of an Assistant to a particular task will depend upon whether they have been specifically requested by a judge or whether the Senior Research Assistant assigns them to the task. Another process which affects the organisation of the work of Research Assistants is the holding of weekly meetings with a High Court and Supreme Court judge. During such meetings issues which are of concern to the judges will come to light and a brief discussion may ensue as to which Assistant is best suited to researching the area in question. Such meetings are invaluable as they encourage discussion of issues which, due to the absence of one-on-one discussion, would not come to the attention of Research Assistants.

HOW CAN LAW CLERKS SUPPORT THE DECISION-MAKING ROLE OF CONSTITUTIONAL COURT JUDGES?

Having examined the work that Research Assistants carry out and the manner in which that work is organised, I wish to now address the central topic for discussion in this paper. In essence that is the following – precisely what is it that makes a Research Assistant's role in constitutional law any different to his or her role in providing support for the judiciary in any other kind of decision? Do constitutional cases throw up logistical and administrative issues which other cases do not? Speaking only from the Irish experience, this does not seem to be the case. Constitutional cases are pleaded in much the same way as other cases, through regularly used civil procedures. Perhaps it may be argued that constitutional cases may be more associated with multi-plaintiff actions requiring special judicial support in sifting through and

[37] It may be said that in general the majority of Research Assistants are recent honour graduates of Irish universities.

[38] Initially only two Research Assistants were appointed, with the funds being provided for by the Department of Justice – see *The Report of the Committee on Judicial Conduct and Ethics* (Pn 9449, 2000), at 49.

arranging multiple books of submissions? Again, from an Irish perspective this does not seem to be the case. Multi-victim litigation is more likely to be the child of mass-tort actions and in any event, as many in the audience will know, multi-victim litigation tends to be focused through civil procedure into *some* form of representative action whereby a relatively discrete set of lawyers will represent a relatively sprawling set of plaintiffs. Thus, its "organisation" does not fall into the hands of the Research Assistant.

There is, however, a particular special feature of constitutional law (at least in Ireland) that I believe marks out the potential for a special role for the law clerk, be it under the label of Judicial Assistant, law clerk or Research Assistant. I am referring to that aspect of constitutional law which involves the well known tool of judicial review which, at least in America since the decision in *Marbury v. Madison*,[39] has been invoked to strike down acts of a domestic legislature when found to be inconsistent with the domestic constitution. In Ireland, the courts' jurisdiction to engage in this striking practice is found in the Constitution itself,[40] and, it is submitted that it is the peculiar aspects of judicial review which may create a particular niche role for law clerks, much as it did during the hey-day of *Lochner*-era activism in the United States during the 1930's.

The decision in *Lochner* came about during an era of intense growth in industry and economic prosperity and a corresponding increase in legislative regulation of commercial practices.[41] Such regulation conflicted with what the US Supreme Court came to believe was a fundamental constitutional principle – *laissez faire* or free market economics.[42] The conflict between these two ideas came to a head in the famous case of *Lochner v. New York*,[43] when regulations limiting the working time of bakers in New York to 60 hours per week were famously struck down by the Supreme Court. The Court believed that any interference with the freedom of employers to contract on whatever terms they saw fit with their employees was highly suspect on constitutional grounds. The decision in *Lochner* paved the way for a period of incredible judicial activism whereby the Supreme Court routinely struck down legislation which was intended to improve the position of the most vulnerable in society such as child and women labourers. This came to a head when President Roosevelt announced his "New Deal" – a legislative programme designed to bring America out of its post-Depression blues. Much of the New-Deal legislation was of the type that the *Lochner* court would have struck down, and strike it down it did. This "New-Deal activism" of the "*Lochner*-era" finally came to an end in 1937 under a Presidential threat of packing the Court with New-Deal sympathetic judges.[44]

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[39] (1803) 5 US (1 Cranch) 137.

[40] Article 34.3.2° makes quite clear that the High Court has the power to consider the constitutionality of an Act of the Oireachtas – "Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of nay law having regard to the provisions of this Constitution…". See also, Article 34.4.3° in relation the Supreme Court. Judicial review *per se* is therefore quite legitimate.

[41] Solove, "The Darkest Domain: Deference, Judicial Review, and the Bill of Rights" (1999) 84 *Iowa L. Rev.* 941, at 978. See also Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (1942).

[42] The preference for laissez faire was a gradual development. See Wright, *The Growth of American Constitutionalism* (1942), at 87-88. See also, McCloskey, *The American Supreme Court* (1960), at 137-139.

[43] (1905) 198 US 64.

[44] Roosevelt's court-packing plan involved a proposal that the President would be entitled to appoint a Judge in place of any Supreme Court justice who did not retire at the age of seventy. The plan did not get past Congress. The traditional perception is that the Court was "scared" into capitulating on its New-Deal opposition. See

So, we can see that during the *Lochner*-era, the US Supreme Court would actively review socially progressive labour-related legislation on the basis that it interfered with the economic freedoms of employers and was therefore "off limits". Now, we have to get a little more technical. In the early days of the United States constitutional life-time, a debate arose as to how one could justify the exercise of state power. Two theories developed, which can be associated with the judgments of Iredell and Calder JJ. in the case of *Calder v. Bull*.[45] To put it briefly the first theory holds that state power is only legitimate when positively authorised by the Constitution. The second holds that state power is only *illegitimate* when expressly negatived by the Constitution. Again, keeping things brief, it was the former theory which eventually won out. Thus, the exercise of State power had to be positively authorised by the Constitution. The problem, however, was that the United States Constitution authorises very little, and so it was not long before the courts began to find *implied* powers. One such power is the famous "police power" – a power of the State to legislate in the interest of public morals, safety, health or welfare of the people.

Legislation then, which was supposed to be an exercise of the police power, was supposed to have an empirical foundation – it was actually (i.e. factually) supposed to advance some public interest in morals, health, safety or welfare. When the *Lochner*-era Court struck down socially progressive legislation it was basically saying that it did not believe that the legislation had the requisite factual foundation. The Court would *not* believe, for example, that the impugned statute in *Lochner* would actually protect health. The empirical basis for the law was lacking, and thus, it could not stand, because such justification was required. In 1916, the Oregon legislature passed a law, quite like that struck down in *Lochner*, limiting the working hours of women in laundries to ten hours per day. Louis Brandeis, an Oregon attorney, was engaged to defend the legislation and came before the Supreme Court to do so in the case of *Muller v. Oregon*.[46] Brandeis believed that he could meet the Court on the second of its *Lochner* principles by demonstrating that the impugned law was a factually and empirically sound exercise of the police power – he would show that the law was actually necessary for the health and welfare of women working in laundries.[47]

Thus was born the "Brandeis Brief". In *Muller*, Brandeis penned and submitted a 113 page document outlining the empirical basis for the Oregon law. The law was upheld. The importance of this development cannot be understated. At this time the Supreme Court was steadfastly opposed to just this kind of legislation. Nevertheless, in the face of clear and accurate social data supporting the view that this was a proper (and therefore constitutional) application of the police power, the Court had no choice but to uphold the law. The same tactic was again employed in

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Nowak & Rotunda, *Constitutional Law, op. cit.,* at 446. It should be noted, however, that it has been doubted whether this *really* brought an end to New-Deal opposition. Cushman has argued that there had been a host of political measures proposed to limit the Courts power during the New-Deal era itself which didn't scare the Court into submission – see Cushman, *Rethinking the New Deal Court* (1998), at 12. See also, Rehnquist, "The American Constitutional Experience" (1989) 24 *Ir. Jur.* 87 (ns) at 96-98. Another possible explanation for the end of the courts opposition is that Roosevelt had just been re-elected President by an overwhelming majority. The Court may have taken this as a sign that its laissez faire approach was simply not something the people believed in.

[45] (1798) 3 US (3 Dall.) 386.

[46] *Muller v Oregon* (1908) 208 US 412.

[47] See e.g. Mason, "The Case of the Overworked Laundress" in Garaty ed., *Quarrels That Have Shaped the Constitution* (1987), at 200-201.

Bunting v. Oregon[48] which concerned the restriction of working hours for factory and mill workers. Whereas Felix Frankfurter (later to become Supreme Court Justice) defended the legislation, he did so on the basis of another brief written by Brandeis, this time spanning over 1,000 pages of empirical justification for the law. Again, right in the midst of the *Lochner* era, the law was upheld.[49] The essence then, of the Brandeis brief is simple – it is just a presentation of the relevant empirical data to the Court to enable them to examine the empirical foundation of the law at hand.

So – what implications will this have for the work of law clerks and, in Ireland, Research Assistants? Well, here it comes. If judges are really going to go about conducting enquiries into the empirical foundations for law, then just *who* is going to do the work? When Louis Brandeis became a judge his law-clerks were given an answer – it was *their* job. As Solove has noted:

> "As a Justice, Brandeis immersed himself in facts, and his clerks spent much time in the Library of Congress gathering sociological data that would be stuffed into his opinions."[50]

Of course, whether this will in fact become the work of law clerks will depend upon the occurrence of two particular developments. The first is that courts in this day and age must actually become concerned with the empirical foundations of law. The second is that judges will not be satisfied with the submissions of lawyers alone in respect of those empirical foundations and will, as a result, turn to their law clerks for assistance. In true lawerly fashion, let me first deal with the question of whether the second development will occur.

Whether judges will refuse to be satisfied with the submissions of lawyers in respect of empirical foundations will obviously depend upon whether they can in fact rely on them to provide enough such information. There is some evidence that they can. For example, in the English case of *R(Hooper) v. Secretary of State for Work and Pensions*,[51] it was alleged that a failure to pay widow's benefit to widowers was an unlawful discrimination in breach of Article 14 of the European Convention of Human Rights. The original justification for this distinction was that the man was deemed to be the "breadwinner" of the married couple. Therefore, if his wife died he did not lose her financial support because she didn't provide any. If however, the husband died, the wife would be without any source of income and therefore needed state support. At the time the challenge was made in *Hooper*, this image of the non-earning wife could not be supported as a general proposition. Of course, to reach an accurate opinion on this, one would need very technical and precise data on the relative earning capacity of women and men and the proportionate increase of that capacity coupled with labour-force participation statistics. That would be data required if one was to reach a proper view on whether women really "needed" such social assistance any more than men in the present day. In *Hooper* this

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[48] *Bunting v Oregon* (1917) 243 US 426.

[49] It is perhaps interesting to note that two of the staunchest judicial opponents to independent fact review were actually Brandeis J and Frankfurter J themselves. Brandeis J clearly believed his efforts in *Muller* and *Bunting* should not have been necessary – see, for example, his comments in *Pacific States Box & Basket Co. v. White* 296 US 176 (1935). Frankfurter J, similarly, wrote several dissenting opinions on the topic of the intensity of fact-review post *Carolene Products* – see, for example, *West Virginia State Board of Education v. Barnette* (1943) 319 US 624 (dissenting).

[50] See Solove, "The Darkest Domain: Deference, Judicial Review, and the Bill of Rights" (1999) 84 *Iowa L. Rev.* 941, at 984

[51] *R (Hooper) v Secretary of State for Work and Pensions* [2003] 3 All ER 673.

evidence was provided through the use of expert witnesses and skilled cross-examination. There was not, in other words, a need for judicial initiative and for the sitting judge to, like Justice Brandeis may have, cast his researchers into the library's to come up with this data.

However, the ability of lawyers is always going to vary. In some cases wholly inadequate data will be presented. In some cases, the judge will not care because he may believe it is no part of his role to think about such data. In other cases, more pro-active judges may have no choice but to scatter his assistants across library's to research complex social data in support (or not in support) of legislation under challenge.

Of course, this all begs one important question – *should* judges really be doing this? This is not the place to enter a discussion on the nuances of constitutional theory and about whether empirical enquiry is right or wrong. We are simply concerned with examining the potential for the role of the clerk *if* our judges are inclined to conduct such an enquiry. That said, I wish to raise one final point about the growing importance of proportionality-based judicial review and the relevance it has for empirical enquiry. As is well known, proportionality-based review is a mainstay of the European Court of Human Rights and consequently *should* be applied in the domestic courts of the High Contracting States. If you allow me to paraphrase slightly (taking on board Irish, Canadian and European aspects of the doctrine[52]), the proportionality test centres around the following questions:

1. Is the objective of the legislation legitimate? Does it pursue an aim pressing in a free and democratic society?
2. Is there a rational connection between the objective and the means chosen to pursue it?
3. Are there any alternative ways in which the objective could be met whilst at the same time doing less violence to the right at hand?

Depending on how deferential a judge believes he should be to the legislature, the proportionality test contains a wealth of potential for empirical enquiry. As Danielle Pinard has noted in a collection of essays, proportionality review is essentially an attempt to demonstrate the factual necessity of law – i.e. that it is factually necessary to pursue a particular policy.[53] For example, a judge may well see fit to follow the example of some Canadian judges and enquire as to how likely it is that that the harm sought to be prevented by the legislation will actually materialise, and moreover, how likely it is that the conduct which is restricted (e.g. free speech) will create the feared harm?[54] Alternatively, when confronted with the question of alternative means to pursue legislative objectives, a judge may well require factual demonstration of how closely tailored particular means are to the pursuit of particular objectives.

Now, all of this is admittedly relatively abstract. However, it does raise the point that proportionality review is not a million miles away from the kind of review that the *Lochner*-era

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[52] These "steps" in the proportionality enquiry are drawn from the leading Irish formulation in *Heaney v. Ireland* [1994] 3 IR 593 and the leading Canadian formulation in *R. v. Oakes* 1986] 1 SCR 103.

[53] See e.g. Pinard, "Institutional Boundaries and Judicial Review – Some Thoughts on How the Court is Going about Its Business: Desperately Seeking Coherence", Paper Delivered at Osgoode Hall Law School Professional Development Program, March 2004; Pinard, "Charter and Context: The Facts for Which We Need Evidence, and the Mysterious Other Ones", Delivered at Osgoode Hall Law School Professional Development Program, April 2001.

[54] For example if the objective of preventing harm to children was invoked to justify measures preventing the possession of child pornography, then it would have to be shown that possession of such (which is the conduct sought to be prohibited) would actually produce such harm (which is the feared result). See e.g. the majority decision in *The Queen v Sharpe* [2001] SCCDJ 42.

Supreme Court was involved in. They both concerned the factual or empirical justification for laws. Speaking again from an Irish perspective, it is not wholly unheard of to see judges engaging in strong fact-based proportionality review. For example in *Kelly v. The Minister for the Environment*[55] the plaintiff sought to challenge legislation which required a candidate for parliamentary election to front a substantial deposit before he was accepted for candidacy. During argument, the point was raised that the objective of preventing the proliferation of "crank candidates" could have been met by the use of a signature system whereby prospective candidates could prove their sincerity by collecting a substantial amount of "nominating" signatures. Clearly then an issue is raised as to the respective efficacy of each method for securing an admittedly legitimate legislative objective. Like in the *Hooper* case, such evidence was provided through the expert testimony of a well-known Irish political scientist. The *Kelly* case, however, illustrates that at least in some cases, Irish judges are willing to "get serious" about the empirical aspects of proportionality review.

If the proportionality experiment grows across Europe through the ECHR, law clerks simply *must* be prepared for the possibility that they will be called upon to "fill in the blanks" when it comes to examining the factual foundation for legislation. This of course, would raise issues of profound importance in respect of their ability to do such work and, moreover, in respect of the administrative infrastructure necessary to do such work and do it well. With this in mind, I would submit that a re-evaluation of the role of the law clerk as support for the decision-making role of constitutional court judges is necessary and should be a central topic for discussion in the future.

[55] [2002] 4 I.R. 191.