AMICUS CURIAE CONCEPT IN MODERN JUSTICE

Concept paper for the Constitutional Court of Ukraine

10 June 2022

Prepared by the Special Advisers to the Constitutional Court of Ukraine:

Alexandru TĂNASE
President (2011-2017)
Constitutional Court of Moldova

George PAPUASHVILI
President (2006-2016)
Constitutional Court of Georgia

OSCE Organization for Security and Co-operation in Europe
Project Co-ordinator in Ukraine

Federal Foreign Office

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Published within the project «Support to Ukraine's Human Rights Protection by Enhancing Accessibility of Constitutional Justice», implemented by the OSCE Project Co-ordinator in Ukraine with the financial support of the Government of the Federal Republic of Germany. This publication expresses only the views of the authors. They do not necessarily coincide with the official position of the OSCE Project Co-ordinator in Ukraine.

I. The origin and key function of Amicus Briefs

Amicus curiae (*Amicus*) or "friend-of-the-court" briefs are filed by someone with a strong interest in the subject matter of a lawsuit, but who is not a party to nor directly involved with the litigation.[1]

The amicus may have "unique information or perspective that could help the court" going beyond what the parties can, or wish to, provide. **Thus, an amicus' interest in the case is both more removed and frequently broader**. *Amicus* may have an interest in another case that could be affected by the court's decision (but not so related that the amicus could actually intervene in the case).

Amicus may be filed to the constitutional and other supreme courts, by an individual or legal person, a nongovernmental organization, or by an international organization. Amicus briefs "are generally aimed at protecting the interests of individuals or organizations who are absent from the proceedings but whose interests are potentially jeopardized by the litigation".[2]

Amicus Curiae as a Key Element of Public Interest Law

The term "public interest law" does not describe any area of legislative regulation or branch of law. Its appearance was justified by the need to emphasize whose interests' lawyers working in this area represent. One of the most significant global developments in "public interest law" in recent decades has been the global spread of the practice of Amicus briefs. Amicus Curiae has undoubtedly become one of the most important tools for raising and examining issues, primarily of a topical nature, which can then be considered by the Society in the courts.

What they are, Amicus Curiae, or Amicus briefs, and where did they come from?

Amicus briefs come from the phrase Amicus Curiae, which is Latin from friend of the court. It is a term that dates back actually to Roman Law, where the friend of the court, was literally the friend of the court. It was a guy who would sit in the court, knew lot about a law and can say thinks like: *"… o, 10 years ago there was a case about this. Didi you guys know that?"*, or if a litigant didn't show up or somebody died, the court can say *"…you know Claudius"* can you just make that argument for us.

It evolved over the time to take account for the fact that well the legal system is set up as a dispute between two people. It is kind of a duel, a trial by combat between two people. The Court cases actually affect the rights of a lot of more people and the courts at common law

[1] Judge Neal Nettesheim & Clare Ryan, Friends of the Court Briefs: What the Curiae Wants in an Amicus, 80 WIS. LAW., May 2007, at 11.

[2] Linda Sandstrom Simard, An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism, 27 Rev. Litig. 669, 674 (2008).

were very unwilling, just a lot of people show up and interfere in what was supposed to be what lawsuit between person A and person B. But, person C frequently had something to say, and so that person would appoint themselves as a friend of the Court, not really out of concern for the Court, but to advance their own interests.

There is a famous 18th century case in England[3] where the law was a lawsuit for a contract and someone sued a woman to enforce this contract and woman's defence was: "she was married, and married woman weren't allowed to form contracts, and during court case this guy shows up, as *Amicus curiae,* and he says: I'm the guy she was married to, and we totally weren't married! I am married to someone else, she's just trying to embarrass me, by getting the court to say we were married!

It is sort of the classic example, it is a lesson actually that the world has always been as wired as it is now. It's an example of how **those who** are strangers to the lawsuit have kind of a lot of things to say about the lawsuit, who lawsuits can affect their rights to.

In modern times, that is evolved from this woman who was trying to pretend someone is married to her, to a kind of broader concerns. We have an ideological concern, we can have concerns about the law or the Constitution and concerns of the sort of ideological nature that we bring to bear. One of the things that we will see sometimes, is the parties to the actual dispute will have a very narrow interest in the way is resolved and sometimes they want it to resolve in a way that is overall not good for society. So, one of the roles that Amicus curiae play is providing that broader **perspective,** so the courts do not get overly focused on just the narrow dispute before them.

Historically as with a lot of things in public interest law, the primary historical example goes back to the NAACP (National Association for the Advancement of Coloured People) crusade against legal segregation that was a lot of direct litigation but a lot of amicus briefs presenting social science research to the courts about what segregation was about, the effects of segregation and trying to broaden the court's perspectives.

We should try to use the amicus briefs to provide useful information to the courts and sort of let the courts know about the context in which they're making these decisions, to help them don't go down the wrong path.

We can frequently see cases where there is a lawyer who has a particular interest for their client. This comes up frequently criminal defence cases. Someone's been charged with a crime. They have a criminal defence lawyer and correctly that criminal defence lawyer wants to get his client off. That's their job, but, the case can tur on important constitutional issues.

[3] Bigamy anecdote is famous 18th century English case. The defendant in that case, she was married to somebody else. There is not the other guy. She was originally married to, so the guy who come in as the amicus curiae and said we weren't married, actually was married to that woman. His marriage was annulled because she had previously been married to yet another buys and so that marriage was invalid and then the second husband went to married to someone else in him married someone else. So, infuriated this woman, that she recruited a fifth guy she had a lot of male friends, to sue her for a contract so she could get a course yes, a she was married to the second guy.

It was a case in US about the non-delegation doctrine. Is this important doctrine about Congress can give administrative agencies or give the executive branch the power to make their own law.

It came up in the context of the criminal case where the defendant was frankly represented by people who were not that excited about the non-delegation doctrine. They didn't get into criminal defence to you know champion the non-delegation doctrine they probably disagreed with the non-delegation doctrine. **It was the central issue in the case and the important thing that we can do in such a case is to come in and say**: *„we have nothing to do with this criminal dispute, but we do have broader interests in the constitutional theory here and us tell you how the non-delegation doctrine has worked in the states. Let us tell you about how this is played out and give you some examples you can use. We will not come up in the parties' briefs but go directly to the legal issue you're considering".*

In all countries we have a different entity like NGO-s, think tanks, independent institutes etc., who have a broad nationwide expertise on eminent domain issues and they have a comprehensive knowledge of the way.

The most famous historical Amicus curiae in USA was Louis Brandeis' brief in 1908 *Muller v. Oregon*[4].

At the beginning of the 20th century in most Supreme Court cases in US, the proceedings went without any *Amicus curiae* at all, but today there is almost no Supreme Courts that proceeds at list one amicus curiae. Every case before the courts draws *Amicus Curiae,* and usual multiple *amici*. In high-profile cases we can find dozens of Amicus briefs (in some cases 50, 60, 70).

Some people joke that the term "friend of the court" is no longer appropriate, because this people are real enemies of the court. They are showing up without anything new to say, just making the judges read more and so there is a challenge for the courts in kind of sifting through what this Amicus Curiae are. There is a challenge for people filing the Amicus curiae to make sure that they are doing so for a good reason, that they provide something useful and sort of create a reputation with the courts.

Whether we accept the Roman or English sources of the amicus curiae institution, we must note that over time the institution has detached itself from its origins and evolved, becoming a tool often used by various bodies, especially non-governmental organizations (4), which did not have a sufficient legal interest in acting as parties, but nevertheless had a certain interest in the outcome and impact on the solution in various cases. Non-governmental organizations have made significant use of this tool to support the group of people or the cause they represent, and this practice has been widely adopted by national institutes for the protection of human rights, equality bodies, and by professional organizations or trade unions.

[4] Muller v. Oregon, one of the most important U.S. Supreme Court cases of the Progressive Era, upheld an Oregon law limiting the workday for female wage earners to ten hours. https://www.oregonencyclopedia.org/articles/muller_v_oregon_1908_/#.YZS_DGBByUk

II. Amicus in shaping public policies

In the past several decades, many countries around the world experienced significant developments in the usage of the Amicus. The institution of Amicus Curiae is related to the fundamental changes in the conception and the function of the work of courts since the 1980s and 1990s.

Amici offer assistance to the courts to help them arrive at the most appropriate solution. Its participation is particularly important when courts have to resolve novel and complex legal and factual issues or in cases concerning controversial and disputed issues. Amici enrich and supplement the legal arguments and perspectives presented by the parties. Amici may also inform the court of the broader consequences of the cases, by showing the potential implications of a decision or by pointing out its consequences for people or groups not party to the suit.

In 2019, The Israeli researcher, Prof. Shai Farber, published multidimensional research on the Amicus institution, entitled "The Amicus Curiae Phenomenon - Theory, Causes and Meanings"[5], which we will refer to several times in this Concept Paper. This research examines the increasing interest in the institution of "Amicus Curiae," which is used in Common law, Civil law, and International law.

Amicus briefs have become a powerful and effective tool in developing public policies through the constitutional or supreme courts. In cases involving significant constitutional or statutory policies, they are an important vehicle "for non-party participation in public law litigation affecting the body politic."[6] The mere filing of an amicus brief can signal to a court that a case is significant and implicates broader issues than just the litigants' interests.[7]

Amicus briefs also can address policy or social issues outside the technical limits of the case or that were not addressed by the parties' briefs, due to page limits or other considerations. In doing so, an amicus brief can advise the court of a decision's unintended ramifications—which is typically an issue of significant concern to courts[8]—by providing the experience of the amicus relative to the issue being decided.

Because of the involvement of the judicial system in the public sphere, several substantial and procedural changes have occurred in the work of the courts, including an adaptation of new work methods and new litigation forms. A significant part of the legal discussions turned from classic litigation (dealing with questions about legal rights of individual controversies) into broader discussions encompassing issues that relate to a broader spectrum of the public.

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5 The Amicus Curiae Phenomenon - Theory, Causes and Meanings Transnational Law & Contemporary Problems (TLCP) (2019)

6 Ibid see p.4

7 Nettesheim & Ryan, supra note 1, at 11.

8 SIMPSON & VASALY, supra note 3, at 41. See also, Kelly Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & POL. 33, 67-68 (2004).

Many times, these discussions include the use of interdisciplinary sources and diverse legal sources. In connection to the form of such discussions, new work methods were adopted, such as the use of mediation as a dispute resolution tool. Also, new procedural causes were adopted, certain remedies and equitable reliefs have been adapted to the ever-changing circumstances, and many proceedings are conducted outside of courts but supervised closely by judges.

These new methods caused procedural changes resulting in the inclusion of more participants taking part in the proceedings, such as the formal parties to the proceeding, court-appointed experts, various NGOs, and various interest groups.

One of the main consequences of these changes is that many courts around the world have adopted and improved a new practice, which is simultaneously also a cause for these changes, the Amicus Curiae. The Amicus practice is one of the most significant changes in the practical work of courts, which simultaneously affects and was affected by other changes to the work of the courts.

III. Classification of Amicus

Amicus briefs serve multiple purposes, including to:

a) address policy issues; provide a more sympathetic advocacy;

b) supplement or bolster a party's brief;

c) provide historical perspective or technical assistance;

d) endorse a party;

e) or seek to mitigate or expand the effects of a potentially important prior court opinion, depending on whether the opinion is damaging or helpful[9].

We can classify the Amicus curiae depending on their own characteristics, legal regulation, and court practice. To summarize, three models of amicus curiae can be distinguished:

i. Permissive model of Amicus

Permissive model of Amicus, when the court, at the request of an outsider, grants permission for the presentation of amicus curiae or, directly on its own initiative, requests the presentation of amicus. For example, according to Art. 27a of the Federal Constitutional Court Act, § 23 (2) The presiding Justice or, if a decision pursuant to § 93c is possible, the reporting Justice shall without delay serve the application on the respondent, other parties and any third parties who are given the opportunity to submit a statement pursuant to § 27a and shall request that they submit a statement on the matter within a period to be specified.[10]

According to the Rules of the Supreme Court of Canada (art. 92, Appointment of Amicus Curiae) the Court or a judge may appoint an amicus curia in an appeal. The position of a third party, who is not a participant in the proceedings may be presented to the court on the court's own initiative.[11]

In some jurisdictions of this model, amicus curiae can be presented only with the permission of the court or with the consent of all parties to the proceeding. According to the R. 625-3 du Code de justice administrative of France, when a technical question does not require complex investigations, **the judging panel may instruct the person it appoints to provide it with an opinion on the points it determines**. It may, for this purpose, appoint a person appearing

[9] Regan Wm. Simpson & Mary R. Vasaly, The Amicus Brief: How To Be A Good Friend Ofthe Court 24 (2nd Ed. 2004).

[10] Act on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz – BVerfGG) BVerfGG.pdf (bundesverfassungsgericht.de)

[11] Rules of the Supreme Court of Canada (SOR/2002-156). https://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-156/index.html

on one of the tables drawn up pursuant to Article R. 221-9. It may, where appropriate, designate any other person of its choice. The consultant, to whom the case file is not given, does not have to operate by respecting a contradictory procedure with regard to the parties. The opinion is recorded in writing. It is communicated to the parties by the court.[12]

ii. Amicus accepted with the consent of the parties

According to the US Supreme Court Rules 37.2(a) and 37.3(a), no motion for leave to file an amicus brief is necessary at the cert or merits stage **if the brief reflects that written consent of all parties has been provided**. Many parties provide blanket consent to the filing of all amicus briefs, and such consent is typically reflected on the Court's docket.

If blanket consent is provided at the cert stage, it does not apply at the merits stage; a party wishing to consent to the filing of all amicus briefs at the merits stage must file a separate blanket consent. Parties may also provide written consent with respect to individual amicus briefs directly to counsel for the amicus; there is no requirement that the individual written consent be submitted along with the brief, only that the brief note that written consent has been provided by counsel of record for each party.[13]

According to the art. 28 (2) of the Constitutional Court Act of Slovenia, the Constitutional Court may obtain necessary clarifications also from other participants in proceedings and from state authorities, local community authorities, and bearers of public authority; it may also obtain opinions from experts and other organizations, examine witnesses or other evidence, or obtain evidence from other courts or authorities.[14]

iii. Mixed model of Amicus

Mixed model of Amicus is the model, when the court can request an opinion from an outsider, but other persons who are not participants in the proceedings can also submit their conclusions, the inclusion of which in the case file depends on the discretion of the court. This model is provided for in the legislation (or by the jurisprudence of the courts) of Ukraine, Moldova, Georgia, Romania, etc.

[12] Code de justice administrative Code de justice administrative (Mise à jour du 2022-05-05) (droit.org)

[13] Memorandum to those intending to file an amicus curiae brief in the supreme court of the united states Guide to Filing Amicus Curiae (supremecourt.gov)

[14] Constitutional Court Act of Slovenia Statutes – Constitutional Court RS (us-rs.si)

IV. The role of Amicus in changing judicial system

Deliberative Democracy considers the participation of various representatives in the discussions preceding the decision (the "Decision-making Process") as the source of legitimacy for the final decision. Because courts have become significant forums for Decision-Making Processes in the public sphere, the Amicus Curiae is growing stronger. This process occurs because the very participation of citizens in the legal process constitutes, in itself, a certain realization of the democratic idea.[15]

Society's desire to influence the Decision-Making Processes is composed of three interrelated aspects that power the Amicus Curiae institution:

a) *economic considerations that encourage the use of Amicus;*

b) *the strengthening of interest groups within society-especially NGOs; and,*

c) *the empowerment of the role of lawyers and their ubiquity in society-including changes in the perception of their role.*

Amicus curiae interventions can be very powerful before national courts, including lower courts. The rules for interventions vary from country to country, and in some countries, there are no rules at all. A lack of rules does not mean that amicus curiae are not accepted: it simply means there are no rules and courts may decide to admit an intervention at their discretion.

Many courts, including those in Europe, Asia, Latin America, Africa, and those, which exist internationally, have adopted the Amicus Curiae Practice. Other courts around the world, such the U.S. and Canada, which have allowed Amicus, have increased their use of Amicus. Courts have adopted the Amicus practice as a procedural tool to bridge gaps in the evolving nature of the courts. For example, given the dynamic social and legal reality and also the growing awareness of the court's role in society, courts have adopted Amicus, which helps required adjustments in the world of courts for two intertwined reasons, discussed below.

Due to the expansion of the law and the complexity of the judicial process, courts are not experts—and are not supposed to be experts—in all fields of knowledge presented to them. Judges do not command the expertise, and of course, cannot command expertise in all existing legal subdivisions, which continue to regularly evolve and change.

When judges are appointed to the bench, it is because the judge is an expert in the field of law. They are not economists, psychologists, sociologists, or philosophers, but jurists who

[15] Paul M. Collins, Jr., Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation, 38 Law & Soc'y REV. 807, 810-16 (2004); Jane Man bridge, Conflict and Self-Interest in Deliberation, in DELIBERATIVE DEMOCRACY AND ITSDISCONTENTS 107 (Samantha Besson & Jos6 Luis Marti eds., 2006)

have been appointed to the bench for adjudication. Needless to say, that even the broadest education is incapable of providing judges with the profound understanding required in many areas of knowledge in connection with the legal issues they are supposed to address.

In order for judges to successfully fulfil and address their modern judicial role with the diverse and complex issues that they are presented, judges require broad and extensive information and the assistance of parties with different perspectives and expertise. This information is often not available merely by the formal parties in the proceeding—or in cases where the formal parties have the relevant information but do not wish to present it to the court to preserve their interests. Therefore, courts require "external" information which is not only relevant to the specific proceeding before them, but which also assists them in formulating adequate legal policy by being forward-looking and anticipating the direct impacts on non-represented third parties in the proceedings.

It should be noted that the information presented by Amicus is unique and different from the information presented to courts by expert witnesses for several reasons. Firstly, the purpose of the expert witness is entirely different from that of the Amicus. While the role of the expert witness is to discuss the significance of the specific facts presented to the court from a professional standpoint, (e.g., medical doctor or ballistics specialist), the role of the Amicus (e.g., a human rights organization or women's rights organization) is to represent an interest or perspective of the public at large. This information should be heard by the court, especially, when it concerns a public issue that might impact broad sections of society other than the formal litigants to the legal proceeding.

Secondly, in most areas in which courts are interested in receiving social information and different perspectives, there are no "expert witnesses" that can be used; this stem mainly from existing practice which does not accommodate submission of expert testimony in such circumstances[16]. Thirdly, not all organizations or individuals who wish to present their position in an Amicus meet the criteria required to recognize their knowledge as knowledge that reaches the level of expertise admissible in courts. In contrast to testimony of an expert witness, the expertise of the Amicus is not a condition for submitting a brief as is required for expert testimony.

That is, the Amicus plays this vital role. As a result of courts increased involvement in society and the new and dynamic legal fields that are inherent in the modern State, courts require a wide range of Amicus to assist them in the ever-growing fields and issues that they are required to address. Such Amicus can be academics,[17] government organizations, NGOs (such as human rights organizations or environmental organizations), or representatives of a professional association (e.g., bar association). [18]

[16] Shana M. Solomon & Edward J. Hackett, Setting Boundaries Between Science and Law:Lessons from Daubert v. Merrell Dow Pharmaceuticals, Inc., 21 Sci. TECH. & HUM. VALUES 131,146 (1996).

[17] M. Collins Jr., Friends of the Court: Examining the Influence of Amicus Curiae Participation inU.S. Supreme Court Litigation, 38 LAw & Soc'Y REV. 807, 814 (2004).

[18] Brief for Respondent, Fisher v. Univ. of Tex. at Austin, 579 U.S. (2016) (No. 11-345),2012 WL 3540402 (supporting the need for diversity in education).

Amicus assist courts that review a wide range of social issues in various areas of knowledge, some of which are cutting-edge and have never been reviewed in the past by the courts, including a broad spectrum of new sources of information and different viewpoints from those presented by the formal parties to the legal proceedings. For example, the United States Supreme Court Justice Stephen Breyer emphasized this by calling upon the American public and various interest groups to submit Amicus briefs to courts to assist judges with their work: "[Amicus] briefs play an important role in educating the judges on potentially relevant technical matters, helping to make us not experts, but moderately educated lay persons, and that education helps to improve the quality of our decisions."

The frequent changes in courts' work and the complexity of the law, described above, have further strengthened the understanding that the information presented to courts is never complete. In light of that—to carry out their work in the best way—sometimes courts require various types of information (e.g., economic, social, psychological, environmental, etc.) presented not only by the formal parties but also by third parties.

Even though courts have traditionally used facts and evidence to come to their decisions, the use of Amicus shows that court's capacity and willingness to use information from a broad spectrum of fields has increased.[19] From the court's perspective, law and fact alone leave the court in a state of incompleteness, and the additional knowledge from Amicus may help the court reach a more complete decision[20].

The supplementary information presented by Amicus assists courts not only in studying the overall complexity of the issue at hand but also in identifying a variety of possible forward-looking solutions to such issues. Such broad and comprehensive information, especially in fields that courts have not addressed before, and which courts do not have sufficient expertise or understanding to address, helps to expand the perspective of the courts in making novel decisions.[21]

This is achieved by allowing the courts to accept factual arguments that are not familiar to them, social arguments stemming from different perspectives, or legal arguments that enable courts to formulate an adequate judicial policy. Amicus can even help minimize and reduce judicial errors by allowing the judge to receive extensive social knowledge, which is held by bodies that are not part of the formal judicial process.[22] In this way, the information presented by Amicus may prevent reliance on exclusive sources of knowledge.

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[19] The philosopher Luciano Floridi argued that the age of information has blurred the boundaries between the individual and the information environment-or as he called it, the "info-sphere." SeeLUCIANO FLORIDI, INFORMATION: A VERY SHORT INTRODUCTION (2010); TEDx Talks, LucianoFloridi "The Fourth Technological Revolution

[20] Stephen Breyer, The Interdependence of Science and Law, 82 JUDICATURE 24, 26 (1998). Justice Breyer emphasized that Amicus are helping courts fulfill their function in modern society. Justice Breyer also holds the record as the Justice with most citations of Amicus briefs by citing Amicus briefs in approximately 63% of his decisions between the years 2014 and 2015. Franze & Anderson, supra note 9, at 2.

[21] Spriggs & Wahlbeck, note 167

[22] Id

When courts discuss broad social issues instead of viewing the conflict from the narrow viewpoint of the individual dispute, their awareness for the broad implications of their decisions on unrepresented third parties is amplified. The idea behind it is that almost every decision in an individual conflict impacts third parties not taking part in the litigation. This mindset requires a willingness to accept differing viewpoints of additional parties who are not part of the formal dispute but are likely to be affected by the court's rulings. When we consider the courts' increased involvement in society as explained previously, we find that Amici help courts fully realize the political, social, ecological, and economic implications of their judicial decisions that exceed the narrow boundaries of the two parties at the heart of the conflict.

This could mean court decisions impact a wider circle of individuals, like different interest groups and the public at large. There are other illustrations of the courts' increasing awareness to the overall implications of their decision and the use of the Amicus practice as a way to accommodate such awareness.

This is evident throughout many judicial systems around the world including in common law countries, the European Court of Human Rights, Latin American courts for Human Rights, international arbitration proceedings, 175 and in the International Criminal Court. The institutional explanation, by which the courts receive information from different groups, as reflected in the current dynamic legal reality, also helps to explain the ever-growing use of Amicus practice in international law. As outlined in the first section, starting in the early 1990s, various organizations for the first time, were allowed, in contradiction of the long running judicial tradition, to intervene as Amicus in legal proceedings conducted in international courts (e.g., European Court of Human Rights).[23]

Similarly, the special international criminal tribunals set up to investigate war crimes committed in Yugoslavia, Rwanda, and Sierra Leone also reached similar outcomes with allowing Amicus intervention.[24] Such special international tribunals also sought to obtain social, legal, or comparative information, from Amicus Briefs, that the formal parties to the proceeding did not provide, either because of the inability of the former parties, or the desire of the formal parties to preserve their interests. [25]

The increasing awareness of the courts to the consequences of their rulings on third parties not directly related to the proceeding can also explain the increasing use of the Amicus practice in European and Latin American countries.[26] In contrast to a judicial tradition that recognized the Amicus practice but did not adopt it, various courts throughout civil law

[23] See Gomez, note 70; Jackie Smith et al., Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s, 20 HUM. RTS. Q. 379 (1998).

[24] International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and evidence, IT/32/Rev.50, r. 74 (July 8, 2015); Special Court for Sierra Leone, Rules of Procedure and Evidence, r. 74 (Jan 16, 2002)

[25] For a critique on the use of Amicus in international criminal law see Jona Razzaque, Changing Role of Friends of the Court in the International Courts and Tribunals, 1 NON-STATE ACTORS &INT'L L. 169 (2002).

[26] Kochevar, supra note 5, at 1659-63

countries have adopted the Amicus practice.[27] Thus, for instance, French courts have begun to add third parties as Amicus in a series of legal cases in connection to surrogacy agreements, compensation for HIV patients, euthanasia cases, and so forth.[28] It can be argued, with due caution, that this development is a somewhat surprising development in the changes of civil law in such countries. This is a somewhat surprising development because civil law provides its judges certain procedural tools that provide a similar function to that of the Amicus already—such as the ability to receive certain types of information without the approval of the formal parties.[29] This development in the work of the civil law courts, further elaborated on in section below, demonstrates that the existing legal procedures in place in civil law countries are insufficient and that the Amicus as an additional new tool is required to enable courts to fulfil their role.

[27] Such as Ethiopia, Uganda, Namibia, South Korea, Thailand, and various other countries in Latin America (Mexico, Argentina, Peru, and Brazil). See generally Kochevar, supra note 5; Medeiros, supra note 76; Yoseph Mulugeta Badwaza, Public Interest Litigation as Practiced bySouth African Human Rights NGOs: Any Lessons for Ethiopia? (Oct. 5, 2005) (unpublished L.L.M.paper) (on file with the University of Pretoria Center for Human Rights).

[28] See Supreme Court [S. Ct.], Brief of the Int'l Trademark Ass'n as Amicus Curiae, Prefel S.A. v.Jae Ik Choi, July 23, 2002, (S. Kor.),[Vol. 29:

[29] John H. Langbein, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823, 826, 833-39 (1985) (As well known, in the Inquisitorial system in most of the Civil law countries, the judges play an active role in determining the facts in the case before them, as opposed to the Adversary system in which the judge has a passive role). See generally, R. DAVID & J. BRIERLEY, MAJORLEGAL SYSTEMS IN THE WORLD TODAY (1978).184 See DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES? (Susan J.Pharr & Robert D. Putnam eds., 2000). Fall 2019]

V. Amicus Curiae in Constitutional Justice

Amicus brief filings in constitutional jurisdiction have increased significantly within the past few decades, for several reasons —recognition that the consequences of constitutional court decisions can reach far beyond a specific case. Additionally, an amicus brief may be a highly effective way to provide the constitutional court with the economic, social science, or political data necessary for an informed decision.

However, the Amicus is used in constitutional justice for the following purposes:

1) *addressing additional legal and factual claims not raised by the formal parties to the litigation;*

2) *providing certain types of information (e.g., economic, environmental, historical, etc.) which the formal parties do not possess or are not willing to present to the court, as it might adversely impact their interests;*

3) *presenting the claims or arguments made by one of the formal parties in an alternative way, showing their support for such arguments and trying to persuade the court to concur with the arguments raised by the formal party which the Amicus supports.*

First and foremost is the long judicial adversarial tradition that does not favour the addition of third parties to legal proceedings. In addition, third-party claims may negatively impact the legal proceedings and the formal parties' interests. At a certain stage, in the early 1990s and early 2000s, this judicial position was "weakened", and a more flexible approach was adopted providing greater consideration for the interests of third-party involvement in the legal proceedings.[30]

The Amicus is a legal procedure which allows an unrelated third party with some interest in the litigation to present its views to the court on the issues at stake by filing an Amicus brief. There are differences between Amicus in various courts, legal systems, and international institutions.

The institution of Amicus refers to the broad usage of Amicus in common law, civil law, and international law. There is a significant rise in the use of the Amicus in most common law countries. Furthermore, an increase of the use of Amicus is also widespread in many of the civil law countries from Europe and Latin America. In addition, in the last two decades, the practice of the Amicus has increased considerably and become dominant in international law, not only with respect to procedures relating to human rights (e.g., European Courts and Latin American Courts for Human Rights), but also concerning international arbitration procedures used by international commercial organizations, which are spearheaded by the World Trade Organization.

[30] Ibid see p.5

In the past Amici mainly were submitted in cases conducted in the highest court within a specific country, now Amici join various courts and tribunals, especially the Constitutional Courts. In addition, the variety and type of entities that have started using the Amicus to influence a court's decision have increased significantly, including human rights, environmental, religious, and women's rights organizations. In addition to such private organizations, public entities such as governmental bodies, political parties, or economic organizations have started using Amicus as a tool to advance their interests.

A comparative examination of judicial litigation in the last three decades of common, civil, and international law shows that in a relatively short period of time, dozens of countries around the world, including developing countries from Latin America, Africa, Asia, and Eastern Europe-and most international institutions have adopted the *Amicus practice* or have significantly increased its use. Taking a broad view of such examination, the processes in most countries that have recently adopted the Amicus practice are relatively similar to one another.

The clear merit of the amicus intervention in constitutional adjudication process is that it may be able to introduce a new or alternative legal position and introduce sociological evidence to a court.[31] Given the low costs and flexibility associated with this method of participation, it is the clear choice for public interest groups when they decide to litigate as a non-party. Within the South African context, groups and organisations have been very receptive to utilising amicus curiae participation as a cost-effective and efficient method of representing the public interest. For instance, in almost all customary cases brought before the Constitutional Court of South Africa, amicus curiae applications were filed, and a range of women's and public interest organisations were allowed to make submissions to the Court.

The Constitutional Court of South Africa Rules require that a non-party seeking to be admitted as an amicus curia have an "interest in any matter before the Court" (Rule 10). The potential amicus must describe this interest in the initial submission to the Court. The Constitutional Court has held that this interest is not the same as the "direct interest" required for intervention (or common law *locus standi*). This difference matters because a person with a "direct and substantial interest" may intervene in a case as of right whilst an amicus needs permission to submit heads of argument; in turn, a person who intervenes as a party has procedural rights, such as the right to adduce evidence and to present oral argument to the court, whilst an amicus has no such rights unless they are specifically granted by the Court".

It is noteworthy that the Constitutional Court of Italy has changed its approach famously in 2020[32] to allow Non-governmental organisations and interest groups to engage in constitutional proceedings. In particular, written opinions can be presented by all non-profit social groups and all institutional bodies representing collective or diffuse interests relevant to the issues discussed. The Court is therefore willing to hear from the so-called Amici Curiae:

[31] Collins, Paul M. Friends of the Supreme Court: Interest Groups and Judicial Decision Making. New York: Oxford University Press, 2008. P. 27.

[32] Romagnoli, Matteo: The Italian Constitutional Court Opens Up to Hear the Voice of Civil Society, VerfBlog, 2020/2/15, https://verfassungsblog.de/the-italian-constitutional-court-opens-up-to-hear-the-voice-of-civil-society/

institutional actors/bodies, trade associations, NGOs. Secondly, the Constitutional Court made changes regarding the intervention of third parties concerning incidental proceedings initiated by a court during civil, criminal or administrative cases.

The range of potential interveners will now be extended to other parties – in addition to the parties to the case and the Prime Minister (and the President of the relevant Regional Council, if a regional law is concerned) – provided that they have a valid and directly and immediately relevant interest in the decision. When appropriate, prospective interveners may also be authorised to access the case files of the constitutional proceedings prior to the hearing before the Court.

The need for a change regarding the participation of third parties was strongly felt by academics as well as constitutional judges themselves (as demonstrated, for instance, by the Seminar on "**Interventions of third parties and 'Amici Curiae'** in the assessing of the constitutional legitimacy of laws, also in the light of the experience of other national and supranational courts", organized by the Constitutional Court on 18 December 2018). The Italian Constitutional Court, similar to many constitutional review bodies in Europe and beyond, is faced with challenges reflecting major society concerns: climate change, the influence of new technologies on people's lives and freedoms, the economic crisis and its impact on welfare, and the recurrent political attack against some pillars of the rule of law. On the one hand, these radical changes require the judges of the Constitutional Court more frequently to consider specialist scientific knowledge which they are unable to acquire on their own; on the other hand, these changes make **participation of civil society all the more important in order to ensure that their point of view as a stakeholder** will be taken into account. Against this background, it becomes clear why the Constitutional Court has decided to follow the trends of other national and supranational constitutional to open litigation.

The Court seems to have finally decided to equip itself with a complete toolbox, not only by choosing between the methods of intervention, but also by regulating to hear well-known experts in chambers in the presence of the parties involved. The court has therefore chosen the "triple-track" route, identifying three separate kinds of intervention of external subjects, which are very different both in terms of requirements and in terms of guarantee and discipline. To sum up, the Constitutional Judges, with a very simple and streamlined approach, have provided a manageable and less formalized regulation of the Amici Curiae, unlike the intervention of third parties, which naturally responds to the general principles of the right of the defence and due process.

Practice of the Constitutional Court of Moldova

Moldovan legislation does not expressly provide for NGOs' right to participate in proceedings before the Constitutional Court, also do not provide the right for the submission of Amicus Curiae.

Below we see the provisions of the legal provisions on this issue.

Article 28. Participants in the trial

The following are considered participants in the process: the parties, their representatives, experts and interpreters.

> *Article 29. The parties*
>
> *(1) The parties in the trial of constitutional jurisdiction are*
>
> *a) the **official bodies** or persons which, according to art. 38, have the right to complaint to the Constitutional Court;*
>
> *b) the official bodies or persons whose acts are contested.*
>
> *(2) Officials who are parties to the proceedings may exercise their procedural rights in person or through representatives. (3)*
>
> *The public authorities, institutions, and organizations are represented as a party in the process by their governing bodies, which act within the limits of the powers granted to them by law, or by representatives.*

However, in the Moldovan system, NGOs can submit Amicus and participate in constitutionality control procedures. This possibility was offered in 2013 by the Constitutional Court by way of jurisprudence.

In 2013, the Constitutional Court of Moldova examined a complaint against some provisions regarding the prohibition of communist symbols and of promoting totalitarian ideologies. During these proceedings, a Moldovan NGO (Association of Former Deportees and Political Prisoners of the Republic of Moldova), filed to the Constitutional Court a requested for admission of its representative as a party at the Court hearing, motivating the need to intervene in the interests of its members.

The association motivated its request by the need to intervene in the interest of its members, who suffered as a result of the crimes committed by the totalitarian communist regime. The Soviet regime used during the Soviet period the symbols prohibited by the contested law. The association expressed interest to contribute to the correct assessment to the Constitutional Court of the fair balance between the prohibition established by the contested law and

the atrocities committed by the totalitarian communist regime in relation to the victims of political repression and deportations.

The Court hold that Article 134 of the Constitution, among other functions, establishes the function of the Constitutional Court as a guarantor of the state's responsibility towards the citizen. In view of this function of the Court, in order to respect the principles of constitutional justice, the Court decides in principle that it will allow the intervention of persons, if this is in their own interest and if it invokes the defense of a constitutional right belonging to them.

The Court hold that in the interest of the administration of constitutional justice, in the case of review of the constitutionality of certain legal acts infringing fundamental rights and freedoms guaranteed by the Constitution, natural or legal persons, non-governmental organizations or groups of individuals having a legitimate interest or they may become victims of violations of fundamental rights directly related to the act notified and if they do not benefit from another means of protection at national level, they may intervene in the proceedings before it. The accepted intervener has the right to submit *Amicus Curiae* and to take part in hearings. Thus, the Court admitted the participation of Ms. Valentina Sturza, President of the Association of Former Deportees and Political Prisoners of the Republic of Moldova, at the public hearing of the Court. The Court decided that such interventions may be accepted at any stage of the proceedings of the constitutional jurisdiction.

The representatives of the Government, the Parliament and the authors of the complaint had no objections regarding the admission in the trial of the representatives of the Association, so from that moment, all NGOs obtained the right to submit Amicus to the court.

Since 2013, dozens of *Amicus Curiae* have been filed by various non-governmental organizations in various cases.

Practice of the Constitutional Court of Georgia

In Georgia, the Amicus intervention in constitutional proceedings is regulated both by legislation and Rules of the Court. In Particular, Article 21[4] of the "Organic Law on the Constitutional Court of Georgia" prescribes:

1. *Any physical or legal person may, with regard to a specific case, submit to the Constitutional Court of Georgia his/her written opinion in accordance with the Rules of the Constitutional Court of Georgia.*

2. *The Constitutional Court of Georgia shall not be obliged to consider the written opinion referred to in paragraph 1 of this article.*

3. *The Constitutional Court may, if it deems necessary, use the opinion submitted by the friend of the court, which may also be included in the reasoning part of the judgment.*

4. *If the Constitutional Court considers the written opinion of the friend of the court to be sufficiently important, it may summon him/her to a court hearing in order to put additional questions."*

The Amicus Curiae mechanism operates in Georgia since 2009, when the legislative changes[33] were initiated in the legislation on constitutional proceedings and all physical or legal person were granted the right with regard to a specific case, to submit to the Constitutional Court of Georgia his/her written opinion in accordance with the Rules of the Constitutional Court of Georgia. Although the Constitutional Court is not be obliged to follow the arguments presented in the written amicus brief, yet if it deems necessary, it could apply the arguments submitted in the brief, which, in turn, may also be included in the reasoning part of the final judgment. Moreover, according to the Rules of the Court,[34] if the Constitutional Court considers the written amicus brief to be sufficiently important, it may summon its author to a court hearing in order to put additional questions.

The application form for the Amicus brief is also specified in the Rules of the Court by which the interested parties are invited to fill in the form and submit the brief to the

Constitutional Court. All Amicus brief registered by the Constitutional Court, though not explicitly mentioned in the Rules of the Court, are in practice published on the official webpage of the Constitutional Court of Georgia and is therefore accessible to the wider public.

During the course of its existence, the amicus curiae mechanism truly proved to be a very useful way for the public to participate in constitutional adjudicative process. In particular, the members of the civil society – human rights NGOs, academic institutions, unions,

[33] Available in Georgian at: https://matsne.gov.ge/ka/document/view/90160?publication=0

[34] Available in Georgian at: https://constcourt.ge/ka/court/legislation/rules-of-the-court

different individuals etc. – submitted to the Constitutional Court of Georgia amicus briefs, which, in essence, helped the Court in the resolution of the cases. It can perhaps be noted that such participation from the public provides assistance to the Constitutional Court in manifold ways: it may well be useful in their substance for the Court to elaborate upon in the judgment, plus, it shows the Constitutional Court the sentiment, the attitude of the public towards some of the pressing issues that are inherently subject to review in the course of constitutional proceedings.

Below is an overview of some of the amicus briefs submitted to the Constitutional Court of Georgia by individuals and legal persons, including NGOs, and also, the Public Defender of Georgia. In total, 75 Amicus Briefs were submitted to the Constitutional Court of Georgia since 2009 when it was initially introduced in legislation.

Amicus Curiae Brief submitted by the "Transparency International Georgia"[35]

In the amicus brief the disputed matter concerned the constitutional claim of a group of members of the Parliament of Georgia with a request to declare the amendments made to the Organic Law of Georgia on the National Bank and the accompanying legislative acts unconstitutional. Under the amendments to the Organic Law on the National Bank of Georgia (NBG), the banking supervision status was removed from the NBG and a new banking supervision agency, a separate entity, was created.

According to the brief, the National Bank retained its constitutional authority to promote the stability of the financial sector, but by removing the banking supervision authority from its purview, it no longer had the appropriate leverage and tools. The National Bank is responsible for the material and technical support of the Agency, although the Agency is not accountable to the National Bank.

It was concluded in the brief that the establishment of the Financial Supervision Agency is an attempt to create a quasi-National Bank with the aim of removing the National Bank from the banking sector. An analysis of the relevant legal norms confirms that the amendment is unconstitutional, insofar as it restricts the constitutional authority of the National Bank and leaves it with only formal powers, without effective mechanism to discharge its constitutional duty.

The proposed governance structure of a new Banking Supervision Agency could result in inadequate independence. The brief authors were concerned by the proposal to give the Parliament the power to appoint Board members of the new Banking Supervision Agency. This would undermine the checks-and-balances principle embedded in the existing appointment procedures for the NBG Board (where the President nominates a candidate and Parliament has to approve) and instead lead to politicization of banking supervision. There is also the risk that a new agency might be too weak to resist lobbying by the banking sector for weaker regulation, which would threaten financial sector stability. Limited

[35] Available in Georgian at: https://constcourt.ge/ka/judicial-acts?legal=1813

operational independence could undermine the supervisor's capacity to mobilize already scarce expertise.

It is worth noting that when the present constitutional claim was registered, the Constitutional Court applied an interim measure to suspend the legal effect of the disputed legislative changes.[36] After the case was heard on merits, the Parliament dropped the already adopted changes in the law and reinstated the legal regime that had existed before. Therefore, in essence, the Constitutional Court proved to be effective in upholding the independence and integrity of the National Bank of Georgia.

Amicus Curiae Brief submitted by the International Society for Fair Elections and Democracy (ISFED), and citizens - Elene Nizharadze, Tatia Kinkladze and Irma Pavliashvili[37]

In the present case (which has already been decided) the disputed norm obliged the election subjects to register a party list to participate in the 2020 parliamentary elections of Georgia in such a way that at least one person in each of the four candidates was of the opposite sex. Otherwise the party list could not be registered.

According to the constitutional claim, the claimant political union developed a system on the basis of which the formation of a party list for participation in the elections depends entirely on the will expressed by the party members. The impugned norm obliges the claimant party to make changes in the party list that was determined by the party partners in order to maintain the balance between the sexes. According to the plaintiffs, imposing such an obligation, on the one hand, unjustifiably restricts their right to vote, on the other hand, forces the political party to disregard the decision made by its partners. This may have a negative impact on the financing of the party by the partners, which will pose a significant threat to the full functioning of the political party in question.

In the amicus brief, the authors indicated that with the existence of a gender quota mechanism in various countries, the opportunities between men and women are equalized to some extent. It is also a kind of emphasis on the fact that political processes are not open only to men and like them women have a full right to be represented in decision-making positions at both central and local levels. Opponents of the quota system often talk about the discriminatory nature of this system. According to them, the formation of party lists in the conditions of quotations does not emphasize the professionalism and abilities of women, but their gender, which is wrong.

The introduction of a gender quota mechanism does not mean the disappearance of criteria by political parties in the process of nominating candidates and forming party lists; the emergence of a gender quota mechanism is also aimed at changing the political culture and practices saturated with gender stereotypes in the long run. If women, as the only voters, have the opportunity to be involved in the political process, this will not be a guarantee

[36] Interim Decision available in Georgian at: https://constcourt.ge/ka/judicial-acts?legal=1046

[37] Available in Georgian at: https://constcourt.ge/ka/judicial-acts?legal=10121

that their suffrage will be fully realized. Substantial equality has a much greater workload and it means the emergence of women as an opportunity for representation for the group, the disappearance of fears and attitudes that do not see their role in politics. Quotas are a mechanism for ensuring that women are adequately represented in elected bodies.

Accordingly, it was submitted in the brief that the disputed norm was in line with the obligations of the state defined by the Constitution of Georgia and international acts and was a proportionate and proportionate intervention in the field of passive suffrage.

The Constitutional Court sided with the arguments raised in the amicus brief, as also submitted by the respondent, and did not upheld the constitutional claim. In its reasoning the Court made references to the arguments emphasized by the authors of the amicus brief.

Amicus Curiae Brief submitted (in 2021) by the Public defender (Ombudsperson) of Georgia[38]

In the present case, the complainant (Mr Bachana Shengelia, a former notary official) challenges the constitutionality of Article 6 (u) of the Decree on Disciplinary Liability of Notaries (issued by the Minister of Justice) that stipulates that a notary's violation of the principle of political neutrality constitutes a serious disciplinary misconduct. The disputed norms allow for the possibility of the suspension of authority for the notary as a sanction, which implies the prohibition of performing notarial acts. According to the constitutional claim, Mr Bachana Shengelia is a notary, against whom a disciplinary case was initiated on the basis of the order of the Minister of Justice of Georgia due to a statement (public post) he made on the social network that was qualified as the violation of the notary's political neutrality.

In his claim the complainant argues that the legitimate aim of the impugned norm may be to protect the rights of a person wishing to receive notary services, although the established restriction fails to meet the requirements of the principle of proportionality because it does not take into account the political nature of the notary public. In particular, the restriction imposed by the disputed norm applies to all possible cases of exercising freedom of expression, including when a person enjoys freedom of expression as a citizen and not as an exercise of public authority. According to the claimant, the right of a citizen to use apolitical notary services cannot be a basis for restricting the freedom of expression of a notary when a notary expresses an opinion / disseminates information as an ordinary citizen.

In the amicus brief, the Public Defender (Ombudsperson) points out that when a notary, as an ordinary citizen, expresses his/her political opinion through a personal social network page during the exercise of non-official powers, it will not affect and will not harm the principle of impartiality, objectivity and neutrality. Consequently, in this situation, there can be no special public need to restrict the freedom of political expression.

[38] Available in Georgian at: https://constcourt.ge/ka/judicial-acts?legal=11471

Considering the activities and functions of a notary, he/she should be subject to a relatively smaller restriction on freedom of expression than is imposed on public officials - public servants. Consequently, the standards for the protection of a notary's freedom of political expression cannot be, at the very least, lower than those imposed on public officials.

In view of all the above, there is no inevitable interest in restricting a notary's right to political expression when a notary: 1) expresses an opinion not in the exercise of his or her official powers; 2) does not use official resources to express personal opinions; 3) does not use the status and status of a notary.

The disputed rule, per the opinion of Ombudsperson, does not make such a differentiation and prohibits the notary from expressing his/ her political speech at any time and in any form, and in case of violation of this prohibition, the suspension of authority for the notary is a sanction. Such an arrangement restricts the right to a greater extent than is necessary for the attainment of a legitimate aim, which, in turn, forms the material basis for the unconstitutional recognition of the disputed norms.

Amicus Curiae Brief submitted (in 2017) by NGO "the Institute for the Development of Freedom of Information" IDFI[39]

In the present case, which is pending currently before the Court, the disputed norms of the Criminal Procedure Code and the Criminal Code of Georgia establish the powers of the investigator/prosecutor, to prohibit the participants of the criminal proceedings from disclosing information on the progress of the investigation, and in case of prior warning, the disclosure of the mentioned information by the person leads to the criminal liability. The claimants indicate that the law does not stipulate the guiding rule for the investigator / prosecutor for prohibiting the disclosure of information, which gives them a wide discretion. Accordingly, it is argued that on the basis of the disputed norms it is possible to prohibit the dissemination of any information related to the investigation, which is a violation of their constitutional rights.

It is argued in the amicus brief that the disputed norms violate the principle of foreseeability and predictability of the law. Within the scope of the disputed norms, the participants in the process do not have the opportunity to clearly foresee the legal consequences that are expected of them, which gives the prosecutor and the investigator immeasurable discretion to decide on these issues themselves. The latter carries the risk of arbitrary actions on their part. In addition, given that the complainants' freedom of expression is restricted under a vague law, the prosecutor and the investigator, as persons having discretion in enforcing this restriction, have the opportunity to make different decisions individually, without any additional justification, including in similar cases. Therefore, the disputed norms do not meet the test for the restriction of freedom of expression, because the required first condition - that the restriction must be provided by law – is not met.

[39] Available in Georgian at: https://constcourt.ge/ka/judicial-acts?legal=1925

The brief also notes that it is unclear what is meant by the words “not to be made public.” In particular, it is not clear to what extent publicity is implied. It is debatable whether public access to specific information is meant to be accessible to the general public, even if the delivery to any person, including another participant in the process, is already considered public. For example, it is not clear under this article whether a prosecutor can prohibit a trial participant from talking to other trial participants about specific facts, for example, forbidding a lawyer and defendant from giving specific details to a witness, and so on.

VI. Amicus in International Law

The second development of the Amicus Curiae institution took place in international law courts. Until the 1980s, international tribunals were hostile to letting third parties present their position or join the legal proceedings. However, as of the early 1990s, international tribunals including the European Court of Human Rights, have gradually changed their position regarding third-party intervention, and have started to accept requests from Amicus, mostly international NGOs to express their positions in legal proceedings.

Once the Amicus practice was adopted, whether in an official or semi-official manner—such as the trickling effect in some of the Latin American countries—the practice of the Amicus procedure increased substantially. This was largely due to the considerable increase in the number of Amicus briefs submitted to the Courts by thousands of interest groups.

This reversal of attitudes is characterized by a number of elements: interpretation of existing civil procedures in a more favourable light supporting the interests of third parties to join the legal proceedings; the creation of new rules or precedents allowing for the participation of third parties in legal proceedings; an increase in the number of parties allowed to join the legal proceedings; and the availability of oral arguments by third parties during legal proceedings.

There is a well-developed practice of amicus curiae interventions at the European Court of Human Rights and at the Inter-American Court of Human Rights. The African Court on Human and Peoples' Rights has an emerging practice. Interventions are possible at other international courts and tribunals as well; for reasons of space, this section focuses only on the three main regional human rights courts.[40]

A. Amicus Briefs in European Human Rights Court

In Europe, including in inquisitorial and civil law systems, the amicus curiae has also become a common feature of human rights litigation in domestic systems, particularly before upper and constitutional courts. Taking the European Human Rights Court as an example illustrates that the presence of NGOs as third parties in legal proceedings in Court has significantly increased in the last decade.

For example, the number of Amicus briefs submitted between 2012 and 2013 alone was much larger than the number of all Amicus curiae briefs submitted in the last decade altogether. In recent years, Amici were submitted in about a quarter of the cases reviewed by the European Human Rights Court, and their percentage of participation in fundamental cases is increasing.

[40] For amicus curiae interventions at the ECOWAS Court of Justice, see Article 89 of the Court's Rules of Procedure: http://www.courtecowas.org/wp-content/uploads/2018/11/Rules_of_Procedure_2002_ENG.pdf; for the East African Court of Justice, see Rule 36 of that Court's Rules of Procedure: https://www.eacj.org/?page_id=5722

The Rule 44 of the Rules of Court of the European Court of Human Rights sets out the procedure for 'third party' interventions, the term that the Court prefers to amicus curiae.[41] Within twelve weeks of a case being 'communicated' to the defending State (this is the point at which a brief summary of the case is published on the Court's website, under the tab 'Communicated Cases'[42]) or referred to the Grand Chamber, an organisation may request permission to intervene.

Requests should be short – no more than two or three pages – and set out a brief introduction to the third party, its interest in the case and the points it wishes to address, and why it would be "in the interest of the proper administration of justice"[43] for it to intervene. If an organisation has intervened previously, it would be good to mention this. If permission is granted, a deadline is set (usually three weeks) and a maximum number of pages specified (usually ten pages). Amici curiae are only very rarely allowed to participate in hearings, but it is always worth asking for permission.

In 1981, the Court accepted for the first time to hear a representative of the British Trade Union Congress in the case Young, James and Webster v the United Kingdom[44]. This case highlighted the need to define a legal basis allowing for this type of third-party participation, which eventually came in the form of an amendment to the Rules of the Court that were modified several times.

With the entry into force of Protocol no. 11 in 1998, third-party interventions were mentioned in the Convention itself. Protocol no. 11 clarified and codified the applicable rules in relation to amicus curiae submissions by opening up possibilities for the president of the court to invite or grant leave to anyone concerned other than the applicants to submit written comments or, in exceptional cases, participate in the hearings (for more details, see our developments in III.2.a).

There is a constant increase in terms of numbers of amicus participation from various NGOs in the European Human Rights Court's proceedings. There is a greater propensity among UK-based organisations/charities and large transnational human rights organisations to intervene in Strasbourg. But research centres, conservative groups or Equality Bodies have also the opportunity to write amicus submissions depending on the issue at stake. The amicus briefs cover almost all issues under scrutiny of the Court, although cases involving the prohibition of torture and inhuman or degrading treatment, the right to family and

[41] At https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf

[42] https://hudoc.echr.coe.int/

[43] The technical rationale stated in Article 36(2) of the Convention for admitting a third party.

[44] First, the European Court of Human Rights did not accept spontaneous amici. At that time, the European Commission perceived its role as impartial and capable of presenting the general interest before the Court. For example, in Tyrer v. The United Kingdom, the Court refused without discussion the intervention requested by the National Council for Civil Liberties App no 5856/72 (ECtHR, 25 April 1978); example quoted by D Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 The American Journal of International Law 611, 630.

private life, the right to free expression and the prohibition of discrimination attract a higher concentration of briefs.[45]

The rate of participation of amici curiae is particularly high before the Grand Chamber, due to the complexity and novelty of the cases reaching this chamber.[46]

The Commissioner of Human Rights can take part in the proceedings of the European Court of Human Rights, either at the invitation of the President of the Court or, since the entry into force of Protocol No. 14 on 1 June 2010, on his own initiative.

The Commissioner can submit written contributions and participate in hearings. As developed below (III.2.b), the European Committee of Social Rights may also invite third-parties to intervene.

It is advised for the parties concerned in respect of the amicus intervention,[47] to focus in their brief on the following types of information:

- **Information on the interpretation of international norms by other jurisdictions**: a third-party intervention can explore how other jurisdictions interpret certain international norms. While the Court is not bound by the interpretation of other regional or international courts, the third party intervention can instruct the Court on the existence of a predominant interpretation of a certain point of law (e.g. by referencing the jurisprudence of other international courts, such as the Inter-American Court of Human Rights) or inform the ECtHR of other legal obligations of the State Party concerned (for instance, under EU law).

- **Information through Comparative Law**: a third-party intervention may also provide comparative law surveys, that is, demonstrate the differences and similarities between the legal systems (and practices) of different countries.

- **Information on the law and practice at the national level**: the intervention may showcase the practice at national level to provide background information that will facilitate the Court's interpretation. For example, details on how certain laws originated, the drafting history of the law, and how the law is applied and interpreted

[45] Laura von den Eynde, Amicus curiae NGOs before the European Court of Human Rights, Stanford Thesis, May 2011 https://law.stanford.edu/wp-content/uploads/2015/03/LauraVan-denEynde-ta2011.pdf

[46] For example, there were 21 third-interveners before the Grand Chamber in Lautsi v. Italy relating to the display of crucifixes in the State-school classrooms in Italy, i.e. the Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, the Republic of San Marino, the Principality of Monaco, Romania, Greek Helsinki Monitor, Associazione nazionale del libero Pensiero, Centre for Law and Justice, Eurojuris, International Commission of Jurists, Interights and Human Rights Watch, Zentralkomitee der deutschen katholiken, Semaines sociales de France and Associazioni cristiane lavoratori italiani, Thirty-three members of the European Parliament acting collectively.

[47] European Network of National Human Rights Institutions (ENNHRI), Guide for National Human Rights Institutions October 2020, p. 23-24. Available at: http://ennhri.org/wp-content/uploads/2020/10/Third-Party-Interventions-Before-the-European-Court-of-Human-Rights-Guide-for-NHRIs.pdf

domestically. This approach can also help the Court to identify systematic issues in the protection of human rights in the State Party concerned.

- **Information on relevant data, statistics and situation on the ground**: the third party might have specialized knowledge as regards data or statistical information on the actual situation on the ground or prevalence of a particular problem or trend. This could be, for instance, the provision of country-of-origin information in expulsion cases (UNHCR is a frequent intervener). A third party can also summarize fact-finding reports that may be relevant to the case (for instance, on the detention conditions in the facilities where an applicant was detained).

- **Information on the ECtHR's jurisprudence**: a third-party intervention can state what the ECtHR case-law is on a specific subject. However, the third party should avoid expressing its views on the ECtHR (see "Do's and don'ts" below). If the intervention is deemed not to comply with the conditions and limitations set in the authorization by the President, the President may decide not to include the intervener's written comments in the case file (Rule 44 § 5), or, if appropriate, direct the intervener to submit fresh written comments which comply with them.

B. Amicus Briefs in Inter-American Court of Human Rights

Much like the European Human Rights Court the Inter-American Court of Human Rights, allowed Amicus briefs to be submitted in legal proceedings conducted by the Court**.** The changes in attitude towards Amicus in the Inter-American Court of Human Rights was also reflected in the creation of new procedural rules, which were more accommodating towards requests of third parties to present their position to courts.

Articles 2.3 and 44 of the Rules of Procedure of the Inter-American Court of Human Rights lay down the procedure for amicus curiae interventions.[48] They provide that any person or institution who is unrelated to the case and to the proceedings may submit a brief to the Court as amicus curiae, in the working language of the case, to offer "reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceedings."[49]

A brief may be submitted up until fifteen days following a public hearing in the case, or if no public hearing has taken place, fifteen days following the publication of an Order setting deadlines for final arguments (a procedural document that lawyers will be familiar with). The brief must be signed; if it is submitted via email and it is not signed, then the original brief together with supporting documentation should reach the Court within seven days of the emailed submission. Following consultation with the President, the amicus curiae brief, and its annexes are transmitted to the parties for their information

[48] Rules of Procedure of the Inter-American Court Of Human Rights, last amended November 2009, at https://www.corteidh.or.cr/reglamento.cfm

[49] Ibid. Article 2(3).

C. *Amicus Briefs in International Criminal Tribunals*

In addition to these tribunals, international criminal tribunals and international criminal courts established ad-hoc began, in the early 2000s, to enable Amici to join legal proceedings. For instance, Amici were allowed to join the legal proceedings at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), as well as the

International Criminal Tribunal for Rwanda ("ICTR").In all of these tribunals, for the first time, third parties unrelated to the litigation were allowed to present their position by joining as Amicus. As a result of these processes, in 2002, the International Criminal Court established clear rules on this subject.

D. *Amicus Briefs in international arbitrations*

The Amicus Curiae institution in international law began to take hold not only in international public law—and specifically international criminal law—but also in international commercial issues including international commercial arbitrations. Several significant international organizations have adopted the practice of accepting briefs from Amicus Curiae, including (1) the World Trade Organization ("WTO");

E. *Amicus Briefs in Civil Law*

The development of the Amicus Curiae institution began in the early 1990s in civil law countries in Europe and Latin America, and to a certain extent also in Africa and Asia. This development occurred due to the adaptation of norms from international law into the civil system. In this way, many of the European and Latin American countries adopted the Amicus practice within their internal judicial systems, allowing Amici to present their point of view in legal proceedings. In general, the adaptation of the Amicus practice into civil law and the change in attitude towards the intervention of third parties was achieved through domestic legislation and the informal trickling effect of this practice into to the judicial system.

F. *Amicus Briefs in social Causes*

In addition to the understanding that Amicus allow the judicial system to better understand broader implications of judicial rulings and to formulate adequate judicial policy, there is also a social explanation as to why courts benefit from receiving additional perspectives from Amicus.

The courts' need for Amicus is to a large degree the need (or will) of various groups in society seeking to influence society through participation in legal proceedings. Participation of third parties as Amicus in existing legal proceedings, in fact, grants access to the judicial system to greater influence and involvement of society on the decisions reached by courts. The Amicus practice constitutes another significant channel for civic participation manifested

by various interest groups in society in addition to existing civic participation channels (such as parliamentary elections).[50]

The use of Amicus enables not only greater involvement in the Decision-Making Processes of courts, but the submission of Amicus briefs to a large extent constitutes the fulfilment of the citizens' right to shape their society.[51]

Similar to the right to vote, which constitutes the right to influence social structure through the ballot, is the opportunity for third parties who are not part of the formal proceeding to submit Amicus briefs to the courts to also provide third-parties with another channel to influence their society.[52]

Conceptually, the "right" of third parties to be involved in decisions that impact their lives by joining legal proceedings as Amicus, even if not directly related to them, is to a large extent similar to the advocacy for granting individuals the right to access the courts as formal parties.[53] This is a fundamental constitutional right in most countries around the world; however, the right to join as Amicus is different from the latter since it does not involve a direct interest of the formal party, as the use of the Amicus practice is, to a large extent, the modern expression of "Deliberative Democracy."[54]

Deliberative Democracy has been a central stream in liberal thought in the past few decades, which focuses on the process of discourse, communication, and cooperation which leads to the decision stage.[55] According to Deliberative Democracy, citizens are obliged to regulate their lives through public discourse, one that is open and free, as such regulation establishes the public institutions.

G. Amicus Briefs in Public Health Litigation

Amicus briefs have become a powerful and effective tool in developing public policy—including public health policy—through the courts.

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[50] See: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3341963

[51] "Disaffected democracies: what's troubling the trilateral countries?" (Susan J. Pharr & Robert D. Putnam eds., 2000).

[52] Nancy Perkins Spyke, Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence, 26 B.C. ENVTL. AFF. L. REV. 263, 266–69 (1999).

[53] For social and cultural justification for the right to access the courts see LAWRENCE M. FRIEDMAN, ACCESS TO JUSTICE: SOCIAL AND HISTORICAL CONTEXT, in 2 ACCESS TO JUSTICE: PROMISING INSTITUTIONS 3 (Mauro Cappelletti & John Weisner eds., 1978) (recognizing that the issue of whether individuals have a "right" to use Amicus in the judicial setting to have their voices be heard is a profound theoretical question, which I leave for future discussion. For the purpose of this Article, it is sufficient to say that this practice has many similarities to the right to vote).

[54] See AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 134 (2004); Joseph Bessette, Deliberative Democracy: The Majority Principle in Republican Government, in HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980) (recognizing additional scholars who have shaped the debate on this issue are John Elstar, Jurgen Habermas, John Rawls, and James Fishkin); David M. Estlund, Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence, 71 TEX. L. REV. 1437 (1993).

[55] Estlund, note 188, at 1437

The mere filing of an amicus brief can signal to a court that a case is significant and implicates broader issues than just the litigants' interests.[56] For example, a public health amicus brief can speak volumes to the court about the health significance of the policies at stake, especially when multiple organizations participate. Of particular relevance to the childhood obesity context, amicus briefs can present medical and social science evidence to a court that a party could not present because it was not included in the record on appeal. (These types of briefs are commonly referred to as "Brandeis briefs," after an influential brief filed by Louis Brandeis—who became one of the most distinguished Justices in the Supreme Court's history—in support of an Oregon law that limited the number of hours women could work in laundries for health reasons).[57] For example, the Tobacco Control Legal Consortium's (TCLC) amicus briefs in support of smoke-free policies have cited the 2006 Surgeon General's Report and economic data on the effects of smoke-free laws on restaurant and bar revenue—data that, for various reasons, is frequently not part of the factual record created by the parties at the trial court level.[58]

Amicus briefs also can address policy or social issues outside the technical limits of the case or that were not addressed by the parties' briefs, due to page limits or other considerations. In doing so, an amicus brief can advise the court of a decision's unintended ramifications—which is typically an issue of significant concern to courts[59]— by providing the experience of the amicus relative to the issue being decided. For example, in the Supreme Court case Grutter v. Bollinger,[60] the University of Michigan Law School's race-conscious affirmative action policy was challenged by a white female applicant who was wait-listed.

A group of retired military officers became a non-traditional and highly influential set of allies for the law school when they submitted an amicus brief in support of the law school, informing the Court that the three main military service academies all had race-conscious affirmative action recruitment and admission policies, and that without such policies, "the military cannot achieve an officer corps that is both highly qualified and racially diverse" which is "essential" to the military's ability to provide national security.[61] This brief was discussed at length during oral argument, and was prominently referenced in Justice

[56] Judge Neal Nettesheim & Clare Ryan, Friends of the Court Briefs: What the Curiae Wants inan Amicus, 80 WIS. LAW. , May 2007, at 11

[57] The original "Brandeis brief" was filed in Muller v. Oregon, 208 U.S. 412 (1908), and presented a lengthy report of empirical data showing how long working hours negatively impacted women's health. The brief, which was reportedly largely prepared by two female labor activists, (see Simard, supra note 4, at 670-'71), emphasized social science research rather than legal arguments, and became a model for the use of briefs, particularly for amicusbriefs, in effecting social change through law. Nettesheim & Ryan, supra note 2, at 12. See also SIMPSON & VASALY, supra note 3, at 44.

[58] Of course, inclusion of non-record evidence must be done prudently, and only nonrecord evidence that is not disputed or indisputable (i.e., of the type that could be subject to judicialnotice by the court on its own) should be relied on.

[59] SIMPSON & VASALY, supra note 3, at 41. See also, Kelly Lynch, Best Friends? SupremeCourt Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & POL. 33, 67-68 (2004).

[60] 539 U.S. 306 (2003)

[61] Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents, filed Feb. 21, 2003 in the case of Grutter v. Bollinger, 539 U.S. 306 (2003), at5 (available on Westlaw at 2003 WL 1787554 and on file with the author).

O'Connor's decision upholding the law school's policy.[62] In a 2007 telephone interview, Justice Ginsberg commented that this brief was one of the most valuable briefs submitted in the case.[63]

As the Grutter case further illustrates, while the message of a brief is central, there are times when the identity of the messenger can be almost as important. Thus, in selecting amici to invite to join its briefs, TCLC works with local officials to identify organizations whose voices are likely to carry particular weight with the court. For example, when TCLC submitted an amicus brief to Montana's Supreme Court supporting local authority to pass smoking-related policies, advocates felt strongly that the American Medical Association would be the most influential voice possible. Thus, TCLC recruited the AMA, along with Montana health organizations, to join the brief. While it is impossible to prove the impact of the AMA's participation, advocates believed it played a crucial role in the court's successful ruling in the case. Similarly, when TCLC filed a brief before Kentucky's Supreme Court in support of the first smoke-free policy in that tobacco-growing state, the City of Lexington asked TCLC's local counsel, who was also the president of the state bar association, to sit conspicuously beside the City's counsel during oral argument to call the court's attention to the support of the amici.

Finally, involvement of health organizations in amicus briefs not only benefits the legal case, but also benefits the public health community by providing opportunities to participate in important cases. This, in turn, builds community support and "buy-in" for the policy at issue. A list of health organizations and others that have chosen to join in amicus briefs prepared by TCLC is attached at the end of this memo.

H. Amicus Curiae Interventions on Freedom of Expression cases

Amicus curiae interventions can play a key role in the setting of lasting legal precedents for the protection and promotion of free, independent and pluralistic media ecosystems.

UNESCO designed the Guide,[64] to provide practical information and guidance to civil society organisations (CSOs) and lawyers who consider intervening in freedom of expression cases before national or international courts as so-called 'amicus curiae' or 'third party intervener'. In particular, it seeks to equip and empower CSOs with the basic tools to file effective amicus curiae interventions and encourage them to intervene in cases where freedom of expression standards can be advanced or where the right to freedom of expression or the safety of journalists is at stake.

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[62] JEFFREY TOOBIN, THE NINE, INSIDE THE SECRET WORLD OF THE SUPREME COURT 219- '20, and 224 (Doubleday 2007).

[63] Simard, supra note 4, at 696. Indeed, one legal analyst asserts that it "may have been the most influential amicus brief in the history of the court." TOOBIN, supra note 16, at 224.

[64] Further see: https://unesdoc.unesco.org/ark:/48223/pf0000379020

The Guide contains the following six parts:

1) A discussion of the main strategic considerations that organisations who are thinking of intervening in a case should take into account. This includes questions such as how an intervention fits into a broader campaign, the type of cases to intervene in, and whether to intervene alone or as part of a coalition.

2) A section providing case studies, each chosen to illustrate interventions before different types of court and in different scenarios. Cases include: a criminal defamation case at the African Court on Human and Peoples' Rights in Burkina Faso; a case involving the protection of bloggers and activists in Palestine; and a case involving the protection of journalistic materials at the European Court of Human Rights.

3) A section discussing practicalities, including how to monitor cases, engage lawyers and communicate with parties in the case.

4) A section discussing technical legal requirements, before international human rights courts as well as at the national level.

5) Some recommended 'do's and don'ts' in writing amicus curiae briefs, discussing what tone to strike and how to remain objective yet firmly set out the organisation's perspective.

6) How to follow-up on a judgment, including monitoring implementation and engaging in post-judgment advocacy.

I. Amicus Curiae Interventions on Environmental cases

Amicus curiae interventions on environmental cases, can play a crucial role. For example, in Romania, on November 2, 2018, public interest law organizations filed an amicus curia brief on behalf of the Roşia Montana community affected by an illegal gold mine project in Romania to include their perspectives in arbitration proceedings at the International Center for the Settlement of Investment Disputes (ICSID), housed at the World Bank.

In the amicus brief, the legal team presents new facts and perspectives regarding the human rights violations suffered by community members who opposed plans to build Europe's largest open pit gold mine.

Both the State and the company have submitted their arguments to the ICSID Tribunal, however both exclude the perspective and experience of local communities. The amicus brief explains how the company has not complied with EU or Romanian law and therefore should not be protected through international investment law.

ICSID, the World Bank tribunal, accepted an 'amicus curiae' brief submitted in the arbitration between Romania and the mining company Gabriel Resources over a destructive gold mine proposal in western Transylvania. Such acceptance marks an opening for the tribunal to hear the perspectives of the people directly affected by the mining project. In this case however, the tribunal conditioned its admission; excluding all testimonials and legal arguments from the villagers of Roşia Montana as well as rejecting their request to participate in the hearings.

The amicus presented new facts about the constitutional, environmental, and human rights violations related to Gabriel Resources' efforts to build Europe's largest open-pit gold mine.[65]

[65] https://www.ecchr.eu/en/press-release/rosia-montana-isds-world-bank-tribunal-partially-admits-romanian-villagers-arguments-over-controversial-goldmine/

VII. Amicus issued by the Venice Commission

One of the aims of the Venice Commission's work is strengthening the mechanisms of constitutional jurisdiction, by providing various services for the courts and by directly supporting them when they come under undue pressure. Upon request by the courts, the Venice Commission provides amicus curiae briefs, on the pending cases, draft legislation, or on legislation that is already in force.

The subject matter of these opinions can also be (draft) constitutional or legal provisions governing the work of the constitutional courts or equivalent bodies. Sometimes, the constitutional courts themselves request opinions on draft legislation on the courts.

An Amicus brief by the Venice Commission provides information on the standards of comparative constitutional and/or international law. An Amicus brief, therefore, does not, *per se*, address the constitutionality of the act or law concerned in a given case before the requesting court.

The Venice Commission's role is therefore neither to address the specific cases pending before the requesting court nor to assess the constitutionality of domestic provisions. This is the national court's role. For this reason, the Venice Commission asks courts in their request for an amicus curia brief to formulate specific questions they would like the Venice Commission to answer.

Amicus Curiae Briefs of the Venice Commission for the Constitutional Court of Georgia

There have been seven instances when the Venice Commission provided a written Amicus Brief to the Constitutional Court of Georgia in view of the pending cases. This has helped the Constitutional Court greatly in terms of identifying and researching the most salient questions regarding the subject matter at hand.

Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases[66]

In particular, to clearly point out once again, the Constitutional Court of Georgia adjudicates on two pending case that challenge the constitutionality of various norms of the Civil Procedure Code and the Organic Law on the Constitutional Court. Both complaints are lodged by the same claimants and have been joined into a single proceeding. The challenged provisions determine the effects of the decisions of the Constitutional Court and notably whether they can affect preceding legal relationships and can be invoked as a ground for reopening final judgments in civil and administrative law matters (res judicata).

[66] CDL-AD(2018)012-e Georgia - Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)012-e

Paragraph 1 of Article 23 of the Organic Law on the Constitutional Court stipulates that a declaration of a norm as unconstitutional results in its invalidity from the moment of the promulgation of the relevant decision of the Constitutional Court. Paragraph 10 of the same Article provides that if the disputed provision is found to have a similar meaning to the provision that had previously been declared unconstitutional by a decision of the Constitutional Court, it shall become invalid from the moment of the promulgation of a relevant ruling of the Constitutional Court. Paragraph 1 of Article 423 of the Civil Procedure Code of Georgia (the disputed norm) determines the grounds for reopening proceedings on final court judgments (res judicata) and does not include decisions of the Constitutional Court as a ground for reopening. The provision applies to both civil and administrative law cases.

The claimants argue that the decision of the Court should constitute an effective remedy for the protection of human rights. The party indicates that paragraphs 1 and 10 of Article 23 of the Organic Law on the Constitutional Court allow only a prospective effect of the Constitutional Court judgments and preclude its retroactive application. Therefore, the decisions do not influence legal relationships that had been finalised before the publication of the Constitutional Court decision, which diminishes the ability of the Court to remedy human rights violations.

The claimants stated that the Constitutional Court must have discretion to decide on a case-by-case basis from which date an unconstitutional normative act becomes invalid and to determine that its decision has retrospective effect. The claimants further argue that the decision of the Constitutional Court should be recognised as being a legal ground for the reopening of final judgments (res judicata) in civil and administrative matters based on the norm declared unconstitutional by a decision of the Constitutional Court. The claimants assert that the disputed norm precludes the abovementioned remedy and is therefore unconstitutional. Based on the arguments provided above, the claimants emphasise that disputed norms diminish the effectiveness of the Constitutional Court and, therefore, are incompatible with the right to a fair trial (Paragraph 1 of Article 42 of the Constitution of Georgia).

Questions raised

In Georgia the Constitutional Court is the sole judicial body responsible for constitutional review and protection of human rights from unconstitutional laws. However, the Constitutional Court is not authorised to declare judgments of the general courts unconstitutional and invalidate them (there is no full constitutional complaint to the Constitutional Court).

Considering the abovementioned: a. Based on European/International best practice, what are the consequences the decision of the Constitutional Court (declaring the relevant provision unconstitutional) should have on civil/administrative law transactions/cases which have been closed before its promulgation? b. What should the effect of the decision of the Constitutional Court be on an on-going legal dispute in which a general court has to decide on civil/administrative law transactions/cases which have been closed before the promulgation of the Constitutional Court decision? c. What should the effect of the decision

of the Constitutional Court be on final judgments of general courts? Should the decision of the Constitutional Court become grounds for reopening a final judgment (res judicata) which is based on an unconstitutional provision?

Amicus Curiae Brief for the Constitutional Court of Georgia on the non ultra petita rule in criminal cases[67]

There were three criminal cases that had been referred to the Constitutional Court by the Supreme Court of Georgia dealing with a situation in which the Supreme Court was considering going beyond the scope of the complaint submitted to it in order to rectify what the Court considers to be a substantial wrong. For each of the following questions, the Supreme Court is questioning the constitutionality of Articles 306.4 and 297(z) of the Criminal Procedure Code (see below, hereinafter, the "CPC"):

(1) Case n°1: "…a party in question does not appeal against their conviction, but asks for his/her sentence to be reduced. Yet, the Supreme Court believes that a person under sentence is innocent, since the totality of evidence presented does not suffice to prove beyond a reasonable doubt that he/she committed a crime. Thus, act committed by this person does not have to be regarded as a crime, as it is not substantiated by the evidence provided."

(2) Case n°2: "…the Supreme Court considers that, based on a decision of the court of first instance, an accused person was tried twice for the same offence. When this case originally was appealed before the court of appeal, a person affected asked only for the alteration of the imposed penalty; yet the court of appeal, not to allow their punishment for the same criminal offence twice, quashed the verdict and found the accused innocent, even though he/she did not appeal for acquittal. This decision was further appealed to the Supreme Court by the prosecution on the basis that the court of appeal went beyond the scope of complaint and thus violated the requirements of law. The Supreme Court, when ascertained the legality of the decision of the court of appeal, found that the provision of CPC, which prevents the court of appeal going beyond the complaint in question, contradicts the Constitution of Georgia ("the Constitution")."

(3) Case n°3: "…the accused was found guilty by the court of first instance despite the fact that, subsequent to the commission of the offence, the provision had been made by the law that decriminalized the prescribed offence. The court of appeal did not change the verdict, albeit discharged the accused from the respective penalty. The decision of the court of appeal was further appealed to the Supreme Court by the accused. However, the accused did not complain about the offence in question. The Supreme Court considers that disputed provision of the CPC unconstitutionally prevents the Supreme Court going beyond the above-mentioned complaint."

[67] CDL-AD(2015)016-e Amicus Curiae Brief for the Constitutional Court of Georgia on the non ultra petita rule in criminal cases, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)016-e

The Supreme Court considered that Articles 306.4 and 297(z) of the CPC did not allow judicial organs to apply the constitutional principles of the protection against double jeopardy, *in dubio pro reo, nullum crimen sine lege* and *lex mitior* on its behalf (*sua sponte/ex proprio motu)*. It therefore considered that the provisions in question were not in compliance with Articles 40.3, 42.4 and 42.5 of the Constitution of Georgia (see below). Article 85.3 of the Constitution respectively provided that legal proceedings shall be exercised on the basis of equality of the parties and the adversarial nature of proceedings.

The Supreme Court considered that, in certain cases, it ought to be possible to depart from this principle in order to protect a person's constitutional rights and freedoms.

The Georgian Constitutional Court **raised the following questions:**

a) What are the international or national human rights standards with regard to the scope of review by a higher court? In which circumstances may courts be entitled to go beyond the appeal in question and decide on the issues that are not indicated in the complaint?

b) What are the international or national standards of application of the principles of protection against double jeopardy (right not to be tried or punished twice), *in dubio pro reo* (defendant may not be convicted by the court when doubts about his or her guilt remain), *nullum crimen sine lege* (there exists no crime and no punishment without a pre-existing penal law) and *lex mitior* (the application of the more lenient criminal law)? Do these principles authorise or even oblige a court of law, in case of no formal demand by an appellant or an accused, to uphold those principles on its own behalf (*sua sponte*)?

Amicus Curiae Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased[68]

The case concerned Article 6 of the Georgian law "On the Freedom of Speech and Expression" which provides that one cannot defend in court the reputation of his or her deceased relative. The case was brought by Mr V., whose son had been shot by the police in 2006. In 2013 a State official declared publicly that the police had used firearms because Mr V.'s son had been armed and ready to kill. Mr V. felt offended by that statement and sued the State official who had made it, seeking the rebuttal of that information. However, the courts referring to Article 6 of the law on the freedom of speech refused to consider that claim on the merits. Mr V. brought proceedings before the Constitutional Court of Georgia maintaining that Article 6 is contrary to the Georgian Constitution, which protect honour, dignity and guarantee judicial protection of rights and freedoms.

[68] CDL-AD(2014)040-e Amicus Curiae Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased adopted by the Venice Commission at its 101st plenary session (Venice, 12-13 December 2014), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)040-e

Having accepted the case for examination, the Georgian Constitutional Court addressed to the Venice Commission a request for an amicus curia brief and put before the Commission the following two questions:

a) *Do deceased persons have a right to dignity?*

b) *If so, which legal subjects should have the right to sue for defamation on behalf of a deceased?*

It was advised in the brief that the idea that the reputation of a deceased person may also need legal protection is not universally accepted. Whereas in continental Europe it is possible to defend in court the reputation of a deceased, most of common law countries follow the rule *actio personalis moritur* cum persona. On the other hand, if relatives cannot contest serious allegations or injurious portrayals directed at their deceased loved ones, not only their dignity, reputation or memory are put at risk, but so is the truth. There are various theories explaining why the reputation of the dead person needs legal protection, and those theories gain public support even in the Anglo-Saxon world.

Even assuming that the European Convention and/or the Georgian Constitution require giving the relatives of the deceased a legal remedy to protect the latter's reputation, the scope of the State's positive obligation in this area should be defined with reference to the principles developed in the Court's case-law under Article 10 of the Convention. So, again, chances are that in most cases the considerations of freedom of speech will prevail. Should the Constitutional Court of Georgia conclude that the notion of "dignity" encompasses the reputation aspect and applies to deceased persons as well, criteria developed in the case-law of the European Court of Human Rights will apply.

Thus, it would be up to the Constitutional Court to check whether Mr V.'s son had been a "public figure" or otherwise entered the "public arena", to decide whether the topic was a "matter of public interest", to define the impact of the allegedly defamatory statement in the light of its form and intensity, of the time element, of the position of the speaker (the president of the country) and of other relevant factors. If, in the opinion of the Constitutional Court, the "reputation interest" outweighs other legitimate considerations, this may require legislative changes and it will be up to the Parliament to design a new legislative framework, which better accommodates all competing interests. In doing so the authorities of Georgia should act in harmony with the European Convention standards and ensure that the freedom of expression is respected. It is important to make sure that defamation laws – in both their framing and application – do not produce "a chilling effect" that will increase self-censorship within the media or academic community out of fear of legal consequences, and that the least intrusive measures are chosen to protect the "reputation interest" of the deceased and/or his or her relatives.

Amicus curiae brief for the Constitutional Court of Georgia on individual application by public broadcasters[69]

The case concerned the reform of the Georgian Law on Broadcasting has been adopted by the Parliament of Georgia on 20 November 2013, which subsequently entered into force following its signature by the President of Georgia. The amendments introduced new provisions relating to the status of the members of the "Board of Trustees" of the Georgian Public Broadcaster. The number of members of the Board was reduced from 15 to 9 and new rules on to the appointment of its members were introduced. The amendments introduced in November 2013 also resulted in the premature termination of the tenure of the current members of the Board of Trustees, who are to be replaced by new members appointed according to the new selection provisions introduced by the amendments. According to Article 3 of the Law on amendments, "once this Law takes effect prior to the commencement of the new Board of Trustees' tenure, Broadcaster's current Board of Trustees shall not be authorized to make any decisions save to make recommendations".

Questions raised

a) *Does the Public Broadcaster have the right to freedom of expression?*

b) *Does unjustified intervention in the work of the Board of Trustees, termination of the office of the current members, amount to the infringement of the constitutional protected right of Public Broadcaster and/or its right to freedom of expression?*

c) *Does a citizen have the right to argue before the Constitutional Court or relevant judicial body for the protection of his/her right to receive information in a case, when state interferes with the independence of Public Broadcaster?"*

The Venice Commission considered that it is possible to approach the subject matter from different angles. First, the request of the Constitutional Court related to the questions about the admissibility of an individual complaint introduced by a public broadcaster, taking account of the fact that according to Article 34 of the European Convention on Human Rights (hereinafter, "ECHR"), "any person, non-governmental organizations3 or group of individuals claiming to be a "victim" of a violation (…) of the rights (…) can lodge an individual application before the ECtHR". The provision, at first glance, seems to exclude the public corporations from the scope of "individual applications".

4 . Secondly, the request by the Constitutional Court also raises questions on whether a decision by the competent authority (i.e. in the particular case, Parliament) concerning the internal organisation of public broadcaster, for instance the election of its members, or any other measure taken in respect of this legal entity, can constitute an interference with individual fundamental rights of its members. In other words, the question is whether a legislative act

[69] CDL-AD(2014)014-e Amicus curiae brief for the Constitutional Court of Georgia on individual application by public broadcasters, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)014-e

concerning the organisation or the functioning of the public broadcaster can be considered as creating a "personal injury" for the individual members of the Board of Trustees.

The Venice Commissions concluded that the question of whether a public broadcaster is entitled to lodge an application before the ECtHR is an open question: in its case-law the ECtHR does not set out abstract criteria in order to distinguish governmental and non-governmental organisations (Article 34 ECHR), but examines the concrete circumstances in order to give an assessment on the practical independence of the legal entity from State authorities.

The fact that the legal entity is qualified according to domestic law as a "public entity" is not decisive. Similarly, even if the applicant broadcaster is classified as "public" at the domestic level, the Court continues to examine its legal status, the right that status gives it, the nature of the activity it carries out, the context in which it is carried out, the degree of the broadcaster's independence from political authorities, to decide whether the public broadcaster can be considered as "nongovernmental organisation" under Article 34 ECHR and entitled to lodge an individual application before it. The Constitutional Court, having the necessary legal and factual knowledge of the concrete circumstances of the case pending before it, can draw conclusions from this analysis of the ECtHR's approach to such cases. Furthermore, the Venice Commission is not aware of any precedent in the case-law of the ECtHR analysing the issue on whether new rules adopted by a parliament concerning the organization of a public broadcaster can be considered as a violation of the right to freedom of expression of the members of the governing board of a broadcaster.

Amicus Curiae Brief for the Constitutional Court of Georgia on the Retroactivity of Statutes of Limitation and the Retroactive Prevention of the Application of a conditional sentence[70]

The questions below were raised in the context of complaints made by three separate complainants. According to the request by the President of the Constitutional Court, the facts in these cases can be described as follows:

1. *The first complainant committed an offence on 5 May 2000. At that time the relevant law was the Criminal Code of Georgia. This provided for a limitation of five years. On 1 June 2000 the Criminal Code of Georgia 1999 came into force, which extended the prescription period to six years with retroactive effect. The accused was indicted on 20 January 2006, outside the five year period but within the six year period. At the time the period was extended the period of prescription had not yet run.*

2. *The facts in relation to the second complainant are similar. The offence was committed on 10 June 1992. The prescription period then for that offence was 10 years. On 1 June 2000 it was*

[70] CDL-AD(2009)012-e Amicus Curiae Brief for the Constitutional Court of Georgia on the Retroactivity of Statutes of Limitation and the Retroactive Prevention of the Application of a conditional sentence adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)012-e

extended to 25 years. The accused was indicted on 15 September 2005, outside the 10 year period but within the 25 year limit.

3. *In the third case, the applicable sentence had been changed between the commission of the offence and the date of sentence so as to prevent the imposition of a conditional sentence.*

Questions raised

a) *Does the prohibition of retroactivity of criminal laws extend to the statute of limitations for the prosecution of offences?*

b) *For the application of the statute of limitations retroactively, is it relevant that in the described cases, the applicable law was amended prior to extinguishment of the statute of limitations under the previous criminal law, which was in force at the time of the commission of the offence; thus, the limitations were not revived, but extended?*

c) *What does the case-law of the European Court of Human Rights state regarding the retroactivity of statutes of limitations of criminal law and regarding conditional punishment?*

d) *Does the principle of retroactivity apply only to criminal law or also to criminal procedure?*

Amicus Curiae Brief for the Constitutional Court of Georgia on the viewer's right of access to Court against decisions of an independent broadcasting authority concerning the programme schedule[71]

The Constitutional Court requested an amicus curiae opinion on the limitation of the viewers' right of access to court against decisions of an independent broadcasting authority regarding the rescheduling of programmes in compliance with the conditions of the broadcasting license (notably broadcast programmes with sexual or erotic content only at specified times).

The Venice Commission concluded that the question of whether viewers may claim to be victims of a violation of the ECHR merely on account of the broadcasting of a television programme in breach of the applicable rules on the broadcasting time needs to be addressed. If the national law provides for the possibility for a viewer to apply to the regulatory authority in order to seek the rescheduling of a programme in line with the applicable rules on the broadcasting time, neither Article 6 nor Article 13 ECHR require the possibility of applying to a court against the possible refusal by a regulatory authority competent to control the content of television programmes.

An analysis of some examples of European legislation in this field shows that some countries provide for the possibility for the viewers to apply to an independent authority in

[71] CDL-AD(2009)013-e Amicus Curiae Brief for the Constitutional Court of Georgia on the viewer's right of access to Court against decisions of an independent broadcasting authority concerning the programme schedule adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)013-e

order to seek the rescheduling of certain programmes. In some cases, the decisions of these authorities are subject to judicial review. Access to court is therefore provided in order to protect constitutionally guaranteed rights of the viewers.

Amicus Curiae Opinion on the relationship between the Freedom of Expression and Defamation with respect to unproven defamatory allegations of fact[72]

The Constitutional Court of Georgia approached the Venice Commission to give an opinion on the relationship between the freedom of expression and defamation – namely, Articles 19.2 of the Constitution of Georgia and Article 18.2 of the Civil Code respectively). Relating to Article 19.2 of the Constitution of Georgia. This provision reads: 1. every individual has the right to freedom of speech, thought, conscience, religion and belief. 2. The persecution of an individual for their thought, beliefs or religion is prohibited as is also the compulsion to express opinions about them. 3. These rights may not be restricted unless the exercise of these rights infringes upon the rights of other individuals.

In a case pending before the Constitutional Court of Georgia the applicant alleged that Article 18 (2) of the Civil Code of Georgia is unconstitutional, namely that it violates Article 19 (2) of the Constitution of Georgia. Article 18 par.2 of the Civil Code reads as follows: "A person is entitled to demand in court the retraction of information that defames his honour, dignity, privacy, personal inviolability or business reputation unless the person who disseminated such information can prove that it corresponds to the true state of affairs. The same rule applies to the incomplete dissemination of facts, if such dissemination defames the honour, dignity or business reputation of a person."

[72] CDL-AD(2004)011-e Amicus Curiae Opinion on the relationship between the Freedom of Expression and Defamation with respect to unproven defamatory allegations of fact as requested by the Constitutional Court of Georgia, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)011-e

VIII. The NGOs as Amicus in judicial proceedings

Concurrently, with the courts' need to obtain different perspectives from non-represented third parties and economic factors related therewith, various interest groups, including NGOs, consider the ability to join existing legal proceedings as Amicus an important method for the advancement of their goals.[73]

Submission of Amicus briefs allows such groups to express their interests through the courts. In the past two decades, there has been a significant increase in the power and number of NGOs both at national and international levels.[74]

NGOs have become significant and sometimes exclusive players in many areas, especially in connection to human rights and civil rights issues.[75] Due to the change in the role of the courts in society and NGO's increased involvement in society, NGOs consider joining legal proceedings as an Amicus as an effective and sometimes even exclusive tool to promote their cause.[76]

In some of the struggles experienced by NGOs, the Amicus practice is perceived as the official legal edge in a multi-level political and moral struggle, which includes, among other tactics, petitions, lobbying the legislative, demonstrations, and media use[77].

The intensive use of the Amicus practice by NGOs started to gain more traction in the mid-20th century in the U.S., 215 and has since spread internationally to countries such as Canada, Britain, Australia, as well as the International Criminal Court, Latin American Courts for Human Rights, international criminal courts, international arbitration proceedings and in Latin American countries and on a smaller scale in countries with authoritarian regimes (e.g., Russia and some Eastern European countries).[78]

The impact of NGOs on the adoption of the Amicus practice in Latin American countries is particularly interesting. NGOs, mainly human rights organizations, have strongly pushed

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[73] Eric De Brabandere, NGOs and the 'Public Interest': The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes, 12 CHI. J. INT'L L. 85 (2011); Henry S. Gao, Amicus Curiae in WTO Dispute Settlement: Theory and Practice, 1 CHINA RTS. F. 51 (2006); Federico Ortino, The Impact of Amicus Curiae Briefs in the Settlement of Trade and Investment Disputes: An Analysis of the Shrimp/Turtle and Methanex Decisions, in ECONOMIC LAW AS AN ECONOMIC GOOD 301, 316 (Karl M. Meessen et al. eds., 2009).

[74] See generally KOSHNER, supra note 209; Kim D. Reimann, A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs, 50 INT'L STUD. Q. 45 (2006).

[75] See generally Steve Charnovitz, Two Centuries of Participation: NGOs and International Governance, 18 MICH. J. INT'L L. 183 (1997); see also COLLINS

[76] PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 1, 48 (2008).

[77] Ibid see p.5

[78] This development in civil society and the rise of NGOs trying to influence the decision-making process relates also to broader changes which have occurred in these countries, including democratization and economic changes. See generally RUSSIAN CIVIL SOCIETY: A CRITICAL ASSESSMENT (Alfred B. Evans, Jr., Laura A. Henry & Lisa McIntosh Sundstrom eds., 2006); Jeffrey Herbst, Political Liberalization in Africa After Ten Years, 33 COMP. POL. 357 (2001).

the courts to adopt the Amicus practice in various Latin American countries.[79] Various international organizations operating in Latin America have submitted Amicus briefs to state courts on a broad spectrum of issues.[80]As a result, these submissions have caused and even compelled courts to adopt the Amicus practice, despite the fact that such practice was not regulated at all.[81]

Even though in the civil law system, as a rule, third parties do not intervene in legal proceedings without the existence of direct interest, the Amicus briefs of these organizations have led to a robust legal and public discussion on this matter, and eventually, managed to gain formal recognition for the Amicus practice.[82] The most prominent examples of such trends include the successes of international organizations to join as Amici, to submit Amicus briefs, and to influence public issues in Brazil, Uruguay, Argentina, Mexico, and Peru. The Amicus briefs submitted by various organizations led state courts to adopt this practice, sometimes reluctantly, and sometimes in spite of the objections of the formal parties to the proceeding. In some Latin American countries, assertive NGOs were not only one of the causes of the Amicus Curiae institution—but the main drivers behind it.

The Growing Power of the Law Profession in submitting Amicus

The desire of interest groups within society to influence the decision-making process is also related to the strengthening of the desire of lawyers to influence society, concurrently with significant growth in the number of lawyers around the world as measured per capita.[83] Due to the increased awareness of liberal rights—such as freedom of speech or political rights—closely linked to capitalism, personal wealth, industrialization, and economic development, the number of lawyers has grown significantly in recent years in western countries.[84]

The growing number of lawyers in the world, and in particular the increase in the number of jurists engaging in advancing certain social causes, sometimes referred to as "cause lawyering," "public interest law," or "social lawyering," has contributed to the development of the Amicus Curiae institution. In Europe and especially in Spain, Germany, and England, there has been a significant increase in the number of lawyers in recent years as compared to

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[79] Steven Kochevar, Amici Curiae in Civil Law Jurisdictions, 122 YALE L.J. 1653 (2013).

[80] Id

[81] Id

[82] Ibid see p.5

[83] CCBE Lawyers' Statistics 2015, CCBE (May 2015), https://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2015_Table_of_Lawyer1_1433140834.pdf; J. Mark Ramseyer & Eric B. Rasmusen, Comparative Litigation Rates, The Harv. John M. Olin Discussion Paper Series (Dec. 2010). For a discussion in the increasing use of Amicus practice in various areas of law for the interest of representing their clients see Carrie Menkel-Meadow, Too Many Lawyers? Or Should Lawyers Be Doing Other Things?, 19 INT'L J. LEGAL PROF. 147, 151 (2012); Kian Ganz, RTI reveals: 1.3m advocates; 1 in 300 Delhi-ites a lawyer; Maharashtra lawyers 'richest'; Jharkand, Assam, J&K fastest, LEGALLY INDIA (Feb. 18, 2013), https://www.legallyindia.com/the-bench-and-the-bar/rti-reveals-number-of-lawyers-india-20130218-3448; Matt Leichter, Lawyers Per Capita by State, LAST GEN X AMERICAN (Sept. 16, 2019, 2:58 PM), https://lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/; Debra Cassens Weiss, Lawyer Population 15% Higher than 10 Years Ago New ABA Data Shows, ABA J. (May 3, 2018, 2:31 PM), http://www.abajournal.com/news/article/lawyer_population_15_higher_than_10_years_ago_new_ aba_data_shows.

[84] 3 CCBE Lawyers' Statistics 2015, supra note 222; Menkel-Meadow, supra note 222.

the population growth. In general, in common law countries, the number of lawyers tends to be greater because lawyers' training leads them to view their practice as one that allows them to be employed in a large number of different jobs.[85]

From the perspective of lawyers, in particular those who advocate for social change, the use of Amicus is one of the prevailing tools in the law which helps promote social interests. Lawyers of groups seeking social change tend to see legal proceedings as a space in which different strategies and techniques are used for purposes beyond those of the litigation at hand.[86]

The Influence on the Decision-Making Process of the Courts

Some critics claim that citations or references to information presented by the Amicus in court decisions serve to indicate that the information presented by the Amicus affects the work of courts and their decisions.[87] For instance, between the years 2010 to 2016, in about 50% of the cases in which the court handed down its decision, the Supreme Court of the

United States cited or referred to information Amicus presented to it.[88] And between the years 2015 and 2016, 54% of its decisions, the Supreme Court of the United States explicitly referred to various types of information presented by Amicus.[89]

Similar statistics from international courts, such as the Latin American Courts for Human Rights,[90] indicate a great reliance on the information presented by Amicus briefs.

Such statistics help strengthen the assumption that courts were influenced by the Amicus briefs submitted to them, although it cannot be determined exactly how influential the briefs were in the outcome of the decision.

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[85] For the increase in the number of lawyers in Europe see CCBE Lawyers' Statistics 2015, supra note 222; see also CCBE Lawyers' Stastistic 2018, CCBE (Oct. 2018), https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Statistics/EN_STAT_-2018_Number-of-lawyers-in-European-countries.pdf.

[86] MICHAEL W. MCCANN, RIGHTS AT WORK 48–91 (1994)

[87] Kelly J. Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & POL. 33 (2004).

[88] Id.; see also Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content, 49 L. & SOC'Y REV. 917 (2015). Between the years 2010–2016, Justice Ginsburg cited Amicus briefs in approximately 45% of her decisions. Justice Kennedy cited Amicus briefs in about 42% of his decisions. Further, Justice Sotomayor 40%, Justice Roberts 40%, Justice Breyer 39%, Justice Kagan 35%, Justice Alito 27%, Justice Scalia 24%, and Justice Thomas 22%. See Franze & Anderson

[89] See Anthony J. Franze & R. Reeves Anderson, In Unusual Term, Big Year for Amicus Curiae at the Supreme Court, NAT'L L.J., 2 (Sep. 21, 2016) [hereinafter Franze & Anderson, Unusual Term].

[90] Francisco J. Rivera Juaristi, The Amicus Curiae in the Inter-American Court of Human Rights (1982–2013), 1 (Aug. 1, 2014)

In light of these findings, and similar findings of other studies,[91] the citation of the Amicus briefs in courts' decisions demonstrates that courts take into consideration, in some way, the positions presented to them by the Amicus. **Even if the court's position did not conform to the position of the Amicus, there is still great importance in the actual participation of Amicus in the proceeding, as the very participation itself helps to—in certain cases—ignite additional processes and at the same time strengthen the legitimacy of these rulings**.[92]

[91] Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the affirmative action admissions policy of the University of Michigan Law School.). Author of the Grutter opinion, Supreme Court Justice Ruth Bader Ginsburg, mentioned that one of the Amicus Curiae briefs that influenced her was a brief by a retired U.S. Army Officer which described the negative impact that the Army would suffer from if it did not have adequate diversity between the officers. Id. at 331; see also Linda Sandstrom Simard, An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism, 27 REV. LITIG. 669, 696 (2008)

[92] Id See supra note 24

IX. Closing Remarks

The Potential for More Complete Judicial Decisions

Drafting Amicus briefs is relatively cheap compared with other existing alternatives. The judicial procedures concerning the usage of the Amicus practice could incentivize the use of the Amicus for two main reasons: low procedural costs, and minimal economic exposure. Thus, the Amicus practice enables courts to introduce, without supplementary costs, extensive knowledge from various fields, different from those presented by the formal parties, and additionally from a wide range of third parties possessing certain interests in the proceedings. Considering this, Amicus may prevent reliance on exclusive sources of knowledge that are presented to the court by the formal litigants.

Economic efficiency of the Amicus Curiae

One of the main social factors for the Amicus Curiae institution is the economic factor. To influence courts, economic resources are required. The Amicus practice has a certain advantage over other legal practices, as the use of Amicus entails rather minimal economic resources for two reasons:

a) *the costs of joining as an Amicus are usually low; and*

b) *the Amicus' exposure to economic risks is rather low.*[93]

These two factors incentivize greater use of the Amicus procedure.

Writing an Amicus brief tends to be relatively easy for interest groups. Usually, most Amicus briefs rely on existing materials, data, and research, so there is no need to generate new information but rather just to provide opinions, interpretation, or perspective concerning a particular issue presented to the court by the formal parties.[94]

The procedure for writing the Amicus brief tends to be shorter and simpler than other litigation alternatives, which tend to require far more resources and time to produce.[95]

For example, an Amicus brief does not need to address all the claims of the parties and debunk, contradict, or dispute them.

The process of drafting an Amicus brief tends to be shorter than other litigation alternatives. The Amicus brief is not required to address all the arguments of the formal parties to the

[93] REAGAN WM. SIMPSON & MARY R. VASALY, THE AMICUS BRIEF: HOW TO BE A GOOD FRIEND OF THE COURT (2d ed. 2004).

[94] Id

[95] Id

litigation but may just present the interests of the party drafting the Amicus as they relate to the legal proceeding. Furthermore, the Amicus brief is often written by citizens or law students without the costs of additional legal services, which further reduce the costs associated with drafting the brief. Often, the costs associated with usage of the Amicus are relatively low, as Amici are not required to pay various court costs. [96]

Procedural advantages of the Amicus

Apart from the low costs, the Amicus benefits from clear procedural advantages. The Amicus allows third parties who are unable (e.g., financially) to file an independent petition, or who are concerned about the costs associated with being a formal party to the proceeding, to present their position. However, those who choose to present their position as Amicus essentially choose to be a relatively passive partner in the legal proceeding. Apart from presenting their position in writing, the Amicus have no real ability to control the judicial process.[97]

The involvement of the Amicus in the proceedings tends to be limited to the submission of a written Amicus brief, and in rare instances, the Amici might be allowed to argue at oral arguments.[98] The formal litigants to the proceedings are who conduct the proceedings under the auspices of the court, and are able, at their discretion, to strike, reject, withdraw a petition, or to settle the case, all without consulting with the Amicus.

Concern for negative impact of the Amicus on the formal parties

Some argue that adding Amicus to existing proceedings may burden the courts with a great deal of information that not only is not essential to their work, but also leads to wasting judicial resources which in turn harms the right of formal parties to be granted an efficient and expeditious process.[99]

The possibility of submitting an Amicus brief, when there are no clear procedural limitations, places too many unnecessary burdens on the courts as a result of the high number of Amicus briefs submitted. As a result, this situation may cause substantial harm to the efficiency of the judicial process and possibly violate the procedural rights of the formal parties.

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[96] Ibid see p.5

[97] REAGAN WM. SIMPSON & MARY R. VASALY, THE AMICUS BRIEF: HOW TO BE A GOOD FRIEND OF THE COURT (2d ed. 2004).

[98] Id

[99] See Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997)

X. Recommendations for the constitutional court of Ukraine

It is important to create an effective basis for the functioning of the Amicus Curiae mechanism both in procedural rules and by an underlying practice. This, first and foremost, requires prescribing the respective rules, on the basis of the legislation on the Constitutional Court of Ukraine, in the Rules (Reglament) of the Court.

The requirements for qualitative Amicus brief for constitutionality review

An effective amicus curiae brief should be clear, realistic in its objectives, succinct, and mindful of the legal culture in the court and country where the case is pending. We want to highlight the following key recommendations for the admissibility of Amicus Briefs before the Constitutional Court.

It is advised that the foregoing rules clearly indicate the scope of subjects, who are to be entitled to submit the Amicus brief to the Constitutional Court and also, prescribe the form that is to be filled in as an Amicus brief.

1) A good understanding of the court and what arguments it finds receptive

It is very important that, from the text of the Amicus, should come a good understanding of the practice of the court in which the case is examined. The NGO should research previous judgments made by that court and ascertain whether there are particular lines of argument that the court finds persuasive, or whether there are indications in previous judgments that it could be willing to consider certain issues.

It is advised to listen to court "insiders" *(former judges or senior lawyers at courts sometimes write blog posts or academic articles on their experience with amicus curiae interventions).* It is useful to track these down, read them and follow the advice they give.[100]

2) Avoid repeating arguments that are already before the court

Even when an amicus curiae intervention is not required to be objective, care should be taken to present arguments other than those that have already been made by the parties. The unique value that an amicus curia brings is providing a perspective on a case that is other than that of the parties. In an area of law that is relatively new and still under development, amicus curiae might provide information on how the issue has been approached in other countries or refer to academic studies that show the implications of different types of regulation.

[100] See, for example, P. Harvey, Third Party Interventions before the ECtHR: A Rough Guide, 24 February 2015: https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/

In some countries and before some courts the law provides that amici curiae are provided with the pleadings in the case, so that they can avoid repetition. Even when there is no legal obligation, parties to the case – or at least, the lawyers representing a journalist or media outlet – may be happy to share their pleadings, or even their draft pleadings, with lawyers acting for the amicus curiae.

3) Include an executive summary and ensure easy readability

Judges may not read every intervention from beginning to end and instead rely on summaries provided by a court clerk. In anticipation of this, an amicus curia is well-advised to provide an executive summary of their own, ensuring that it reflects exactly the concerns and arguments that they wish to highlight. Interventions should always be succinct and to the point. Some courts enforce this by setting page limits, but even when no maximum number of pages is set an intervener should write crisply and avoid repetition.

Interveners should realize that they are, in a sense, a 'guest' in the proceedings, and if they outstay their welcome through writing at unnecessary length, courts may not be receptive to the arguments they make or allow them to intervene in future cases. In terms of presentation, the amicus curiae brief should be formatted in such a way as to make it easy to read.

Longer briefs should have a table of contents, sections should have clear headers, and conclusions should be clearly indicated as such. The writer of the brief should have in mind that their target audience is a court clerk who is overworked and who has little time: the clerk's job of reading the brief and summarizing it (if, despite the advice above, no executive summary is included) should be made as easy as possible.

For instance, the Rules of the Constitutional Court of Georgia provide for the special application form that includes specific sub-sections designed to present information by the Amicus in a coherent and structured manner. This is likely to simplify the work of the Constitutional Court of Ukraine when studying the substance of the registered Amicus briefs.

In addition, similar to the practice adopted by the Constitutional Court of Georgia, it might make sense to publish all registered Amicus briefs on the webpage of the Constitutional Court of Ukraine in order to ensure accessibility to the wider public. This is going to contribute to increasing the awareness about constitutional proceedings and also, spark the interest in pending constitutional cases.

In parallel to designing the respective regulatory rules regarding the Amicus Curiae mechanism, in order to make the system effective it is further advised to engage actively with a potential target audience of the Amicus. This, chiefly, includes non-governmental organizations, academic institutions professional associations and unions – institutions that are most likely to have an inherent interest and motivation to become Amici of the Constitutional Court. It could be beneficial to organize different events – meetings,

workshops, discussions – that would focus on exchanging information about the Amicus Curiae mechanism, its regulatory rules and operation in practice.

The Constitutional Court along with other Ukrainian and international partners may also consider training specific groups of people – e.g. students at university clinics, NGO representatives – to make them more equipped to submit Amicus briefs. It should be noted that this is a two-way street, as an added benefit of the said strategy would be both widening the scope of access towards constitutional justice, increasing public participation and, thereby, influencing constitutional adjudication, which, also, is likely to contribute to a sustained increase of trust in the work of the Constitutional Court.


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