

The Potential Benefits and Legal Basis of the Participation of *amicus curiae* in the African Commission on Human and Peoples' Rights, African Court of Human and Peoples' Rights, and the African Committee on the Rights and Welfare of the Child

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Abstract

Amicus curiae sometimes known as friend of court, is a volunteer who consults and directs courts on cases believed to be very ambiguous and complex and thereby help court to render the case at hand. It can be said that *amicus curiae* is a means to assist the justice system where courts are at difficulty to determine complex cases. However, the *modus operandi* of *amicus curiae* is not clearly and comprehensively regulated by both domestic and regional human rights instruments.

This article tries to explore whether *amicus curiae* legally exists in the African Charter on Human and Peoples Rights, the means of enforcement, its status and the value of using *amicus curiae* in human rights litigation in Africa.

Key words: *Amicus curiae*, African Charter on Human and Peoples Rights, status of *amicus curiae* and Human rights

A. Definition and Historical Root

Having a definition of a concept will help to understand contents and the scope of application of the concept. On this personal conviction, the definition of *amicus curiae* varies across legal system which creates legal bewilderment and content misunderstanding. Scholars are divided

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into different lines of understanding over the origin of *amicus curiae* across civil and common law legal systems. Some argue that *amicus curiae* was originated from early Roman world *consilium* and developed following the civil law legal system to mean a “friend of the court”. Yet others assert that *amicus curiae* were originated from the common law legal system, especially USA and UK to overcome adversarial shortcomings by complementing evidences and other problems from the *amicus curiae*.

According to modern *Law Lexicon* which is inspired by old English legal commentaries define *amicus curiae* as:

one, who volunteers or on invitation of the Court, instructs the Court on a matter of law concerning which the latter is doubtful or mistaken, or informs him on facts, a knowledge of which is necessary to a proper disposition of the case.²

The Corpus Juris Secundum defines an *amicus curiae* as a friend of the court:

one who, not a party, but, just as any stranger might, gives information for the assistance of the court on some matter of law in regard to which the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts.³

Another dictionary for the legal profession in the United States describes the same 'friend of the court' as:

Individuals or groups who are not parties to a litigation, but who are nevertheless permitted to present their views on the issues involved in a pending case to the court in written briefs or via oral presentation.⁴

Mellinkoff's Dictionary of American Legal Usage, on the other hand, states that this friend of the court is “someone not a party to the litigation, but usually favoring one of the parties, and permitted to make an argument to the court”⁵.

Another definition on the meaning of the content of the *amicus curiae* is:

[A]micus curiae is one who, as a stander-by, when a judge is in doubt or mistaken in a matter of law, may inform the court. He is only heard by leave, and for the assistance of

² P. Ramanatha Aiyar, *The Law Lexicon*, 2d ed. (Nagpur: Wadhwa and Co., 1997) at 102 as cited in S. Chandra Mohan, *The Amicus Curiae: Friends No More?*, (Singapore Journal of Legal Studies, 2010) P 334 , available at <http://heionline.org> (accessed in February 18, 2013)

³ Ibid

⁴ Ibid

⁵ Ibid

the court, upon a case then before it [The practice is] to allow an attorney, or other person, to appear as a friend of the court in a case, to act as an adviser of the court, and to make suggestions as to matters appearing upon the record, or in matters of practice.⁶

These variant definitions are indications of the problems of the concept of *amicus curiae*. Who are *amicus curiae*? Is she volunteer, respected invitee, or complete stranger or bystander/passersby spectator? Must she trained or professional? Is she an advisor or an assistant to court? Is she independent or represent a partisan over the case? Does the *amicus* assist the court issue of law or issue of fact? In fact there is a difference between a friend *of* the court or *to* the court⁷ where the former is to mean that the *amicus* will assist the court in providing information in order to save the court from falling into error whereas in the later case the *amicus* will persuade the court to adopt a particular point of view on the outcome of the case.

B. Pros and Cons of *Amicus Curiae*

A concept has its own advantages and disadvantages taking into account different principles and policies. Succinctly I will provide the advantages and disadvantages of *amicus curiae* under different institutional arrangements *inter alia* African Commission on Human and Peoples Rights, African Court on Human and Peoples Rights and African Committee of Experts on the Rights and Welfare of the Child.

1. Pros of *Amicus Curiae*

The advantages of using *amicus curiae* in international human rights institutions in charge of solving international human rights are: i)In these increasing volumes of relevant international, regional and local jurisprudence presents great challenges to international institutions in charge of absolving human rights can be complemented by *amicus curiae*, ii)Currently huge volumes of different laws, conventions, decisions, and state practice, general principles of law and writings and publications managing information could be a major problem to international tribunals and hence *amicus curiae* could bring the information to the attention of the tribunals, iii)Speedy dispensation of cases is one of the principles of human right litigations and in order to realize these *amicus curiae* could complement international or regional human right tribunals in

⁶Comments: Quasi-Party In the Guise of *Amicus Curiae*,(Cumberland Law Review, Volume7, 293(1976-1977)), P 294, available at <http://heionline.org> (accessed on February 19, 2013)

⁷ Supra note at 1

providing significant factual material evidences, iv) Resource limitation of finance, material and human could be overcome using *amicus curiae* to conduct a research over issues in order to develop human rights jurisprudence, v) *Amicus curiae* could be a means for lobbying technique to influence policy and overcome cost effective access to information⁸,vi) *Amicus curiae* could assist the international tribunals by providing ideas, arguments, theories, insights, facts, and data in order to do away with arbitrariness and bring about a proper administration of justice to the corpus of human rights, and vii) Caseloads and burdens under international tribunals could be managed using *amicus curiae*.⁹

2. Cons of *Amicus Curiae*

The disadvantages of using *amicus curiae* in international human rights litigation are: i) Sometime using *amicus curiae* could result in waste of judicial resources, ii) Duplicative arguments may be created resulting in confusions and confrontations¹⁰, iii) Imbalance of arms may be created among litigant parties, iv) Lack of accountability on the side of *amicus curiae* could lead to injustice¹¹, and v) Confidentiality procedure could be at risk of disclosure.

C. Legal Backup of *Amicus Curiae* under the African Commission on HPRs, the African Court on HPRs and African Committee of Experts on the Rights and Welfare of the Child?

To begin with the first on issues of *amicus curiae*, I personally believe that the African Commission somehow recognizes *amicus curiae*.

⁸ Sarah Williams and Hannah Woolaver. The Role of the *Amicus Curiae* Before International Criminal Tribunal, (International Criminal Law Review 6, PP 151-189), 2006, available at <http://heinonline.org> (accessed on February 18, 2013)

⁹Karen O'connor and Lee Epstein. Court, Rules And Workload: A Case Study Of Rules Governing *Amicus Curiae* Participation, (The Justice System Journal Volume 8, Number 1, (1983), available at <http://heinonline.org> (accessed on February 19, 2013)

¹⁰ Ibid

¹¹ Supra note at 7

The Commission may *resort to any appropriate method of investigation*; it may hear from the Secretary General of the Organization of African Unity or **any other person capable of enlightening it** (Emphasis mine).¹²

From this article, we can understand that *amicus curiae* though not mentioned by name, is recognized by the African Commission. I'm saying this, because the investigation of the commission can be entrusted to *any person capable of enlightening the Commission* in its investigation. But entrusting the investigation to any person capable of enlightening the Commission is discretionary upon the Commission. Thus "friend of" the Commission will help the Commission in providing information not persuading the view over its decision. However, Rules of Procedure 2010 Rule 99(16) clearly uses *amicus curiae* by name articulating that:

The Commission *may receive amicus curiae* brief on communication. During the hearing of a Communication in which *amicus curiae* brief has been filed, the Commission, *where necessary* shall permit the author of the brief or the representative to address the Commission (Emphasis mine).¹³

As regards to the court, the provision of the protocol could help to understand the existence of the concept; The Court *may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence* (Emphasis mine).¹⁴ Here, the court seems to be abiding by the evidences (oral, written or expert testimony) to arrive at its decision though entrusting is discretionary for deliberation.¹⁵ But how the court shall abide by the evidences of the expert testimony which entrusted at discretion? I think the information will also be used at the discretion of the court and hence should not be binding.

However, there is no clear legal indication as to the existence of the concept on the African Committee of Experts on the Rights and Welfare of the Child except explicating nuanced concept from the readings of the following.

¹² Article 46 of the African Charter on Human and Peoples Rights, (adopted 27 June 1981, OAU Doc, CAB/LEG/67/3rev.5,21 I.L.M.58(1982), entered into force 21 October 1986)

¹³ Rules of Procedure of the African Commission on Human and Peoples' Rights.(Approved by the African Commission on Human and Peoples' Rights during its 47th ordinary session held in Banjul (The Gambia) from May 12 to 26, 2010)

¹⁴ Article 26(2) of Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004)

¹⁵ David Padilla. An African Human Rights Court: Reflections from the perspective of the Inter-American system. (African Human Rights Law Journal 2, 185, 2002). P192, available at <http://heionline.org> (accessed on February 18, 2013)

The Committee may, resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the States Parties any information relevant to the implementation of the Charter and may also *resort to any appropriate method of investigating* the measures the State Party has adopted to implement the Charter(Emphasis mine).¹⁶

Generally, it can be said that *amicus curiae*, though named only in the Rules of Procedure, there are indications as a concept showing its existence taking the above-mentioned evidences.

Summary and Concluding Remarks

Amicus curiae, when explored in different human rights legislations in Africa regional setup, is vaguely stated in various provisions particularly, the Rules of Procedure 2010 Rule 99(16). This Rule states *amicus curiae* by name under Rule 99(16) very boldly. However, the mode of operation of *amicus curiae* and its use to human rights litigation are not clearly regulated.

As said above, *amicus curiae*, if harnessed and regulated properly, could enhance realization of human rights and justice in the rendition of cases by courts. From this understanding the following remarks can be drawn.

- ✓ It is important to the African Commission to consider and fashion *amicus curiae* in the human rights litigations in Africa by clearly regulating it by law.
- ✓ In the exercise of court's jurisdiction, *amicus curiae* should be seen as a friend who can reinforce justice not as threat for courts impartiality and roles.
- ✓ African Commission is mandated for the protection and promotion of human rights in Africa, and hence, should develop a standard whereby *amicus curiae* can be utilized.

¹⁶ Article 45(1) of the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.