The *Amicus Curiae*: Its Relevance to Ethiopia*

By Getachew Aberra**

The institution of the *amicus curiae* has been an important feature of the common law system. It also appears in some form or another in the civil law system. Particularly in the common law system, the institution has been serving important purposes of justice for ages now. However, the treatment it has been accorded in legal literature does not match with its importance. There is generally a dearth of material dealing with this old and important institution.

More importantly, there appears to be very little awareness of the nature and functions of the *amicus curiae* among law makers, judges and practitioners in Ethiopia. Considering the current developments in Ethiopia where various civil organizations and advocacy groups are being formed with a view to advancing and promoting individual and group rights, discussions on the nature, functions and relevancy of the institution of the *amicus curiae* are necessary and topical.

This paper is aimed at provoking such discussions. The paper is divided into two parts. Part one deals with the nature and the scope of function of the *amicus curia*. Part two examines traditional and modern Ethiopian practice regarding the *amicus curiae* followed by some concluding remarks on the relevance of the institution to the Ethiopian situation.

Part I
General

1. Nature of the *Amicus Curiae*

The Latin term "*amicus curiae*" is derived from the Greek phrase, *amaykas kuriyay*, which literally means a friend of the court.[1] The *amicus curiae*, as a friend of the court, is a bystander who, when a judge is doubtful or mistaken, may inform the court.[2]

The forerunner of the present *amicus curiae* was the *consilium* under Roman law who could be appointed by the judge from among attorneys to advise and assist the court in the disposition of a case before it.[3] His opinion would enlighten the court on points of law with which it was not familiar.

The literal meaning of the *amicus curiae* as a friend of the court has technical significance in the sense that he is a friend of the court and not of the parties. He is a bystander who may, when the judge is doubtful or mistaken as to questions of fact or of law, inform the court. The *amicus curiae* is, therefore, distinguished from an advocate or attorney, in that the latter represents a party and is regarded by the law as a party to the dispute before the court having an interest in the outcome of the dispute and cannot, as such, be a bystander, a friend of the court.

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** Assistant Professor, Faculty of Law, Addis Ababa University.

[1] Black's Law Dictionary, West Publishing House, St. Paul, Minn. (1991) p.54.

[2] Corpus Juris Secundum Section 3A, (hereinafter CJS) p.422. For a discussion of the roles of international organizations as *amicus curiae* before the International Court of Justice, see C.W. Jenks, "The Status of International Organizations in Relation to the International Court of Justice", Grotious Transactions, vol. 32 (1946) p. 1 et. seq.

[3] "The *Amicus Curiae*", North-Western University Law Review, vol. 55 No. 4 (1960) p.469.

The *amicus curiae* must also be distinguished from those who are formally represented in any civil or criminal proceedings. Those formally represented are what are referred to, under procedural laws, as necessary and intervening parties. These are parties who have "vested interests" in the case and on whom any decree passed by the court in respect of the interests litigated in the proceeding is binding. The *amicus curiae* is not any of these parties; nor does he represent any of them. He is not, therefore, bound by the decree of the court. In fact, he can later on be a party to a dispute in respect of which he had earlier acted as an *amicus curiae*.[4]

2. **The Role of the Amicus Curiae**

The role of the *amicus curiae* is, upon designation by or leave of the court, to interpose in a dispute and inform or advise the court with regard to points of law or fact about which the court is doubtful or which may escape its attention.

The interposition of a person as an *amicus curiae* in any proceeding may have the effect of undermining the position of a party and enhancing that of the other party. But this does not make the *amicus curiae* a party to the proceeding. The *amicus curiae* is concerned, and must concern himself solely, with the true statement of the facts and of the law. Thus, objectively, no interest of any party is made better or worse of as a result of the interposition of the *amicus curiae* as a friend of the court,[5] or conversely, no party can have any legal interest in the facts and the law relevant to the issue or issues before the court remaining hidden from it.[6]

Early English practice would show that any bystander would volunteer as amicus curiae and offer an advice to the court without any invitation from it and without the consent of the parties. Thus " a bystander would make an appearance as *ut amicii curiae* and (would) inform the court of the truth".[7] The modern conception of this term is a combination of features of the Roman *concilium* who may be appointed by the judge and the English *ut amicii curiae* who made an appearance on his own initiation, without the consent of the parties and invitation by the court. Accordingly, today, the court has the right to appoint, and to grant leave to any person to appear as an *amicus curiae*. The consequence is that no person can be, and act as, an *amicus curiae* in any preceding unless he is appointed or granted leave to appear as one by the court.[8]

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[4] Ibid. p.470; so, too, a person who has served as *amicus curiae* can again serve as an *amicus curiae* of the same case in a subsequent proceeding - ibid.

[5] In modern practice, however, the consent of the parties can have influence on the decision of the court to grant or reject application to file amicus brief though the judge can overrule the objection of the parties - Black's Dictionary, op. cit. page 54; H. Abraham. The Judicial Process, Wynnewood, PA (1993) p. 235; see discussion of this point on pp. 8-9 of this paper.

[6] This is truer in the Continental Legal System where the judge has a role in raising questions of fact and law than in the Common Law System where the adversarial approach limits his role, though, even in the latter system, it is his duty to make an informed decision as to the facts and the law.

[7] "The *Amicus Curiae*", op. cit., p. 469; see also pp. 5-6 infra.

[8] CJS, p.423, Note 10; Abraham, op. cit, p. 235

It must be noted here that the conception of the *amicus curiae* has undergone and continues to undergo changes to keep pace with practice. Thus, the *amicus curiae* is sometimes viewed as someone "with strong interest in or view on the subject matter of an action".[9] But this is only partly true. The court itself may find it necessary to appoint an attorney or a lay man to undertake investigations and to furnish it with information relevant to an action before it. Such appointment is not so much dependent upon the personal views of the person so appointed as *amicus curiae* as on his independence and qualification for the task. Admittedly, where a person applies to the court for leave to intervene in an action as an *amicus curiae*, he does so in pursuit of a strong interest or view. However, this strong interest or view cannot be personal to such person.[10] It must be prompted not by individual interest but by a higher, social or communal interest.

If, therefore, a party benefits from the appearance of a person as an *amicus curiae*, it simply means that the interest of such party is the same as the interest of society in the truth and justice; this cannot be objectionable as a matter of principles. The cause in pursuit of which an *amicus curiae* interposes is the cause of society and if a party benefits from such interposition, he benefits from the truth and justice which are causes espoused by society itself.[11] The benefit of such party is only incidental: it is not and cannot be the purpose for which the *amicus curiae* interposes. The whole idea behind the institution of the *amicus curiae*, and the judicial system for that matter, is the protection of the truth and the dispensation of justice to the litigants. The nature and purpose of the *amicus curiae* is to assist the court achieve these ends. As an English court held, "It is for the honour of the court to avoid error in their judgements ... Barbarism will be introduced if it be not admitted to inform the court of such gross and apparent errors in offices."[12] Where these nature and purpose change, the *raison d'être* of the *amicus curiae* disappears.

Social life and law are never static. They keep on changing and grow ever more complex. Judges of courts cannot be expected to know and to properly appreciate all the realities and the different manifestations of social life. This limitation of judges has long been recognized by the Supreme Court of the United States specially since it accepted and relied on the Brandeis Brief to decide a constitutional dispute before it, where Mr. Brandeis, later Justice, appeared as counsel and briefed the court on important constitutional facts.[13] Since then, "The courts have been generous in important constitutional law controversies in allowing interested parties to intervene or to submit *amicus curiae* briefs to inform the justices on constitutional facts".[14] This liberality is grounded on the understanding that while judges can, by training and experience, be especially qualified to determine the usual questions of law, this assumption cannot hold true with regard to the determination of questions of fact on the basis of which

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[9] Black's Law Dictionary. op. cit. p. 54; Abraham, op. cit., p. 234; Weiner "The Supreme Court's New Rules" 68 *Harvard Law Review*, p.80.

[10] As soon as the position of the *amicus curiae* coincides with his personal interest, his appearance will be deemed by the court an appearance of counsel - CJS, P. 422.

[11] There is no intention here to raise philosophical controversy; it is assumed that the measure of "the truth" is social reality and of "justice" the legal prescriptions, deemed fair and laid down by society.

[12] "The *Amicus Curiae*", op. cit. p.470, note 7.

[13] C.J. Antieau, *Adjudicating Constitutional Issues*, Oceana Publications, London, 1995, p.80; Weiner, op. cit. p.80.

[14] Antieau, op. cit. p.80.

the validity of a legislative act depends.[15] In every case where, for example, a court is asked to hold a statute invalid on the ground that it contravenes the constitution, the court is well advised to get information as to the facts which make such action valid or invalid. In as-much-as questions of fact are not proved through the regular process to the court in respect of the particular issue before it, it is not specially qualified to make better judgements than those made by ordinary people in general and the law - maker in particular.

The need for the court to avoid error is not limited to constitutional matters though errors in such matters can have much more serious social and political repercussions. The court is easily exposed to errors in all cases where the parties to any proceeding, either through lack of foresight, skill, interest, negligence or through collusion fail to adduce the facts and to raise the legal arguments which are relevant to thei ssues before it.[16] The *amicus curiae*, in such cases, is well suited "to inform the court as to the facts or situations which may have escaped consideration or to remind the court of legal matters which have escaped its notice and regarding which it appears in danger of a wrong interperetation."[17]

Thus, when the Supreme Court of the United States moved to amend its rules in 1949 with a view to tightening those relating to *amicus curiae* briefs on the ground that they had become 'a vehicle for propaganda effort ... essentially designed to exert extra - judicial pressure on judicial decision,"[18] Mr. justice Black, who dissented to the amendment, wrote: "most of the cases before the Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs" [19] The 1952 amendment of the rules relaxed the restrictions on amicus briefs and more roles are now permitted to them.[20]

It must be noted here that society's interest in the truth and justice is not any less important than its interest in the proper disposition of constitutional cases. What is more, society is interested in the integrity and reliability of judicial decisions. In this regard, it is not difficult to see that society's interest is indivisible in the sense that society is interested in attaining the objectives which an *amicus curiae* pursues irrespective of whose interest is served by his intervention. The court must in all cases avoid error and to the extent that an *amicus curiae* assists the court to this effect, it is a socially necessary institution.

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[15] Weiner, op. cit. p.80; H. W. Bikles "Judicial Determination of Constitutional Facts Affecting the Constitutionality of Legislative Action", *Harvard Law Review*, vol. 38 (1924-25), p.6.

[16] "The Amicus Curiae" op. cit. pp. 469-470.

[17] C.J.S. cited above, note 1, p.436; as the parties are in control regarding the facts of the case, it will be in the interest of justice and will protect the court from making errors if a person who has knowledge of the facts in dispute and *whom neither party is willing to vouch*, is called as the court's witness at the instance of an amicus curiae, see, for example - "The *Amicus Curiae*", op. cit. p. 471. Note 14.

[18] Weinter, op. cit. p.80; for the contrary view, see Abraham, op. cit. p. 230.

[19] "The *Amicus Curiae*", op. cit. p. 475, note 24.

[20] Weiner, op. cit. p. 81; a full text of the present rules is found in *Moore's Federal Practice*, Mathew Bender, New York, 1970.

3. Scope of Functions of the *Amicus curiae*

The outcome of litigation can affect interests, private or public, other than those formally represented, by establishing precedents, and *res judicata*, and by producing more immediately tangible public or private benefits or harms.[21] In view of the fact that the parties may, intentionally or otherwise, omit "to present clearly these consequences, a trial or appellate court traditionally could request or permit in its uncontrolled discretion, an outside *amicus curiae* to inform the court without the risk of being bound as an original party or intervenor."[22] The *amicus curiae*, therefore, ensures adequate disclosure before hand of the effects of a potential adjudication and saves the court from arriving at wrongful conclusions of fact and of law. This then is the basic principle that defines the functions of the *amicus curiae*.

As the institution of the *amicus curiae* under modern practice emerged out of the combination of the Roman *concilium* and the English *ut amicii curiae*,[23] this combination, in a sense, defines the scope of the function of the *amicus curiae*. The Roman *concilium* was basically the personal advisor of the judge. He gave the advice when the judge required him to. It appears that the advice of the *concilium* was available to the judge at all times though the *concilium* was not a public official. Engelman writes:

> ***"The greater the demands which the exercise of the 'jurisdiction' made upon the magistrates (for) knowledge of law, the more it became the custom for the magistrate to have about him assistants learned in the law. These ('assistants') were not public officials, but merely private aids of the magistrate whom they served. For this reason they never had any positive influence upon the administration of justice, their co-operation consisting only in advising the magistrate, who acted upon his own responsibility."[24] (Emphasis added).***

The Roman concilium was, therefore, a person who advised the court upon request or appointment by the court.

The English *ut amicii curiae*, on the other hand, was neither the personal advisor of the judge nor was his advice available to the judge at all times. The English *ut amicii curiae* was any bystander who gave his advice to the judge on his own initiation and without invitation from the court.[25]

Consequently the modern function of the *amicus curiae* is to advise the court *upon request* by the court and to offer advice to the court *upon permission* by the court. In both cases, the *amicus curiae* informs the court as the friend of the court on questions of fact and of law.

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[21] "The *Amicus Curiae*", op. cit p.469.
[22] Ibid, p.469-70.
[23] See note 7 supra
[24] Arthur Engelman, *A History of Continental Civil Procedure*, Augustus M. Kelly, New York, 1969, p.256
[25] "The *Amicus Curiae*", op. cit p.469, Note 3.

4. Basis of Intervention by the *Amicus Curiae*

Under modern practice, the court itself may find it advisable and expedient to appoint a person to serve as an *amicus curiae*. In a proper case, an *amicus curiae* may be appointed "to aid the court by the performance of certain labours and examinations which are necessary to guide the court to a proper conclusion"[26] Thus for example in contempt proceedings and cases of fraud committed against the court itself, an *amicus curiae* may be appointed by the court to make an investigation and conduct the hearing.[27] Similarly, where an attorney appointed by the State to represent a party in a proceeding declines to present oral arguments on behalf of his client, the court may appoint an *amicus curiae* to present such oral argument on behalf of such party.[28]

While the court is at liberty to appoint a person as an *amicus curiae*, case law and court practice have established some limitations on this liberty. Thus, the court may not appoint a person to serve as an amicus where his attitude appears to be partisan or where he is in the service of those having private interests in the outcome or is a regularly employed attorney of a party to the action.[29] Moreover, a trial court cannot appoint an *amicus curiae* after an appeal is taken; and an appellate court is without authority to appoint an *amicus curiae* in a case pending in a lower court.[30]

A person may also apply to the court for permission to appear as an *amicus curiae* in a proceeding. Such is the case where a person has a strong interest or view in the subject matter of the action, and he is not a proper party to the proceeding. Normally, the person who so intervenes may ostensibly advance the cause of a party while in actual fact he suggests a rationale consistent with his views[31] which views are not motivated by private interest or gain.[32] Apart from the rare cases where the *amicus curiae* can be said to be representing a private interest such as when he represents the interest of an insane person, or an infant (see note 33 CJS, p.425), which intervention itself is motivated by the pursuit of justice, practice shows that in most cases amicus briefs are submitted on behalf of sufficiently broad social interest. This is so because normally it is governmental units and

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[26] CJS., p. 428
[27] Ibid, Note 77
[28] Ibid,
[29] Ibid, p.426
[30] Ibid, p.429
[31] Black's Dictionary, op. cit, p.54
[32] See for example, the decision of the Supreme Court of India in Hirjbhoy Rustomji Patel V.State of Bombay (1953) quoted in N.S. Bindera, *Pleadings and Practice*, Law Books Co., Allahabad (1973), pp 349-50; see also New Encyclopaedia Britanica, vol. I (1995) where it is affirmed that "(*The amicus curiae*) is not a party to a law suit and thus differs from an intervenor who has direct interest in the outcome of the law suit and is, therefore permitted to participate as a party to the suit; for the contrary view see Abraham H., cited at note 5 supra who writes (p.234), "(The *amicus curiae*) is not a litigant in the suit but who is virtually interested in a decision favourable to the side it espouses. Long gone is the original concept of the amicus curiae - namely, that it 'acts for no one, but simply seeks to give information to the court'".

public interest bodies who apply for leave to act as *amicus curiae*.[33] Though, theoretically any interested party may apply, in practice "most *amicus curiae* briefs have come from active civic organisations and other pressure groups and, not surprisingly, from the (US) federal government itself via the Solicitor General"[34]

5. Descretion of the Court

It must be noted here that the court has no legal duty to appoint any person to serve as an *amicus curiae;* nor does the court have any legal duty to grant any person leave to appear as an *amicus curiae.* "The privilege to be heard as an *amicus curiae* is within the discretion of the court ... An amicus curiae is heard by leave, and only by leave, of the court. The granting of leave to be heard as an *amicus curiae* is a matter of favor or grace and not a matter of right but of privilege".[35]

As the privilege to be heard as an *amicus curiae* is entirely within the discretion of the court, there is no right to challenge the decision of the court denying or granting leave to appear as an *amicus curiae.* The decision of the court is not appealable.[36] This strongly contrasts with the position of counsel for the proper parties in that while counsel for the parties appears before the court as a matter of right, counsel as an *amicus curiae* can only appear at the instance and pleasure of the court.[37] The court itself determines whether and when it needs any assistance from an outsider and in this decision, it has exclusive privilege and absolute discretion.

When deciding to grant or deny leave to appear as an *amicus curiae*, the court takes into account certain important considerations. The Supreme Court of India, for instance, tends to grant leave to appear as an *amicus curiae* when it is faced with "difficult questions of law and practice"[38] or where the nature and importance of the question before the court would require the assistance of such person.[39]

In Us practice, intervention by a person as an amicus Curiae is justified only when he can show to the court that the infromation he desires to proffer is timely and useful.[40] He needs to

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[33] "The Amicus Curiae", op. cit, pp. 480-81

[34] Abraham, op. cit., p.435, where it is indicated that most requests have been filed by: The American Civil Liberties Union, the NAACP, the American Jewish Congress, the AFL - CIO, the American Bar Association, sandry consumer groups often led by Ralph Nader in the 1970s, various veteran's pressure groups led by the American Legion, the United States Government in matters involving reapportionment re-districting, sexual discrimination and segregation integration; regarding the practice of Indian courts, see Bindra, Supra, Note. 32.

[35] CJS, p.423; Louiswell and Hazzard, *Cases and Materials on Pleading and Procedure, State and Federal*, the Foundation Press Inc., New York, 1973, p.751; Bindra op. cit. pp. 423; Black, op. cit, p.54.

[36] CJS, p.424

[37] Bindra, op. cit, note 32 supra.

[38] Ibid.

[39] Daulet Ram Prim, *Law of Writs in India, England and America* N.M. Tripatti Private ltd., Bombay (1963), p.316.

[40] "The *Amicus Curiae*" op. cit. p.470

show to the court that his assistance is necessary and advisable to protect it from wrongful decision with regard to the matter before it. The large number of requests in the US has made it necessary to economize with the time of the court spent on screening such requests. Consequently, "the role of the *amicus curiae* as court informer for the benefit of otherwise inadequately represented interests limits the amicus to the presentation of material relevant to these effects, not presented equally well by the parties. Judicial economy further limits him to efficient presentation of *necessary* matter *significantly* relevant, not *sufficiently* presented by the parties."[41] Adequacy of representation is, therefore one major yardstick the court applies to grant or deny leave to appear as an *amicus curiae*. It must be an assistance which is otherwise not available to the court. Where matters of public concern are involved, however, the courts are liberal in granting such leave. "The courts have been generous in important constitutional law controversies in allowing interested parties to intervene or to submit *amicus curiae* briefs to inform the justices on constitutional facts."[42] This is also the case in the practice of the United Kingdom and Canada though the courts there tend to favour oral rather than written arguments by the *amicus curiae*.[43]

5. Consent of the Parties

Another consideration which courts take into account when deciding to grant or deny leave to appear as *amicus curiae* is the consent of the parties. In principle, the consent of the parties to any proceeding before the court is not essential to the appearance of an outsider as an *amicus curiae*, since it is of no concern to the parties and since no party has any cause to complain if the court grants a stranger the privilege of being heard, as no action of such stranger can affect the legal rights of a party to the action.[44] However, where both parties object to the participation of a stranger as an *amicus curiae*, the court will certainly hesitate to grant leave and it will [Consequently, "the role of the *amicus curiae* as court informer for the benefit of otherwise inadequately represented interests limits] the amicus to the presentation of material relevant to these effects, not presented equally well by the parties. Judicial economy further limits require such stranger to show compelling justifications for his intervention. As the intervention of an *amicus curiae* can have the incidental effect of enhancing the position of a party, perhaps at the expense of the other party, the person applying to intervene as an *amicus curiae* is required to give notice, to both parties, of his application and the factual and legal points he intends to raise.[45] The parties have the corresponding opportunity to explain or resist his arguments. It should be noted, however, that the court can overrule the objections of one or both of the parties to the appearance of an *amicus curiae*. This is so mainly because such objection can deny the court of valuable information and advice. "The most useful amicus material is that which is unlikely to be presented to the court by any party because of collusion between the parties, or because the party who might be benefitted by the material fails to recognize its utility, or because the material militates towards a result or remedy which neither party desires or because the

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[41] Ibid.
[42] C.J. Antieau, op. cit., p.80
[43] Ibid.
[44] CJS, p.425; see also note 10 supra.
[45] Rule 42 (5) of the *Supreme Court Rules, In Moore's Federal Practice*, note 20 supra.

material comes too late from the party who would be thereby benefited (due to estoppel, waiver, prior inconsistency or position, failure to introduce the fact into the record at trial or some other rule of the game).[46] While obtaining the consent of the parties will provide stronger justification to grant leave to be heard as an *amicus curiae*, it will alter the very basis of this institution if it is allowed to veto the applications of *amicus curiae*.To make the consent of one or both parties a condition precedent or even a major factor or consideration for leave to be heard as an amicus will be "contrary to the traditional principle that the appearance of an amicus is to be determined by the court in each instance because of primary concern to society whose interests he (the *amicus curiae*) represents rather than the parties personally."[47] Normally, therefore, the court may grant or refuse leave, according as it deems the proffered information of fact or law timely and useful or otherwise.[48]

6. Limitations on the Role of the Amicus Curiae

The fact that a person is appointed or granted leave to appear as an *amicus curiae* does not entitle such person to assume judicial function. His function is limited to informing and advising the court. The ancient Roman rule that "the judge acted upon his own responsibility" though he had the option of getting advice from an *amicus curiae* still holds.[49] The judge pronounces judgement on his own account in accordance with the conclusion he arrives at with or without the assistance of the *amicus curiae*. An *amicus curiae* had historically no judicial function and this is as true today as it was historically.[50]

In like manner, the fact that a person is appointed or granted leave to appear as an *amicus curiae* does not entitle such person to assume the functions of a litigant. Indeed, it has been held that the office of an *amicus curiae* cannot be subverted to the use of a litigant in the case.[51]

That the *amicus curiae* can assume neither judicial functions nor the function of a litigant in a case provide the bases for important limitations on the roles of his office. Thus, at the trial level, his assistance to the court is limited to matters of law and jurisdiction and to issues framed by the pleadings and evidence of the parties.[52] "He does not have any right to create, extend, or enlarge issues" since he is obliged to take the case as he finds it with the issues made by the parties.[53] At the appellate level, too, the *amicus curiae* can only raise those issues which the court itself could have raised on its own record and he is limited to matters with respect to which the court could proceed upon its own motion within the framework of

[46] "The *Amicus Curiae*", op. cit., p. 471

[47] "Ibid, p. 476

[48] CJS. p. 424 - 5

[49] Engelman, op. cit. p.484 - 5; under the old Roman practice, any error discovered on appeal was attributed not to the judge but to the person consulted, ibid., p.485; this obviously does not hold true today as the judge renders judgement on his own account.

[50] CJS, p.429; Abraham, op. cit. p.236

[51] CJS. p.428; thus, in a prosecution for molesting a minor, appointment of attorney employed by the victims father as *amicus curiae* was held to be an error; the court said, "This office is to aid the court and for its personal benefit, and cannot be subverted to the use of a litigant in the case"; Ibid., p.426. Notes 44; and 45.

[52] Ibid, p.430, note 91; "The *Amicus Curiae*", op.cit. p.471

[53] CJS. p.430; "The *Amicus Curiae*", op.cit. p.471

the adversary sysyem.[54] An act of *amicus curiae* caluculated to influence the court by placing before it matters which do not appear in the record is entitled to no weight"[55]

The very nature of the office of the *amicus curiae* does not entitle him to institute proceedings nor to lodge appeals against court ruling and judgements nor to apply for rehearing.[56] This is so because, as the *amicus curiae* is not a party to the proceedings, he does not in any way exercise any control over the conduct of the case. He does not for example, have standing to call or to interrogate witnesses though the court in its discretion may allow him to interrogate a party.[57] An *amicus curiae* can, upon consent of the parties, present oral arguments. However, in the absence of the consent of the parties, oral argument by an *amicus curiae* may be made only by special leave of court, on motion particularly setting forth why such argument is thought to provide assistance to the court not otherwise available. Such motions unless made on behalf of the public interest *are not favoured.* Requests for oral arguments are subject not only to the special leave of the court but must also be justified by compelling reasons. Here again, the courts exercise greater liberality when the interest to be protected is a public interest.

Accordingly, amicus briefs are the usual means for amicus intervention. In his brief the filing of which must be preceded by a signed request submitted to the clerk of the reviewing court specifying the points to be argued in the brief,[58] the amicus can advise the court or draw its attention to law or to fact or to circumstances that may have escaped consideration.[59] He may also make suggestions as to matters of practice and may question the sufficiency of service of process.[60]

The *amicus curiae* does not have any standing in respect of matters which are hypothetical. The controversy about which the *amicus curiae* is concerned must be actual and relate to litigation actually pending before the court[61] as the assistance of the *amicus curiae* cannot be sought except in respect of the disposition of issues before the court. In line with the proposition that the *amicus curiae* must take the case as he finds it with the issues made by the parties, he does not have any standing to attack the constitutionality of a statute.[62] This is also in line with the doctrine of constitutional law that "The constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby"[63] Even if a statute

[54] Ibid; CJS, p.430
[55] Ibid., p.431
[56] Louiswell and Hazard op. cit., p.751; "The *Amicus Curiae*" op. cit, p.471; CJS, p.434; he cannot generally move to discontinue or to dismiss an action unless for want of jurisdiction or prosecution, ibid., p.432.
[57] US Supreme Court Rules, Art. 42(7), Moore, cited at note 20 supra; see also "The *Amicus Curiae*" op. cit., p.475
[58] Louiswell and Hazard, op. cit, p. 1268
[59] C.J.S. pp 427 - 8
[60] Ibid. p.424, 429; "The *Amicus curiae*' op. cit, p.471
[61] CJS. P.424; in an action to test whether plaintiff's air conditioners were subject to federal excise tax intervention by *amicus curiae* was denied - ibid., p.424, note 26.
[62] CJS p. 432
[63] American Jurisprudence, Constitutional Law, volumes 11 and 12, Section III, Jurisprudence Publishers, 1937, 1938; Bindra, op.cit, note 32 supra

which is challenged is invalid, a person can have standing to ask the court to declare it invalid only if such person can show to the court that "he has sustained or is in immediate danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[64]

Where the constitutionality of a statute is raised by the parties, it becomes a proper subject for amicus brief. It must be observed in this connection that public interest issues most of which involved the constitutionality of statutes and administrative measures as well as the enforcement of constitutional right provided the bulk of amicus briefs in respect of which leave was granted by US courts.[65]

The fact that the *amicus curiae* has been granted leave to intervene in an action pending before a court and to submit a brief or oral arguments or both does not mean that the court has thereby incurred an obligation to heed to the advice or information proffered by him. "Although the court may hear the communication of an *amicus curiae*, it is within its discretion whether it will heed the advice given, the *amicus curiae* having no right to complain if the court refuses to accept his suggestions.[66] Not only are the suggestions of the *amicus curiae* not to be followed blindly, but also the court can do only that which it could do without communication from the *amicus curiae*."[67] The *amicus curiae* only helps the court make informed decision regarding the issues made by the parties pending before it for decision. The court is supposed to base its decision on, and, therefore, to know the facts and the law relevant to the case before it. The *amicus curiae* fills whatever gaps there could occur in information available to the court as to the facts and the law. Ultimately, the court decides on the issues before it on its own account and under its own responsibility.

This is particularly so in the Common Law System where litigation is basically adversarial. There, it is argued that material accepted in amicus briefs should not be decisive in determining the final decision except where "it is extremely compelling, necessary and reflective of widespread interests."[68] It can be observed in this connection that the degree to which courts take into account points of fact and law raised by *amicus curiae* are rarely mentioned in reported court opinions.[69] There could be more than one reasons for this practice. Normally, courts do not want to admit outside influences brought to bear upon them in their decisions.. Indeed, crites to this effect are not lacking. One writer for example, believes that amicus briefs in US practice had been a vehicle for propaganda effort and instruments to exert extra - judicial pressure on judicial decisions.[70] Others try to show that

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[64] Ibid.
[65] See H. Abraham op. cit pp. 235 - 7; "The *Amicus Curiae*" op. cit pp. 479 - 81; for Indian practice, see N.S. Bindra cited at note 32 supra.
[66] CJS. p.431
[67] Ibid.
[68] "The *Amicus curiae*", op. cit. p.472
[69] Ibid, see also Abraham, op. cit. p.236-37
[70] Weiner op. cit, p.80

amicus briefs for the most part "are repetitions at best and emotional explosions at worst."[71] However, it must be admitted that judges as members of society are inevitably prone to various influences both negative and positive. Society's only consolation in this regard is that judges are wise enough to discriminate between right and wrong, between negative influence and positive influence. To quote one protagonist,

> ***"Surely, briefs of the amicus curiae may, and sometimes do, influence members of the court. To acknowledge that entirely plausible, and in many cases quite conceivably salutary, phenomenon, is one thing; to lower it to the level of a sinister or subversive cops - and - robbers plot is quite another. In this realm of alleged outside influence ... the fact remains that, when all is said and done, the Justices have the final word on whether or how far, if at all, they permit themselves to be influenced within the accepted framework of the judicial process"***[72]

There is no denial of the fact that screening of amicus briefs and arguments constitutes additional charge on the time and attention of judges. This is even more so where the courts have to contend with a large number of amicus briefs annually. However, this has not been taken as good enough reason to underestimate the value of such briefs. To the contrary, it has been generally observed that amicus briefs whether presented by government or non-government amicii do present economic, social and political data or do represent important, widespread interest[73] and which, therefore, could be of considerable help to the court in reaching informed and well-reasoned decisions.

7. The Role of the *Amicus Curiae* in Criminal Cases

Admittedly, the role of the *amicus curiae* is not and cannot be as pronounced in criminal cases as it is in civil and especially in constitutional cases. In criminal cases, the public interest is normally expected to be properly protected by the public itself acting through the public prosecutors. In legal systems where public prosecutors are considered fit and adequate to protect the public interest, intervention by private *amicus curiae* is rare.[74] Where they are granted leave to intervene, briefs and arguments of the *amicus curiae* are circumvented in important respects. They cannot, for example, seek judicial review on the decision of a prosecutor dismissing a criminal prosecution nor can they raise a ground of error not raised by him, or express an opinion as to the guilt of the defendant.[75] They can only point out to the court defects in the information and suggest that the defendant be required to plead to such information.[76] In certain legal systems, however, public prosecutors may be challenged and the courts themselves may not be thought to have grasped new social values and their constitutional implications. Thus, in India, for example, third parties acting as

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[71] Harper & Etherington, "Lobbyists Before the Court" quoted in "The *Amicus Curiae*", op. cit, p.473, note 21.

[72] Abraham, op. cit, p.237

[73] "The *Amicus Curiae*"; op. cit., pp. 480 - 80

[74] CJS, p.437

[75] Ibid

[76] Rani Jethmalani, "Social Action Litigation in India", *Kali's Yug, Empowerment Law and Dowry Deaths*, Har -Anand Publications, New Delhi (1995), p.25

amicus curiae had to move the Supreme Court of India, sometimes on the basis of newspapers reports, to issue the necessary writs concerning criminal prosecutions in which several undertrials including women and children were held in custody without conviction for periods longer than the maximum imprisonment for the offences many of them could be charged with.

The Supreme court was in like manner moved by an *amicus curiae* in the case of a young offender who had been detained with adult prisoners in violation of the Juvenile Prison Act and other prison rules of India..[77] These are some of the instances where those involved in criminal prosecution of individuals failed to protect the public interest. The experience of India is yet again illustrative of the fact that judges of courts may, under the influence of existing social customs or otherwise, fail to properly appreciate the circumstances of such sections of society as women in the context of the prevailing socio-economic situation and the egalitarian vision of women expressed in the Indian Constitution.

This failure is perhaps more pronounced in cases involving prosecutions for dowry deaths. In such cases, various social action groups such as Women's Action Research and Legal Action for Women (Warlaw) have been able to achieve positive results by acting as *amicus curiae* and informing the courts as to the situation and the law relating to dowry deaths.[78] This intervention is effected in the form of "social action litigation" in the Supreme Court which was mostly judge induced whereby the court, by enlarging the rules of locus standi, allowed persons or groups of persons, acting on behalf of those who are socially disadvantaged or who could not assert their own rights, to do so by invoking the courts' power of intervention under Articles 32 and 226 of the Constitution of India"[79]

Consequently, it may be observed here that the extent to which the *amicus curiae* can be of assistance to the courts in criminal cases depends on the particular requirements of each legal system. Where, in criminal cases, justice can be maintained and the public interest protected by strong and independent public prosecution office, there may be no need for any outside intervention. But where this is dependent upon the appreciation of new social values and circumstances occasioned by continuing social change, as it is the case in countries such as India, the courts have accepted amicus intervention as constructive and necessary. In such matters, the judges themselves should have the final say as the institution of the *amicus curiae* is essentially justified by its continuing and relevant service to the courts.

[77] Ibid, p. 26
[78] Ibid pp. 36 - 45
[79] Ibid, p. 45

part II

The *Amicus Curiae* under the Ethiopian Legal System

1. Customary Practice

Before 1931, when a decree dealing with the administration of justice was issued as a written law, the courts in Ethiopia operated on the basis of custom. There were two types of courts under the traditional administration of justice of the country - the traditional courts and the official courts. The former exercised jurisdiction on the basis of the consent of the parties while the latter had compulsory jurisdiction. The traditional courts served as the lowest level of the system. Litigation at the lowest level was more or less voluntary and spontaneous.[80] The parties in dispute would request any passer-by to settle their dispute and the passer-by would normally accept the task not as a matter of legal duty but as part of his social obligation. The person or persons who got seized of the matter at the request of the parties would be the arbitrator or arbitrators and would settle the dispute on the basis of comparomise[81] and on their own account. But, as the arbitrator(s) gets seized of the matter spontaneously, he is not necessarily a person versed in the law or custom applicable to the dispute.

Ethiopian tradition had provision for such an eventuality. The roadside court sitting under a tree not far from the road would be a captivaing spectacle for most of those Ethiopians who happened to pass-by. They would, therefore, join the legal drama and seize the opportunity to show their skills in the use of language and legal reasoning of which they are reputed to be richly endowed. Of this court room fascination of most Ethiopians, Wylde is quoted by Perham (p.144) as having remarked, "The legal profession is at a discount in Abyssinia as every man is his own lawyer." Those who joined the legal chamber as spectators of the roadside court were not mere spectators.

They were commentators on the facts and the law; their comments would help the arbitrator(s) to settle the dispute. But they had neigher judicial capacity nor legal standing in the sense of having a personal stake in the outcome of the dispute.

The spectators as disinterested commentators on the factual and legal issues raised in the dispute discharged functions which are very much close to that of what modern law recognizes as the *amicus curiae*. As we shall see later on, this amicus role of the spectators appears in clearer and well enternched fashion in the Imperial Chilot.[82]

"Arbitration" as used here as an aspect of the traditional administration of justice of Ethiopia should not be understood as having the consequences which it has under modern law. The decision of the arbitrator in the traditional Ethiopian system would not have binding effect unless accepted by the parties. If the parties rejected the decision or if they did not opt for this mode of settlement they would take their case to the lowest official court, the *Chika Shum*, and, on appeal, to the melkenya and upwards up to the Chilot of the Emperor.[83]

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[80] Margery Perham, *The Government of Ethiopia*. Faber and Faber Limited, London (1948) pp. 143-4
[81] Ibid.
[82] See pp. 96 -97 intra
[83] Perham, op. cit., pp. 144 - 5

Various accounts have been given by different travellors to Ethiopia starting from the 16th century onwards as to the structure and hierarchy of official courts.[84] But, all official courts at all levels appear to have had one feature in common - they all had what are referred to as "assessors."[85] The "spectators" of the traditional courts become "assessors" in the official courts thus assuming a more formal status but basically serving the same purpose as the spectators.

The traditional practice of using assessors as aids to the court was taken over by the modern legal system of the country. Thus under the 1931 decree and later under the 1942 Administration of Justice Proclamation, the institution of assessors was accorded legal recognition. Under the latter proclamation which is now repealed, any court might, if it sees fit, sit with two or more suitable persons in the capacity of assessors.[86] The functions of these assessors and the manner of their selection was to be determined by rules to be issued by the Afe Negus of the Supreme Court and the President of the High Court.[87] As no such rules have been issued, the specific functions that assessors performed cannot be known. However, the Proclamation itself lays down the basic attributes of assessors: firstly, that assessors were selected on *ad hoc* basis is implied in the Proclamation; secondly, they were specifically entitled to put any relevant question to witnesses. Thirdly, at the conclusion of the case, they had to give their opinions on the facts at issue; and fourthly and most importantly, the court was not bound by their opinions.

In connection with assessors, Perham has observed that their function appeared to correspond somewhat with that of a jury.[88] With respect, the present writer would chose to view their function more corresponding with that of the *amicus curiae* than with a jury.[89] Juries do not proffer mere opinions as to the facts; they pass verdicts. The opinions of jurors are verdicts which are binding on the parties and the court. Where a jury system is applicable, courts cannot make valid decisions in the absence of juries. None of these was true in the case of assessors under the Ethiopian system.

It can also be observed here that assessors which formed an important feature of the judiciary in the legal system of the former British East Africa performed functions which correspond more with the *amicus curiae* than with juries. In view of the historical fact that

[84] Ibid; see also Aberra Jembere, *Legal History of Ethiopia*, Erasmus University, Rotterdam, (1998), pp. 214-8

[85] Perham, op. cit., p. 144.; see also Sir John Gray, "Opinions of Assessors in Criminal Trials in East Africa as to Native Custom", *Journal of African Law*, vol. 2(1958) pp. 5 et. seq.

[86] *Consolidated laws of Ethioia*, vol. 1, section 5(1)

[87] Ibid.

[88] Perham, cp. cit p. 144; Paul and Claphan, *Ethiopian Constitutional Development*, Faculty of Law, Haile Selassie I University, Addis Ababa, (1971), volume II, p.842

[89] A jury is "a certain number of men and women selected according to law, and sworn ... to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them" - Black's Law Dictionary, op. cit., p.596; the right to trial by jury is only guaranteed in respect of actions at common law or by statute as opposed to actions in equity - 50 CJS section 24.

our legal system was then as much under the influence of the British system[90] as was that of the then East Africa, the meaning and nature of assessors under the latter system is quite instructive and relevant to our own. Under the then East African legal system, assessors assisted the court in being informed of customs and rights which existed in East Africa and, therefore, in arriving at conclusions and decision which were fair and just, basically on the basis of natural justice.[91] "An assessor" wrote Sir John Gray "aided the court arrive at fair and correct conclusion" and he acted "as *amicus curiae* in respect of a matter which might not otherwise come to the notice of the court"[92] This is significant in that assessors there had essentially the same attributes and functions with regard to questioning witnesses, expressing opinions on the evidence and the effect of their opinions on the judge,[93] as assessors under the Administration of Justice Proclamation, 1942, of Ethiopia.[94]

At the court of the Emperor, we find the *amicus curiae* in operation in fact if not in form. The court of the Emperor known as the "chilot" from ancient times until the recent past, was the court of last resort. The Emperior's chilot heard appeals from the decisions of official courts.[95] Appeals were heard in the presence of various dignitaries of different ranks and the common people. It is interesting to note that the Emperor never decided a case in the chilot before hearing the opinions of the various dignitaries and other person, who spoke according to rank, persons of lower rank giving their opinions first.[96]

No one spoke, no matter his rank, without leave and no one responded to any questions unless specifically asked to do so.[97] On they day of hearing, the chilot was open to every passer-by, though every body had to sit or stand according to his rank. Upon the accused pleading not guilty or the defendant denying the claims of the plaintiff, persons would be granted leave to speak in turns. Balambaras Mahteme Selessie tells of those people present in the chilot who, once they got hold of some clue about the matter, brought to the fore hidden issues and solutions in totally unexpected angles and thus concretised and clarified the case being heard.[98] Of the dignitaries present at the chilot, only the Afenegus, the equivalent of the present President of the Supreme Court, and the Emperor Himself had judicial status. The others were commentators or, "passers - by" if one pleases. Though cases were not decided on the basis of the preponderance of opinions, the fact that they were heard in open court where different people commented on them from different angles on the basis of special knowledge and experience helped the Emperor enormously to arrive at fair conclusions.[99] It is interesting to observe that the Emperor was never bound by any opinions

[90] Perham, op. cit, p. 147; see also Art. 4 of the Administration of Justice Proclamation providing for the apointment, to the High court, of judges of British nationality.
[91] Gray, op. cit, p. 8.
[92] Ibid, p. 16.
[93] See Note 86, supra, Art. 19 of the Proclamation cited.
[94] Ibid, Art. 19.
[95] Paul and Claphan, op. cit, p. 842.
[96] Balambaras Mahteme Selassie Wolde Meskel, *Zikre Neger*, Netsanet Printing Press, Addis Ababa (1942) p.108
[97] Ibid
[98] Ibid, p. 104
[99] Ibid p.108.

profferred by any person present in the chilot; he gave the decision which he thought was fair and he gave it on his own account.[100]

2. Legislation

The institution of the *amicus curiae* is also recognised at least partly under some provisions of the Civil and Commercial Codes of Ethiopia. Thus the public prosecutor has the right, and in certain cases the duty, to intervene in certain civil proceedings.[101] In most of the cases provided for in the Civil Code, however, the public prosecutor, strictly speaking, initiates proceedings, and does not "intervene" in a proceeding that is already pending before a court.[102]

Moreover, the instances in respect of which he initiates proceedings are not suits in the sense of two parties contending issues before a court.[103] This is also true with regard to most of the Commercial Code articles listed under Art. 42 of the Civil Procedure Code. Only Articles 978 and 998(3) appear to provide bases for the true intervention of the public prosecutor as government *amicus*. It can, therefore, be observed here that in most civil cases, the public prosecutor initiates certain civil actions as a principal party to such action and his role as a government amicus is very much limited. In both cases, of course, he represents the public interest. But where he himself initiates civil actions, the State becomes a party through him. It is only where he intervenes in civil actions between other parties that he can be a government *amicus curiae*.

It is in labour disputes that the Government (presumably through the Minister of Labour and Social Affairs) can play the role of *amicus curiae* proper.[104] The Labour Proclamation entitles the Government to move the Labour Relations Board to grant it leave to intervene as an *amicus curiae* in labour dispute proceedings. Since, however, only collective labour disputes are heard by the Labour Relations Board,[105] the amicus role of the Government even in labour disputes is limited. It does not extend to individual labour disputes which are

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[100] Bairu Tafla, and H.Scholler, *Ser'ata Mangst*, Faculty of Law, Addis Ababa University, Addis Ababa,(1974), pp.14-15

[101] See Art.42 of the Civil Procedure Code of Ethiopia which lists articles of the Civil and Commercial Codes providing for cases where the public prosecutor initiates or intervenes in civil suits.

[102] See, for example, Articles 116, 122, 156, 234, 253, 377, 592, 608 and 612 of the Civil Code under which the public prosecutor only initiates actions.

[103] Art. 116 only entitles the public prosecutor to apply for the annulment of a judgment declaring death; Art.122 relates to the correction of a record of civil status; and Art. 156 relates to the duty of the public prosecutor to make enquiries, upon order by the court, about a person whose absence is at issue. Arts.234 and 377 relate to cases of capacity (removal of guardian, application for the withdrawal of interdiction of insane persons); Arts. 592, 608 and 612 relate to the right of the public prosecutor to oppose the conclusion of marriage none of these is a case of real intervention.

[104] The Labur Proclamation No. 42/1993, Art. 150(2), which provides, "The Board may, in appropriate circumstances, consider not only the interest of the parties immediately concerned but also the interests of the community of which they are a part and the national interest and ecnomy as well, and may in such circumstances grant a motion to intervene by the Government as *amicus curiae*"; the Labour Proclamation No. 64/1975, which is now repealed by the present proclamation, had a similar provision Art.100(2).

[105] See Art. 147 cum Art. 142 of the Labour Proclamation No. 42/1993

heard by the regular courts,[106] which apparently are not authorised to grant leave to such motions of the Government.

3. Foreign Inspirations

The role of the public prosecutor under Ethiopian law appears to have been inspired by the role of the French *Ministere Public*[107] and the Italian *Publico Ministero*. Under the Italian Civil Procedure Code, the *publico ministero*[108] institutes certain civil actions such as applications for declaration of mentally infirm persons as incompetents, for declarations of presumptive death, for annulments of marriages on certain specified grounds and for declarations of bankruptcy.[109] In all cases in respect of which he can institute civil actions, he has the right to intervene and, indeed, his intervention is indispensable when instituted by other parties. Such cases include matrimonial cases, and generally cases affecting the status and capacity of persons.[110] He has also the right to intervene in all civil actions which affect the public interest.[111] It is interesting to note that the *publico minstero* has all the rights of private parties in respect of civil actions he institutes though his role "is limited to the introduction of evidence and the making of motions within the limits of the prayers for relief of the private parties."[112] Hence, his intervention is subject to the scope of powers of the *amicus curiae* in the sense, among other things, that the parties remain in control of the proceedings and that he is limited to the issues raised by the parties.

Under the French Civil Procedure, too, the *minister public* has the right to initiate civil actions as well as the right to intervene in those initiated by other parties.[113] In this regard, there is hardly any difference between the roles of the Italian *publico ministero* and the French *ministere public*. However, under the French system, intervention by the *ministere public* is discretionary unless the court requests its participation or the law specifically so provides in certain cases.[114] The cases in respect of which the *ministere public* has to intervene by virtue of the law include actions concerning personal status, (such as divorce, guardianship and related cases) actions concerning declarations of presumed death, matters involving infants and highest French court, the Court de Cassation.[115] Thus, both the French

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[106] Ibid, Arts. 138 and 139.
[107] Peter Herzog, *Civil Procedure in France*, Martinus Nijhoff, Nethrlands, the Hague (1967) p.121-22
[108] Mauro Cappelletti and Joseph M.Perilo, *Civil Procedure in Italy*, Martinus Nijhoff, Netherlands, the Hague (1965), p. 128
[109] Ibid.
[110] Ibid.
[111] M. Cappelletti and J.M. Perilo, op. cit, p.128
[112] Ibid, p.192
[113] Ibid, p. 129
[114] P.Herzog, op. cit, pp. 121-22
[115] Ibid. p.290

and Italian legal systems recognize government *amicus curiae* which have been clearly provided for in their respective civil procedure codes. In this regard, the Ethiopian legal system is not different from the former two. It only differs in its approach; while the French and Italian systems have prescribed the rules applicable to government *amicu curiae* in their civil procedure codes, the Ethiopian system has incorporated the rules in the substantive laws. [Art.42 of the Ethiopian Civil Procedure Code is not an independent source of authority for the Ethiopian public prosecutor to initiate or intervene in civil actions, it merely listes rules laid down in the Civil and Commercial Codes].

Both french and Italian law do not recognize private *amicus curiae* as such. However, the French legal system recongizes a form of third party intervention which is hardly different from intervention by a private *amicus curiae*. This form of intervention is referred to, under French procedural law, as *conservatory intervention* whereby the intervenor does not seek his own relief but supports the position of one of the parties[116] as opposed to *aggressive intervention* whereby the intervenor seeks his own relief. This form of intervention is used as a substitute for private *amicus curiae*.[117]

Italian procedural law, too, provides for a type of voluntary intervention whereby a third party intervenes, not to assert his own claim, but to support the claim or defence of one of the parties. Like the French conservatory intervenor, the Italian voluntary intervenor has to show some interest. This requirement can be satisfied if he can show some economic or moral interest in the outcome of the litigation.[118]

4. The Need for New Rules on Standing

The traditional Ethiopian legal system had, as has been shown in this paper, recognized the institution of private *amicus curiae* in one form or another. Since the role of government was very much limited then, and private parties prosecuted their own civil and criminal cases, it did not have provisions of government *amicus curiae*; the reasons are understandable. The modern Ethiopian legal system on the other hand, recognizes government *amicus curia* though not adequately and clearly, but fails to mention private *amicus curia*. Since private parties prosecuted their own civil cases as in the past, the reasons for the failure of our legal system to clearly provide for the institution of private *amicus curiae* is not justified in view of the fact that this institution is serving important purposes of justice and good government in many legal systems and especially in view of the fact that it has, to some degree served such purposes in our traditional legal system.

Admittedly, the insitution is more popular and more deeply entrenched in the common law system than in the civil law system. Though in the latter system, too, it is recognized openly in the case of government *amicus* and somewhat timidly in the case of private *amicus curiae*.

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[116] Ibid

[117] Cappelletti and J.M. Perilo, op. cit, p.128

[118] P. Herzog, op. cit p.290

This lukeworm recognition of the *amicus curiae* in the civil law system generally can perhaps be taken as an indication that the institution does not have relevance in the civil law system. Lawyers here in Ethiopia may take up this indication and argue that since Ethiopia follows the civil law system, the *amicus curiae* does not have any relevance here.

However, the present writer believes that this argument is based on a wrong premise. If this institution is relevant in the common law system, it is not any less relevant in the civil law system. The *amicus curiae* enables courts in the common law system pass informed decisions as to the facts and the law; it also affords to the disadvantaged sections of the population access to justice. If the facts and the law can escape the courts of the common law system, they can also escape the courts of the civil law system.

Surely, it cannot be seriously believed that the judges of the civil law system are better trained and experienced than those of the common law system. Nor does the fact that judges of the civil law system have all the laws codified for them really provide them a better possibility of avoiding error as to the law. The precedents relied on by courts in the common law system are by now comprehensive enough to apply to practically all cases brought before them.[119] These precedents are available to the courts just as readily as the code provisions are to the courts of the civil law system.

Moreover, we should not forget that legislation is now an all pervading phenomenon in the common law system. [120] And yet, the *amicus curiae* is necessary and relevant in the common law system. It is just as relevant in the civil law system for the same reasons and considerations. The difference between the two systems in this regard does not lie so much in the absence or presence of the need for the institution of the *amicus curiae* as on the perception of the need.

Nor is it possible to seriously argue that one system is better than the other as regards access to justice of the less advantaged sections of the population. discussion of the issues of access to justice is beyond the scope of this paper. Suffice it to mention here that the courts and justice are more and more getting inaccessible to the poor everywhere. This phenomenon is not particular to any one legal system. Given this common problem, the *amicus curia* is necessary and relevant to both the common law and the civil law systems.

An attempt to explain the absence of private *amicus curiae* in the Ethiopian legal system by the fact that it follows the civil law system is, therefore, a *non sequitor* since there is nothing in the nature of the civil law system that makes it incomptatible with the institution of private *amicus curiae*. It has been shown above [121] that the civil law system itself is trying to introduce private *amicus curiae*, rather through the backdoor, in the form of relaxing the rules applicable to *conservatory intervention*.

Yet, the Ethiopian legal system does not fully follow the civil law system especially as regards procedure. Indeed, the Ethiopian law of civil procedure has much more in common with the common law system than with the civil law system. This is so because, although

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[119] See generally C.K. Allen, *Law in the Making*, Oxford, at the Clarendon Press (7th ed., 1963), pp. 187-225; David Barker and Colin Padfield, *Law*, Martins the Printers Ltd. (9th ed., 1996), p.16

[120] Allen, op cit., pp.428-9

[121] pp. 99-100

our substantive laws follow the civil law system, the Civil Procedure Code of Ethiopia follows the common law system,[122] specifically the Civil Procedure Code of India, and of course, our own traditional concepts of procedure. These sources of our procedure provide the proper context for its interpretation and application. The institution of the *amicus curia*, as shown above, has been common to these sources. It can, therefore, be observed here that the standing of third party intervenors in the form of *amicus curiae* both government and private under the present civil procedure code of Ethiopia should be seen in the light of our traditional experience and that of the common law system in general and India in particular. Above all, it must be seen in the light of the needs of our present legal and judicial system.

It is common knowledge in Ethiopia as everywhere else, that the law and the courts are getting ever more inaccessible to large sections of the population such as women, children, the disabled and the like. Where, because of lack of resources or out of ignorance, they cannot be represented or are poorly represented in a dispute in the outcome of which they are personally interested, it is only just and proper if a third party having no personal interest informs the court of the relevant facts and the law on behalf of justice. Such intervention cannot only protect the interests of the less advantaged but will also protect our courts from defective judgements.

It is hardly possible for our judges, most whom are too young to have the required level of experience, to be fully aware of the facts of social life and the ever increasing and complicated laws issued every year. Moreover, the volume of their work cannot allow them to identify and resolve all the issues before them which often are complicated requiring research work and subtle analysis. Under the present circumstances, the bench can benefit from the experience and skill of the bar.

It is, indeed, clear that our courts at present have too many cases to handle it may, therefore, be argued that amicus briefs will further delay justice. One must not forget, however, that a wrongful decision due to defects as to the facts or the law is as bad and perhaps worse than denial of justice due to delays. Under the circumstances, informed decision rendered within a reasonable period of time is a better alternative. To the extent that the *amicus curiae* can contribute to this goal, his role cannot be objectionable just because *amicus* briefs may take some more time to examine. Correct decisions, of necessity, do demand more time and the court takes only such time as is necessary to give a correct decision. Thus the court has to do with or without the intervention of an *amicus curiae*.

One more objection that could be raised against the entrenchment in our legal system of the institution of *amicus curiae* may be that it may influence the decision of the court. However, as shown in this paper, the *amicus curiae* only serves as a source of information to the court. It is up to the court to accept or reject the information. Indeed, if the court finds the information useful and relevant, this is information it ought to have itself looked for and obtained on its own initiation. This sort of information can only be positive and, therefore, welcome. The court on the other hand, has absolute discretion to disregard irrelevant and inadmissible information. Thus, the *amicus curiae* cannot exert any undue influence on the court any more than any law book, treatise, dictionary or any other source of information

[122] R.A. Sedler, *Ethiopian Civil Procedure*, Faculty of Law, Oxford University Press, Addis Ababa (1968), p.5

does. If the judges do not have the necessary skills to discriminate between irrelevant and relevant information or are somehow lacking in integrity, the problem does not relate to the institution of the *amicus curiae*.

To conclude, the institution of the *amicus curiae* can play an important role in affording access to justice to the less advantaged sections of the population. It can also help maintain the reliability and integrity of the courts in Ethiopia.

It is, therefore, advisable that the rules of standing provided for in our procedural laws should be amended and expanded so that private individuals and social action groups as well as the Government can serve as *amicus curiae* both private and government, and help attain the ends of justice.