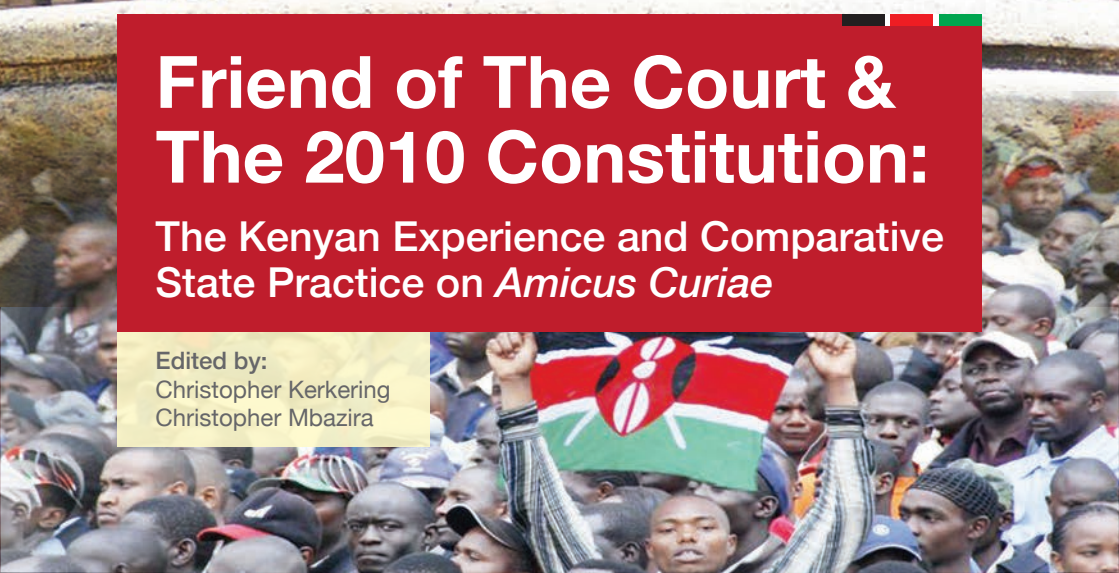




Friend of The Court & The 2010 Constitution:

The Kenyan Experience and Comparative
State Practice on *Amicus Curiae*

Edited by:
Christopher Kerkering
Christopher Mbazira





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Christopher Kerkerling
Christopher Mbazira



FRIEND OF THE COURT & THE 2010 CONSTITUTION: THE KENYAN EXPERIENCE AND COMPARATIVE STATE PRACTICE ON *AMICUS CURIAE*

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Edited by Christopher Kerkering and Dr. Christopher Mbazira.

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Contents

Table of Contents	iii
Foreword: Chief Justice	xi
Preface: Yash Ghai	xiii
Contributor Bios and Organizational Profiles	xxi
Introduction	1
Chapter 1: Friend of the Court Perspective from the Bench: Emerging Jurisprudence on the Role of the Friend of the Court in Kenya. <i>By Hon. Justice (Prof) James Otieno Odek</i>	9
1. Introduction	9
1.1 Distinction Between <i>Amicus Curiae</i> and an Interested Party	11
2. Admission of an <i>Amicus Curiae</i> and Interested Party in Proceedings	13
2.1 Legal Provisions	13
2.2 Supreme Court Rules	14
2.3 Mutunga Rules	15
3. Admission of an <i>Amicus Curiae</i>	17
4. Admission of an Interested Party	18
5. Role of an <i>Amicus Curiae</i>	19
6. Conclusion	22
Chapter 2: Friend of the Court: An Assessment of Its Role in Kenya's Judicial Process. <i>By Christopher Kerkerering</i>	23
1. Introduction.....	23

2. <i>Amicus Curiae</i> Participation in Kenya Prior to the Implementation of the 2010 Constitution	24
2.1 The Legacy of the <i>Makali</i> , <i>Gachoka</i> and <i>Njoya</i> Cases under the 2010 Constitution	30
3. Constitutional and Statutory Sources of Law on Friend of the Court Participation	31
3.1 The Constitutional Right to Participate in Cases Involving the Bill of Rights	32
3.2 The Mutunga Rules and the Article 22(3)(e) Right to Participate as a Friend of the Court	37
3.3 Using Expertise, Impartiality, Independence, and Relevance to Regulate Article 22(3)(e) Submissions	40
3.3.1 Expertise	41
3.3.1.1 Fields of Expertise	41
3.3.1.2 Relevancy of Expertise	42
3.3.1.3 Qualifications of an Expert	44
3.3.2 Impartiality and Bias	45
3.3.2.1 Implied Bias	46
3.3.2.2 Actual Bias	49
3.3.3 Independence	51
3.4 The Attorney-General's Constitutional Right to Participate as Friend of the Court	51
3.5 The Court's Ability to Appoint a Friend of the Court on Its Own Motion	52
3.6 Friend of the Court Participation in Cases that Do Not Involve Human Rights and Fundamental Freedoms	54

3.7	<i>Amicus Curiae</i> Participation in the Court of Appeals, High Court, and Subordinate Courts	56
3.8	Friend of the Court Participation in Criminal Cases	56
3.9	The Court's Ultimate Authority: Determining Which Submissions Are Worth Its Attention	58
4.	Conclusion	59
Chapter 3: The Place of Friend of the Court in Election Dispute Resolution in Uganda Comparative to Kenya. <i>By Christopher</i> <i>Mbazira</i>		
		60
1.	Introduction	60
2.	Unpacking the Concept	62
3.	Kenya Comparative to Uganda and the East African Court	64
4.	Approach to Bias and Impartiality	66
5.	Approach in Election Disputes	71
6.	Conclusion	77
Chapter 4: <i>Amicus Curiae</i> Participation in Foreign Jurisdictions		
		78
1.	Use of Foreign Law in <i>Amicus</i> Jurisprudence	80
2.	South Africa	82
2.1	Relationship of <i>Amicus Curiae</i> to the Courts	82
2.2	South Africa: Procedures for Admission—Court Rules and Case Law	83
2.3	Duty of <i>Amicus</i> to the Courts—Underlying Principles.....	85
2.4	<i>Amicus</i> and Introduction of New Evidence	85
2.5	<i>Amicus</i> Participation—Prejudice Incurred by Delay	87

2.6	<i>Amicus</i> Submission—Partisanship or Bias	88
2.7	<i>Amicus</i> Participation—Criminal Cases	88
2.8	<i>Amicus</i> and Costs of Litigation	89
3.	Canada	89
3.1	Canadian Court Overview	89
3.2	Rules of the Supreme Court of Canada	90
3.3	Intervention in Federal Courts of Canada	92
3.4	Canadian Provincial Courts	93
3.4.1	Ontario	93
3.4.1.1	The Nature of the Case: Constitutional Disputes Versus Private Litigation	94
3.4.1.2	Issues Involved in the Dispute	96
3.4.1.3	Applicant’s Ability to Contribute to the Resolution of the Dispute	97
3.4.1.4	Impartiality	97
3.4.1.5	Costs	98
3.4.1.6	Criminal Cases	99
3.5	Role of <i>Amicus</i> in Canadian Courts	99
4.	United Kingdom of Great Britain and Northern Ireland	100
4.1	Non-Party Participation in the Supreme Court: <i>Amicus</i> , Assessor, and Intervener in the Public Interest	100
4.2	Appointment of an Assessor	101
4.3	Intervening Parties: Intervention in the Public Interest	101
4.4	Substance of Intervener Submissions	103
5.	India	103

5.1	<i>Amicus</i> Participation at the Indian Supreme Court	103
5.2	<i>Amicus</i> as Appointed Counsel	104
5.3	Court-Appointed Expert and Third-Party <i>Amicus</i> Participation	105
6.	United States	108
7.	Colombia	114
8.	Mexico	115
9.	Argentina	116
10.	Conclusion	117

Chapter 5: Friend of the Court Participation in Regional Courts

By Christine Nkonge, the Katiba Institute; the Public Interest

	<i>Law and Policy Group; and Equality Now</i>	118
1.	Introduction	120
2.	Inter-American Court of Human Rights	120
2.1	Inter-American Court Definition and Procedure	122
2.2	Impact of Friend of the Court Participation	125
3.	European Court of Human Rights	128
3.1	European Court Procedure	129
3.1.1	Additional Criteria for Admissibility	130
3.1.2	The Proper Administration of Justice	131
3.1.3	Additional Discretionary Criteria	131
3.1.4	Precedent	134
3.1.5	Avoiding Duplication	134
3.2	Types of Interveners	134

3.3	Impact of Third-Party Submissions	136
3.3.1	New Legal Principles	137
3.3.2	Controversial Ethical Questions	138
3.3.3	Context and General Importance	139
4.	African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights	140
4.1	Definition and Procedure	141
4.2	Impact of Friend of the Court Participation	143
5.	Conclusion	145

Chapter 6: Friend of the Court Participation in Specific Areas

of Law	146
1. Introduction	146
2. Friend of the Court Participation in Election Dispute Resolution	147
2.1 Election Dispute Resolution in Kenya	147
2.2 Comparative Jurisprudence on Friend of the Court Participation in Election Dispute Resolution	151
2.2.1 Ghana	151
2.2.2 India	151
2.2.3 Uganda	154
2.2.4 South Africa	155
2.2.5 United States	156
3. Friend of The Court Participation in Economic, Social and Cultural Rights Cases	159
3.1 Economic, Social, and Cultural Rights in Kenya	159

- 3.2 Comparative Jurisprudence on the Role of the Friend of the Court in Economic, Social and Cultural Rights Cases 160
 - 3.2.1 South Africa 160
 - 3.2.2 Colombia 163
 - 3.2.3 India 166
 - 3.2.4 Canada 167
- 4. Friend of the Court Participation in Environment Law 167
 - 4.1 Environmental Rights in Kenya 167
 - 4.2 Comparative Jurisprudence on the Role of the Friend of the Court in Environmental Law Cases 168
 - 4.2.1 India 168
 - 4.2.2 Colombia 171
 - 4.2.3 Mexico 171
- 5. Friend of the Court Participation in Cases Involving Gender Discrimination and the Rights of Women 172
 - 5.1 Gender Discrimination and Women’s Rights in Kenya 172
 - 5.2 Comparative Jurisprudence on the Role of the Friend of the Court in Cases Involving Gender Discrimination and the Rights of Women 178
 - 5.2.1 South Africa 178
 - 5.2.2 Botswana 181
 - 5.2.3 India 181
 - 5.2.4 Australia 182
- 6. Conclusion 185

Chapter 7: Form and Structure of *Amicus* Brief.
By Christopher Mbazira 186

Chapter 8: Deciding *Amicus* Participation: A Step-by-Step Approach. *By Christopher Kerkering* 190

Conclusion 195



Foreword

*Hon. David K. Maraga, EGH
Chief Justice & President of the Supreme Court of Kenya*

S

Since the opening of the Kenyan Supreme Court, a sculpture of Wanjiku, the Kenyan commoner as referred to by the former President Daniel Arap Moi, has stood at the main entrance. The statue is the symbolic answer to Moi's rhetorical question, 'What does Wanjiku know about the Constitution?' She knows everything. The 2010 Constitution is the people's document, derived through public participation and approved by popular vote.

Wanjiku reminds us all that the judiciary must protect the values and principles of a government by and for the people. But she also represents another significant change in how we understand the methods of interpreting the law. The statue of Wanjiku also reminds us that the Constitution established a broader understanding of expertise. Specialised knowledge does not just come from books, but also from lived experiences. The value of expertise no longer stems solely from how it was derived but from how reliable it is and how well it can be applied. The Constitution was not just made by and for Wanjiku, it is informed by her lived experiences, the experiences of all Kenyans.

That is what makes the role of the friend of the court, or *amicus curiae*, such an important part of the Kenyan Constitution. Article 22(1) states that 'Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened'. Article 23 further states that anyone with particular expertise can, upon request, act as a friend of the court. It does not matter how that expertise was derived so long as it can usefully assist the

court in reaching its decision. The concept of *amicus*, therefore, reinforces the constitutional provision on locus standi that guarantees any person the right to institute court proceedings.

As this book recognises, the law is not, and is no longer seen as, a pure social science. Determining how to apply the law requires that judges incorporate information from many other fields, including science, technology, engineering, and anthropology. No one, not even the most accomplished of polymaths, can rely on their own reservoir of knowledge to solve the complicated problems that appear before the courts.

The friend of the court provides an opportunity for the experts to share their knowledge with the courts and allows judges to become mini-experts on fields relevant to the facts and controversies before them. The friend of the court ensures that judges have the information to make better decisions and craft remedies that meet the needs of the public and respect the values of the Constitution.

I thank all those who contributed to this publication, especially the editors, Christopher Kerkering and Dr Christopher Mbazira, who safeguarded the high quality of the publication. This project is the result of dedicated and collaborative teamwork between the Judicial Training Institute, the National Council on the Administration of Justice, the International Development Law Organization, Public International Law & Policy Group, The Kenyan Section of the International Commission of Jurists, Equality Now, Solidarity for African Women's Rights Coalition, Kenyans for Peace with Truth and Justice, and The Katiba Institute. This spirit of collaboration speaks to the sustained transformation of the Kenyan Judiciary.

The analysis presented in this book will provide a much-needed resource for the judiciary and the legal community as the friend of the court assumes its vital role in Kenya's judicial process.

Hon. David K. Maraga, EGH
Chief Justice & President of the Supreme Court of Kenya



Preface

Yash Ghai

T

The publication of this book on the definition, status, and role of an *amicus curiae* (a friend of the court) is greatly welcomed. It will fill a big gap in the understanding of the legal profession (including the Judiciary) and the public on the role of the *amicus*. While acknowledging the specificity of each legal system, but also conscious of the recent practice of exchanges of legal doctrines and interpretation among states, the editors and authors of the book introduce its readers to comparative jurisprudence.

Kenyan lawyers and judges have hitherto paid little regard to international developments. The role of an *amicus* was little acknowledged until the Constitution of Kenya 2010. There is little role for an *amicus* in a dictatorial regime, especially when the judiciary is beholden to and under the control of the government. This situation changed radically with the introduction of the new constitution. It is generally acknowledged that the Constitution of Kenya 2010 is transformative, seeking to change the state as well as society in fundamental ways. The Constitution sets out through the Preamble and early articles national principles and values of the country. To understand the role of the *amicus curiae*, it is critical to understand the Constitution.

I start with the national values and principles outlined in Article 10, which bind ‘all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution...’,¹ as emphasised by the Court of Appeal in the case about the printing of presidential ballot papers.²

¹ ‘The Constitution of Kenya 2010’ art 10(1).

² *Independent Electoral and Boundaries Commission v National Super Alliance Kenya (NASA)* [2017] Court of Appeal Civ App No 224 of 2017, eKLR [80]-[81].

The values pertinent to understanding the scope of ‘*amicus curiae*’ include the rule of law and participation of the people as well as good governance. More specific guidance as far as the judiciary is concerned is provided in Article 159 at the start of the chapter on the Judiciary. It acknowledges that ‘judicial authority is derived from the people’.³ More specifically, it states that justice shall be administered ‘without undue regard to procedural technicalities’ and ‘the purpose and principles of this Constitution shall be protected and promoted’.⁴ The judiciary is subject only to the Constitution.

The Constitution provides considerable guidance as to its interpretation. In respect of the Bill of Rights, Article 21(3) says that ‘[a]ll State organs and all public officers have the duty to address the needs of vulnerable groups within society’. Article 22 gives the right to institute legal proceedings to protect human rights to, among others, a person acting as a member of, or in the interest of a group or a class of persons, or a person or association ‘acting in the public interest’.⁵ The spirit of these provisions is not confined to matters of human rights, as is evident from Articles 22 and 258, which allow the right to bring legal proceedings to a ‘person acting in the public interest’.⁶ The right to litigate or participate in constitutional litigation is also implicit in Article 259 which sets out the rules of interpretation, stating that the Constitution should be interpreted in a way that ‘promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance’.⁷ As far as the judiciary is concerned, the Constitution makes clear that dealing with matters of public importance should not be restricted by procedural technicalities.⁸ The major responsibility of the judiciary is stated at the end of Article 159(2)(e): ‘The purpose and principles of this Constitution shall be protected and promoted’.

³The Constitution of Kenya 2010’ (n 1) art 159(1).

⁴The Constitution of Kenya 2010’ (n 1) art 159(2)(d) & (e).

⁵The Constitution of Kenya 2010’ (n 1) art 22(2)(c).

⁶The Constitution of Kenya 2010’ (n 1) arts 22(2)(c) & 258(2)(a).

⁷The Constitution of Kenya 2010’ (n 1) art 259(1)(a)-(d).

⁸The Constitution of Kenya 2010’ (n 1) arts 22(3)(b) & (d), art 159(2)(d).

It is within this broad framework that the issue of the admission of a person or association as *amicus curiae* should be addressed. To this should be added the reality that the bulk of Kenyans live in varying degrees of poverty, that most of them have no experience of the legal system (which they find forbidding, and full of rituals and obscure language), an expensive legal profession, and the failure of the state to provide access to justice for them as is required by the Constitution. If justice for all is the goal of the Constitution, a broad and liberal view of the participation of *amicus curiae*, as of paralegals, is imperative. Recent experience has shown that it is the involvement of the *amicus curiae* that is beginning to break the monopoly of the rich and well off over the judicial system.

As former Chief Justice Mutunga stated,

It is, therefore, necessary for the Court at this early opportunity to state that no prescriptions are necessary other than those that are within the Constitution itself. The Constitution is complete with its mode of its interpretation, and its various Articles achieve this collective purpose. It is in interpreting the constitution that our robust, patriotic, progressive and indigenous jurisprudence will be nurtured, grown to maturity, exported, and becomes a beacon to other progressive national, African, regional, and global jurisprudence. After all, Kenya correctly prides itself as having the most progressive constitution in the world with the most modern Bill of Rights. In my view, this is the development of jurisprudence decreed by Section 3 of the Supreme Court Act and that respects Kenya's history and traditions and facilitates its social, economic and political growth.⁹

In these circumstances, there is little need to look at foreign jurisprudence that advocates a severely limited role for *amici curiae*.

⁹ *Re the Principle of Gender Representation in the National Assembly and the Senate* [2012] Supreme Court Adv Op App 2 of 2012, eKLR 38 (Mutunga, CJ dissenting).

The importance of the constitutional provisions is acknowledged even in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* by two judges of the Supreme Court. It said,

[t]he Constitution of Kenya, 2010, by express terms, requires Courts to ‘develop the law to the extent that it does not give effect to a right or fundamental freedom...’. This is the very foundation for well-informed inputs before the Court, which inherently, justifies the admission of *amici curiae*. We have a duty to ensure that our decisions enhance the right of access to justice, as well as open positive lines of development in jurisprudence, to serve the judicial system within the terms of the Constitution.¹⁰

So, briefly, what is the basis and role of the *amicus curiae* in Kenya (a topic dealt with in detail in this book)? In particular, what is the relationship between the common law and the Constitution? The constitutional basis of *amicus curiae* is Article 22(3)(c): ‘an organization or individual with particular expertise, may with the leave of the court, appear as a friend of the court’. Until the Chief Justice made a rule on this matter, it would presumably be governed by common law rules, but by Kenya’s common law, crafted or adapted in light of the orientation and specifications of the Constitution.

In accordance with Article 22(3), the former Chief Justice made rules—the Mutunga Rules, as they are called—which, combined with other regulations governing the Supreme Court, and the Constitution, now constitute the basis of the participation of *amicus curiae* in litigation. Rule 6 of the Mutunga Rules states that:

- a) The Court may allow any person with expertise in a particular issue which is before the Court to appear as a friend of the Court.
- b) Leave to appear as a friend of the Court may be granted to any person on application orally or in writing.

¹⁰ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* [2015] Supreme Court Pet 12 of 2013, 2015 eKLR [21] (quoting ‘The Constitution of Kenya 2010’ [n 1] art 20[3][a]).

- c) The Court may on its own motion request a person with expertise to appear as a friend of the Court in proceedings before it.

The definition of *amicus curiae* in the Mutunga Rules is not significantly different from that in the Constitution: applications to appear as an *amicus curiae* can be made on the basis of the applicant's expertise. The decision whether to allow a person to appear as *amicus* depends on the court ('may allow'). There is no guidance to the courts on the grounds on which a person may be disallowed from appearing as a friend of the court. This rule applies only to applications in respect of cases under Chapter Four, that is, those concerning human rights.

To the possibility of *amicus curiae* in other matters, the common law rules would apply. But what are the common law rules? Common law countries vary considerably regarding the circumstances in which and conditions under which a person may be allowed as *amicus*. As this book notes, there seem to be as many rules governing the admission of an *amicus* as there are countries. In the absence of greater guidance from the Chief Justice under Article 22(3), the courts must develop the rules governing the admission of an applicant, and must look not only to the common law but also to the orientation of the Constitution.

In practice, there have been relatively few applications to be *amicus curiae*. A small number of organizations and individuals have so far have acted as *amicus curiae*, in a limited number of cases. Most applications have in fact been granted. However, there is no reason for optimism, as civil society comes under attack from the government because of its emphasis on the rule of law, and the Attorney-General shows little respect for the law. An example of a restrictive approach is a decision of Justices Ibrahim and Ndungu of the Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors*, which the judiciary seems to accept as the ruling of the Supreme Court. The judges formulated a long and restrictive list of guidelines about the role of *amicus curiae*. The main points are that the *amicus* should be limited to legal arguments, and his or her interventions must be 'neutral' and have

“fidelity” to the law’.¹¹ The *amicus* should stay away from legal points already presented by the plaintiffs and respondents. No applicant who may be seen to be hostile to a party or against whom a party has made complaints is likely to be appointed an *amicus* (apparently without giving the intended *amicus* a chance to respond). The applicant ought not to raise any perception of bias or partisanship, by documents filed, or by his submissions. There are other restrictions, as well, that if fully observed would substantially reduce the number or effectiveness of *amici*.

These rules sound like the resurrection of the old restrictive role/rules for *amicus curiae* of the President Moi era, not a reflection of a transformative constitution, looking to justice for all. They make the role of the *amicus* potentially very difficult, if not close to impossible.

That brings me to the ambiguity of ‘impartiality’ which is always stated as a condition for being *amicus*. But what is ‘impartial’ is not defined. It is inevitable that, in highly contested disputes on the law to be applied to the case, the *amicus* may seem to be taking sides. But most institutions or individuals who seek to participate as *amicus* do not do so because they are partisan in relation to one of the parties. If that was their interest, they could as well join as a party or offer advice to their litigant-friend. An important motive for seeking to be an *amicus*—rather than an interested party—is in part to demonstrate impartiality as between the litigants, but primarily to show that the *amicus*’ role is to protect the law or (very often in Kenya’s case) Constitution from being violated or derogated from. An *amicus* has no interest in the decision being made either way but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, the *amicus*’ cause is to ensure that a legal and legitimate decision is achieved.¹²

Speaking personally, I—as someone who had something to do with the preparation and enactment of the Constitution and as committed first and foremost to the Constitution and the Rule of Law—would apply to be *amicus* precisely for that reason. The two occasions on which I was refused permission

¹¹ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 10) [16], [17].

¹² *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 10) 16]-[18.

to appear as an *amicus*, I had no personal interest whatsoever. I was purely concerned with the rights of the parties and the integrity of the Constitution.

Being *amicus* liberates one to explore the nuances of the law without feeling obliged to push only one side of the argument. An *amicus* argues on law, not on facts. The court decides the legal issues based on the strength of the arguments, mostly those presented by the parties, and is not inhibited in doing so by any suspicion of partiality on the part of counsel, or the inevitability of partiality on the side of a party. The same discernment would be applied to evaluating the submissions of an *amicus*.

The consequences of a restrictive policy in respect of admitting *amici* (not yet a major problem) are potentially serious for our legal and social order. For example, because of the nature of our Constitution, including making economic, social and cultural rights justiciable as well as its emphasis on values and principles as interpretative tools, *amicus* participation helps to illuminate and enrich litigation discourse. And it gives the judges better and more comprehensive perspectives which may help to support transformative jurisprudence.

Sometimes there is insufficient discipline and professionalism on the part of some members of the bar (including the Attorney-General's office) resulting in cases with far-reaching ramifications not being adequately prosecuted through failure of counsel to supply courts with all the relevant materials and arguments necessary for it to make a well-informed judgment and exposing the public and sometimes the State to seriously harmful effects. *Amicus* participation can assist to ensure that the Court is fully apprised of the relevant argument leading to better and more contextually informed decisions.

Finally, there is a consistent record of the Attorney-General failing to live by the tenets of Article 156(6)—to protect and uphold the rule of law and defend the public interest—and, instead, conducting his affairs in a politically convenient and partisan manner. *Amici curiae* can help explain the public interest in such circumstances.

Kenyan and international civil society organizations, as *amici curiae*, have undoubtedly played a significant part in public interest litigation since

the new Constitution. They have contributed to the interpretation of the Constitution, the elaboration of rights, including the newly recognised economic and social rights, and to the rule of law. We have only to think of the foreign NGOs in the field of economic and social rights who appeared in the *Ibrahim Sangor Osman*¹³ case, an early case on the right to housing, and the Center for Reproductive Rights in the *Aids Law Project* case.¹⁴ Kenyan organizations appeared as *amici* in the case about the criteria for shortlisting candidates for Chief Justice (Article 19),¹⁵ in the case about the retirement age of judges (International Commission of Jurists - Kenya and Kituo cha Sheria),¹⁶ in the Security Laws Amendment Act case (Commission on the Implementation of the Constitution and the Law Society of Kenya),¹⁷ and the case about the correct procedure for passing the annual Division of Revenue Bill (Katiba Institute).¹⁸

It would be most ironic if it became easier for foreign NGOs to appear than Kenyans because the former were not seen as having any pre-existing position because they are not actively involved in local issues.

The phrase *amicus curiae* means ‘friend of the court’. And that is the whole idea. If the courts take too narrow a view of when it is appropriate for persons and bodies to be admitted as *amici*, it is the courts themselves that will be disadvantaged, as well as the development of the law, and the sections of the community for whom civil society speaks.



Yash Pal Ghai

¹³ High Court Const Pet 2 of 2011, eKLR.

¹⁴ *Aids Law Project v Attorney-General & 3 Ors* [2015] High Court Pet 318 of 2012, eKLR.

¹⁵ *Trusted Society of Human Rights Alliance & 3 Ors v Judicial Service Commission & Anr* [2016] High Court Pet 314 of 2016 & Jud Rev 306 of 2016 (Consolidated), eKLR 3.

¹⁶ *Kalpana H Rawal & 2 Ors v Judicial Service Commission & 3 Ors* [2016] Supreme Court Civ App 11 & 12 of 2016, eKLR.

¹⁷ *Coalition for Reform and Democracy (CORD) & 2 Ors v Republic of Kenya & 10 Ors* [2015] High Court Petition 628, 630 of 2014 & 12 of 2015 (Consolidated), eKLR.

¹⁸ *Speaker of the Senate & Anr v Attorney-General & 4 Ors* [2013] Supreme Court Advisory Opinion Reference 2 of 2013, eKLR.

Contributor Bios and Organizational Profiles

Christopher Kerkering is an attorney licensed to practice in the United States. He received a Bachelor of Arts from Columbia University in 1995 and a Juris Doctorate from Harvard Law School in 2001. He has clerked for two United States District Court Judges where he drafted legal opinions in all areas of law, including criminal, patent, internet, and civil disputes. He spent over seven years working for the Federal Public Defender for the Western District of Washington as both a research and writing specialist and as an Assistant Federal Public Defender. Mr. Kerkering currently lives in Nairobi, Kenya where he works on issues relating to rule of law in the region. Previously, Mr. Kerkering was a lecturer with the University of Nairobi School of Law where he taught legal research and writing and assisted with the redesign of the curriculum on the same. He then served from 2014-2016 as a legal advisor with the International Development Law Organization, Somali Office, where he conducted trainings for Somali lawyers, supervised, mentored and worked closely with Somali judges, prosecutors, and defense attorneys. He has also served in an advisory capacity for several prominent civil society organizations in Kenya on issues related to public interest litigation. He can be reached at ckerkeri@gmail.com.

Dr. Christopher Mbazira is an Associate Professor of Law and the Ag Principal in the School of Law, Makerere University, where he is also the Coordinator of the Public Interest Law Clinic (PILAC). He is a Guest Professor at the Center for Human Rights, University of Pretoria and a Research Fellow at the Dullah Omar Institute, University of the Western Cape. He is also the Chair of the Rule of Law and Strategic Litigation Committee of the Uganda Law Society. Prof. Mbazira is a human rights

expert with vast experience in human rights research and strategic litigation. His areas of research include: public interest litigation, economic, social and cultural rights, as well as governance and democratisation. Christopher was one of the 9 Makerere Law dons who filed an Amicus Application in the Presidential Elections Petition before the Supreme Court in March 2016. Christopher teaches public international law and international and regional human rights law. He is also a keen promoter of public interest litigation in Uganda as a member of the Network of Public Interest Lawyers. Prof Mbazira has consulted widely with both local and international civil society organizations, including the United Nations. In 2014, he was invited by the United Nations Office of the High Commissioner for Human Rights in collaboration with the Judicial Studies Institute (JSI) of Uganda to design a curriculum for judicial officers on the judicial enforcement of economic, social and cultural rights. Prof Mbazira has also on several occasions interacted with Kenyan judicial officers at the invitation of the Judicial Training Institute (JTI). He can be reached at chrismbazira@gmail.com.

Hon. Justice Professor Otieno Odek is Judge of the Court of Appeal and former Dean of the School of Law, of the University of Nairobi. He was formerly the Managing Director of the Kenya Industrial Property Institute (KIPI). He has served as the Chairman of the Paris Union of the World Intellectual Property Organization (WIPO) in Geneva and was the Chairman of Madrid Union of WIPO and Chair of the Berne Executive Committee of WIPO. He is an accomplished academician who has published several articles in internationally renowned and refereed journals. He has undergone training on good governance and respect for rule of law. Judge Odek has written numerous monographs and publications. He lectured several national, regional and international conferences on legal aspects of trade and intellectual property. He holds a law degree (First Class Honours) from the University of Nairobi, a master's degree in law from Yale Law School, USA, and a doctoral degree in Juridical Science (SJD) from the University of Toronto in Ontario, Canada. Prof Odek was

admitted to the Roll of Advocates in 1988 and is currently the Director of the Judiciary Training Institute.

Sofia Rajab-Leteipan is an advocate of the High Court of Kenya, and a feminist lawyer whose practice is focused on human rights, democratic governance, constitutionalism and public law. She is passionate about using constitutional and human rights law to redress human rights violations, address systemic deficits in the protection of marginalized groups and communities and challenging legislation, policy decisions and administrative action offending the Constitution of Kenya and fundamental rights in international law. She is a Special Prosecutor, appointed in 2012 by the Director of Public Prosecutions in Kenya, to assist in the prosecution of sexual and gender based violence under the Kenyan Penal Code, and has worked in various capacities relating to advocacy and litigation on sexual and gender-based violence. She has a strong commitment to promoting women's rights and gender equality and is keen on contributing to African feminist and gender discourse and legal scholarship. She holds an LLB from Nelson Mandela Metropolitan University and a Masters of Arts in International Studies from the University of Nairobi. She can be reached at sofialeteipan@gmail.com.

Christine Nkonge is the Litigation Counsel in Charge of Case Management at the Katiba Institute. The Katiba Institute is an organisation based in Nairobi, Kenya which works to promote constitutionalism and the rule of law in Kenya. Christine practices constitutional law as a public interest litigator and appears regularly at the High Court, Court of Appeal and the Supreme Court of Kenya on ground-breaking constitutional matters. She also has significant experience in criminal law, women's and children's rights. She holds a Bachelor of Laws (LLB) degree from the University of Nairobi in Kenya and a Master of Laws (LLM) degree in Human Rights from Central European University in Hungary. She is also an advocate of the High Court of Kenya.

Judiciary Training Institute

The Judiciary Training Institute (JTI) is the organ of the Kenyan Judiciary responsible for meeting the training, research and capacity development needs of judges, judicial officers and judiciary staff. JTI performs this mandate in part through various training programmes and seminars, public lectures, research and other forms of discourses targeting all cadres of judges, judicial officers and judiciary staff, and, where appropriate, members of academia, other organs of the state and public at large. As the Judiciary's institute of higher learning, the JTI is leading the Judiciary, in line with Judiciary Transformation Framework and the blueprint for Sustaining Judiciary Transformation, in facilitating the growth of jurisprudence and judicial practice as the lifeblood of the institution. The JTI is the judicial think tank: an institute of global excellence and the nerve centre of rich intellectual exchange. It interfaces between the Judiciary and contemporary developments in society, on the one hand, and learning interaction between the Judiciary and other agencies, on the other. The JTI provides the intellectual anchor in making Kenya's courts the hearth and home of a robust and functional jurisprudence that meets the aspirations of Kenyans.

The National Council on the Administration of Justice (NCAJ)

The NCAJ was established under Section 34 of the Judicial Service Act (No. 1 of 2011). It is a high level policy making, implementation and oversight coordinating mechanism as reflected in its membership that is composed of state and non-state actors from the justice sector. The mandate as stipulated in the Act is to ensure a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system. Specific functions of the NCAJ are to: formulate policies relating to the administration of justice; implement, monitor, evaluate and review strategies for the administration of justice; facilitate the establishment of Court Users Committees at the county level; and mobilize resources for purposes of the efficient administration of justice.

International Development Law Organization

The International Development Law Organization (IDLO) is the only intergovernmental organization exclusively devoted to promoting the rule of law. IDLO works to enable governments and empower people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity. Its programmes, research and policy advocacy cover the spectrum of rule of law from peace and institution building to social development and economic recovery in countries emerging from conflict and striving towards democracy. IDLO has its headquarters in Rome, a branch office in The Hague, liaison offices for the United Nations in New York and Geneva, and country offices in Afghanistan, Honduras, Indonesia, Kenya, Kyrgyzstan, Liberia, Mali, Mongolia, Myanmar, the Philippines, Somalia, South Sudan, Tajikistan, Tunisia and Ukraine.

Public International Law & Policy Group

The Public International Law & Policy Group, a 2005 Nobel Peace Prize nominee, operates as a non-profit, global *pro bono* law firm providing free legal assistance to its clients, which include governments, sub-state entities, and civil society groups worldwide. Through its work, PILPG promotes the use of international law as an alternative to violent conflict for resolving international disputes. PILPG provides legal counsel to *pro bono* clients during peace negotiations, advises on the creation and operation of transitional justice mechanisms, provides expertise during the drafting of post-conflict constitutions, and advises on ways to strengthen the rule of law and effective institutions. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

In January 2005, a number of PILPG's *pro bono* clients nominated PILPG for the Nobel Peace Prize for "significantly contributing to the promotion of peace throughout the globe by providing crucial *pro bono* legal assistance

to states and non-state entities involved in peace negotiations and in bringing war criminals to justice.” PILPG’s Kenya programme focuses on strengthening domestic accountability for election-related and politically-motivated human rights abuses. The Kenya programme focuses on strengthening domestic accountability for election-related and politically-motivated human rights abuses.

Equality Now

Equality Now is an international human rights organization that works to protect the rights of women and girls around the world by raising international visibility of individual cases of abuse, mobilizing public support through its global memberships and wielding strategic political pressure to ensure that Governments enact and enforce laws and policies that uphold the rights of women and girls. Founded in 1992, Equality Now works to create lasting change to make equality a reality for girls and women around the world. Equality Now advocates against legal inequality, sex trafficking, sexual violence and harmful practices such as child marriage, and female genital mutilation (FGM). One of its major areas of focus is on legal reforms, with the law being used as a tool for social transformation and the changing of traditional social attitudes to guarantee the protection of the rights of women and girls.

Solidarity for African Women’s Rights (SOAWR) Coalition

The Solidarity for African Women’s Rights (SOAWR) Coalition is a regional network comprised of 50 national, regional and international civil society organizations based in 25 African countries, working towards the promotion and protection of women’s human rights in Africa. Since its inauguration in 2004, SOAWR’s main area of focus has been to advocate for African states to urgently sign, ratify, domesticate and implement the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

Kenans for Peace with Truth and Justice (KPTJ)

KPTJ is a coalition of over 30 legal, human rights, and governance organizations, together with ordinary Kenyans, convened after the disputed 2007 presidential election with the purpose of seeking truth and justice for the election and the widespread violence that followed. KPTJ maintains that there can be no sustainable peace without truth and justice, which in turn requires that Kenya addresses its history of human rights violations and historical injustices, and addresses the deep chasms and inequalities in Kenyan society. KPTJ plays a key role through providing research, technical support and advocacy on issues of accountability, transparency and constitutional implementation. It is convened by a secretariat hosted at Africa Centre for Open Governance (AfriCOG) which is one of its founding partner organizations.

The Kenyan Section of the International Commission of Jurists (ICJ Kenya)

ICJ Kenya is a jurists based membership, non-governmental, non-partisan and not-for-profit organization registered society. It is the only autonomous national section of the International Commission of Jurists based in Geneva and has been working in Kenya and around the African continent since 1959 promoting human rights, the rule of law and democracy in Kenya and the region. Its membership comprises of judicial officers (judges and magistrates), legal scholars and lawyers who are committed to promoting the ideals for which the organization was established. ICJ Kenya has observer status with the African Commission on Human and Peoples' Rights. It is governed under a constitution through an elected Council of 7 members that serves for two-year fixed terms.

Katiba Institute

The Katiba Institute was established in 2011 to promote knowledge and studies of constitutionalism and to facilitate the implementation of Kenya's

new constitution. Its activities include publications on the Constitution, workshops on constitutional issues, public interest litigation, development of the legal and judicial system, establishment of county governments, land reform, review of legislative bills to implement the Constitution, and promoting the participation of Kenyans in public affairs.



Introduction

By Christopher Kererking and Christopher Mbazira

B

Broadly speaking, ‘friend of the court’—or ‘*amicus curiae*’ as it is known in Latin—defines a person or organization that is not a party to a lawsuit, but participates in the litigation by providing the court with important information that will assist the court in making an informed decision. Yet, as the practice of allowing non-parties to participate in cases has evolved, it has developed differently depending on the jurisdiction. Now, there are about as many definitions of ‘friend of the court’ as there are jurisdictions. And some jurisdictions have eschewed the terms ‘friend of the court’ and ‘*amicus curiae*’ and adopted different terms, such as ‘intervener in the public interest,’ that more distinctly reflect the role a non-party may play in a case. Each definition is closely tailored to the unique circumstances of the jurisdiction and adjusted to fit changing needs. What they all have in common, however, is that they recognize that courts often need more information than they can get from the parties to a dispute. And increasingly courts realize that their decisions are far-reaching and, without adequate information, may have unintended, even harmful, consequences.

Whether a decision makes a big splash or a small plop, it will have ripple effects. It may be impossible to tell beforehand how significant those effects will be. But invariably, judicial decisions will change laws, government practice, business practice, and human relations. In short, whether they like it or not, courts make policy, and policy often depends on technical expertise that the courts do not have. No one can expect the court to be both an expert on law and an expert in hydrology, ornithology, and economics. Yet, a case involving the environmental effects of a development near a wetland, for example, may require a court to understand water flow in wetland environments, bird migration, and the economic costs of halting development. To be sure, a court could reach a decision, even the right decision, without any knowledge of these issues, but that decision would not be well-informed and, accordingly, not well-reasoned. Since court decisions live forever as precedent, an ill-reasoned or ill-informed decision may change business practices, government policy, and human relations—and change them for the worse.

Ill-reasoned and ill-informed decisions are dangerous for another reason. Courts wield incredible power. A court's power, however, turns on its authority, and its authority turns on its credibility. Credibility is not just derived from getting the right answer. After all, for every decision a court makes at least one person (and perhaps millions) will believe the court got it wrong. Instead, credibility turns on *how* the court reaches its decision. If a decision is well-reasoned and well-informed, it will be accepted even by those who disagree with the result.

This is where the friend of the court comes in. The friend of the court provides the court with expertise on an issue relevant to the dispute that may not be provided by the parties. In the wetlands example, an ornithologist may provide information on which birds use the wetlands and the importance the wetlands play in migration. A hydrologist could provide the court with expertise on whether draining the wetland will cause flooding in surrounding areas. An economist could provide the

court with information on how stopping an important project will affect the economy in the region. An expert in international law could provide the court with information on international standards for environmental preservation and wetlands restoration. All this information will assist the court in balancing the competing interests of the parties and properly applying the legal standards. The court is more likely to get the right answer and will do it in a way that bolsters its credibility and authority.

It should be noted that a friend of the court is different from an expert witness who is hired by one of the parties to testify before court. Although both are experts, a friend of the court is not related to, not paid by, and not representing the interests of any of the parties. A friend of the court's analysis may bolster an argument made by one of the parties, but the friend of the court reaches its decision independent of the parties' influence and based on its own analysis and expertise.

Since the implementation of the 2010 Constitution, Kenya has fully embraced the friend of the court as a key participant in complex legal disputes. It, unlike any other jurisdiction, has even incorporated the friend of the court within its constitution. As explained in Chapter Two, this is a radical transformation for the Kenyan Judiciary, whose hostility to the friend of the court in previous decades bordered on the illiberal. But reimagining the friend of the court poses two problems for Kenya. The first is conceptual: because the friend of the court must always be defined in context of the jurisdiction in which it is used, the courts must first determine what friend of the court really means in Kenya. This requires an analysis of Kenya's previous treatment of the friend of the court, the Constitution, case law, and court rules. Second, but equally important, the Kenyan judiciary is faced with a practical problem: how to implement the right to friend of the court participation in a way that respects the important role it plays in the judicial process but does not infringe on the rights of litigants and does not overwhelm the courts.

This publication addresses these two concerns. Chapter One, authored by Hon. Justice (Prof) James Otieno Odek, an appellate court judge in Kenya and the director of Kenya's Judiciary Training Institute, discusses friend of the court and *amicus* participation from the perspective of the Kenyan Judiciary. The Chapter is a summary of the case law on friend of the court participation under the 2010 Constitution. It notes that for a court to reach a 'just determination' it must first have 'a complete understanding of issues arising from the dispute'. With that value in mind, the Chapter explains how the case law has distinguished a friend of the court from an interested party. As explained in the Chapter, an interested party has a stake in the outcome of the case, whereas a friend of the court has a stake in the quality of the decision. An interested party wants to win, whereas a friend of the court wants to make sure that the court has all the necessary information before it to make a thorough, well-reasoned decision that considers the broader impact its holdings may have.

The Chapter then discusses the case law regarding the impartiality of a friend of the court applicant. As the cases highlighted in the Chapter show, the issue of impartiality is difficult to define in a system that is inherently adversarial. Although a friend of the court should not be explicitly partisan, the Chapter recognizes that a friend of the court will often have an opinion about how the court should view an issue. If having an opinion is the equivalent of partisanship, few friends of the court will be admitted and the court will lose access to important information it may need to arrive at a well-reasoned and thorough decision. As a result, the Chapter notes that impartiality does not mean an absence of opinion, but rather that the opinion must be independent of the parties and tied to the friend of the court's expertise. Thus, the friend of the court should not opine on who should win, but rather on how an issue that is the subject of its expertise should be resolved.

Whereas Chapter One identifies the salient holdings from the case law, Chapter Two, authored by Christopher Kerkering, tackles the conceptual

understanding of friend of the court participation under the 2010 Constitution. The Chapter distinguishes between friend of the court participation under the constitution and *amicus curiae* participation under court rules and common law. The Constitution establishes friend of the court participation as a constitutional right in two circumstances: when the Attorney-General participates as a friend of the court in civil cases in which it is not a party, and when a person or organization participates as a friend of the court in cases involving fundamental rights and freedoms. The limit on the Attorney-General's participation prevents the government from playing the dual role of both an impartial expert and an adversary—a practice it had done prior to the implementation of the 2010 Constitution.

The constitutional right to friend of the court participation in cases involving fundamental rights and freedoms is unique to Kenya; no other jurisdiction has placed such a high value on the right. Basic tenets of constitutional interpretation, the Chapter argues, strictly limit the court's discretion when determining who can be admitted as a friend of the court in cases involving fundamental rights and freedoms. If a friend of the court applicant meets the requirements for participation that are set forth in the Constitution—namely that it has expertise on an issue and has requested admission—the Constitution requires that the applicant be admitted.

Although the court has limited discretion on who can be admitted as a friend of the court in cases involving fundamental rights and freedoms, the court has significant authority to regulate that participation. This regulatory authority, the Chapter argues, should be applied to ensure that friend of the court's participation does not violate a fundamental right or freedom of a litigant and to ensure the smooth running of the court's docket. But, the Chapter argues, the court can only apply its regulatory powers to identify the least restrictive means necessary to allow for friend of the court participation while ensuring that other rights are realized. Because the court has such

broad regulatory powers at its disposal, the Chapter suggests that it will rarely be necessary for the court to deny a friend of the court application in cases involving fundamental rights and freedoms.

Chapter Three, written by Christopher Mbazira, professor of law at Makerere University, compares *amicus curiae* participation in Uganda with that in Kenya. Like Kenya, Uganda has enjoyed an increase in *amicus* participation and, like Kenya, the courts have had to determine both who to let in and the procedures for doing so. In election dispute adjudication, Uganda has taken a somewhat different approach than Kenya to the extent that the Supreme Court of Uganda has held that a friend of the court applicant should not be denied admission merely because the applicant is perceived to be partial. The Court has reasoned that it has the capacity to control the friend of the court participants and the ability to disregard biased submissions.

Chapters Four and Five, jointly authored by the Public Interest Law and Policy Group, Christine Nkonge from the Katiba Institute, and Equality Now, discuss *amicus* rules and practice in different jurisdictions, including domestic, regional, and international courts. These chapters are intended to be a resource for the courts and the legal community from which they can conduct further research. The chapters identify key rules of procedure and case law that have developed in the different jurisdictions and provide examples of how these jurisdictions have confronted some of the issues that the Kenyan courts have, or will have to, face.

As the Kenyan Supreme Court has noted, Kenya cannot simply cut-and-paste its friend of the court practice from other jurisdictions. Nevertheless, these cases all identify similar concerns about how to allow friend of the court participation efficiently and without infringing the rights of the litigants. Equally as important, the cases provide examples of how valuable friend of the court participation is in helping the courts in other jurisdictions develop well-reasoned and thorough decisions.

Chapter Six, jointly authored by the Public Interest Law and Policy Group, Christine Nkonge from the Katiba Institute, Equality Now, Kenyans for Peace with Truth and Justice, and Sofia Rajib-Leteipan focuses on *amicus* participation in specific areas of law. It looks at how *amici* have participated in cases involving election dispute resolution, the environment, economic and social rights, and the rights of women and children. In each of these cases, *amici* played a significant role in assisting the court reach a decision, and they provide examples of how *amici* can assist the Kenyan courts in cases that will, invariably, have a significant impact on the greater community. It is important to note, however, that this is only a sample of cases in which *amicus* participation influenced the court's decision. There are many more cases that cite *amicus* briefings and still more that rely on *amicus* arguments but never refer to the *amicus* briefing in their decisions. *Amicus* participants are, as a rule, silent contributors; these are cases where that silence has been broken and where the importance of the *amicus* participation has been made clear.

Finally, Chapters Seven and Eight provide two practitioner's tools on friend of the court participation in Kenya. Chapter 7 includes recommendations for the form and content of friend of the court briefs. The Chapter recognizes that one of the best ways to save the court time and resources—and to make sure a friend of the court's expertise is well-received—is to provide succinct briefing that is straightforward and clear. It provides a series of recommendations on how to achieve those goals.

Chapter Eight provides a step-by-step approach that Kenyan judges can consider when deciding whether or not to admit a friend of the court applicant. This decision tree, for lack of a better term, should help the courts parse out the arguments made by objecting parties and focus the courts on the issues most relevant to determining who should be admitted as a friend of the court and how to regulate their participation. Disputes about who should participate as a friend of the court should be straightforward and

turn on a few key questions. They should not devolve into mini-trials. This index will help the courts make quick, accurate, and effective decisions so that it can move forward to the substantive issues in a case.



Chapter 1

Friend of the Court Perspective from the Bench: Emerging Jurisprudence on the Role of the Friend of the Court in Kenya

By Hon. Justice (Prof) James Otieno Odek

1. Introduction

Pursuant to Article 159 of the Constitution of Kenya, judicial authority, which is derived from the people, is vested and exercised by the courts and other tribunals established thereunder. Because judicial authority is derived from the people, the Constitution of Kenya 2010 states that every person has the right to institute court proceedings, otherwise referred to as legal standing.¹ This right of standing can be exercised by a person acting on their own behalf, on behalf of another who cannot act in their own name, on behalf of the public interest, or by an association acting on behalf of its members.²

In addition to these broad rights of standing, the court recognizes that a just determination of a matter before a court requires a complete understanding

¹The Constitution of Kenya 2010' arts 22(1) & 258(1).

²The Constitution of Kenya 2010' (n 1) art 22(2)(a)-(b).

of issues arising from the dispute. That means that at times parties who were not initially a part of the suit should be allowed to participate in the suit.³ This is referred to as ‘joinder’ and it allows parties who share the same rights to participate together in a single lawsuit. It is on that basis that Order 1 Rule (10)(2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or on its own motion, to join a party to a suit when that party’s presence is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

The High Court in *Meme v Republic* [2004] 1 EA 124 observed that a party could be joined in a matter when joinder would: ‘result in a complete settlement of all the questions involved in the proceedings’; ‘provide protection for the rights of a party who would otherwise be adversely affected in law’; or ‘prevent a likely course of proliferated litigation’.

Although joinder occurs at the discretion of the court, it is broadly understood that the guidelines for joining parties ‘should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties’.⁴

The liberal standards for joining parties also applies to the admission of *amicus curiae*. As explained in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors*, the Supreme Court expressed;

The Constitution of Kenya, 2010, by express terms, requires Courts to ‘develop the law to the extent that it does not give effect to a right or fundamental freedom’. (Art. 20(3)(a)). This is the very foundation for well-informed inputs before the Court, which inherently, justifies the admission of *amicus curiae*. We have a duty to ensure that our decisions enhance

³ Hardinge Stanley Giffard Halsbury & Ors, *Halsbury’s Laws of England*, vol 11 (Butterworths 2015) 469.

⁴ *Sarkar On Code of Civil Procedure 2 Volumes* (2006) Vol 1, p 887.

the right of access to justice, as well as open up positive lines of development in jurisprudence, to serve the judicial system within the terms of the Constitution.⁵

1.1 Distinction between *Amicus Curiae* and an Interested Party

Article 22(3) of the Constitution required the Chief Justice to make rules that apply to cases relating to the rights and fundamental freedoms set forth under the Bill of Rights of the Constitution. The rules are intended to facilitate the broad rights of standing as well as to authorize courts, at their discretion, to allow ‘an organization or individual with particular expertise’ to appear as a ‘friend of the court’.⁶

These rules were promulgated by then Chief Justice Willy Mutunga as The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (‘the Mutunga Rules’). The Mutunga Rules define an ‘interested party’ as ‘a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation’.⁷ As with the Civil Procedure Rules, the Mutunga Rules authorize the court to join a person as an interested party either on its own motion or by motion of the party.⁸ It must be noted, however, that the Mutunga Rules implement what is required under the Constitution. If there is any conflict between the Constitution and the Mutunga Rules, the Constitution takes precedence.⁹

The Mutunga Rules define a ‘friend of the court’ as ‘an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their

⁵ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* [2015] Supreme Court Pet 12 of 2013, 2015 eKLR [21].

⁶ ‘The Constitution of Kenya 2010’ (n 1) arts 22(3)(a) & (e).

⁷ Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 s 2.

⁸ Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (n 7) s 7.

⁹ Compare *Katiba Institute v Judicial Service Commission & 8 Ors* [2017] Court of Appeals Pet 518 of 2013 eKLR [23]-[24], in which the Court of Appeals appears to have conflated the requirements for admission as a friend of the court under the 2010 Constitution with the requirements for admission under the Mutunga Rules.

expertise'.¹⁰ A person may be admitted as a friend of the court when, either on application or on the court's own motion, the person has expertise that may benefit the court in determining the proceeding before it.¹¹

The High Court in *Judicial Service Commission v Speaker of the National Assembly & 8 Ors* noted that an *amicus curiae* must have expertise that is relevant to the matters before the court, must be non-partisan, and must provide the court with 'a clear picture of the issues in dispute in order for the court to arrive at an informed and just decision'.¹²

It is imperative to note that other jurisdictions, namely the United States of America, South Africa, Ireland and Australia, require *amicus* to have *bona fide* interest in the matter. In Kenya, however, a *bona fide* interest means an interest in the issues that arise in the litigation. The Supreme Court has emphasized that an interest in the issues is different from an interest in an outcome that favours a party. Although an *amicus* may have an interest in a specific issue, it must enter the proceedings on a foundation of neutrality as to which litigant should prevail.¹³

In *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors*, a two-judge panel¹⁴ of the Supreme Court summarized the difference between a neutral interest in an issue and a partisan interest in favour of a specific party. As the panel explained:

an *amicus* ought not to be partisan. This is a 'neutral' party admitted into the proceedings so as to aid the Court in reaching an 'informed' decision, either way.

¹⁰ Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (n 7) s 7.

¹¹ Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (n 7) s 6.

¹² *Judicial Service Commission v Speaker of the National Assembly & Attorney-General* [2013] High Court Pet 518 of 2013, eKLR [4].

¹³ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 5). In *Muruatetu v Republic* [2016] Supreme Court Petition 16 of 2016 (Consolidated), eKLR [53] the Supreme Court asserted that '[i]t is only with extreme caution, and in exceptional cases, that Kenyan courts will apply authorities from foreign jurisdictions as regards the admission of *amicus curiae*; only those aspects that the Court deems applicable in the Kenyan context will be adopted'.

¹⁴ The Kenyan Supreme Court has yet to determine what weight should be given to decisions issued from a Bench that does not constitute a quorum.

Suffice it to say that while an interested party has a ‘stake/interest’ directly in the case, an *amicus’s* interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.

Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an *amicus* is only interested in the Court making a decision of professional integrity. An *amicus* has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his/her cause is to ensure that a legal and legitimate decision is achieved.¹⁵

Based on the foregoing, it is clear that an interested party is joined as a party to the proceedings while an *amicus* is admitted to participate so as to offer its expertise on a specific issue to be confronted by the court. An *amicus* is an advisor to, but not extension of the court; it neither advances a party’s case nor is bound by the decision of the court, except as to its precedent.¹⁶

2. Admission of an *Amicus Curiae* and Interested Party in Proceedings

2.1 Legal Provisions

The Rules for admission of *amicus curiae* and for joinder of interested parties are set forth in the Supreme Court Rules, 2012¹⁷ and in the

¹⁵ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 5) [16]-[18].

¹⁶ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 5) [38].

¹⁷ Supreme Court Rules, 2012 (Supreme Court Act, 2011 [Subsidiary Legislation]) Art 3(1).

Mutunga Rules. The Supreme Court Rules apply only to cases before the Supreme Court that do not address fundamental rights and freedoms while the Mutunga Rules apply to all cases that address fundamental rights and freedoms and are made under Article 22 of the Constitution.¹⁸

2.2 Supreme Court Rules

Rule 25 of the Supreme Court Rules, 2012 states:

- 1) A person may at any time in any proceedings before the Court apply for leave to be joined as an interested party.
- 2) An application under this rule shall include
 - a) a description of the interested party;
 - b) any prejudice that the interested party would suffer if the intervention was denied; and
 - c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.
- 3) An application under this rule shall be determined on the basis of written submissions. Provided that the Court may, where the applicant is unrepresented, direct that submissions may be made orally.

Rule 54 of the Supreme Court Rules, 2012 addresses the admission of *amicus curiae*. It states that:

¹⁸ Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (n 7) s 3(1).

- 1) The Court may—
 - a) in any matter allow an *amicus curiae*;
 - b) appoint a legal expert to assist the Court in legal submissions; or
 - c) at the request of a party or on its own initiative, appoint an independent expert to assist the Court on any technical matter.
- 2) The Court shall before allowing an *amicus curiae* take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest, or any other relevant factor.
- 3) The fees and expenses of an advocate or expert appointed by the Court on its own initiative shall be paid out of the Judiciary Fund in accordance to the scale of fees set by the Chief Justice from time to time.

2.3 Mutunga Rules

Rule 6 of the Mutunga Rules provides that:

- a) The Court may allow any person with expertise in a particular issue which is before the Court to appear as a friend of the Court.
- b) Leave to appear as a friend of the Court may be granted to any person on application orally or in writing.
- c) The Court may on its own motion request a person with expertise to appear as a friend of the Court in proceedings before it.

Rule 7 goes further to state that:

- 1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.
- 2) A Court may on its own motion join any interested party to the proceedings before it.

From the jurisprudence developed by the courts, persons may make applications to be joined in either capacity at any stage of the proceedings.

However, to be joined as an interested party or allowed to appear as *amicus* is not a matter of right. Any joinder to, or appearance in proceedings is discretionary, and each case must be examined on its own merits and circumstances.

As explained in *Francis Kariuki Muruatetu & Anr v Republic & 5 Ors*, leave to appear as *amicus* ‘is a matter of privilege, rather than of right’.¹⁹ Similarly, although rules on joinder should be applied liberally,²⁰ a party looking to participate in litigation cannot assume that it will automatically qualify for admission as *amicus* or joinder as an interested party:

Indeed, in some instances it would be more appropriate for an applicant not to participate in proceedings at all, especially where such applicant does not stand to be prejudiced in any way if he/she is not enjoined; or adds no value to the proceedings; or increases the likelihood of diverting the natural course of the proceedings.²¹

In every application for joinder, the paramount consideration for the court is the interest of the primary parties. In *Francis Kariuki Muruatetu & Anr v Republic & 5 Ors*, the Supreme Court observed that, particularly in proceedings that are not considered public interest litigation, ‘[t]hird

¹⁹ *Muruatetu v Republic* [2016] Supreme Court Pet 16 of 2016 (Consolidated), eKLR [54].

²⁰ *Sarkar On Code of Civil Procedure 2 Volumes* (n 4) vol 1, 887.

²¹ *Muruatetu* (n 19) [54].

parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved to Court'.²² An interested party must show that it has a stake in the issues as they have been presented to the Court; it '*may not frame its own issues or introduce new issues for determination*'.²³

The Supreme Court also appreciated that the threshold of admission of an *amicus* or interested party in criminal proceedings is not identical to admission in civil proceedings. 'This is because the nature of criminal proceedings demands that the interests of the accused person or prisoner, as the case may be, be given due regard by the Court'.²⁴ As a result, 'the Court will admit such additional parties only if it is satisfied that their participation will not prejudice an accused person or prisoner; occasion unnecessary delay; introduce issues foreign to the proceedings; or protract the issues for determination'.²⁵

3. Admission of an *Amicus Curiae*

The Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors*, set out the following directions to be taken into account by a court considering an *amicus* application:

- i) A party seeking to appear in any proceedings as *amicus curiae* should prepare an *amicus* brief, detailing the points of law set to be canvassed during oral presentation. This brief should accompany the motion seeking leave to be enjoined in the proceedings as *amicus*.
- ii) The Court may exercise its inherent power to call upon a person to appear in any proceedings as *amicus curiae*.

²² *Muruatetu* (n 19) [41].

²³ *Muruatetu* (n 19) [42].

²⁴ *Muruatetu* (n 19) [56].

²⁵ *Muruatetu* (n 19) [57].

- iii) In proceedings before the Supreme Court, the Bench as constituted by the President of the Court, may exercise its discretion to admit or decline an application from a party seeking to appear in any proceedings as *amicus curiae*, and denial or acceptance of such an application should have finality.
- iv) The Court reserves the right to summarily examine *amicus* motions, accompanied by *amicus* briefs, on paper without any oral hearing.
- v) The Court may also consider suggestions from parties to any proceedings, to have a particular person, State Organ or Organization admitted in any proceedings as *amicus curiae*.²⁶

4. Admission of an Interested Party

In *Francis Kariuki Muruatetu & Anr v Republic & 5 Ors*, the Supreme Court indicated that an interested party must submit an application for joinder that includes the proposed submissions.²⁷ In addition, the interested party must submit an application that: clearly sets out the interests of the party; shows that these interests are consistent with the issues presented by the principal parties and not merely peripheral; asserts that the interested party will not merely repeat the arguments set forth by the principal parties; and asserts that the interested party will suffer prejudice if not joined.²⁸

In addition, the High Court in *Yash Pal Ghai & Anr v Judicial Service Commission & Anr* set out the following principle:

Whether the applicant's interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.²⁹

²⁶ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 5) [43].

²⁷ *Muruatetu* (n 19) [37].

²⁸ *Muruatetu* (n 19) [37].

²⁹ *Yash Pal Ghai & Anr v Judicial Service Commission & Anr* [2016] High Court Const Pet 324 of 2016, eKLR [18].

5. Role of an *Amicus Curiae*

As posited by the Constitutional Court of South Africa in *Re: Certain Amicus Curiae Applications; Minister of Health & Ors v Treatment Action Campaign & Ors*, an *amicus* ‘in return for the privilege of participating in the proceedings without having to qualify as a party, has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court’.³⁰ In doing so, an *amicus curiae* should not exhibit partiality towards any party.

In this regard, *amicus* submissions should be issue-specific rather than party-specific. Because an *amicus* has expertise in a particular issue, it should focus on how the analysis of that issue relates to the decision before the court. This may include an assessment of how an issue may affect the court’s decision, but it should base that assessment on its expertise, not on its allegiance to one of the parties.

In determining whether *amicus* is partisan, the test should be ‘that of the ordinary litigant, rather than of a legal expert examining the dichotomy between factual matter and legal matter’.³¹ An *amicus*, however, should not be considered partisan merely because its expert analysis disfavours the outcome sought by one of the litigants. After all, an expert’s analysis will often favour one argument over another. The critical question is whether the conclusion is sufficiently supported by the expert analysis as to merit consideration by the court. If the analysis is nakedly partisan and not supported by expertise, the court is free to deny admission. If, however, the analysis is sufficiently supported, the *amicus* should be admitted, and it will be up to the court to determine what weight, if any, to give to the submissions.

There is, however, an exception in *amicus* interventions in advisory-opinion proceedings before the Supreme Court, as indicated in *Re the*

³⁰ In *Re: Certain Amicus Curiae Applications; Minister of Health & Ors v Treatment Action Campaign & Ors* [2002] Constitutional Court CCT 8/02, 13 ZACC [5].

³¹ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 5) [16].

Matter of the Interim Independent Electoral Commission.³² The absence of a live controversy in such proceedings opens a window for the *amicus* to steer the court, by specific proposals, towards a definite legal position. The ultimate decision, however, lies with the Court.

The Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors*, formulated the following guidelines in relation to the role of *amicus curiae*:

- i) An *amicus* brief should be limited to legal arguments.
- ii) The relationship between *amicus curiae*, the principal parties and the principal arguments in an appeal, and the direction of *amicus* intervention, ought to be governed by the principle of neutrality, and fidelity to the law.
- iii) An *amicus* brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The Court may therefore, and on a case-by-case basis, reject *amicus* briefs that do not comply with this principle.
- iv) An *amicus* brief should address point(s) of law not already addressed by the parties to the suit or by other *amici*, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.
- v) The Court may call upon the Attorney-General to appear as *amicus curiae* in a case involving issues of great public interest. In such instances, admission of the Attorney-General is not defeated solely by the subsistence of a State interest, in a matter of public interest.

³² In *Re the Matter of the Interim Independent Electoral Commission* [2011] Supreme Court Const App 2 of 2011, eKLR 92.

- vi) Where, in adversarial proceedings, parties allege that a proposed *amicus curiae* is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see: *Raila Odinga & Ors v IEBC & Ors*; S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as *amicus*).
- vii) An *amicus curiae* is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as *amicus*, the legal expenses may be borne by the Judiciary.
- viii) The Court will regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role to partisan role.
- ix) In appropriate cases and at its discretion, the Court may assign questions for *amicus* research and presentation.
- x) An *amicus curiae* shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.
- xi) The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his or her submissions.
- xii) The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.
- xiii) The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken

into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.

- xiv) The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.
- xv) Whereas consent of the parties, to proposed *amicus* role, is a factor to be taken into consideration, it is not the determining factor.³³

It is only in exceptional cases where a party can be joined in another capacity other than the one it had applied. In *Francis Kariuki Muruatetu & Anr v Republic & 5 Ors*, the Supreme Court admitted persons as *amici curiae* even though they applied to be joined as interested parties.³⁴

6. Conclusion

Judicial authority is derived from the people, and the friend of the court plays an important role in ensuring that the people can fully participate in the judicial process. With the implementation of the 2010 Constitution, the judiciary plays a greater role in the development of important and complex policies regarding the rights of individuals and the role government will play in their lives. As the jurisprudence on *amicus curiae* develops, the judiciary and Kenyans, as a whole, will benefit from the expertise that *amicus* participants provide.

³³ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 5) [41].

³⁴ *Muruatetu* (n 19) [61].



Chapter 2

Friend of the Court: An Assessment of Its Role in Kenya's Judicial Process

By Christopher Kerkering

1. Introduction



This Chapter builds on Chapter One by focusing on the historical role of *amicus curiae* in Kenyan case law, the important role the Constitution plays in establishing the right to friend of the court participation, and the rules that have guided the court in determining who should be allowed to participate as a friend of the court. Looking at cases decided before the implementation of the 2010 Constitution demonstrates how radically *amicus curiae* has transformed under the new constitutional regime. The comparison demonstrates how insular the courts had become and how the 2010 Constitution significantly broadened the right to public participation in the judicial process. As the credibility of the court came into question in the 1990s, it pronounced its fairness and institutional piety quite loudly, but often acted in a way that, at a minimum, appeared unfair and biased. It created its own echo-chamber by closing out other voices and, in doing so, lost the public's faith.

The Constitutional transformation simultaneously stripped the courts of its ivory-towered authority, yet gave it a powerful role under the 2010 Constitutional regime. Previously, it had the power to choose who to listen

to and make decisions based on what voices it decided to hear. Under the 2010 Constitution, everyone has the right of standing to appear before the court and the court has a greater power to interpret and enforce their rights.

The shift in *amicus curiae* exemplifies that transformation. At least regarding fundamental rights and freedoms, the court has much less discretion on who can participate, but a much greater role in shaping the lives of Kenyans. The newly-established openness of the courts creates some burdens, but reflects a strong, and valid, belief that the courts must have a broad array of information to make decisions that are well-reasoned and, equally important, inclusive.

2. *Amicus Curiae* Participation in Kenya Prior to the Implementation of the 2010 Constitution

Prior to the implementation of the 2010 Constitution, *amicus curiae* played a minimal, if at times controversial, role in Kenyan court proceedings. Neither the former constitution nor the rules of procedure specifically authorized *amicus* participation. The few decisions in which *amicus* is discussed do not provide rules or standards that should be applied to determine whether to admit *amicus* or otherwise explain why an *amicus* was admitted.

Of the reported cases, the government represented most *amicus* participants. The court invited the Attorney-General and other government representatives to assist on issues regarding land control,¹ whether amendments to the former Constitution disqualified President Moi from seeking a successive term,² and the scope of the City of Nairobi's vicarious tort liability.³ Other cases addressed the government's role in private prosecutions,⁴ and the Court of Appeal's jurisdiction to hear appeals of such prosecutions.⁵

¹ *Karanja Matheri v Sarah Wanjiru Kanyi* High Court Civil Case 424 of 1972, eKLR.

² *Charles Kagai Mwhia & Anr v Ndolo Ayah & Anr* [1992] High Court Civ Case 6287 of 1992, eKLR.

³ *Nairobi City Council v Ursula Krishnan Patel* [1977] High Court Civ App 94 of 1975, eKLR.

⁴ *Alphonse Andalo & Anr t/a Highspeed General Supplies v James Gleen Russel Ltd* [1988] High Court Civ Case 590 of 1988, eKLR; *Apeli v Buluku* [1980] Court of Appeal Civ App 12 of 1979, eKLR; *Kimani v Kahara* [1983] High Court Priv Pros 7/82, eKLR.

⁵ *Republic v Shem Agungo & 5 Ors* [1988] Court of Appeal Crim App 168 of 1987, eKLR.

But, the government's *amicus* role could become muddled, as government counsel would at times appear on behalf of an interested party and as an *amicus*. In *In re Law Society of Kenya*⁶, for example, the Attorney-General represented both the Judicial Commission of Inquiry into Tribal Clashes in Kenya and at the same time appeared as *amicus*. The court glossed over objections to this dual role, asserting that it was 'understandable' for the government to participate both as 'state counsel' for the commission as well as *amicus curiae* because 'the subject requires deeper debate and perhaps legislation'.⁷ This assertion is somewhat curious, however, as the court did not explain how the government's dual role created deeper debate or how it would affect potential legislation. Instead, the court seemed to decide based on what was most convenient under the circumstances.

The lack of standards and a reliance on *ad hoc* decision-making led, at times, to informal requests to participate as *amicus* that defied court protocol—especially in politically sensitive cases. This is evident in *Republic v David Makali & 3 Ors*, in which several newspaper reporters and publishers were charged with contempt of court after publishing an article alleging executive interference in the court's decisions.⁸ In *Makali* the Law Society of Kenya had, somewhat unceremoniously, requested permission to act as *amicus curiae*. Justice Cockar complained that the Law Society 'gated-crashed' the proceedings and that the Law Society's counsel

suddenly shot up from a back row in the court room and attempted to address the Court as if he was addressing a villagers' *baraza* and not the highest Court of the country.⁹

The Law Society intended to argue that holding the journalists in contempt would violate their right to free speech. According to Justice Cockar, the Law Society was permitted leave to appear and was given a full hearing.¹⁰

⁶ *In re Law Society of Kenya* [1998] High Court Misc Civ App 141 of 1998, eKLR.

⁷ *In re Law Society of Kenya* (n 6) 4.

⁸ *Republic v David Makali & 3 Ors* [1994] Court of Appeal Crim Appl NAI 4 & 5 1994 (Consolidated), eKLR.

⁹ *Republic v David Makali & 3 Ors* (n 8) 5–6.

¹⁰ *Republic v David Makali & 3 Ors* (n 8) 6.

Justice Omolo, however, described the Law Society's efforts as 'abortive' and 'attempted but unsuccessful'.¹¹

The Justices may have been confused about whether the Law Society had been formally admitted as *amicus*, but they were uniform in their animosity. The Law Society argued that the contempt of court charges violated the journalists' right to free speech. These arguments were not well-received, as it appears that the court believed the Law Society was impugning its independence and attempting to politicize the hearing. Although the right to free speech is a relevant and important defence in any contempt charge, Justice Omolo referred to the argument as a 'spurious ground' used as pretext to politicize the case.¹²

The *Makali* court's rough treatment of the Law Society reflected longstanding tension between the Law Society and the Judiciary. Justice Omolo believed the Law Society 'was treating this Court as an enemy... which must be fought and subdued'.¹³ This sentiment makes it clear that the court did not admit the Law Society because it was a friend of the court that could provide useful information, but rather because the court saw it as a petulant child it could no longer control. Having its hand forced by the Law Society's conduct, the *Makali* court took the opportunity to chastise the Law Society and threaten Law Society counsel with 'extremely dire consequences' for its impertinence.¹⁴

The court's battle with the press (and concern about its image) did not go away after *Makali*. In *Republic v Tony Gachoka & Ann*,¹⁵ the Attorney-General filed contempt of court proceedings against a journalist and newspaper director for publishing articles that impugned the Judiciary's credibility. On appeal, the Court of Appeal affirmed the conviction. In a concurring decision, Justice Lakha wrote that the Attorney-General, which

¹¹ *Republic v David Makali & 3 Ors* (n 8) 23–24.

¹² *Republic v David Makali & 3 Ors* (n 8) 23.

¹³ *Republic v David Makali & 3 Ors* (n 8) 24.

¹⁴ *Republic v David Makali & 3 Ors* (n 8) 6.

¹⁵ Court of Appeal Crim App 4 of 1999, eKLR.

had filed and prosecuted the criminal case, was not really a prosecutor representing the republic, but an ‘*amicus curiae*’ that was defending the court’s integrity.¹⁶ This definition of *amicus curiae* as the court’s advocate stretched the meaning of the term beyond all recognition. *Amicus curiae* no longer referred to a non-party to the suit who assisted the court to enter a reasoned, fully informed judgement. Instead, *amicus curiae* was anyone who would defend the court’s credibility.

Makali and *Gachoka* suggest that, at least in contempt proceedings, the Judiciary viewed the *amicus curiae* as any participant that aligned itself with the court’s perspective. In *Makali*, the Law Society was a gate crasher and enemy because it argued for the right to free speech in a case challenging the court’s credibility. In *Gachoka*, the Attorney-General was a ‘friend’ because it defended the court’s credibility by filing criminal contempt proceedings against those critical of the court. The lines between the Executive and the Judiciary had blurred significantly, and the term ‘*amicus curiae*’ now appeared to distinguish between those on the inside—the Executive—from those on the outside—the Law Society.

By 2004, roughly a decade after *Makali*, the Court of Appeal seemed, at least to some extent, to have shed its imperious skin. In *Timothy M Njoya & 6 Ors v Attorney-General & 3 Ors*, the Law Society’s *amicus* participation was much more warmly received.¹⁷ *Njoya* addressed the right of the people to participate in the development of a new Kenyan constitution. Parliament had enacted the Constitution of Kenya Review Act, 2008¹⁸ to begin the process of constitutional reform. The Act gave Parliament, not the people, the right to approve and adopt a new constitution.

The central question in *Njoya* was whether the Act violated the 1969 Constitution by cutting the people out of the constitution-making process. The petitioners argued that it did and that constituent powers

¹⁶ *Republic v Tony Gachoka & Anr* (n 15) 22.

¹⁷ *Timothy M Njoya & 6 Ors v Attorney-General & 3 Ors* [2004] HC Misc Civ App 82 of 2004, eKLR.

¹⁸ Constitution of Kenya Review Act, 2008 (Cap 3A).

rested with the people, not with Parliament. Petitioners asserted that a new constitution could only be ratified by the people through a referendum. The respondents, including the Attorney-General and Constitution of Kenya Review Commission, disagreed. They argued that the Act did not violate the existing constitution and that Parliament did have the power to vote on whether to ratify a new constitution.

The Law Society applied to appear as *amicus* and subsequently played a prominent role in the court's decisions. The Law Society supported the respondent's position. It argued that the Constitution of Kenya Review Act did not violate the existing constitution and had established a valid procedure for the implementation of a new constitution. The Law Society presented arguments on the constituent power of the people, how that power should be manifested, the role of a referendum in the constitution-making process, the constitutional right to protection from discrimination, and the court's injunctive powers. The Law Society's submissions were addressed in all three opinions, and referred to no less than ten times.

Ultimately, the Law Society's arguments did not carry the day. Two judges from the three-judge panel ruled in the petitioner's favour, declaring that the Act violated the existing constitution and holding, among other things, that the proposed constitution must be submitted to referendum. In dissent, however, Justice Kubo relied heavily on the Law Society's arguments to support his conclusion that the Act did not violate the constitution and that the power to implement a new constitution had been vested in Parliament.

The *Njoya* court did not elaborate on its decision to admit the Law Society as *amicus*. The Law Society would certainly have been considered an expert on the legal issues addressed by the court. It is much more difficult, however, to speculate about how the court would have assessed whether the Law Society was biased. The Law Society obviously had an interest in the outcome of the case and had adopted a position that supported one of the parties. This is not surprising. The development of a new constitution had been years in the making and would affect every level of government, including the courts.

Every Kenyan should have had an opinion as to what the constitution should say and how it should be approved. Certainly, the Law Society, which had been part of the fight for a new constitution for years, would have had strong opinions on the issue. The *Njoya* court, however, looked past any apparent bias and carefully considered the Law Society's submissions.

Njoya provides an excellent example of how a court can benefit from *amicus* participation without fear that *amicus* arguments will overshadow the parties' interests. In *Njoya*, the Law Society's arguments helped drive the issues forward and provide useful analysis for the courts. The Law Society's arguments were mentioned frequently because they helped the court clarify the issues before it and allowed it to fully address potential arguments against, or criticisms of, its decision. Even though the court did not side with the Law Society, its *amicus* participation resulted in a more thorough and clearer decision. In short, the decision was better because *amicus* had been allowed to participate.

In many respects, the *Makalil Gachoka* cases and the *Njoya* case appear to be from two vastly different judicial worlds. *Makali* and *Gachoka* are the products of a defensive and insecure court eager to push back against any public challenge to its independence; the court had its friends and it had its enemies. The *Makali* court seems to have imagined that it should be closed from the 'gate-crashing' public. Its threats of 'extremely dire consequences' to the Law Society for its imposition suggests that the Law Society had stepped between the dragon and its wrath.¹⁹ Yet, the court did not seem to realize that its own tough language undermined its repeated claims of impartiality. The *Gachoka* case represents the flip side of that wrath, but with a similar consequence. The court's eagerness to embrace the Attorney-General as an *amicus* even though it was prosecuting the case further undermined the court's credibility.

The *Njoya* case, on the other hand, represents a court far more secure both in its procedures and its substantive analyses. Its decision is even-handed

¹⁹ *Republic v David Makali & 3 Ors* (n 8) 6.

and considers the arguments of all the parties. Regardless of whether one agrees with the decision, it would be extremely difficult to argue that the *Njoya* court had not thought things through; it carefully assessed all the arguments and reached a determination based on its valuation of those arguments. Unlike *Makali* and *Gachoka*, the *Njoya* court did not need to repeatedly announce how impartial it was; the substance of the *Njoya* decision, including its acceptance and consideration of *amicus* participation, demonstrated its impartiality. The decision reflects a watershed moment in constitutional reform in Kenya and is a primer on the development of a post-colonial constitutional democracy. If the *Njoya* decision had come out differently, Kenya would likely have a different constitution today.

2.1 The Legacy of the *Makali*, *Gachoka* and *Njoya* Cases under the 2010 Constitution

The 2010 Constitution represents a near-wholesale repudiation of the approach taken in *Makali* and *Gachoka*, while adopting the more inclusive aspects of *Njoya*. The Judiciary under the 2010 Constitution, for example, has incorporated some of the values of the *baraza*, namely a preference for inclusiveness and public participation, that were belittled in *Makali*. The Constitution makes it clear that the Judiciary is derived from the people and that, accordingly, the court is a public space. Rights of standing are guaranteed to every person, either acting on their own interest, on behalf of another person or group, or in the public interest. The Constitution also demands that in cases involving the Bill of Rights, the court establish rules of procedure to guide the public and the court.²⁰ These rules are intended to dispense with unnecessary formalities and technicalities and provide guidance on how to navigate court procedures. In doing so, they help the people understand the criteria the courts use to make their decisions. These rules should make it so that applicants no longer need to ‘crash the gates’ because they have clear guidance on the proper way to enter. The rules not only ensure that constitutional

²⁰ The Constitution of Kenya 2010’ art 22(3).

values are enforced, but also avoid the seemingly *ad hoc* procedures seen in such cases as *Makali*, *Gachoka*, and *In re Law Society of Kenya*. The court now must be accountable both to the Constitution and to the rules promulgated under the Constitution.

One of those constitutionally mandated rules ensures the right to participate as *amicus* in human rights cases—such as the right to free speech that was at issue in *Makali*. Another rule prevents the Attorney-General from participating as *amicus* in any case in which it is a party, as it had done in *Gachoka* and *In re Law Society of Kenya*. If any dispute remained about whether *amicus curiae* were gate crashers, the Constitution has resolved it. It has also ensured that, unlike in *Gachoka*, the lines between the Judiciary and the other branches remain clear. The days of *Makali* and *Gachoka* are gone; participation as *amicus curiae*—or, in the Constitution’s own terms, ‘friend of the court’—is a Constitutional right and the court’s rules must enforce that right. And as the *Njoya* decision shows, the court will appear more credible and its decisions will be better because of friend of the court participation.

3. Constitutional and Statutory Sources of Law on Friend of the Court Participation

This section discusses the constitutional right to friend of the court participation and analyses the procedural rules that address friend of the court participation in constitutional cases. It breaks down constitutional friend of the court participation into two types: an organization or individual’s constitutional right to participate as a friend of the court in cases involving fundamental rights or freedoms,²¹ and the Attorney-General’s constitutional right to participate as friend of the court in civil cases in which the government is not a party.²² The section also addresses a core struggle for the court—how to ensure the broad constitutional right to friend of the court participation while, at the same time, ensuring that that right does not jeopardize the litigant’s fundamental right to a fair hearing.

²¹ ‘The Constitution of Kenya 2010’ (n 20) art 22(3)(e).

²² ‘The Constitution of Kenya 2010’ (n 20) art 156(5).

3.1 The Constitutional Right to Participate in Cases Involving the Bill of Rights

An organization or individual with particular expertise may, with leave of the court, appear as a friend of the court.

—*Constitution of Kenya 2010, art 22(3)(e)*

Article 22(3)(e) of the Constitution establishes friend of the court participation as a Constitutional right in all cases claiming a violation of a right or fundamental freedom guaranteed in the Bill of Rights. Such cases include claims of violations of the rights to: life; freedom from discrimination; human dignity; freedom and security of the person; freedom from slavery, servitude and forced labour; right to privacy; freedom of conscience, religion, belief and opinion; freedom of expression; freedom of the media; access to information; freedom of association; freedom of assembly, demonstration, picketing and petition; freedom to exercise political rights; freedom of movement and residence; protection of the right to property; fair labour practices; a clean and healthy environment; economic and social rights; language and culture; consumer rights; fair administrative action; access to justice; rights upon arrest; fair hearing; and rights of persons detained, held in custody or imprisoned. In short, any right guaranteed under the Constitution also includes the right to friend of the court participation.

It is important to emphasize how unique and significant Article 22(3)(e) is. It is unique because no other country has placed such a high value on friend of the court participation. No other jurisdictions addressed in this publication—and likely no other jurisdiction in the world—has established friend of the court participation as a *constitutional* right as opposed to a right created through rules of court, statute, or common law. The friend of the court right under Article 22(3)(e) can only be altered by an amendment to the constitution. And because such an amendment would affect the Bill of Rights, it would require approval through a referendum. An amendment through referendum, in turn, would require the approval of both twenty percent of the registered voters in half of the counties and a simple majority of the actual voters in the referendum. These

strict requirements demonstrate that friend of the court participation in Bill of Rights cases is jealously guarded. Short of a massive overhaul of what Kenyans understand to be their fundamental rights and freedoms, the constitutional status of friend of the court participation is here to stay.

Article 22(3)(e) is significant because the rights and fundamental freedoms in the Bill of Rights do not stand alone; they are intrinsically connected to the other provisions of the Constitution. For example, refusing to grant citizenship to someone entitled to it under Article 15 not only violates that article but also violates a person's political rights, freedom of movement and residence, economic and social rights, land rights, and the right to fair administrative action.²³ Similarly, challenges to the regulation of land under Article 66 or alleged violations of the State's duty to the environment may also entail violations of the fundamental rights to protection of property and a clean and healthy environment.²⁴ And any violation of the provisions relating to the electoral system would also likely entail a violation of political rights.²⁵ These are only a few examples of how the fundamental rights and freedoms are woven throughout the fabric of the Constitution. Even issues that seem technical or purely institutional may affect an individual's fundamental rights and freedoms. Once they do, and a violation of those individual rights and freedoms is alleged, the constitutional right to friend of the court participation is triggered.

Equally as important, Article 22(3)(e) significantly limits the discretion of the Judiciary. As discussed above, the court's discretion to admit *amicus* under the former constitution was broad and unguided. For the most part, the court could exercise its discretion in any manner it saw fit. There were no settled rules or criteria that a court should consider. Instead, the process was *ad hoc* and informal. This is no longer the case. The Constitution is Kenya's supreme law, and the Judiciary's power 'may only be exercised

²³ 'The Constitution of Kenya 2010' (n 20) arts 38, 39, 40, 43, 47.

²⁴ 'The Constitution of Kenya 2010' (n 20) art 40.

²⁵ 'The Constitution of Kenya 2010' (n 20) art 38.

in accordance with th[e] Constitution'.²⁶ Any law, including common law, 'that is inconsistent with th[e] Constitution is void to the extent of that inconsistency'.²⁷ Since the right to participate as a friend of the court is established under Article 22(3)(e), the courts may not simply add extra requirements for participation without first ensuring that those requirements are consistent with Article 22(3)(e).

The Constitutional requirements under Article 22(3)(e) are minimal; to participate as a friend of the court, an organization or individual must have 'particular expertise' and must first obtain leave of the court.²⁸ A straightforward reading of Article 22(3)(e) indicates that, so long as an organization or individual has requested permission, it must be admitted if the court finds that it has 'particular expertise'. If the court were to consider factors beyond the applicant's particular expertise, it would impose requirements that were inconsistent with the Constitution and, accordingly, void. Questions regarding bias, impartiality, or independence would have no bearing on the admissibility of a friend of the court. Although these issues may have prohibited participation under common law, a strict reading of the Constitution indicates that they are no longer factors that can be considered to determine admissibility under Article 22(3)(e).²⁹

Of course, whether an applicant should be allowed to participate is a different question from *how* that participation should take place. Like all fundamental rights and freedoms, the right to friend of the court participation under the Constitution is not truly unlimited. Rights and freedoms often compete with one another, and one person's right may impinge on another person's freedom. This is equally true with the Article 22(3)(e) right to friend of the court participation. Article 24 of

²⁶'The Constitution of Kenya 2010' (n 20) art 1(1).

²⁷'The Constitution of Kenya 2010' (n 20) art 2(4).

²⁸'The Constitution of Kenya 2010' (n 20) art 22(3)(e).

²⁹ In a recent decision, however, the Court of Appeal held differently. In *Katiba Institute v Judicial Service Commission & 8 Ors*, the court held that partisanship is a proper consideration when determining whether to admit a friend of the court applicant. In reaching its decision, however, the court conflated the requirements for friend of the court participation under Article 22 of the Constitution with the procedural rules adopted to implement Article 22. The *Katiba Institute* decision is discussed more fully in Section 2.2.2.

the Constitution, which discusses limitations of rights and fundamental freedoms, addresses such a situation. Under Article 24, it may be appropriate for a court to limit the right to friend of the court participation if it were, for example, unfairly compromising another person's right to a fair hearing or making it impossible for the court to effectively administer its docket. Before it does limit the right under Article 22(3)(e), however, a court must carefully consider the following factors:

- The nature of the right of friend of the court participation.
- The importance of the reason for limiting friend of the court participation.
- The need to make sure that the right to friend of the court participation does not impede on other fundamental rights.
- What the purpose of the limitation is and whether there are less restrictive means of achieving that purpose.³⁰

The most obvious potential conflict relating to friend of the court participation is that it may somehow impinge on a litigant's right to a fair hearing or an accused's right to a fair trial as guaranteed under Article 50. If this does develop into a real concern, however, the key question is not whether a party with particular expertise should be allowed to participate, but whether the participation may be limited in a way that ameliorates the conflict. A tension between the right to a fair hearing and the right to participate as a friend of the court is not a zero-sum game. Instead, the Constitution demands that, if a limitation is necessary, the court adopt the *least restrictive means* necessary to allow for both rights to coexist.³¹ The least restrictive means will, as a rule, almost never include prohibiting friend of the court participation under Article 22(3)(e) altogether; denying a properly qualified expert the right to participate under Article 22(3)(e) is, in fact, the most restrictive means. Instead, if a conflict does exist, the

³⁰ The Constitution of Kenya 2010' (n 20) art 24(1)(a)-(e).

³¹ The Constitution of Kenya 2010' (n 20) art 24.

least restrictive means would likely entail putting limits on the method and substance of participation.

Determining whether limits, if any, should be imposed gives meaning to Article 22(3)(e)'s requirement that a friend of the court applicant first receive permission from the court. Seeking permission serves two purposes. First, it provides some order to the process and reduces the *baraza*-like chaos that frustrated the *Makali* court. But more importantly, it gives the court an opportunity to determine whether a friend of the court should participate and how that participation should occur. The questions of *whether* and *how* are very distinct. Under Article 22(3)(e), the only disqualifying factor would be that an applicant is not an expert on a particular issue. If such expertise does not exist, then the applicant does not have a constitutional right to intervene as a friend of the court. If, however, an applicant does have particular expertise, the next consideration is *how* that applicant should be allowed to participate.

The courts have wider discretion to determine how an Article 22(3)(e) applicant participates in the proceedings by, for instance, doing the following:

- Limiting the applicant to issues directly relevant to its expertise.
- Imposing page limits on the submissions.
- Preventing the applicant from introducing new evidence, or limit the introduction of evidence only to the issues relevant to its expertise.
- Allowing briefing, but not oral argument.
- Providing the litigants an opportunity to respond to the friend of the court's submissions, or even allowing the litigants to introduce new evidence to counter the friend of the court submissions.

As Dr. Collins Odote noted, the Kenyan courts are better off admitting friends of the court and then focusing on how to limit their participation,

if necessary.³² The court's only requirement is that whatever limitations it imposes should be the least restrictive to accomplish the goal of limiting the conflict between two competing rights.

If the courts focus on *how* best to allow participation rather than on *whether* to allow participation, then Article 22(3)(e) has a greater opportunity to create true friends of the court. Imposing constitutionally appropriate limits allows the friend of the court to focus on how its particular expertise relates to the issues before the court and is more likely to produce meaningful information that the court can use. In this regard, the decision in *Njoya* remains a good example of how a friend of the court can both make the court's decision better and make it appear fairer. Unlike *Makali*, the *Njoya* court appears to have understood that the best way to address potential biases or conflicts was not to close the gates to the *amicus* participant, but to incorporate that participant in a way that allowed the court to hone its reasoning and deliver a sounder decision. The friend of the court under Article 22(3)(e) will truly become a friend when the courts focus less on who should participate and more on how they can participate in a meaningful way.

3.2 The Mutunga Rules and the Article 22(3)(e) Right to Participate as a Friend of the Court

Article 22(3) required the Chief Justice to make rules of procedure that address, among other things, the right to friend of the court participation. In 2013, then-Chief Justice Willy Mutunga fulfilled this obligation by adopting the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013—known as the 'Mutunga Rules'. These are procedural rules that are intended to determine the processes the court will use to realize the rights guaranteed under Article 22. The Mutunga Rules are not intended to further define those rights or circumscribe them in any way. The rules must allow for

³² 'Friend of the Court or Partisan Irritant: The Role of *Amicus Curiae* in Kenya's Electoral Dispute Resolution', *Balancing the Scales of Electoral Justice: Resolving Disputes From the 2013 Elections in Kenya and the Emerging Jurisprudence* (2016) 295 (it is preferable that the test for *amicus* focuses on post-admission limitation).

the enjoyment of the Article 22 rights, including the right to friend of the court participation, as those rights are described within the Constitution.

The Mutunga Rules, however, define ‘friend of the court’ more narrowly than the Constitution does. Rule 2 defines a ‘friend of the court’ as:

an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise.

Each of the italicized terms—*independent*, *impartial*, and *subject matter of proceedings*—add a qualifying element to the ‘friend of the court’ definition that does not exist in the Constitution. Article 22(3)(e) is silent on whether a friend of the court must be independent or impartial. And it only requires that a friend of the court have ‘particular expertise’ and not expertise on an issue that is the subject matter of the proceedings.

The narrower definition of ‘friend of the court’ found in the Mutunga Rules creates an interpretive dilemma. It goes without saying that if there is any conflict between the definition of a term in a procedural rule and the same term as defined by the Constitution, the Constitutional definition must prevail. That is not just a long-standing rule of interpretation, it is explicitly stated in the Constitution: ‘Any law... that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid’.³³ If there is a conflict between the definition of ‘friend of the court’ in the Mutunga Rules and the definition in the Constitution, the definition in the Constitution wins.

The Court of Appeal, however, recently provided *obiter dicta* that appears to abandon the longstanding rules of constitutional interpretation. In *Katiba Institute v Judicial Service Commission & 9 Ors*, the Court of Appeal conflated the requirements for admission as a friend of the court under Article 22(3)(e) of the Constitution with the definition of a friend of the

³³ ‘The Constitution of Kenya 2010’ (n 20) art 1(1), 2(4).

court under the Mutunga Rules. As the court stated, ‘the requirements under the Constitution and under Mutunga Rules that a person seeking leave to appear, as *amicus curiae* in any particular case should meet are expertise, independence and impartiality’.³⁴ By merging the definitions of friend of the court in the Constitution and the Mutunga Rules into a single test, the *Katiba Institute* court imposed a condition for admission as a friend of the court—impartiality—that is not included in the Constitution.

Although the *Katiba Institute v Judicial Service Commission* court’s *obiter dicta* erred in giving equal weight to the procedural rules and Constitutional requirements, it would be a mistake simply to ignore the qualifiers in the Mutunga Rules or treat them as mere surplusage. The qualifiers reflect values that are important in any effective friend of the court participant. Submissions that are biased, merely parrot the positions of a litigant, or are wholly irrelevant to the proceedings do not help the court reach a better decision; they merely waste its time. The court should have a way to regulate Article 22(3)(e) participation so that the participants can help the court reach a just, reasoned decision rather than hinder it.

One way to give meaning to the qualifiers in the Mutunga Rules is to focus on the Article 22(3)(e)’s *submissions* rather than on the applicant itself. It is more important that the submissions are impartial, independent, and based on the applicant’s expertise than that the applicant itself is impartial and independent. Shifting the focus to the quality of the submissions rather than the character of the applicant reduces the conflict between the Mutunga Rules and Article 22(3)(e). It also makes practical sense. Being biased or lacking independence, after all, is different from being wrong. A biased person, for example, could provide compelling, sound, submissions that are an excellent resource for the court. Being biased or lacking independence does not necessarily equate with a compromised work product. They may often go together, but not always. In this regard, the courts would be better off focusing on the quality of the submissions rather than on the characteristics of the participants.

³⁴ *Katiba Institute v Judicial Service Commission & 8 Ors* [2017] Court of Appeal Pet 518 of 2013, eKLR [24].

For better or worse, the Constitution does not allow the courts to control for the bias or independence of an Article 22(3)(e) participant. As discussed above, however, the Constitution does give the courts significant regulatory control over how to manage these participants. The court can demand that the *submissions* be independent and unbiased. As noted above, it can also limit an Article 22(3)(e) participant to only written submission or only oral argument. And it can limit the length of those submissions and arguments. Finally, it can require that the submissions sufficiently link the particular expertise of the Article 22(3)(e) participant with an issue relevant to the case. These are powerful tools that will help the court keep the gates open while at the same time managing the quality of the information that comes in and maintaining a litigant's right to a fair hearing and a fair trial.

3.3 Using Expertise, Impartiality, Independence, and Relevance to Regulate Article 22(3)(e) submissions

The courts have struggled to apply Article 22(3)(e), and their decisions have been inconsistent. Some courts have focused more on regulating the submissions and less on who is submitting them.³⁵ Other courts have focused exclusively on ferreting out whether the Article 22(3)(e) applicant is biased without looking at how to regulate the submissions.³⁶ Still other courts appear to have done both.³⁷

This section looks closely at the terms bias, independence, and expertise to determine how they can be used to regulate friend of the court submissions. It first focuses on expertise, since that is the only requirement that, should it be lacking, would constitutionally disqualify an Article 22(3)(e) applicant. It then focuses on bias, distinguishing between *implied bias* and *actual bias*. This distinction is important because it affects the tools that the court can use to regulate submissions and ensure that they are useful to the court. Finally, it focuses on independence and how the court can avoid any conflicts that result from a real or perceived lack of independence.

³⁵ *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* [2016] High Court Pet 605 of 2014, eKLR.

³⁶ *Judicial Service Commission v Speaker of the National Assembly & 8 Ors* [2014] High Court Pet 8 of 2013, eKLR.

³⁷ *Muruatetu v Republic* [2016] Supreme Court Pet 16 of 2016 (Consolidated), eKLR.

3.3.1 Expertise

As recently explained in *Christopher Ndaru Kagina v Esther Mbandi Kagina & Anr*, ‘questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court’.³⁸ In exercising that discretion, the courts are faced with several issues: what fields are subject to expert analysis; when is an issue relevant to a dispute; and what qualifications are necessary to demonstrate expertise. This section discusses these issues.

3.3.1.1 Fields of Expertise

The term ‘expertise’ has been interpreted broadly to incorporate a wide variety of disciplines and facts that would not be readily available to the court. As discussed above, the Constitution only requires that the Article 22(3)(e) applicant have a ‘particular expertise,’ whereas the Mutunga Rules suggest that the expertise must be relevant to the ‘subject matter’ of the litigation.³⁹ Although the courts have not directly addressed the distinction, the two-judge panel in *Trusted Society of Human Rights Alliance v Matemo* seems to have resolved the conflict by adopting a broad reading of the Mutunga Rules.⁴⁰ *Matemo* states that friend of the court expertise can apply to any matter, whether legal or factual, that is ‘relevant to the matter in dispute’.⁴¹

Article 48 of the Evidence Act provides some additional guidance. Like *Matemo*, it identifies a broad array of fields of expertise available to

³⁸ *Christopher Ndaru Kagina v Esther Mbandi Kagina & Anr* [2016] High Court Succ Cause 300 of 2013, eKLR (no pagination provided, emphasis omitted).

³⁹ ‘The Constitution of Kenya 2010’ (n 20) art 22(3)(e); Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 r 2.

⁴⁰ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* [2015] Supreme Court Pet 12 of 2013, 2015 eKLR. *Matemo* has a complicated procedural history, including two other decisions from the Supreme Court with the same petition number. The decision regarding friend of the court participation, however, used *Matemo* as the surname of the respondent, whereas the other two cases use *Matemu*. *Matemo* was decided in 2015 and is the only decision that discusses friend of the court participation and the only decision referred to in this chapter. Because Kenya Law Reports uses *Matemo* as the official name of the citation, this chapter will also do so.

⁴¹ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 40) [42(xiv)]; citing *Justice Philip K Tunoi & Anr v Judicial Service Commission & 2 Ors* [2014] High Court Pet 244 of 2014, eKLR [38[4]].

the courts, including foreign law, science or art, and handwriting and fingerprint identification.⁴² It also identifies issues that require ‘special knowledge’ and states that information that would explain the relationship between individuals could be considered expert opinion.⁴³ It further states that both the opinion and the grounds on which that opinion is based are admissible in court.⁴⁴

Taken together, the Constitution, the Mutunga Rules, the Supreme Court opinions, and the Evidence Act indicate that the fields in which expertise are available are extremely broad. Particular expertise includes all areas of science, the social sciences and the study of societies, art and culture, specific areas of law, and special facts that may not be available to the court or that may assist the court in reaching an informed opinion.

3.3.1.2 Relevancy of Expertise

Given the broad scope of expertise available for friend of the court participation, the critical question often is whether the field in which the friend of the court has expertise is relevant to the dispute. Relevancy is a broad term, and in cases that may have an impact beyond the parties to the suit, what is relevant may well expand to include issues not directly raised by the parties. This is especially true in cases involving fundamental rights and freedoms, in which the court’s decision will almost certainly implicate the rights and freedoms of others. Ultimately, however, it will be the court that determines what is relevant to the decision it is to make.

In *Matemo*, the Supreme Court indicated that a friend of the court brief should address ‘relevant matters of law or fact which would otherwise not have been taken into account’.⁴⁵ In the same opinion, however, the Supreme Court states that a friend of the court *brief* should be related to

⁴² The Evidence Act (Cap 80) 1963 (Cap 80) s 48(1).

⁴³ The Evidence Act (Cap 80) (n 42) ss 52, 53.

⁴⁴ The Evidence Act (Cap 80) (n 42) s 54.

⁴⁵ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 40) [42(xiii)].

legal arguments.⁴⁶ At first blush, this statement seems to contradict both *Matemo's* broad definition of 'relevant matters' as well as the definition of relevancy under the Constitution. When looked at as a whole, however, the *Matemo* decision can be read to mean that a friend of the court submission is relevant to the dispute and, thus, admissible, if the expertise can be linked to the 'legal arguments' made by the parties.⁴⁷ 'Legal arguments' under Article 22(3)(e) means any claim that a fundamental right or freedom has been violated. Thus, under *Matemo*, the Article 22(3)(e) applicant's expertise is relevant so long as it relates in some way to the fundamental rights or freedoms at issue in the case.

In *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors*, Justice Lenaola reached a similar conclusion. The petitioners in *SWK* argued that their fundamental rights and freedoms were violated when they were forcibly sterilized because they were HIV positive. When friends of the court with expertise on health and human rights, reproductive health, social and economic rights, and HIV prevention applied for admission, the respondents objected. They claimed that, although they were experts, their expertise was not relevant to whether a constitutional violation had occurred.⁴⁸

Justice Lenaola disagreed. He noted that a friend of the court's field of expertise need not be limited to the narrow issue of whether a constitutional violation occurred, but rather should be understood expansively to encompass any 'consequential and relevant' issue that would assist the court in reaching a decision.⁴⁹ This would not only include whether the expertise was relevant to whether a violation occurred, but also include the scope and extent of the rights available to the petitioners, an assessment of the arguments made by the parties, the reliability and probity of evidence presented by the parties, and the best way to assess damages or craft a remedy.

⁴⁶ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 40) [41(i)].

⁴⁷ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 40) [41(i)].

⁴⁸ *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* (n 35) [73].

⁴⁹ *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* (n 35) [73].

3.3.1.3 Qualifications of an Expert

Because particular expertise is a requirement under Article 22(3)(e), an applicant should provide the court with information indicating what its expertise is and the basis for that expertise. Other than asserting that a ‘general expertise in law does not suffice’,⁵⁰ the courts have not yet provided additional guidance on what evidence would be sufficient to qualify someone as having the necessary expertise. A look at the case law, however, indicates that expertise has been shown by education and training; scholarship and other writings in relevant areas; experience in specific areas of law; and participation in cases in other jurisdictions.⁵¹ This list, however, is not exhaustive.

There have only been a few cases in which a friend of the court applicant was denied because it did not have sufficient expertise. In *Justice Philip K Tunoi & Anr v Judicial Service Commission & 2 Ors*, the High Court held that the Commission on Administrative Justice did not have sufficient expertise to qualify as a friend of the court because, even though the Commission was established under both the Constitution and statutory law, it had not published ‘scholarly briefs’.⁵² This case is a bit unusual because, although other courts have held that scholarly publications are sufficient to qualify a friend of the court applicant as an expert, no other court has suggested that it is a necessary requirement. By focusing solely on one method of gaining expertise, the court interpreted the expertise requirement too narrowly. A more appropriate interpretation would require the court to look at other ways that an applicant could have gained expertise.

The court in *Martin Nyaga Wambora & 30 Ors v County Assembly of Embu & 4 Ors*, however, reached a different conclusion than the High Court in *Tunoi*. It held that the Commission on Administrative Justice met

⁵⁰ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 40) [42(xiv)].

⁵¹ *Judicial Service Commission v Speaker of the National Assembly & 8 Ors* (n 36) [18]; *Muruatetu* (n 36) [48]; *Randu Nzai Ruwa & 2 Ors v Secretary, Independent Electoral and Boundaries Commission & 9 Ors* [2012] High Court Const App 6 of 2012, eKLR [3]; *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* (n 35) [13].

⁵² *Justice Philip K. Tunoi & Anr v Judicial Service Commission & 2 Ors* (n 41) [5], [19].

the expertise requirement and admitted it as friend of the court.⁵³ The *Wambora* court took a broader, more appropriate, view of what constitutes expertise for the purposes of admitting a friend of the court.

In *Diana Kethi Kilonzo & Anr v Independent Electoral & Boundaries Commission & 10 Ors*, the court denied the application for friend of the court from an individual who wanted to appear as a fact witness, rather than a friend of the court.⁵⁴ The *Kilonzo* court made the appropriate distinction between factual information and expertise. When looking at an Article 22(3)(e) applicant's qualifications, these cases suggest that a court should not adopt a cramped view of what makes an applicant an expert, but rather look at a broad variety of ways that a person may have acquired expertise.

3.3.2 Impartiality and Bias

The courts have used the terms 'impartial' and 'unbiased' interchangeably and, in fact, they are synonymous.⁵⁵ Bias can occur in two forms, *actual bias* which, would constitute 'genuine prejudice' against a party to the litigation, and *implied bias*, which is an inference that bias exists based on the experience or relationships of the friend of the court applicant.⁵⁶ Actual bias may result if a friend of the court applicant is a party to the case, has a direct financial or proprietary interest in the outcome of the case, or demonstrates a genuine prejudice against a party to the case that is otherwise unconnected to the issues before the court. Implied bias is different, in that it can be inferred based on the previous positions that a proposed friend of the court has taken on an issue, experience it has with relation to matters before the court, or opinions and publications made by the applicant.

⁵³ *Martin Nyaga Wambora & 30 Ors v County Assembly of Embu & 4 Ors* [2015] High Court Embu Const Pet 7 & 8 of 2014, eKLR [15].

⁵⁴ *Diana Kethi Kilonzo & Anr v Independent Electoral & Boundaries Commission & 10 Ors* [2013] High Court Pet 359 of 2013, eKLR [16–23].

⁵⁵ Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (9th ed, West 2009).

⁵⁶ Garner and Black (n 55).

3.3.2.1 Implied Bias

To qualify as a friend of the court, the applicant must demonstrate that it has expertise in an area relevant to the litigation. Such expertise is often demonstrated by previous employment, writing, or positions held by the applicant. And in nearly all cases, an applicant who has demonstrated an expertise in an area has also taken a side on an issue relevant to that expertise. For instance, an expert on climate change who has written extensively on the issue will certainly have demonstrated an implied bias relating to the causes of climate change and the ways to ameliorate its effects. Similarly, an expert on international maritime law may demonstrate her expertise through writings that take a position on certain maritime legal disputes. Finding friend of the court applicants who have offered no opinions or have not expressed themselves on the areas of their expertise would be nearly impossible. In short, it would be very difficult to find a friend of the court applicant that has expertise but does not have some sort of implied bias.

And, of course, expertise is required under Article 22(3)(e) for a reason. A primary purpose of a friend of the court is to provide information that is relevant to the court's decision making but that would not otherwise be available. It goes without saying that an expert with no expertise is of little or no use to the courts. By contrast, a friend of the court can help guide the court to develop reasoned conclusions that fully account for technical details, policy implications, and social circumstances, and that help the court reach a just conclusion that considers the broader affects its decision may have.

Although implied bias will not disqualify an applicant under Article 22(3)(e), it is an important concern for the courts. Any worry that implied bias may bleed into actual bias, however, can be addressed through the court's inherent ability to regulate the role played by a friend of the court. For example, in *Muruatetu v Republic*—a case regarding the constitutionality of the mandatory death penalty—the Supreme Court admitted the Death Penalty Project as a friend of the court even though the organization maintained an abolitionist position on the death penalty.⁵⁷ Despite this implied bias,

⁵⁷*Muruatetu* (n 37) [52]; Death Penalty Project, 'What We Do » The Death Penalty Project' <<http://www.deathpenaltyproject.org/what-we-do/>> accessed 23 March 2017.

the court noted that the Death Penalty Project had expertise on ‘sentencing principles and procedures that have emerged from the abolition of the mandatory death penalty in other common law jurisdictions, with a focus on Africa’.⁵⁸ The court addressed the concern about implied bias by requiring the Death Penalty Project to limit its submissions to its specific expertise and not include general arguments against the death penalty. Because the application was limited to a specific issue, the Death Penalty Project’s expertise overcame any apparent bias that may have existed.⁵⁹

Similarly, in *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* Justice Lenaola admitted friends of the court with extensive experience on relevant issues despite objections that the applicants had an apparent bias.⁶⁰ Justice Lenaola noted that the applicants intended to offer expertise ‘to impartially appraise the Court of international and human rights standards’ relevant to the litigation.⁶¹ An applicant’s expertise combined with its stated intention to maintain impartiality in its submissions was sufficient to overcome any concern of implied bias. Moreover, as Justice Lenaola noted, the friend of the court’s experience and information would be ‘useful to this Court in reaching a just determination’.⁶² *SWK* and *Muruatetu* are excellent examples of the court’s ability to admit a friend of the court but also utilize its regulatory powers to ensure that the submission be relevant and useful.

The *SWK* decision and the *Muruatetu* decision regarding the Death Penalty Project are consistent with the Ugandan Supreme Court’s position in *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof Oloka Onyango & 8 Ors*. In this case, referred to as the *Onyango Application*, the respondents argued that the *amicus* applicants were biased because they had written articles on issues germane to the dispute.⁶³ The

⁵⁸ *Muruatetu* (n 37) [48].

⁵⁹ *Muruatetu* (n 37) [51]-[52].

⁶⁰ *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* (n 35) [36], [39].

⁶¹ *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* (n 35) [6].

⁶² *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* (n 35) [73].

⁶³ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof Oloka Onyango & 8 Ors* [2016] Supreme Court Civ App 02 of 2016, 2 UGSC 7–8.

amicus applicants disagreed. They argued that, although a general claim of bias had been raised, that the court should look at the substance of the briefing and not at the general positions held by the applicants.⁶⁴

The Ugandan Supreme Court sided with the applicants. The court noted that even if any prejudice existed, it was not actual prejudice but merely ‘potential prejudice’.⁶⁵ Such potential prejudice, it determined, was not sufficient to deny the *amicus* application because the court’s ability to regulate the role *amicus* played would mitigate any potential harm to the litigants. Most importantly, the court asserted that it had the independence and authority to determine ‘what use it will make of the brief, (if any)’.⁶⁶

One decision in Kenya reached a different conclusion on the significance of implied bias. In *Judicial Service Commission v Speaker of the National Assembly & 8 Ors*, the High Court was presented with the same issue as the Ugandan Supreme Court in the *Onyango Application*: whether a friend of the court should be denied because it had previously written articles on issues before the court.⁶⁷ The *Judicial Service Commission* reached the opposite conclusion than the Ugandan Supreme Court. It held that the friend of the court application should be denied because the previous writings showed that the applicants were partisan.⁶⁸ The *Judicial Service Commission* decision is inconsistent with other case law. Unlike in *SWK, Muruatetu*, and the *Onyango Application*, the *Judicial Service Commission* court did not attempt to mitigate the implied bias by limiting the scope of the submissions or ensure that the submissions, themselves, remained impartial. Because the court chose not to employ its regulatory powers, it is arguable that it did not sufficiently consider whether there were less restrictive means for allowing friend of the court participation.

⁶⁴ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 63) 9.

⁶⁵ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 63) 18.

⁶⁶ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 63) 18.

⁶⁷ *Judicial Service Commission v Speaker of the National Assembly & 8 Ors* (n 36) [23].

⁶⁸ *Judicial Service Commission v Speaker of the National Assembly & 8 Ors* (n 36) [23].

Without evidence that an implied bias would translate into an actual bias against one of the parties, the courts should not rely on implied bias alone to deny admission to an Article 22(3)(e) applicant. If an applicant does have an implied bias, the court has sufficient capability to regulate the submissions so as to avoid any concerns about how that bias may harm the court or the parties. As indicated in the *Onyango Application*, the court should look to the proposed briefings, not previous positions taken on issues, to determine whether an implied bias has transformed into an actual bias. And, as the *SWK, Muruatetu*, and *Onyango Application* cases show, the court can use its inherent powers to regulate the proceedings in a manner that limits the potential for actual bias.

3.3.2.2 Actual Bias

Under Article 22(3)(e), actual bias does not disqualify an applicant with particular expertise from participating as a friend of the court. Nevertheless, someone with an actual bias cannot be impartial—which is an important value identified under the Mutunga Rules.⁶⁹ Actual bias presents two problems for the court. First, friend of the court submissions that are infused with actual bias are much less likely to provide the court with helpful information. Instead, they are a distraction and a waste of both the court’s and the litigant’s time and resources. Second, there is at least an abstract fear that a friend of the court with actual bias may improperly influence the court in a way that violates a litigant’s right to a fair hearing or fair trial.

Fortunately, actual bias is relatively rare. Only one case under the 2010 Constitution appears to have involved actual bias. In *Moses Kiarie Kuria & 2 Ors v Ahmed Issack Hassan & Anr*, the Supreme Court held that a friend of the court applicant from the Law Society of Kenya should not be admitted because the Vice-Chairman of the Law Society had submitted an affidavit that supported one of the parties.⁷⁰ Although the court did not provide guidance on when the actions of an individual in an organization should be attributed

⁶⁹ Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (n 39) r 2.

⁷⁰ *Moses Kiarie Kuria & Ors v Ahmed Issack Hassan & Anr* [2013] Supreme Court Pet 3, 4, 5 of 2013, eKLR [10].

to the organization itself, it held that that the participation in the litigation on behalf of one of the friend of the court representatives constituted an actual bias. Assuming it was proper to impute the bias of the Vice-Chairman to the organization, *Moses Kiarie Kuria* represents a case of actual bias because the friend of the court submitted evidence in the litigation.

Actual bias is relatively easy to solve because the Constitution provides other mechanisms for a party with an actual bias to participate in the proceedings. If a party does have an actual bias, it necessarily has an interest in the proceedings. Because Article 22 adopts broad rights of standing, an applicant with an actual bias would have the right to either institute its own proceedings or apply to join the litigation as an interested party.⁷¹ As a result, if the court finds that an Article 22(3)(e) applicant does have an actual bias, it need not foreclose the applicant from participating entirely. Instead it can deny the Article 22(3)(e) application but admit the applicant as an interested party under Article 22(1) or 22(2).

The Supreme Court made a similar decision in *Muruatetu*. In that case, two applicants requested to be admitted as interested parties under Article 22(2). The court found that the two applicants did not qualify as interested parties. Rather than deny their application all together, however, the court found that the parties had an important contribution to make and determined that ‘the role suitable for them in this matter is that of *amici curiae*, as opposed to interested parties’.⁷² The *Muruatetu* court rightly decided not to be restricted by procedural technicalities, but rather make a determination that honoured the applicants’ right to participate while, at the same time, ensuring that their participation was consistent with the interests they had in the proceedings. Although *Muruatetu* indicated that the court ordinarily would ‘not enjoin a party in proceedings in a capacity different from that which they had sought’,⁷³ it recognized that in the rare circumstances in which an Article 22(3)(e) applicant did have an actual

⁷¹ ‘The Constitution of Kenya 2010’ (n 20) art 22(1).

⁷² *Muruatetu* (n 37) [59].

⁷³ *Muruatetu* (n 37) [61].

bias, it may be appropriate to deny the 22(3)(e) application and allow joinder as an interested party.

3.3.3 Independence

Although the courts have yet to address what it means for a friend of the court to be independent, it is closely related to impartiality. Strictly speaking, no individual or entity is truly independent. Organizations rely on their shareholders, donors, or investors. And individuals are influenced by their relations. The question should not be whether a friend of the court is independent in the abstract, but rather if it is independent of the parties to the litigation. A friend of the court applicant is independent of the parties if its submissions are based on its own expertise and are free from the parties' control. For instance, if an organization seeking admission as a friend of the court were owned by the same person who was a party to the litigation, the friend of the court's independence would be an issue. However, if a proposed friend of the court were dependent on donor funding and that donor had an implied bias regarding an issue before the court, that fact should not undermine the proposed friend of the court's independence.

3.4 The Attorney-General's Constitutional Right to Participate as Friend of the Court

The Attorney-General shall have the authority, with leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

—*Constitution of Kenya, art 156(5)*

The Attorney-General, as the principle legal adviser to the Government, also has a constitutional right to appear as a friend of the court. This right applies to all civil proceedings in which the Government, in one form or another, is not a party.⁷⁴ The Attorney-General, moreover, has the duty

⁷⁴The Constitution of Kenya 2010' (n 20) art 260.

to ‘promote, protect and uphold the rule of law and defend the public interest’.⁷⁵ Its submissions as friend of the court must also be limited to furthering this duty.

There is good reason to limit the Attorney-General’s friend of the court participation to civil cases in which the Government is not a party. The Attorney-General is the lawyer for the Government. If the Government is a petitioner or respondent in a civil proceeding, the Attorney-General would, necessarily, have a duty to the Government as a party. It could not play the role as both the Government’s lawyer in an adversarial proceeding and as an impartial assistant to the court. Limiting the Government’s friend of the court role eliminates the problems seen in decisions like *In re Law Society of Kenya*⁷⁶ and *Gachoka*,⁷⁷ in which the Attorney-General’s dual role created the perception that the Government had an undue influence on the court’s decision.

3.5 The Court’s Ability to Appoint a Friend of the Court on Its Own Motion

The Court may on its own motion request a person with expertise to appear as a friend of the Court in proceedings before it.

—*Mutunga Rules, r 6(c)*

Rule 6(c) of the Mutunga Rules authorizes any court hearing a case regarding fundamental rights and freedoms to request that an expert participate as a friend of the court. Despite the broad authority this gives the court and the opportunity it provides for additional information that may be necessary to address issues of policy or technical expertise, Rule 6(c) has rarely been used.

⁷⁵ ‘The Constitution of Kenya 2010’ (n 20) art 156(6).

⁷⁶ *In re Law Society of Kenya* (n 6).

⁷⁷ *Republic v Tony Gachoka & Anr* (n 15).

Two cases, both by Justice E.M. Muriithi, have relied on Rule 6(c) to invite *amicus* participation. In *Masoud Salim Hemed & Anr v Director of Public Prosecution & 3 Ors*, Justice Muriithi appointed the Kenya National Commission on Human Rights to appear as *amicus curiae*.⁷⁸ In *Hemed*, the petitioners filed a petition for writ of *habeas corpus* following the disappearance of Masoud Salim Hemed, who was last seen in police custody. The petitioners argued that because the police were alleged to have been responsible for Hemed's disappearance, they would not adequately investigate the matter. In response, the court, on its own motion, ordered the Kenya National Commission on Human Rights to appear as *amicus* because it is 'constitutionally mandated to investigate all cases of human rights violations, to conduct investigations in the matter and jointly with the Criminal Investigations Directorate to prepare a report for the Inquest and this Court'.⁷⁹

Similarly, in *Muslims For Human Rights (MUHURI) on Behalf of Mohammed Aden Mohammed & 39 Ors v Minister for Immigration & 3 Ors*, the petitioners sought orders to compel the State to provide them with identification documents and to declare them Kenyan citizens.⁸⁰ Justice Muriithi held that the respondents had violated the petitioners' fundamental right to a fair administrative action by failing to explain why the petitioners had been denied identity cards.⁸¹ The court ordered that the respondents consider the applications for identification documents on a case by case basis and provide reasons if it denied an application.⁸² In addition, Justice Muriithi held that 'the matter is serious and important enough to warrant the calling in of expert assistance of the specialized state organizations on human rights and equality to aid in the determination of the truth as to the applicants' citizenship'.⁸³ He then appointed the

⁷⁸ *Masoud Salim Hemed & Anr v DPP & 3 Ors* [2014] High Court Pet 7 & 8 of 2014 (Cons), eKLR [45(3)].

⁷⁹ *Masoud Salim Hemed & Anr v DPP & 3 Ors* (n 78) [45(3)].

⁸⁰ *Muslims for Human Rights (MUHURI) on Behalf of Mohammed Aden Mohammed & 39 Ors v Minister for Immigration & 3 Ors* [2014] High Court Const Pet 50 of 2011, eKLR [2].

⁸¹ *Muslims for Human Rights (MUHURI) on Behalf of Mohammed Aden Mohammed & 39 Ors v Minister for Immigration & 3 Ors* (n 80) [14].

⁸² *Muslims for Human Rights (MUHURI) on Behalf of Mohammed Aden Mohammed & 39 Ors v Minister for Immigration & 3 Ors* (n 80) [15].

⁸³ *Muslims for Human Rights (MUHURI) on Behalf of Mohammed Aden Mohammed & 39 Ors v Minister for Immigration & 3 Ors* (n 80) [18].

Kenya National Commission on Human Rights and National Gender and Equality Commission as *amici curiae* to assist the respondents in determining the citizenship status of the petitioners.⁸⁴

Relying on Rule 6(c) to incorporate constitutional commissions and independent offices as friends of the court makes sense. These organs are intended to have independence and the authority to investigate constitutional violations. They provide an additional resource to the court to assist both in ensuring that, as in *Hemed*, complaints are properly investigated and, as in *Muhuri*, the State fulfil their obligations to Kenyan residents.

Rule 6(c), however, does not limit itself to inviting only government agencies as friends of the court. To the contrary, courts have much broader authority to invite experts outside the government to assist them when needed. The scope of that authority, however, has not fully been determined by the courts.

3.6 Friend of The Court Participation in Cases that Do Not Involve Human Rights and Fundamental Freedoms

Under the Supreme Court Rules, 2012, the Supreme Court may allow an *amicus curiae* in ‘any matter’ before it.⁸⁵ It may also appoint a legal expert to assist the court in its legal submissions or, at the request of the parties, appoint an independent expert to assist the court on any technical matter.⁸⁶ An *amicus curiae* is defined as ‘a person who is not party to a suit, but has been allowed by the Court to appear as a friend of the Court’.⁸⁷ The terms ‘legal expert’ and ‘independent expert’ are not defined. Before admitting an *amicus curiae* under the Supreme Court Rules, the court will ‘take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest, or any other relevant factor’.⁸⁸

⁸⁴ *Muslims for Human Rights (MUHURI) on Behalf of Mohammed Aden Mohammed & 39 Ors v Minister for Immigration & 3 Ors* (n 80) [22].

⁸⁵ Supreme Court Rules, 2012 (Supreme Court Act, 2011 [Subsidiary Legislation]) r 54(1)(a).

⁸⁶ Supreme Court Rules, 2012 (n 85) rr 54(1)(b), 54(1)(c).

⁸⁷ Supreme Court Rules, 2012 (n 85) r 2.

⁸⁸ Supreme Court Rules, 2012 (n 85) r 54(2).

Unlike friend of the court participation under Article 22(3)(e), *amicus curiae* participation under the Supreme Court Rules is not constitutionally protected. It does, however, have a broad scope. The right to *amicus* participation under the Supreme Court Rules applies to all cases that do not involve fundamental rights or freedoms. Taken together, Article 22(3)(e) and the Supreme Court Rules indicate that friend of the court or *amicus* participation is available in every case before the Supreme Court.

Like the Mutunga Rules, the Supreme Court Rules emphasize expertise, independence, and impartiality as factors the court will consider when admitting an *amicus* applicant. It is not clear, however, whether these factors will be weighed differently in cases under the Supreme Court Rules than they are under the Mutunga Rules. It is possible that the Supreme Court will apply the same standards to applicants regardless of whether they apply under Article 22(3)(e) or under the Supreme Court rules. It is also possible that the Supreme Court will apply stricter scrutiny to *amici* applicants in cases that do not involve fundamental rights or freedoms.

As it stands, the Supreme Court has yet to specifically state what, if any, difference there is between friend of the court participation under Article 22(3)(e) and *amicus* participation under the Supreme Court Rules. In practice, it appears that the courts apply the same standards for both types of cases. The friend of the court applicant in *Matemo* for instance, asserted that its submissions would address the leadership and integrity provisions in Chapter 6 of the Constitution.⁸⁹ Such submissions would not directly involve fundamental rights and freedoms and, as a result, would presumably be controlled by the Supreme Court Rules. *Muruatetu*, on the other hand, involved whether the mandatory death penalty violated the petitioners' right to life—one of the fundamental rights and freedoms covered by Article 22(3)(e).⁹⁰ In its analysis, *Muruatetu* discussed *Matemo* thoroughly and adopted its standards when reaching its conclusions.⁹¹ Until the Supreme Court holds otherwise, it is safe to assume that it will apply

⁸⁹ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (n 40) [4].

⁹⁰ *Muruatetu* (n 37) [25].

⁹¹ *Muruatetu* (n 37) [49], [52]-[55], [60]-[62].

the same standards used for *amicus* participation under the Supreme Court Rules as it uses for friend of the court participation under Article 22(3)(e).

Although authorized to do so under the Supreme Court Rules, the Supreme Court has yet to appoint a legal expert or independent expert on its own initiative. Nor does it appear that any party before the Supreme Court has asked it to appoint an independent expert.

3.7 *Amicus Curiae* Participation in the Court of Appeal, High Court, and Subordinate Courts

No rules or statutes, other than Article 22(3)(e) and the Mutunga Rules, address *amicus curiae* participation in the Court of Appeal, High Court, and Subordinate Courts. Although it is presumed that these courts have the inherent authority to admit *amicus* in cases that do not involve fundamental rights and freedoms, this has not been explicitly decided. It would not be surprising for these courts to apply the same standards as used by the Supreme Court under the Supreme Court Rules. Subsequent amendments to the rules of procedure or case law, however, may help resolve the question.

3.8 Friend of the Court Participation in Criminal Cases

The *Muruatetu* court raised some concerns about friend of the court participation in criminal proceedings. It noted that criminal cases are different from civil cases because criminal cases ‘directly touch on the personal fundamental rights and freedom of an individual, particularly the right to liberty’.⁹² Because an accused in a criminal proceeding ‘must ordinarily be informed beforehand of the case against him/her,’ the court should be careful to ensure that friend of the court submissions do not place the accused at a disadvantage.⁹³ Accordingly, the *Muruatetu* court held that ‘the Court should always guard against admitting third parties who may end up clogging the case of the petitioners in criminal matters’.⁹⁴

⁹² *Muruatetu* (n 37) [44].

⁹³ *Muruatetu* (n 37) [44].

⁹⁴ *Muruatetu* (n 37) [44].

The *Muruatetu* court's concerns are valid and deserve some unpacking. Criminal matters always involve a fundamental right that may not be limited: the right to a fair trial.⁹⁵ Often other rights are at stake that may not be limited, including the right to freedom from torture, cruel, inhuman or degrading treatment or punishment, and the right to an order of *habeas corpus*.⁹⁶ Yet, numerous other fundamental rights and freedoms may also be implicated in a criminal proceeding. Moreover, the courts must always be mindful that an accused often is at a disadvantage when compared to the prosecution. The Department of Public Prosecution has all the resources of the State at its disposal, whereas a criminal defendant often does not even have a lawyer.

As a result, the court must always be careful to ensure that the playing field does not tilt in favour of the government. The heightened burden of proof, the ethical obligations of the government, the rules of procedure, and the Constitution all provide the court with an opportunity to ensure that the State does not enjoy an unfair advantage and that an accused does, indeed, enjoy the right to a fair trial.

Yet, friend of the court proceedings still must be available in criminal cases. Article 22(3)(e) applies in all cases involving fundamental rights and freedoms, including criminal cases. In fact, the friend of the court plays an important role in such cases, as the court's decisions will often affect every person in custody, awaiting trial, or to be charged with a crime in the future. It is precisely because the stakes are so high that the court can benefit from friends of the court who can provide it information necessary to make a reasoned decision. Since these decisions will have precedent, the court must know how they will affect future cases. A friend of the court is an important tool for the court.

In this regard, the accused's interest in a fair trial and the Article 22(3)(e) right do not need to conflict. One way to ensure they are complementary

⁹⁵ 'The Constitution of Kenya 2010' (n 20) art 25(c).

⁹⁶ 'The Constitution of Kenya 2010' (n 20) arts 25(a), 25(d).

is to require that friend of the court submissions never touch on the guilt or innocence of an accused. Submissions that touch on issues relating to fundamental rights and freedoms, however, should be allowed so long as they do not unfairly tilt the playing field in the government's favour.

Based on those two standards, there are still a wide variety of subjects that are available for friend of the court briefing. These include assessments of international law, analyses of the constitutionality of certain procedural rules, expert assessments of the reliability of certain kinds of evidence, whether existing court practice comports to the right to a fair trial, the constitutionality of a criminal statute, or a variety of other issues the court will face in criminal matters. The most important consideration is not that the case is criminal, but whether the applicant's submissions will somehow disrupt the measures taken to ensure that an accused is not unfairly disadvantaged.

3.9 The Court's Ultimate Authority: Determining Which Submissions Are Worth Its Attention

The courts have one more tool at their disposal, and it may be the most important: they are experts at sussing out good arguments from bad. Courts are in the business of evaluating argument, assessing credibility, and weighing the value of the information submitted to them. As the Ugandan Supreme Court said in the *Oloka Onyango Application*, the court has the ultimate discretion to determine 'what use it will make of the [*amicus*] brief (if any)'.⁹⁷ Determining, *ex ante*, what briefs will be useful or what briefs may end up containing elements of bias is incredibly difficult. Invariably, the courts will end up with briefs that it deems biased or that lack independence, are repetitive, or irrelevant. The court, however, retains the ultimate corrective measure. If it deems the briefing unworthy of consideration, it does not have to consider it. It can simply put it aside and focus on more credible and relevant submissions.

⁹⁷ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 63) 18.

4. Conclusion

Friend of the court participation in Kenya Courts has transformed dramatically since the implementation of the 2010 Constitution. Unlike any other jurisdiction, Kenya has instilled friend of the court participation as a constitutional right in cases involving fundamental rights and freedoms. The Attorney-General also has a constitutional right to participate as a friend of the court in limited circumstances. In Supreme Court cases that do not implicate fundamental rights or freedoms, the Supreme Court has adopted rules for *amicus* participation. The other courts retain their inherent power to allow friends of the court to participate in cases.

This emphasis on inclusiveness represents a near complete reversal of court practice before the 2010 Constitution. Understandably, the courts have struggled to apply these broad rights. However, looking closely at the Constitution, the rules of court, and the case law uncovers a consistent theme. Once a friend of the court applicant has established its expertise, the court must determine the least restrictive means available for admitting the applicant to the proceedings. In establishing these least restrictive means, the court should consider the applicant's impartiality and independence. Because the court has such broad discretion to regulate how the applicant participates, it should, in almost all instances, be able to admit the friend of the court. In doing so, the court will honour the core principles of the Constitution while providing itself with important information that will allow it to make better, more reasoned decisions.



Chapter 3

The Place of Friend of the Court in Election Dispute Resolution in Uganda Comparative to Kenya

By Christopher Mbazira

1. Introduction

In Africa, constitutional judicial review has recently become both exciting and challenging. The excitement has arisen from the adoption of new constitutions in many countries on the continent, as well as the changing nature of the composition and profiles of different judicial Benches. Yet, challenges have arisen from new constitutional norms that have been created by the ‘new constitutions’. An example here includes the inclusion in the bills of rights of new human rights norms, *hitherto* unknown in many jurisdictions, such as economic, social and cultural rights. In addition, judiciaries have been given wider adjudicatory mandates, accompanied by ‘new’ sources of law, such as international law which has been recognized as a source of law in many constitutions now. In addition, the excitement could also be explained by the ‘trans-national judicial dialogues’, which

have seen judges across jurisdictions ‘talk’ to each other, either through the increasing number of physical interactions at seminars and meetings or through reading each other’s decisions, facilitated mainly by the internet and telecommunications technological revolution.

Furthermore, society is becoming more and more ‘litigious’, with individuals and groups of people increasingly looking to litigation, especially public interest litigation (PIL), as a tool for social transformation. An ever burgeoning PIL movement has emerged, inspired by the success of this form of litigation in such countries as India and the United States of America. In Africa, the success and lessons of South Africa are part of the fuel for the movement. Legal scholarship, with its increasing attention to social justice, is also another factor.

East Africa has not been spared from the above developments. The adoption of a new Constitution in Kenya in 2010, introducing new norms and positioning the Judiciary as an arena to protect the Constitution stands out. The Constitution has also inspired the rise of several groups and civil society formations using it to hold the state accountable. Election related disputes are also on the rise in the country, as is the case in other countries in the region like Uganda. Rather than resort to violence and other crude means of sorting differences, election contestants are increasingly running to the courts to protect their political, sometimes alleged ‘stolen,’ victories.

It is in the above context that the issue of friend of the court should be understood. As much as the use of the friend of the court procedure is hundreds of years old, particularly in the Commonwealth, it has also emerged as an evolving procedure, and one being embraced in different forms. The most recent use of the procedure in some African countries has been in human rights adjudication. However, the procedure is slowly making its entry into other forms of cases. The most recent, as seen in Kenya and Uganda, is in election dispute resolution.

With the above background, the purpose of this Chapter is to explore the role which the friend of the court procedure could play in election dispute resolution

and the approach which courts have recently adopted, with particular focus on Uganda and Kenya. It should be noted, however, that friend of the court approaches in election dispute resolution should not be viewed as entirely distinct from friend of the court participation in other types of cases. There is often an overlap and election dispute resolution cases should not be looked at in isolation. The Chapter discusses the approach which Kenya has taken, comparative to Uganda, especially in election disputes. Reference is also made to approaches in other jurisdictions in election matters. The Chapter also deals with the question of 'bias' and how this has played out. The Chapter makes a case for the relevance of friend of the court in election disputes litigation and how the procedure enhances democracy and illustrates how election disputes are a matter of public importance.

2. Unpacking the Concept

Chapter One of this book gives a detailed exposition of the concept of friend of the court and different forms it has taken, its history and application in Kenya. In addition, there are now a number of writings in the region that examine the concept of friend of the court, its origins and how it has evolved. Collins Odote has recently written an excellent piece on the subject.¹ Also available is a paper written by Joe Oloka-Onyango and Christopher Mbazira,² so is another piece by John Mubangizi and Christopher Mbazira.³ In addition to the writings, judicial jurisprudence on the subject has also been growing. Furthermore, elsewhere, this book deals with the approaches which several jurisdictions have adopted. Based on the above, this Chapter will not go into details defining the concept, its parameters and judicial approaches. For this, reference should be made to Chapters One and Two.

¹ 'Friend of the Court or Partisan Irritant: The Role of *Amicus Curiae* in Kenya's Electoral Dispute Resolution', *Balancing the Scales of Electoral Justice: Resolving Disputes From the 2013 Elections in Kenya and the Emerging Jurisprudence* (2016).

² J Oloka-Onyango and Christopher Mbazira, 'Befriending the Judiciary: Behind and Beyond the 2016 Supreme Court *Amicus Curiae* Rulings in Uganda' (2016) 2016 *Africa Journal of Comparative Constitutional Law* 1 <<https://journals.co.za/content/journal/10520/EJC-60f9613a8>> accessed 23 May 2017.

³ John C Mubangizi and Christopher Mbazira, 'Constructing the *Amicus Curiae* Procedure in Human Rights Litigation: What Can Uganda Learn from South Africa' (2012) 16 *Law Democracy & Dev.* 199.

Legal research shows that the friend of the court procedure was used as early as 1353, when the law allowed any person to step forward to advise the court.⁴ In the United States of America, the procedure has been traced to the 1823 case of *Green v Biddle* (*Green case*).⁵ In Africa, the procedure in British colonies was imported as part of the English common law from England where for a long time it remained unlegislated. The procedure was also in many jurisdictions applied by the courts themselves inviting a person to appear as friend of the court. However, later, contrary to historical manifestations, a person could offer themselves to help the court. In South Africa, a judge as early as 1939 held that a friend of the court is a person who, if he detects that the judge is in doubt about a legal issue, requests the court's permission to assist the judicial officer by pointing out what appears to be in danger of being overlooked.⁶

In many jurisdictions, the questions of whether it is only courts that could invite a person is now history, the procedure having been legislated and allowing any person interested in being friend of the court to apply to the court for admission as such. In England and Wales, the concept has evolved with the term 'intervener' being used. The effect of the evolution has been that it is no-longer the law that one can only intervene as friend of the court at the invitation of the court. The rules of procedure in all courts now allow for persons to apply to be admitted. In the Supreme Court, the Rules of the Court have dealt with the matter, moreover in a liberal manner.⁷ The courts' approach to the issue in the UK has historically been guided by the statement of Lord Hoffman in the House of Lords decision of *Re E (a child)*:⁸

It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human

⁴ S Chandra Mohan, 'The *Amicus Curiae*: Friends No More' [2010] Sing. J. Legal Stud. 352.

⁵ *Green v Biddle* (1823) 21 US 1 (Supreme Court).

⁶ *Connock's Motor Co Ltd (SA) v Pretorius* [1939] TPD 355 (Transvaal Provincial Division Decisions).

⁷ See Supreme Court Rules 2009 (2009 No 1603 (L 17)) r 26.

⁸ [2008] UKHL 66.

Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organizations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.⁹

In the United States of America, as indicated above, the procedure was first applied in the *Green* case, and United States now has the most entrenched use of the procedure. The rules governing the procedure are defined at an appellate level, and the lower courts have looked to the appellate courts in this respect. Rule 29 of the Federal Rules of Appellate Procedure allows for participation of friend of the court if all the parties consent and in absence of this with the consent of the court.¹⁰ The consent of the parties does not however take away the discretion of the court. With respect to the Supreme Court, the law is found in Rule 37 of the US Supreme Court Rules allowing for *amicus* participation which should start with the applicant getting the permission of the parties, but may apply to the court if such permission is not granted. Evidence shows that it is a rare occurrence for the Supreme Court to withhold the permission and most of the cases in the Court have friend of the court, sometime multiple friends in the same case.

3. Kenya Comparative to Uganda and the East African Court

As already indicated, the Kenyan approach is discussed in detail in Chapters One and Two. The approach Kenya has followed, unlike its neighbour Uganda, is to expressly legislate the friend of the court procedure. This

⁹ *Re E (a Child)* (n 8) [2].

¹⁰ Federal Rules of Appellate Procedure 2004 (Fed R App Proc) r 29.

can be seen right away from the Constitution which requires among others that rules made by the Chief Justice for the enforcement of the Bill of Rights shall satisfy criteria that ‘an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court’.¹¹ As illustrated in Chapter Two above, it is on the basis of this that the Chief Justice promulgated *The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013*.¹² In these Rules, “friend of the court” is defined as an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise’.¹³ The Rules of the Supreme Court have taken the same approach.

As indicated in Chapters One and Two, the jurisprudence on the subject has been growing, with all courts, including the Supreme Court defining principles that guide applications for friend of the court. One of the most comprehensive decisions is that of the Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemo & Ors*.¹⁴ In this case, the Supreme Court laid down 15 principles that should guide the courts in deciding whether to admit friend of the court. These are discussed in Chapter One.

The biggest difference between Uganda and Kenya is in the fact that in Uganda, the law on friend of the court has not been legislated and is generally a product of case-law. Until 2016, the position of the law was that someone could only take part in proceedings as friend of the court at the invitation of the court. In *Edward Frederick Sempebwa v Attorney-General*,¹⁵ the High Court adopted the definition given by Osborn’s Law Dictionary, 6th Ed to define the term as *one who calls the attention of the court to some of law or fact which would appear to have been overlooked*.

¹¹ ‘The Constitution of Kenya 2010’ art 22(3)(e).

¹² Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

¹³ Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (n 12) r 2.

¹⁴ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* [2015] Supreme Court Pet 12 of 2013, 2015 eKLR.

¹⁵ *Edward Frederick Ssempebwa v Attorney-General* [1986] High Court Const Case No 1 of 1986.

The court also referred to the Dictionary of English Law by Earl Jowitt to the effect that *friend of court is a member of the bar not engaged in the case or bystander who call the attention of the court to some decision reported or unreported which would appear to have been overlooked*. In *Attorney-General v Silver Springs Hotel Ltd & Ors*, (*Silver Springs case*),¹⁶ the court held that one could only take part in a case as friend of the court if invited by a court. However, this position changed in 2016 In the *Matter of Prof J Oloka-Onyango and 8 Ors*.¹⁷ In overturning the *Silver Springs case*, the Supreme Court was persuaded by the fact that the friend of the court procedure is now entrenched in many jurisdictions where rules allow for persons to apply to join in matters as friend of the court. The Court held that it was ‘also mindful of the fact that under Article 126(1) of the Constitution, judicial power is derived from the people and is exercised by the Courts on behalf of the people’.¹⁸ The Court then defined 17 principles that would guide it in its decision, which appear to have largely been drawn from those in the Kenyan case, *Trusted Society v Matemo case*.

The Court then formed four issues whose answers would determine the outcome of the application. These issues were (1) whether the applicants have expertise in the relevant area of law; (2) whether the friend of the court are neutral; (3) whether the intervention would expand issues already agreed upon by the parties; (4) whether the points of law which the applicants intend to canvass are novel and would aid development of jurisprudence.

4. Approach to Bias and Impartiality

The difference between the Kenyan and Ugandan approach with regard to the issues above is visible in how the two jurisdictions have handled the second issue, how to determine whether the applicant is neutral. The approach

¹⁶ *Attorney-General v Silver Springs Hotel Limited & 9 Ors* [1989] Supreme Court Civil Appeal No. 1 of 1989.

¹⁷ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof Oloka Onyango & 8 Ors* [2016] Supreme Court Civ App 02 of 2016, 2 UGSC, arising from; *Amama Mbabazi v Museveni & Ors* [2016] UGSC 3.

¹⁸ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 17) 12.

in Kenya, although a little mixed, appears to pursue the position that an objection relating to the bias of an applicant ought to be taken seriously and this can be based on previous conduct towards any of the parties or matters in issue. As seen in Chapter One, in *Raila Odinga & Ors v Independent Electoral & Boundaries Commission & Ors*,¹⁹ the Supreme Court rejected the application by the Law Society of Kenya (LSK), because the Vice President of LSK had sworn an affidavit in favour of one of the parties. The application by Katiba Institute was also rejected because one of its members, Professor Yash Ghai, had written an article in which he said that Uhuru Kenyatta, who was one of the parties in the case, and another William Ruto, were not qualified to stand as president and deputy president respectively because of the cases against them at the time at the ICC.

In contrast, the Supreme Court of Uganda took a different approach in the 2016 Presidential Petition referred to above. At the start of the Petition, a group of 9 law academics applied to intervene as friends of the court in the case. The basis of their application was to remind the court of recommendations made by the same court in previous presidential elections petitions for electoral law reform. These had largely been ignored. The applicants persuaded the Court to issue a structural injunction to ensure implementation of the recommendations. The lawyers representing Yoweri Kaguta Museveni and the Electoral Commission, as well as the Attorney-General objected vehemently. Their strongest point of objection was that 4 of the applicants had previously in their academic work written articles against Yoweri Museveni. In their submissions for instance, the lawyers for Museveni quoted a reference previously made by the 6th applicant to Yoweri Museveni as ‘a military dictator in a suit’. Based on this and others, it was argued that the applicants were biased and not neutral.

In response, the Court held:

The 1st respondent in refuting the impartiality and neutrality of the applicants referred this Court to written articles by the

¹⁹ *Raila Odinga v Independent Electoral & Boundaries Commission* [2013] Supreme Court Pet No. 5 of 2013, eKLR.

1st, 2nd, 3rd and 6th applicants which revealed bias against the 1st respondent. The respondents submitted that court should not entertain such partisan people to come under the guise of being friends of the court. However, although objections to the admission of an application as *amicus curiae* are a factor to be taken into consideration, it is not the only determining factor.²⁰

The Court continued:

....

What Court is called upon to do is balancing the wider interest of justice and the benefit of the participation of the intended *amicus curiae* to court against the risk of the friend of court descending into the litigation between the parties. An *amicus curiae* is the friend of the court and the court can only take what it considers relevant and non-partisan from the friend of court and the ultimate control over what the friend of court can do is the court itself.

Aware of the concern of the respondents, Court will be vigilant in ensuring that the applicants will not overstep their friend of court brief and the directives given herein so as not to prejudice any of the parties to the proceedings.

Court will ensure that the intervention will not serve to widen the case between the parties or introduce a new cause of action.²¹

²⁰ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 17) 16 (emphasis added).

²¹ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 17) 16–17.

Additionally, the Court held:

We are further convinced that the potential prejudice to the respondents (if any) will be curtailed by the principle of regulation of the extent of *amicus* participation in the proceeding to forestall the degeneration of *amicus* role into partisan role. The Court retains the power to determine what use it will make of the brief (if any).²²

The difference in the approaches above appears to be informed and influenced by the dynamic understanding of the role of the friend of the court. The traditional position that friend of the court must be impartial and unbiased is being given a new spin. As a matter of fact, it is impracticable that a person will intervene in a matter without having a position on the issue or the subject of the case. The intervention is always propelled by the fact that the friend of the court desires to see the case take and conclude in a certain direction. If one of the pre-requisites of being friend of the court is ‘expertise’, it is impossible that an expert will have a neutral position on the matters being adjudicated. It is also likely that the expert will have previously, either through his practice or writings, taken positions that illustrate his or her biases. According to Professor Chandra Mohan of Singapore Management University: ‘although not a party to the case, the modern *amicus* often has a strong interest in its outcome’. Professor Chandra refers to United States of America research that shows that ‘the neutral *amicus curiae* or traditional friend of the court, offering gratuitous legal advice to assist the court, had ceased to exist in the United States since the 1820s’. Accordingly, ‘[t]he political or modern *amicus curiae* that has emerged in its place, is a friend of court representing an interest group or organization with a social or political agenda’.²³ Professor Chandra concludes his assessment of the modern *amicus* as seen in the United States by stating:

²² *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 17) 18.

²³ Mohan (n 4) 370.

In most cases the American *amicus* has long gone past the traditional boundaries of his Roman ancestors. This has been attributed to the creative use of a flexible judicial tool such as the *amicus* to meet 20th century changes in the legal environment and the changing nature of litigation, rather than in the partisanship of lawyers. In choosing to push the agendas of business, corporate and civil society clients, the modern *amici* have no doubt parted ways from their revered Roman cousins of the same name. That has inevitably led to a further blurring of the lines between an *amicus* and an intervenor or advocate. In some federal district courts, the *amicus* has even been permitted to present oral arguments, to examine witnesses, to introduce evidence and even to enforce previous court orders.²⁴

At the level of the East African Court of Justice, the approach to the issue of neutrality and bias has also taken a dynamic shape. One such case is *Secretariat of the Joint United Nations Programme on HIV/AIDS v Human Rights Awareness & Promotion Forum (HRAPF) and Attorney-General of Uganda*.²⁵ In this case, one of the reasons given to object to the application was that the Applicant on its website had expressed its views on the issues which were the subject of the case and had even given a press statement on the subject and was therefore not neutral. In addition, the Executive Director of the Applicant had also publically expressed his views on the legality of the law whose annulment the case was about. In its decision, the Court held:

It has been submitted that these statements are an expression of bias and lack of partiality but in our considered view, the undenied [sic] statements were made as part of the Applicant's mandate generally, and not necessarily in the context of

²⁴ Mohan (n 4) 370–371.

²⁵ [2015] EACJ 3 of 2015.

the reference before Court. The statements were also made generally as regards the impugned law and were not targeted at the various sections of the law placed before us for scrutiny.

...

In addition to the above findings, it has not been denied by the Attorney-General that the Applicant is an expert in HIV related service provision and questions of human rights attendant to the said service and that is why he proposed that the Applicant could indeed join the reference as an expert. Its knowledge of the subject, which is partly an issue in the reference, is therefore necessary for the court to get an understanding of the same.²⁶

Writing on the Kenya approach to the question of bias and making some suggestions, Dr Odote suggests that the approach that would help is one where the court uses a test which focuses on ensuring that friend of the court actually serve the role of providing technical and expert assistance to the court.²⁷ According to Dr Odote, '[t]o do so it would be more desirable to adopt an approach that encourages those with expertise to aid the court in appropriate cases, while ensuring that they focus on technical contributions and not turn into parties to the case, canvassing partisan interests'.²⁸

5. Approach in Election Disputes

Kenya's approach can also be contrasted with Uganda's in election dispute resolution. It should be noted that the admission of friends of the court in election disputes is not something new but has been practiced in some

²⁶ *Secretariat of the Joint United Nations Programme on HIV/AIDS v Human Rights Awareness and Promotion Forum (HRAPF) & Attorney-General of Uganda* (n 25) [26]-[27].

²⁷ 'Friend of the Court or Partisan Irritant: The Role of *Amicus Curiae* in Kenya's Electoral Dispute Resolution' (n 1) 292.

²⁸ 'Friend of the Court or Partisan Irritant: The Role of *Amicus Curiae* in Kenya's Electoral Dispute Resolution' (n 1) 292-293.

jurisdiction as is illustrated in Chapter Six. Nonetheless, this though, with the exception of the United States, has been on a limited scale. Recently, the Supreme Court of Nepal, on its own motion, invited six friends, including the Nepal Bar Association, to advise it in an election dispute it had.²⁹ In the United States, as has become the tradition in other cases, it is common for friends of the court to be admitted to election related disputes. For instance, in 2012, the Supreme Court of Montana in the United States allowed two former election officials to file a friend of the court brief in a case which related to a law banning corporate funding in elections.³⁰ Recently, an organization called Judicial Watch filed a friend of the court brief in the US Supreme Court in a case to do with the voters roll.³¹ Even in the popular election case of *Bush v Gore*,³² the Court allowed several briefs to be filed.

The Kenya approach is seen in the case of *Raila Odinga & Ors*, where the court, while rejecting LSK and Katiba Institute, admitted the Attorney-General to the Petition, reasoning that the admission of the Attorney-General would not present a condition prejudicial to either the scope or the court's authority or the best interests of the parties.

In the case of Uganda, to understand the approach of the Supreme Court in 2016, it is important to understand why the 9 Makerere University law dons sought to intervene as friends of the court in the Presidential Petition. The 9 dons have various expertise in the range of constitutional law and human rights. Their intervention was motivated by two things: First, the Presidential Petition was viewed as an opportunity to influence the law on friend of the court by growing the jurisprudence away from the *Silver Springs* case in which, as seen above, it had been held that friend of the

²⁹ See Post Report, 'Local Elections: Apex Court Sets up *Amicus Curiae*' (22 December 2016) <<https://tinyurl.com/yb2wk58h>> accessed 23 May 2017.

³⁰ *American Tradition Partnership v Bullock* (2012) 132 S Ct 2490 (Supreme Court).

³¹ *A Philip Randolph Inst v Husted* (2016) 838 F 3d 699 (Court of Appeals, 6th Circuit); cert granted *Husted v Randolph Institute, et al* US Sup Ct No 16-980; Robert D Popper, 'Brief of *Amicus Curiae* Judicial Watch in Support of Petitioners' <<https://tinyurl.com/y89m6jdz>> accessed 5 June 2017.

³² (2000) 531 US 98 (Supreme Court).

court can only be admitted at the invitation of the court. Secondly, and most importantly, the dons were frustrated by the lack of progress in making electoral law reforms. Although since 2005 there had been concerted efforts for the reform of various aspects of the electoral laws, this had not been done. This was the case even when the Government itself admitted that there was need for electoral reforms and had commissioned the Uganda Law Reform Commission to collect views for this purpose. The Supreme Court in previous Presidential petitions in 2001 and 2006 had itself made several recommendations for electoral law reform, these too had been ignored. The dons foresaw that the Supreme Court would make additional or similar recommendations in 2016, yet these would be in vain. Because of this the dons sought to highlight to the Court its previous recommendations and to urge the Court to come out strongly on these.

As can be deduced from the *Amici Brief* the dons filed, the legal basis for their application was grounded in the Constitution. They argued:

11. Article 1(1) of the Constitution of Uganda provides that: All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution. Article 1(2) provides: Without limiting the effect of clause (1) of this article, all authority in the state emanates from the people of Uganda; and the people shall be governed through their will and consent. It is submitted that this provision justifies the intervention in a Presidential Petition of persons who seek to protect the public interest and the power of the people.

12. Article 1 is complemented by Article 126(1) which provides that: Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the values, norms and aspirations of the people. The same participation is envisaged by Article 127.

13. Article 104 which regulates the determination of Presidential Election petitions provides in clause (5) that: After due inquiry under clause (3) of this article, the Supreme Court may - (a) dismiss the petition, (b) declare which candidate was validly elected, or (c) annul the election. It is humbly submitted that the need for “due inquiry” justifies the admission of friend of the court seeking to help court decide the Petition by considering arguments made in the public interest.

With respect to the electoral law reforms, it was asserted thus:

16. The Supreme Court of Uganda has handled presidential election petitions on two previous occasions, that is to say, *Rtd. Col. Dr Kizza Besigye v Electoral Commission and Yoweri Kaguta Museveni* Presidential Election Petition No. 1 of 2001 (hereinafter ‘*Besigye v Museveni I*’) and *Rtd. Col. Dr Kizza Besigye v Electoral Commission and Yoweri Kaguta Museveni* Presidential Election Petition No. 1 of 2006 (hereinafter ‘*Besigye v Museveni II*’). On both occasions, the Court and individual Justices have made a number of specific and general recommendations regarding necessary reforms to the law required to enable the holding of free and fair elections, which can be said to truly express the will of the Ugandan public.

17. Twelve broad interventions can be identified in this regard: i) Facilitation of the Electoral Commission; ii) Nature of evidence; iii) Time for filing and determining a petition; iv) Time for holding re-election; v) Timely enactment of election laws; vi) Partiality of election officials; vii) Deletion of voters from register without due process; viii) Failure or refusal by Returning Officers to avail reports on time; ix) Contradictory and inadequate legal standards; x) Level ground for candidates; xi) Role of security forces; and xii) Historical context of inadequate electoral law.

The approach which the Court followed in changing its position to the admission of friend of the court has already been discussed above, so is the approach in dealing with the issue of bias. The Court was also convinced that the applications raised novel points of law not canvassed by the parties, including submissions that the Court issues a structural injunction.

However, for the purposes of this sub-section, the reasons advanced by the Supreme Court for the admission of friend of the court in election disputes are the most important. The reasoning of the Court is set out below. The Court held:

In arriving at our decision to allow this application, we have also taken into account the role envisaged of this Court under the Constitution, when it is seized with a Petition arising out of a Presidential Election.

We have considered two possible approaches the Court can adopt in this matter in the course of its inquiry. The first being to limit our role only to the Petition as presented by the Petitioner as an aggrieved candidate under Article 104(1) of the Constitution and also under Article 104(3) of the Constitution to inquire into the Petition and make our findings.

The other approach is to view the Court's role within the wider context of the Orders it is empowered to make under Article 104(1) and Article 104(5) which include:

- (a) That a candidate declared by the Electoral Commission elected as President was not validly elected;
- (b) To declare that another candidate was validly elected; and
- (c) To annul the entire Presidential election.

We are aware that by virtue of the powers vested in this Court under **Article 104(3) and 104(5)**, our decision in an Election Petition is likely to affect many Ugandans who participated in the election, as well as those who did not participate.

It therefore follows, in our view, that the Court should at all times be mindful of its role in this broader context, because it is seized with a matter of great public importance. If Court were to prefer the narrow interpretation, or restrict itself to considering only those Presidential candidates who feel aggrieved, the Court would be excluding or making an interpretation that is inconsistent with the spirit of the Constitution which vested in it wider powers to hear, determine and make pronouncements on Presidential Elections as a whole.

Given this responsibility vested in the Court by the Constitution, the Court has concluded that this great public interest and importance outweighs the concerns or objections raised by the respondents to the applicants as *amici curiae* in the Presidential Election Petition No. 1 of 2016.³³

From the above, it is clear that the Court placed a lot of weight on the nature of the public interest involved in elections petitions, and saw these as a contest beyond only the parties. For this reason, the negative adversarial effect of the case had to be mitigated by the friends of the court participation. Indeed, in its decision on the Petition, the Court adopted the recommendations made by the friends of the court and ordered the Attorney-General within two years to report on the steps taken in implementing these. The recommendations, if implemented, would have far reaching effects on electoral laws in Uganda.³⁴

³³ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 17) 18.

³⁴ Federal Rules of Appellate Procedure (n 10).

6. Conclusion

Ugandan and Kenyan courts have made tremendous progress in advancing constitutional jurisprudence. There are however some differences between the two countries. Although both jurisdictions make provision for election dispute resolution, the Uganda Supreme Court has easily allowed the participation of friends of the court in election cases. This has not been the case in Kenya. The point of divergence is with respect to considering the question of the bias of the applicant. Unlike Kenya, Uganda has not allowed perceived bias to be a bar for admission. Rather, the Supreme Court has said that admission of a friend could be conditioned on severing biased submissions from those that add value to the litigation. The approach in Uganda has been influenced by the value which the Supreme Court has attached to the consideration of the public interest in election dispute resolution.



Chapter 4

***Amicus Curiae* Participation in Foreign Jurisdictions**

*By Christine Nkonge, the Katiba Institute; the Public Interest Law and Policy Group; and Equality Now**

Summary

- The 2010 Constitution encourages the Kenyan courts to analyse and apply international law. Although the Kenyan courts should not blindly adopt the *amicus curiae* practice from other jurisdictions, a close analysis of how the practice is used in other contexts will help develop *amicus* practice in Kenya.
- South African courts have long considered the *amicus curiae* to provide valuable information, especially in cases involving issues of constitutional law or that implicate the broader public interest.
- South Africa imposes a ‘special duty’ on *amicus* participants to provide cogent and helpful information that would not otherwise be available to the courts.
- In the lower courts in South Africa, *amicus* participants have greater leeway to submit evidence in support of their briefings.

* The authors are grateful to Kifaya Abdulkadir for her outstanding research assistance.

- When determining whether an *amicus* participant is partisan or biased, the South African courts will consider whether the *amicus* has a direct or substantial interest as a party or litigant, not whether the *amicus* has argued for a specific outcome.
- South Africa allows *amicus* participation in criminal cases so long as it does not prejudice the accused.
- The court rules in South Africa and Canada provide detailed guidance for *amicus curiae* participants to follow when submitting their briefings to court.
- Canadian provincial courts allow any person to intervene as *amicus* so long as the information provided will be of assistance to the court.
- When considering whether to admit an *amicus* participant in Ontario, the courts consider the nature of the case, the issues involved in the dispute, and the likelihood that the applicant will contribute to the resolution of the case without injustice to the parties.
- In the United Kingdom, the Supreme Court Rules have eschewed the term *amicus curiae* and instead adopted the terms ‘assessor’, who is appointed by the court to assist it on an issue, and ‘intervener’ in the public interest’, who has an interest in the case that is related to public policy.
- In India, the courts distinguish between an *amicus* who is appointed by the court to represent a litigant, an expert who is appointed by the court to address complex issues, and independent *amici* who provides the court with information on issues of public concern.
- *Amicus curiae* participation is much more widely used in the United States, particularly in cases before the Supreme Court.
- The rules for the United States Supreme Court establish different requirements for government agencies that appear as *amicus curiae* and private parties that appear as *amicus curiae*.

¹ Different jurisdictions have chosen to use the spelling ‘intervener’ or ‘intervenor’. When speaking of a specific jurisdiction, this Chapter uses the spelling adopted by that jurisdiction. Otherwise the Chapter uses ‘intervener’.

- Mexico and Colombia have adopted the equivalent of *amicus curiae* practice only recently. Nevertheless, the practice has become an important part of constitutional litigation in both countries.
- Argentina is one of the few civil law countries to have adopted *amicus curiae* practice. It provides detailed guidelines for *amicus* submissions.

1. Use of Foreign Law in *Amicus* Jurisprudence

As the two-judge panel in *Muruatetu v Republic* noted, although nearly all jurisdictions have friend of the court participation, there is little consensus on what, exactly, friend of the court means or the role that it plays in court proceedings. Although the jurisdictions are more similar than different, their application of friend of the court participation is dependent on the variabilities of the jurisdiction in which it is applied. As a result, *Muruatetu* noted that when making decisions about friend of the court participation the authority from foreign jurisdictions should be applied with caution and only in exceptional circumstances.

There has been some disagreement about how to interpret this *obiter dicta* in *Muruatetu*. The Kenyan courts had never previously identified a field of law for which no authority outside of Kenya should be applied. And an insular, cloistered jurisprudence is inconsistent with the 2010 Constitution and years of court practice. To the contrary, the court has looked to other jurisdictions for interpretation of freedom of religion,² freedom of expression,³ freedom of association,⁴ and any other number of significant constitutional issues. *Muruatetu*, itself, is an excellent example: the friend of the court applicant that *Muruatetu* admitted provided guidance on how foreign jurisdictions addressed whether the mandatory death penalty violated the right to life.

² *Seventh Day Adventist Church (East Africa) Ltd v Minister for Education, Attorney-General, Board of Governors Alliance High School & National Gender and Equality Commission* [2013] High Court Pet 431 of 2012, eKLR.

³ *Geoffrey Andare v Attorney-General & 2 Ors* [2016] High Court Pet 149 of 2015, eKLR.

⁴ *Council of County Governors v Attorney-General & Anr* [2017] High Court Const Pet 56 of 2017, eKLR.

Under the circumstances, it would strain the meaning of *Muruatetu* to suggest it meant to limit the analysis of foreign law when developing friend of the court jurisprudence in Kenya. A closer reading of *Muruatetu* suggests that Kenyan courts must be cognizant that all jurisdictions treat the issue differently. That difference often depends on unique aspects of the rights of standing, the extent to which a party can be admitted as an interested party, and different Constitutional values that may influence the right to participate in court proceedings. This variety of influences suggests that there is no one-size-fits-all approach to friend of the court participation and that the whole-sale adoption of the procedures from another jurisdiction is inadvisable. The caution that *Muruatetu* urges is a reminder that when looking at *amicus curiae* procedures in foreign jurisdictions, we must not just look at the holdings, but also look to the procedural and Constitutional circumstances in which they are made.

When it comes to friend of the court participation in Bill of Rights cases, caution is appropriate for another reason. As noted in Chapter Two, the Constitution has incorporated friend of the court participation as a fundamental right in cases involving the Bill of Rights. Limits on the fundamental rights set forth in the Bill of Rights are strictly circumscribed; the court may not impose a limit without first undergoing the analysis set forth in Article 24 of the Constitution. That analysis requires the court to determine the least restrictive means of limiting a right while, at the same time, ensuring that the right can be exercised to the greatest extent possible. Since the courts must apply this analysis when deciding what limits, if any, to impose on friend of the court participation, they should be sure to analyse all case law with the requirements of Article 24 in mind.

Yet, even though the courts should not ‘cut and paste’ the procedures and standards developed in other jurisdictions, there is much to learn from looking at how other jurisdictions incorporate *amicus* participation into their jurisprudence. In-depth analyses of other jurisdictions provide insight into the similarities and differences in the respective courts. Undertaking such analyses helps Kenya understand its own jurisdiction, identify the benefits and drawbacks of other approaches, and allows the courts to draw

on the experiences of others to create a practice that best comports with the rules and values under the Constitution.

The courts need not adopt the procedures from other jurisdictions. In fact, as often happens, the courts may conduct an in-depth analysis of foreign law only to choose a different approach. Regardless of whether foreign law is applied, courts will be better informed if they look to how other jurisdictions have addressed similar problems. This is equally true with *amicus curiae* as it is with other areas of law.

Unfortunately, an in-depth analysis of how all jurisdictions incorporate friend of the court participation into their jurisprudence is not possible here. There are simply too many jurisdictions and too much case law to digest thoroughly and efficiently in this Chapter. What the following section does do, however, is provide an overview of key jurisdictions and a platform for further research.

This Chapter first discusses common law jurisdictions with the most developed jurisprudence on *amicus curiae*: South Africa, Canada, the United Kingdom, and India. These jurisdictions are discussed in detail both because they share common legal origins with Kenya and because they provide rich and diverse resources on *amicus curiae*. The Chapter then turns to the United States, which may have the most robust *amicus* participation. Finally, the Chapter looks at Colombia, Mexico, and Argentina, three countries that have more recently developed *amicus* participation and have begun to use it to ensure that the courts have a broader source of information when deciding cases.

2. South Africa

2.1 Relationship of *Amicus Curiae* to the Courts

Unlike Kenya, South Africa's Constitution does not directly incorporate the right to *amicus curiae* participation. Nevertheless, the South African courts have recognised that 'constitutional cases often have consequences which

go far beyond the parties concerned’,⁵ and have welcomed the role that *amicus* plays in ensuring that courts are fully aware of these consequences when deciding constitutional issues.

The Constitutional Court has stated that an *amicus* ‘assists the courts in effectively promoting and protecting the rights enshrined in our Constitution’.⁶ It has emphasised that *amicus* participation has made an ‘invaluable contribution to its jurisprudence and that their participation should be welcomed and encouraged’.⁷ *Amicus* is especially welcome in constitutional cases, which inherently involve issues in the public interest.⁸ These cases require a nuanced perspective that the parties may not be able to provide but that *amicus* can.⁹

The South African Constitution and rules of procedure ‘facilitate the role of *amici* in promoting and protecting the public interest’.¹⁰ Since public interest cases often take a different form and impose different demands on the court, *amicus* ensures the court is well-informed and provides it with options that may not have been presented by the parties.¹¹ Further, *amicus* participation increases public participation, especially in matters relating to constitutional issues.¹² This improves the legitimacy of the court’s decisions and supports the Constitutional value of democratic participation.

2.2 South Africa: Procedures for Admission—Court Rules and Case Law

The Rules of the Constitutional Court establish procedures for the admission of *amicus*. Rule 10 states that ‘any person interested in a matter

⁵ *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp & Ors* [2012] Constitutional Court CCT 69/12, ZACC 25 [25].

⁶ *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp & Ors* (n 5) [27].

⁷ *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp & Ors* (n 5) [15].

⁸ *Koyabe & Ors v Minister for Home Affairs & Ors* [2009] Constitutional Court CCT 53/08, ZACC 23 [80].

⁹ *Koyabe & Ors v Minister for Home Affairs & Ors* (n 8) [80].

¹⁰ *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp & Ors* (n 5) [26].

¹¹ *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp & Ors* (n 5) [26].

¹² *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp & Ors* (n 5) [26].

before the Court' can apply to be admitted as *amicus*.¹³ It addresses two situations: one in which the parties agree to *amicus* participation and establish the terms of that participation, and one in which the parties do not agree to such participation.

If the parties consent to admission, they may also agree to the terms and conditions of *amicus* participation and establish the deadline for submitting *amicus* briefing.¹⁴ The Chief Justice, however, may review the agreement between the parties and has the authority to amend it as she sees fit.¹⁵ The Supreme Court, however, has repeatedly noted that, merely because the parties agree to *amicus* participation, the court is not bound by that agreement.¹⁶

If the parties do not consent, an *amicus* applicant can apply to the Chief Justice to be admitted.¹⁷ The Chief Justice has the authority to grant the application and set the terms and conditions on which the *amicus* will participate. Unless stated otherwise by the Chief Justice or agreed to by the parties, an *amicus* must submit its briefings within five days after the deadline for the respondent to submit its briefings.¹⁸ As with applications made by consent, the Chief Justice retains the authority to admit the applicant based on the applicant's interest in the issues and the contentions it wishes to advance.¹⁹

Under the Rules, an *amicus* must set out the submissions it will file with the court and provide the court with the following information:²⁰

- the applicant's interest in the proceedings
- the position the applicant will adopt in the proceedings
- how the applicant's submissions are relevant to the proceedings

¹³ Rules of Constitutional Court (Government Notice) Rule 10(1), 10(4).

¹⁴ Rules of Constitutional Court (n 13).

¹⁵ Rules of Constitutional Court (n 13).

¹⁶ *Ex Parte Institute for Security Studies: In Re S v Basson* Constitutional Court CCT 30/03, ZACC 4 [7].

¹⁷ Rules of Constitutional Court (n 13).

¹⁸ Rules of Constitutional Court (n 13).

¹⁹ *Brümmer v Minister for Social Development & Ors* [2009] Constitutional Court CCT 25/09, ZACC 21 [21].

²⁰ Rules of Constitutional Court (n 13).

- why the applicant believes the submissions will be useful to the Court and different from the submissions of the parties.

Rule 10 authorises the submission of written argument but does not specifically authorise oral argument.²¹ *Amicus*, however, can request to present oral argument and are routinely allowed to do so.

2.3 Duty of *Amicus* to the Court—Underlying Principles

In *In Re: Certain Amicus Curiae Applications; Minister of Health & Ors v Treatment Action Campaign & Ors*, the Constitutional Court set the standard for *amicus* participation that has been consistently followed.²² In the case, the court explained that *amicus* has a ‘special duty’ to provide a broader understanding of the issues on appeal.²³ Its submissions must be ‘cogent and helpful’ and must not ‘repeat arguments already made’ but rather ‘raise new contentions’.²⁴ The court noted that an *amicus* must ‘ordinarily’ base its arguments on the record, but left open the possibility that it could expand the record in some circumstances.

2.4 *Amicus* and Introduction of New Evidence

Generally, an *amicus* must base its submissions on ‘the record on appeal and the facts found proved in other proceedings’.²⁵ However, the Constitutional Court Rules allow an *amicus*, like any other party to an appeal, to submit facts that are not in the record so long as those facts are either ‘common cause or otherwise incontrovertible’ or ‘are of an official, scientific, technical or statistical nature capable of easy verification’.²⁶ The other parties have the right to respond to these submissions by either admitting to them, denying them, or providing additional information.²⁷

²¹ Rules of Constitutional Court (n 13).

²² See, eg, *Brümmer* (n 19) [21].

²³ *In Re: Certain Amicus Curiae Applications; Minister of Health & Ors v Treatment Action Campaign & Ors* [2002] Constitutional Court CCT 8/02, 13 ZACC [5].

²⁴ *In Re: Certain Amicus Curiae Applications; Minister of Health & Ors v Treatment Action Campaign & Ors* (n 23) [5].

²⁵ Rules of Constitutional Court (n 13).

²⁶ Rules of Constitutional Court (n 13).

²⁷ Rules of Constitutional Court (n 13).

The Supreme Court, however, has held that the South African High Court has a broader authority to allow an *amicus* to submit evidence.²⁸ As noted in *Children's Institute*, the purpose of *amici* and the role they play in the High Court often requires the admission of new evidence.²⁹ After all, *amicus* submissions often draw on considerations that are broader than that submitted by the parties; it should be able to refer in its submissions to the facts that support those considerations. As the court explained, 'it would make little sense to allow the presentation of bare submissions unsupported by any facts'.³⁰

Although, as noted above, the Constitutional Court has relatively strict rules on the admission of evidence that apply to all the parties, *Children's Institute* indicated that the trial court is only limited by considerations of the interests of justice.³¹ It based its conclusion in part on its finding that the trial court was in a better position than the appellate courts to consider facts that may have a bearing on the case. As an appellate court, rather than a court of first instance, it made sense for the Court of Appeal to be more restrictive in the requirements for expanding the record.

In the *Children's Institute* case, the court indicated that the admission of new evidence may be most appropriate in cases with vulnerable parties.³² Petitioners like the one in *Children's Institute*, who was a minor orphan, often do not have the resources or ability to adduce the evidence necessary to support their claim. *Amici* often are in the best position to provide the evidence and expertise that helps give shape and meaning to the claims before the court. In these cases, additional evidence, such as statistics or expert testimony, will allow the court to better understand the case before it and reach a just conclusion.³³

²⁸ *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Ors* (n 5) [39].

²⁹ *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Ors* (n 5) [34].

³⁰ *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Ors* (n 5) [31].

³¹ *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Ors* (n 5) [39].

³² *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Ors* (n 5) [34].

³³ *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Ors* (n 5) [34].

2.5 *Amicus* Participation—Prejudice Incurred by Delay

In deciding whether to admit *amicus*, South African Courts have also considered whether the parties would be prejudiced by the admission. For the most part, the question of prejudice arises when an *amicus* has submitted its request late enough in the proceedings that the parties believe they do not have sufficient time to respond.

The court generally looks at whether the *amicus* applicant had acted diligently in filing its submission. If so, the Constitutional Court has allowed the admission and used other measures to mitigate any prejudice the parties may suffer. For example, in *Brümmer v Minister for Social Development & Ors*, the Supreme Court considered whether an application for *amicus* admission unfairly prejudiced a party because the party did not have sufficient time to respond to the *amicus* submissions under the court-imposed deadlines for oral argument.³⁴ The court found in favour of *amicus* participation, noting that the potential prejudice to the parties was ‘not insurmountable,’ and it provided the party with an opportunity to respond to *amicus* pleadings by submitting additional briefing.³⁵

In *National Treasury & Ors v Opposition to Urban Tolling Alliance & Ors*, as well, the court rejected a party’s claim that it was prejudiced because of the lateness of an *amicus* submission. The court forgave the late filing because it had set expedited deadlines, and the *amicus* applicant had done its best to respect those deadlines by diligently filing its submissions.³⁶

Similarly, in *Shilubana & Ors v Nwamitwa*, the court admitted an *amicus* applicant even though it had not satisfied the deadlines under Rule 10. The court held that the *amicus* applicant had important information that would assist the court and, as a result, admission was in the interests of justice.³⁷

³⁴ *Brümmer* (n 19).

³⁵ *Brümmer* (n 19) [27].

³⁶ *National Treasury & Ors v Opposition to Urban Tolling Alliance & Ors* [2012] Constitutional Court CCT 38/12, ZACC 18 [12] (leave for admission as *amicus* was denied on other grounds).

³⁷ *Shilubana & Ors v Nwamitwa* [2008] Constitutional Court CCT 03/07, ZACC 9 [17].

2.6 Amicus Submission—Partisanship or Bias

In *National Treasury & Ors*, the court had an opportunity to address concerns about an *amicus*' partisanship. *National Treasury* concerned a debate on the most appropriate way to fund a government roads project.³⁸ The *National Treasury* court emphasised that an *amicus* applicant must not have a 'direct or substantial interest as a party or litigant'.³⁹ The court held that the *amicus* applicant failed this requirement, explaining that the *amicus*' interest was 'avowedly political' and that it was 'plainly the fifth wheel of the respondents'.⁴⁰

Although it denied the *amicus* application, the *National Treasury* court emphasised that, so long as it did not have a direct or substantial interest as a party or litigant, an *amicus* may still argue for a particular outcome.⁴¹ It may do so, however, 'only in the course of assisting a court to arrive at a just outcome and not to serve or bolster a sectarian or partisan interest against any of the parties in litigation'.⁴² Similarly, in *Mohunran & Anr v National Director of Public Prosecutions*, the court noted that, even though *amicus* 'made common cause with the applicants,' it was not biased because its arguments were of 'a more general application'.⁴³

2.7 Amicus Participation—Criminal Cases

In *Institute for Security Studies*, the court identified a special consideration in criminal cases. In addition to the factors set forth in Rule 10, the court must make sure that *amicus* submissions in criminal cases 'do not stack the odds against the accused person', or otherwise strengthen the case against the accused.⁴⁴ This rule, it held, is flexible and should be applied based on 'fairness, equality of arms, and more importantly, what is in the interests of justice'.⁴⁵

³⁸ *National Treasury & Ors v Opposition to Urban Tolling Alliance & Ors* (n 36) [5].

³⁹ *National Treasury & Ors v Opposition to Urban Tolling Alliance & Ors* (n 36) [13].

⁴⁰ *National Treasury & Ors v Opposition to Urban Tolling Alliance & Ors* (n 36) [14].

⁴¹ *National Treasury & Ors v Opposition to Urban Tolling Alliance & Ors* (n 36) [13].

⁴² *National Treasury & Ors v Opposition to Urban Tolling Alliance & Ors* (n 36) [13].

⁴³ *Mohunram & Anr v National Director of Public Prosecutions & Anr (Law Review Project as Amicus Curiae)* [2007] Constitutional Court CCT19/06, ZACC 4 [106].

⁴⁴ *Ex Parte Institute for Security Studies: In Re S v Basson* (n 16) [14].

⁴⁵ *Ex Parte Institute for Security Studies: In Re S v Basson* (n 16) [14].

2.8 *Amicus* and Costs of Litigation

Although Rule 10 allows for costs to be imposed either in favour of or against an *amicus* participant, ordering costs is rarely done.⁴⁶

3. Canada

3.1 Canadian Court Overview

The Canadian Supreme Court is the highest court of appeal in Canada. It hears appeals from the Federal Court, Provincial/Territorial courts, and the military court. The federal courts specialise in cases on intellectual property, maritime law, disputes between the federal and provincial governments, civil cases related to terrorism, and tax matters.⁴⁷ The Federal Court of Appeals is the appellate court of first instance for the federal courts.

The Provincial/Territorial courts address mostly civil and criminal cases. Other than Quebec, which uses a civil code, the provinces and territories rely on statutes, rules of procedure, and common law to decide cases. The Provincial/Territorial courts of appeal are the appellate courts of first instance.

The Supreme Court, Federal Court, and Provincial/Territorial Courts all have their own rules of procedure and may address friend of the court participation in a different manner. As a result, this section is divided into three parts. The first discusses Supreme Court rules and case law. The second addresses the rules for friend of the court participation in the Federal Courts. The third section addresses friend of the court participation in the Provincial/Territorial courts.

Although the Provincial/Territorial courts are independent of one another, Ontario, Manitoba, New Brunswick, and Saskatchewan have nearly identical rules governing friend of the court participation. In other

⁴⁶ Rules of Constitutional Court (n 13); *Minister of Justice v Ntuli* Constitutional Court CCT15/97, CCT17/95, ZACC 7 [43].

⁴⁷ Department of Justice Government of Canada, 'The Judicial Structure - About Canada's System of Justice' (7 September 2016) <<https://tinyurl.com/yavkconv>> accessed 6 May 2017.

jurisdictions, such as Alberta, British Columbia, and the Yukon, the ability to appoint *amicus curiae* is part of the court's inherent jurisdiction. The other jurisdictions have adopted rules, but there is limited case law on how they are applied. Because the Ontario court has the most detailed case law of friend of the court participation, its case law features most prominently.

3.2 Rules of the Supreme Court of Canada

As in the United Kingdom, the Canadian Supreme Court distinguishes between an *amicus curiae* and an intervener. Under the Rules of the Supreme Court of Canada, the Supreme Court, at its discretion, may appoint an *amicus curiae* to assist it in the determination of a case.⁴⁸ Often, the Supreme Court appoints *amicus* when a party is unrepresented.⁴⁹

An intervener, on the other hand, must apply for admission and is admitted at the discretion of the Supreme Court. Under Rules 55-59 of the Supreme Court, any interested person may file a motion to intervene.⁵⁰ The potential intervener must include an affidavit in support of the motion 'identify[ing] the person interested in the proceeding and describ[ing] that person's interest in the proceeding'.⁵¹ The affidavit should include 'any prejudice that the person interested in the proceeding would suffer if the intervention were denied'.⁵²

The motion to intervene itself must present 'the position the person... intends to take with respect to the questions on which they propose to intervene'.⁵³ It must also provide 'the submissions to be advanced...with respect to the questions on which they propose to intervene, their relevance to the proceeding, and the reasons for believing that the submissions will be useful to the court and different from those of the other parties'.⁵⁴

⁴⁸ Rules of the Supreme Court of Canada (SOR/2002-156) s 92.

⁴⁹ *Leskun v Leskun* (2006) 1 SCR 920 (SCC); *R v Larivière* (2001) 3 SCR 1013 (SCC); *R v Carter* (1981) 1 SCR 937 (C).

⁵⁰ Rules of the Supreme Court of Canada (n 48) r 55.

⁵¹ Rules of the Supreme Court of Canada (n 48) r 57(1).

⁵² Rules of the Supreme Court of Canada (n 48) r 57(1).

⁵³ Rules of the Supreme Court of Canada (n 48) r 57(2)(b).

⁵⁴ Rules of the Supreme Court of Canada (n 48) r 57(2)(b).

Once a motion is filed, one judge or registrar of the Supreme Court will review the motion.⁵⁵ The judge has the discretion to allow the intervener to present more evidence ‘or otherwise to supplement the record’.⁵⁶ Over 90 percent of motions to intervene are granted.⁵⁷ After the motion is granted, an intervener may submit briefing as well as appear before the court for oral argument.⁵⁸ The intervener may not argue any new questions ‘unless otherwise ordered by a judge’.⁵⁹

Either the Attorney-General or Department of Public Prosecutions may intervene as a matter of right in Criminal Appeals before the Supreme Court.⁶⁰ The Federal Attorney-General, provincial attorneys general, and territorial justice ministers may intervene as of right when a constitutional question is raised by the Supreme Court.⁶¹ All other interventions by the government require leave of the court.⁶²

Interveners include a broad spectrum of parties, from the Attorney-General and Director of Public Prosecutions (either as of right or at the court’s discretion) to private parties. An assessment of interventions before the Supreme Court of Canada between 2000 and 2008 indicated that the Attorney-General comprised more than a third of interventions while public interest groups were a distant second. Most intervening parties represented government interests, financial interests, trade associations, and aboriginal interests. For these groups, applications to intervene were granted in over 90% of the cases in which they were filed.⁶³

⁵⁵ Benjamin RD Alarie and Andrew J Green, ‘Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance’ (2010) 48 *Osgoode Hall LJ* 381, 385.

⁵⁶ Rules of the Supreme Court of Canada (n 48) r 59(b)(1).

⁵⁷ Alarie and Green (n 55) 395.

⁵⁸ Alarie and Green (n 55) 395.

⁵⁹ Rules of the Supreme Court of Canada (n 48) r 59(3).

⁶⁰ Director of Public Prosecutions Act (SC 2006, c 9, s 121) s 3(3)(b), 14.

⁶¹ Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook* (2014) s 5.1.3.1 <<https://tinyurl.com/ycb5r6ao>> accessed 25 April 2017.

⁶² Public Prosecution Service of Canada (n 61) 5.1.3.2.

⁶³ Alarie and Green (n 55) 383.

3.3 Intervention in Federal Courts of Canada

In addition to intervention at the Supreme Court level, a person may file to intervene at the Federal Court of Appeal and at the Federal Court level. The Federal Court Rules govern interventions in both courts and allow the courts to grant leave to intervene at their discretion.⁶⁴ An intervener must describe how its participation will assist the court in determining ‘a factual or legal issue related to the proceeding’.⁶⁵ If a motion to intervene is granted at the Federal Court of Appeals or at the Federal Court, the granting judge will identify the scope of the intervener’s role, make determinations as to costs, and address other procedural matters.⁶⁶

In determining whether to grant intervention in the public interest, the Federal Court of Appeal will consider the following questions:

- Is the proposed intervenor directly affected by the outcome?
- Does there exist a justiciable issue and a public interest?
- Is there an apparent lack of any other reasonable or efficient means to submit the question to the court?
- Is the position of the proposed intervenor adequately defended by one of the parties to the case?
- Are the interests of justice better served by allowing intervention?
- Can the court hear and decide the cause on its merits without the proposed intervenor?⁶⁷

A proposed intervener, however, need not meet all the factors. Ultimately, ‘the Court has the inherent authority to allow intervention on terms and conditions which are appropriate in the circumstances’.⁶⁸

⁶⁴ Federal Courts Rules (SOR/98-106) rr 1.1(1), 109.

⁶⁵ Federal Courts Rules (n 64) r 109.

⁶⁶ Federal Courts Rules (n 64) r 109(3).

⁶⁷ *Canada (Attorney-General) v Shakov* [2016] FCA A-41-16, FCA 208 [6].

⁶⁸ *Canadian Pacific Railway Company v Boutique Jacob Inc* [2006] FCA A-116-06, FCA 426 [21].

If a constitutional question is raised during the court proceedings, the Attorney-General of Canada and the Attorney-General of each province may intervene as of right.⁶⁹

3.4 Canadian Provincial Courts

As indicated above, the provinces of Ontario, Manitoba, New Brunswick, and Saskatchewan have nearly identical rules of procedure governing intervention by a friend of the court.⁷⁰ As the Ontario rules state:

Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.⁷¹

In Alberta and British Columbia, the ability to appoint *amicus curiae* is part of the court's inherent jurisdiction.⁷²

3.4.1 Ontario

In *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd (CA)*, the Ontario Court of Appeal reviewed the case law on friend of the court applications and identified the following factors as relevant to whether a friend of the court should be admitted:

- the nature of the case,
- the issues involved in the dispute, and
- the likelihood that the applicant will contribute to the resolution of the case without injustice to the 'immediate parties.'⁷³

⁶⁹ Federal Courts Act (RSC 1985, c F-7) s 57(4).

⁷⁰ Rules of Civil Procedure (RRO 1990, Reg 194); Court of Queens Bench Rules (Man Reg); New Brunswick Rules of Court (NB Reg 82-73); The Queen's Bench Rules, SaskGaz December 27, 2013, 2684, Part 2: The Parties to Litigation.

⁷¹ Rules of Civil Procedure (n 70) r 13.02.

⁷² *Sup v Alberta (Attorney-General)* 453 (ABQB) [12]; *R v Podolski* (2017) 2017 169 (BCCA) [12].

⁷³ *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd (CA)* (1990) 74 OR (2d) 164 (C) 167; *Authorson (Guardian of) v Canada (Attorney-General)* [2001] C M27437, CanLII 4382 [6].

These criteria have been used repeatedly by the court in deciding whether to admit a friend of the court applicant and will be addressed more thoroughly below.

3.4.1.1 The Nature of the Case: Constitutional Disputes Versus Private Litigation

The Ontario courts apply a different standard for intervention in constitutional cases than for cases that involve strictly private disputes between two parties.⁷⁴ The courts are much more likely to allow intervention in cases that raise constitutional claims because they require the court to consider issues that are ‘much broader and much more difficult to define’.⁷⁵ As explained in *Adler v Ontario*, greater participation in constitutional cases is necessary because the issues that arise ‘are almost impossible to either number or identify’.⁷⁶ Friend of the court participation in constitutional cases provides the court with ‘the benefit of various perspectives of the historical and sociological context, as well as policy and other considerations that bear on the validity of legislation’.⁷⁷

The courts have adopted a narrower approach in conventional litigation that involves strictly private disputes and that does not have constitutional implications.⁷⁸ In these cases, ‘the standard to be met by the proposed intervenor is more onerous or more stringently applied’.⁷⁹ The courts will place a heavier burden on the applicant to demonstrate that it will not unduly broaden the issues beyond those raised by the litigants or add to the costs the litigants will incur in pursuing the case.

The Ontario courts have noted, however, that there is no bright line distinction. ‘Many appeals will fall somewhere in between the

⁷⁴ *Authorson (Guardian of) v Canada (Attorney-General)* (n 73) [8].

⁷⁵ *Adler v Ontario* (1992) 8 OR (3d) 200, 9.

⁷⁶ *Adler v Ontario* (n 75).

⁷⁷ *Authorson (Guardian of) v Canada (Attorney-General)* (n 73) [7].

⁷⁸ *Authorson (Guardian of) v Canada (Attorney-General)* (n 73) [7].

⁷⁹ *Jones v Tsige* (2011) 106 OR (3d) 721 [23].

constitutional and strictly private litigation continuum, depending on the nature of the case and the issues to be adjudicated'.⁸⁰ As a result, the court must determine the extent to which its decisions will have a constitutional, policy, or statutory impact beyond merely resolving the dispute between the parties. As explained in *Jones v Tsige*:

The issues that arise in cases involving private litigation fall along a continuum. Some have no implications beyond their idiosyncratic facts and occupy the interest of none save the immediate parties. Others transcend the dispute between the immediate parties and have broader implications, for example, the construction of a legislative enactment or the interpretation of the common law.⁸¹

Zoe Childs v Desormeaux presents an example of this continuum. *Childs* was a tort case in which the defendants were accused of negligence that resulted in a drunk driving accident.⁸² Even though the case raised a private tort claim that involved the duties the parties owed to one another, the court granted intervenor status to an interest group, Mothers Against Drunk Driving Canada. The court held that a broader issue involved in the dispute—the duty of care owed by the host of a party to her guests—'differentiates this case from one that is solely of interest to the affected parties'.⁸³

Similarly, in *1162994 Ontario Inc. v Bakker*, a landlord-tenant dispute, the court admitted a low-income housing legal clinic as a friend of the court. The court recognised that although the suit involved a private dispute between lessor and lessee, its decision could have a broader impact on 'the nature of the relationship between co-tenants, between co-tenants and landlords and the effect of the departure of a co-tenant with respect to these relationships'.⁸⁴ It determined that the friend of the court applicant

⁸⁰ *Authorson (Guardian of) v Canada (Attorney-General)* (n 73) [9].

⁸¹ *Jones v Tsige* (n 79) [24].

⁸² *Zoe Childs v Desormeaux* (2003) 67 OR (3d) 385.

⁸³ *Zoe Childs v Desormeaux* (n 82) [10].

⁸⁴ *1162994 Ontario Inc v Bakker* [2004] C M30965; C40655, CanLII 60019 [7].

had sufficient expertise to ‘assist the court in understanding the dimensions of the legal issues that arise in this case’.⁸⁵

3.4.1.2 Issues Involved in the Dispute

The Ontario courts will also look at what issues the friend of the court applicant wishes to address in its litigation. If those issues do not require a constitutional or public policy analysis, admission as a friend of the court is less compelling.⁸⁶ In addition, the issues must bear some relation to the case as presented by the parties. In *Adler*, the court noted that where the applicant openly acknowledged that it was interested in expanding the issues beyond those presented by the parties, it would not be allowed to participate.⁸⁷

In conventional non-constitutional litigation, the Ontario courts are sensitive to the potential that an intervenor may expand the issues in a way that would complicate the litigation or increase the expenses for the parties. In *Authorson*, for example, the court denied a request to intervene as a friend of the court by a veteran’s association. It noted that the issues that the veteran’s association intended to address were ‘speculative’ and did not have the type of public policy or constitutional implications that would justify intervention in a private dispute.⁸⁸

The issues involved in the dispute have not played a significant factor in determining whether to grant friend of the court participation in constitutional cases and cases involving public policy. That is likely because such cases will have broad implications beyond the specific interests of the parties, and it is more likely that the court will benefit from information on the consequences of the decision it will reach.

⁸⁵ 1162994 Ontario Inc. v Bakker (n 84) [7]. 1162994 Ontario Inc. v Bakker (n 84) [7].

⁸⁶ *Authorson (Guardian of) v Canada (Attorney-General)* (n 73) [14].

⁸⁷ *Adler v Ontario* (n 75).

⁸⁸ *Authorson (Guardian of) v Canada (Attorney-General)* (n 73) [17].

3.4.1.3 Applicant's Ability to Contribute to the Resolution of the Dispute

This analysis requires an assessment of the applicant's expertise and the issues that are before the court. Where the applicant's expertise can assist the court in resolving the issues before it, this factor favours admission. Where, however, the applicant's expertise is unrelated or discursive to the issues before the court, this factor does not militate in favour of admission.

Similarly, it is not enough for an applicant to assert that it can contribute to the litigation because it has conducted general research on an issue. Instead, the applicant must 'provide the court with sufficient facts to enable it to conclude that the knowledge, expertise and unique perspective of the intervenor are such that they will assist the court and will not otherwise be available to the court'.⁸⁹

3.4.1.4 Impartiality

The Ontario courts have acknowledged that friend of the court participants will often present arguments that favour one side of the litigation. In fact, an interest in the outcome of the proceedings is an important criterion for determining who should be admitted. As explained in *Adler*, the court should include those intervenor applicants 'who may have a real, substantial and identifiable interest in the outcome of the proceedings' while at the same time culling out those applicants 'whose interests are illusory, insubstantial, or excessively difficult to identify'.⁹⁰ When deciding whether to admit a friend of the court, impartiality is less important than whether the applicant will make a 'useful contribution' that will assist the court in reaching its decision.⁹¹

⁸⁹ *Morgentaler v New Brunswick (Attorney-General)* [1994] CanLII 1044 (C) 8.

⁹⁰ *Adler v Ontario* (n 75).

⁹¹ *Jones v Tsige* (n 79) [28].

The courts have also noted that the rules allow a friend of the court to present ‘argument,’ which connotes the right to persuade the court with ‘advocacy and reasoned persuasion’.⁹² In *Childs* for example, the court recognised that the intervenor had a long history of advocacy in support of the position taken by the petitioners. Nevertheless, the *Childs* court held that it could usefully contribute to the determination of the case.

In *Manitoba Securities Commission v Crocus Investment Fund*, the court reached a different conclusion.⁹³ It denied a friend of the court application after finding that the applicant was legal counsel to one of the parties and was being paid by an interested party.⁹⁴ The applicant argued that he could represent the shareholders in the corporate dispute. The court found that the applicant had a ‘fundamental misunderstanding’ of the role of *amicus*.⁹⁵ Rather than being a disinterested party, the applicant’s relationship to the litigants demonstrated a bias that could not be overcome.

3.4.1.5 Costs

The Ontario Rules of Civil Procedure do not address the issue of costs for friend of the court intervention, and the issue is determined on a case by case basis at the court’s discretion. For the most part, decisions authorising friend of the court participation include orders regarding costs. In these decisions, the courts have held that friend of the court intervenors are not allowed to seek costs, but that the parties may seek costs against the friend of the court intervenors.⁹⁶ In its orders on intervention, however, the *Adler* court specifically stated that no intervening party should either seek costs or be ordered to pay costs.⁹⁷

⁹² *Bhajan v Ontario (Children’s Lawyer)* 560 (ONCA) [7].

⁹³ 2006 MBQB 276 (CanLII)

⁹⁴ *Manitoba Securities Commission v Crocus Investment Fund* 276 (MBQB) [49].

⁹⁵ *Manitoba Securities Commission v Crocus Investment Fund* (n 94) [49].

⁹⁶ *Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada Ltd. (C.A.)* (n 73) [7]; *Bhajan v Ontario (Children’s Lawyer)* (n 92) [13]; *2016596 Ontario Inc v Ontario (C)* [16]; *Zoe Childs v Desormeaux* (n 82) [18].

⁹⁷ *Adler v Ontario* (n 75).

3.4.1.6 Criminal Cases

The Court of Appeal in New Brunswick has held that intervention on direct appeal of criminal cases should be allowed only in exceptional circumstances.⁹⁸ *R v Wood* was one of those circumstances. The accused had raised a novel defence to charges of distribution of marijuana, and the court allowed the Attorney-General of Canada leave to intervene as a friend of the court to provide guidance on the interpretation of Canada's laws on controlled substances. The *Wood* court, however, held that the Attorney-General of Canada would not be allowed to expand the record and would be limited to statutory interpretation of the controlled substance laws.

3.5 Role of *Amicus* in Canadian Courts

Interveners seem to have an impact on courts, as interventions tend to be successful on average.⁹⁹ One study revealed that at the Supreme Court level, '[a]bout 60 percent of the time, the final result of the appeal is in line with the position of any given intervener'.¹⁰⁰ At the Supreme Court level, justices will mention interveners by name or simply by the term 'intervener' in their decisions.¹⁰¹

Indeed, some Canadian courts refer to interveners in their decisions. In *R. v Keegstra*, a high school teacher was charged with 'wilfully promoting hatred against an identifiable group' after making anti-Semitic statements in front of his students.¹⁰² He contended that the law in question violated his freedom of expression under the Canadian Charter of Rights and Freedoms.¹⁰³ In its decision, the court agreed with an intervener's argument that 'government action against group hate, because it promotes social equality as guaranteed

⁹⁸ *R v Wood* (2006) 296 NBR (2d) 139 [6].

⁹⁹ Alarie and Green (n 55) 400.

¹⁰⁰ Alarie and Green (n 55) 400.

¹⁰¹ Amanda Jane Burgess, 'Interveners Before the Supreme Court of Canada, 1997-1999: A Content Analyse' (University of Windsor 2000) 69.

¹⁰² *R v Keegstra* (1990) 3 SCR 697, 698, 713.

¹⁰³ *R. v Keegstra* (n 102).

by the Charter, deserves special constitutional consideration'.¹⁰⁴ The court ultimately ruled that the law in question was constitutional.

In *R. v Zundel*, the accused published a pamphlet in which he denied that the Holocaust had occurred.¹⁰⁵ The accused was charged with violating section 181 of the Criminal Code, which stipulates that '[e]very one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment'.¹⁰⁶ He argued that section 181 violated freedom of expression protections, as provided for in the Canadian Charter of Rights and Freedoms. The court held that section 181 was unconstitutional. In the decision, the court addressed the argument of an intervener that section 181 was meant to prevent 'harmful consequences' of publications such as the one in question, rather than to restrict freedom of expression.¹⁰⁷ Though the court ultimately concluded that the intervener 'misse[d] the point',¹⁰⁸ the explicit reference to the intervener nevertheless reflects the fact that Canadian courts consider the arguments of interveners in making their decisions.

4. United Kingdom of Great Britain and Northern Ireland

4.1 Non-Party Participation in the Supreme Court: *Amicus*, Assessor, and Intervener in the Public Interest

In the United Kingdom, the term *amicus curiae* was used almost entirely to describe a non-partisan figure appointed by the Attorney-General at the request of the court.¹⁰⁹ Courts could seek *amicus* assistance when a party to a suit was not represented, the parties had not addressed an issue

¹⁰⁴ *R. v Keegstra* (n 102).

¹⁰⁵ *R v Zundel* (1992) 2 SCR 731, 743–44.

¹⁰⁶ *R. v Zundel* (n 105).

¹⁰⁷ *R. v Zundel* (n 105).

¹⁰⁸ *R. v Zundel* (n 105).

¹⁰⁹ Justice and Freshfields Bruckhaus Deringer LLP, 'To Assist the Court: Third Party Interventions in the Public Interest' (2016) para 1.11 <<https://tinyurl.com/y9fh5fek>> accessed 11 April 2017.

germane to the case, or an issue arose that may require specific expertise. The request for *amicus* was made by the court to the Attorney-General who then selected the person, usually a barrister, to be appointed.¹¹⁰

4.2 Appointment of an Assessor

In the recently established Supreme Court, the term '*amicus curiae*' does not appear in the rules of procedure. Instead, the traditional role of *amicus curiae* is subsumed under Rule 35 of the Supreme Court Rules. This rule not only allows the court to appoint an advocate to assist it with legal submissions but also allows the court to 'appoint one or more independent specially qualified advisers to assist the Court as assessors on any technical matter'.¹¹¹ An assessor can be appointed on the court's initiative or at the request of the parties. The costs of an assessor will be considered costs on appeal.¹¹²

4.3 Intervening Parties: Intervention in the Public Interest

The Rules of the Supreme Court define 'intervening party' broadly. The Rules state that any person may apply to intervene in a case, but singles out as potential interveners, government bodies or non-governmental organizations seeking to make a submission in the public interest; any person with an interest in the proceedings; or any person who intervened in the case below.¹¹³

An intervener in the public interest does not have a private financial or liberty interest in a case, but rather a policy-related interest in the case.¹¹⁴ This policy interest may include an interest in the ramifications of a constitutional decision, an interest in ensuring that the court has information about how a decision may affect a specific community, an

¹¹⁰ Justice and Freshfields Bruckhaus Deringer LLP (n 109) 35–36.

¹¹¹ Supreme Court Rules 2009 (2009 No 1603 (L 17)) Rule 39.

¹¹² Supreme Court Rules (n 111) r 35(3).

¹¹³ The High Court has adopted similarly broad rules for participation in court proceedings. Rule 54.17 authorises 'any person' to apply for permission to submit evidence or argue before the High Court in cases of judicial review.

¹¹⁴ Justice and Freshfields Bruckhaus Deringer LLP (n 109) 1.11.

interest in informing the court of relevant international law,¹¹⁵ an interest in ensuring that the court is aware of technical or scientific matters that may bear on the decision, an interest in providing expertise in a specific area of law, or any other myriad interests.¹¹⁶

Under the Rules, a potential intervener must submit an application which is reviewed by a panel of justices.¹¹⁷ Before doing so, however, an applicant must first seek permission from the parties.¹¹⁸ If one of the parties refuses to give permission, the applicant must explain why to the court.¹¹⁹ The application must indicate whether the intervener wants to provide written submissions, participate in oral argument, or both.¹²⁰ The panel of justices has discretion whether to accept the application and may determine the scope of the applicant's participation.¹²¹

If granted leave to intervene, the intervener must submit its briefings to the court and the parties at least four weeks before the hearing date.¹²² Written submission should not exceed 20 pages.¹²³

The Crown does not require permission to participate in certain human rights cases, and government officers do not need permission to participate in cases involving matters of devolution.

As a rule, orders of costs are not issued either for or against interveners.¹²⁴ However, the court may make an order for costs if it finds that the intervener has 'in substance acted as the sole or principal appellant or respondent' and the court determines it is in the interests of justice to do so.¹²⁵

¹¹⁵ *Secretary of State for Foreign and Commonwealth Affairs v Rahmatullah* [2012] UKSC 48 (Supreme Court); *Smith & Ors v The Ministry of Defence* [2013] UKSC 41 (Supreme Court).

¹¹⁶ *Justice and Freshfields Bruckhaus Deringer LLP* (n 109) 39.

¹¹⁷ Supreme Court Rules (n 111) r 26(2).

¹¹⁸ Supreme Court Rules (n 111) Practice Direction 6.9.2.

¹¹⁹ Supreme Court Rules (n 111) Practice Direction 6.9.2.

¹²⁰ Supreme Court Rules (n 111) Practice Direction 6.9.2.

¹²¹ Supreme Court Rules (n 111) r 26(2).

¹²² Supreme Court Rules (n 111) Practice Direction 6.9.4.

¹²³ Supreme Court Rules (n 111) Practice Direction 6.9.4.

¹²⁴ Supreme Court Rules (n 111) r 46(3).

¹²⁵ Supreme Court Rules (n 111) Practice Direction 6.9.6.

4.4 Substance of Intervener Submissions

Like other jurisdictions, the United Kingdom emphasises that intervening parties should not merely repeat the arguments raised by the appellants but, instead, should focus on its areas of expertise or interest. As stated in the Supreme Court Practice Directions, intervention does not assist the court if it merely repeats the arguments made by one of the parties or acts as a secondary advocate for one of the parties.¹²⁶

The UK Courts have noted the value of interveners in the public interest. In *E v The Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission Intervening)*, the court spoke generally of the benefits provided by interveners in the public interest.¹²⁷ In *HC (A Child,), R (on the Application of) v Secretary of State for the Home Department & Anr*, the court noted that ‘many of the important arguments were not contained in the claimant’s submissions but rather emerged... within the intervener’s submissions’.¹²⁸ These and other cases reflect the benefit that interveners in the public interest have had in assisting courts in the United Kingdom decide cases with significant public policy implications.

5. India

5.1 *Amicus* Participation at the Indian Supreme Court

In India, the term *amicus curiae* refers to two distinct practices. The first is the appointment of an advocate to represent someone who does not have counsel. The second is intervention, either at the court’s request or through an application to the court, to provide legal or technical information. Both practices have helped develop robust jurisprudence in India and ensured that the rights of traditionally unrepresented people are heard.

¹²⁶ *E v Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission Intervening)* [2008] UKHL 66 [3]; *E v Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission Intervening)* [3].

¹²⁷ *E v Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission Intervening)* (n 126) [2].

¹²⁸ *HC (a child) v The Secretary of State for the Home Department & Ors* EWHC 982 (Admin) (High Court of Justice) 35.

5.2 *Amicus* as Appointed Counsel

With regard to the first practice, the Rules of the Supreme Court of India authorise the court to appoint advocates as *amici curiae* to assist in a case.¹²⁹ The Supreme Court of India emphasises that the appointed advocate must represent a case with an unbiased will and opinion.¹³⁰ The court will appoint *amicus* in criminal cases in which an accused is unrepresented, in civil cases in which an unrepresented party could benefit from the assistance of counsel, and ‘in any matter of general public importance or in which the interest of the public at large is involved’.¹³¹ Courts may also appoint *amicus curiae* upon the request of the parties where counsel have refused to stand for the case. For instance, in the *Dev Ashish Bhattacharya case*, one of the respondents requested that the court appoint *amicus curiae* because his counsel had left the case and all other counsel had refused to represent him.¹³²

Even in cases in which a party wishes to proceed without counsel, the party must demonstrate its ability to assist the court. If it cannot do so, *amicus curiae* will be provided.¹³³ The Supreme Court keeps a list of lawyers who have ‘standing at the bar’ for a minimum of 10 years that may be appointed as *amicus curiae*.¹³⁴ The court can appoint anyone from this list to any sensitive or complicated case for which the court needs an expert opinion.¹³⁵ The Supreme Court, however, is not restricted to that list; it can appoint *amici curiae* that are not on the list if the case requires special expertise.¹³⁶

¹²⁹ Supreme Court of India, ‘Jurisdiction of the Supreme Court’ <<https://tinyurl.com/m9tc3xk>> accessed 10 May 2017.

¹³⁰ Ishita Sehgal, ‘Friend of the Court- *Amicus Curiae*’ (*Legal Services India*, undated) <<https://tinyurl.com/mrpw6zt>> accessed 10 May 2017.

¹³¹ Supreme Court of India (n 129).

¹³² ‘Respondent Requests *Amicus Curiae* in Priyanka Gandhi Land Case’ *The Times of India* <<https://tinyurl.com/mjb-7poj>> accessed 10 May 2017.

¹³³ Supreme Court Rules, 2013 Rule IV(1)(c).

¹³⁴ Additional Registrar, Supreme Court of Indian, ‘Notice, No. F.5/ACPanel/2014-16/SCI(IIA)’ 1 <<https://tinyurl.com/lffhq2v>> accessed 10 May 2017.

¹³⁵ Kian Ganz, ‘Do You Want to Be an *Amicus*? SC Opens List to New “Friends of the Court” (But Won’t Be Exclusive)’ *Legally India* (13 February 2014) <<https://tinyurl.com/m9acm6e>> accessed 10 May 2017.

¹³⁶ Ganz (n 135).

Matters of public interest that justify the appointment of *amicus curiae* include cases brought under Article 32 of the Indian Constitution, which provides the right to approach the Supreme Court for the enforcement of rights.¹³⁷ Article 32 cases can only be brought against the state and are limited to redressing a public injury, enforcement of a public obligation, and other matters related to the public interest.¹³⁸ Article 32 cases are not adversarial. Instead, they are a collaborative effort to protect Constitutional rights.¹³⁹ Anyone may file an Article 32 case, and filings may be in the form of a simple letter, reflecting the relaxed standing and procedural requirements for public interest litigation.¹⁴⁰

The court can also appoint *amicus* in cases that do not fall under Article 32, so long as the court determines that an unrepresented person requires assistance, the issues address matters of public importance, or the interests of the public are involved. These matters may include landlord-tenant disputes and requests for police protection.¹⁴¹

5.3 Court-Appointed Expert and Third-Party *Amicus* Participation

In addition to an advocate participating as *amicus* through judicial appointment, the court may appoint an expert as *amicus* or a person or organization may request to participate as *amicus*. When the court appoints an *amicus*, it has in most occasions elected eminent personalities who are experts in the subject matter. For instance, in a fraud case widely known as the *Odisha Chit Fund Case*, a senior advocate was elected as *amicus curiae* in order to provide valuable assistance to the court.¹⁴²

¹³⁷ Constitution of India, 1950 art 32.

¹³⁸ Avani Mehta Sood, 'Gender Justice Through Public Interest Litigation: Case Studies from India' 41.

¹³⁹ Sood (n 138) 41.

¹⁴⁰ Lise Johnson and Niranjali Amerasinghe, 'Protecting the Public Interest in International Dispute Settlement: The *Amicus Curiae* Phenomenon' (Center for International Environmental Law 2009) 29.

¹⁴¹ Supreme Court of India, *Practice and Procedure: A Handbook of Information* (Bibhuti Bhusan Bose ed, 3rd edn, Supreme Court of India 2010) 51 <<https://tinyurl.com/lfxuthf>> accessed 10 May 2017.

¹⁴² Odisha Sun Times Editorial Desk, 'Shyam Divan Appointed "*Amicus Curiae*" in Odisha Chit Fund Case' <<https://tinyurl.com/mmh9yrt>> accessed 10 May 2017.

In addition to cases where *amici* are called to provide substantive expertise, they may also be called to help an inexperienced petitioner in a public interest case. Since anyone can file a public interest claim, petitioners may not be able to articulate the case properly or objectively.¹⁴³ In this case, courts call on *amici curiae*, who understand the legal dimensions of the case, can maintain objectivity, and can construct a proper writ.¹⁴⁴ This occurred in *Baljit Malik v Delhi Golf Club*, a case concerning a golf club's alleged failure to properly upkeep ancient and protected monuments on rented public land.¹⁴⁵ Shri Muralidhar, the *amicus curiae*, created a petition based on the letter sent by the petitioner.¹⁴⁶

In cases that concern the public interest, the court can continue a case contrary to the wishes of the petitioner, if the court feels that doing so is in the interest of justice.¹⁴⁷ The Supreme Court did so in *Sheela Barse v Union of India & Ors*, which concerned abuses against imprisoned children in several states in India.¹⁴⁸ The petitioner who initiated the proceedings sought to withdraw due to delays and other 'dysfunctional' aspects of the court proceedings.¹⁴⁹ The petitioner also argued that since she had initiated the action, she could discontinue it and prevent anyone else from continuing the case.¹⁵⁰ The Supreme Court, in dismissing the petitioner's request, asserted that in public interest cases, the interests of the petitioner are subordinate to the interests of the public.¹⁵¹ Accordingly, the court refused to dismiss the case and, instead, ordered the 'Supreme Court Legal Aid Committee to prosecute the petition together with the aid and assistance of such persons or agencies as the Court may permit or direct from time to time'.¹⁵²

¹⁴³ Ashok H Desai and S Muralidhar, 'Public Interest Litigation: Potential and Problems', *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford Univ Press 2004) 1, 6.

¹⁴⁴ Desai and Muralidhar (n 143) 14.

¹⁴⁵ Desai and Muralidhar (n 143) 24, n 151.

¹⁴⁶ Desai and Muralidhar (n 143) 1, 6.

¹⁴⁷ Desai and Muralidhar (n 143) 5.

¹⁴⁸ *Sheela Barse v Union of India & Ors* (1988) 3 JT 643 (Supreme Court of India).

¹⁴⁹ *Sheela Barse v Union of India & Ors* (n 148) 644.

¹⁵⁰ *Sheela Barse v Union of India & Ors* (n 148) 648–49.

¹⁵¹ *Sheela Barse v Union of India & Ors* (n 148) 652.

¹⁵² *Sheela Barse v Union of India & Ors* (n 148) 667.

Indian courts have used *amici curiae* to counter bias in public interest proceedings and to verify information supplied by PIL petitioners.¹⁵³ Courts, however, now rely less on letter petitions to initiate proceedings, as some activists were writing petition letters to specific judges in order to influence the case.¹⁵⁴ The increased appointment of *amici curiae* addresses this concern by having the *amicus* file a petition to the court based on the petitioner's letter, instead of the letter going directly to the judge.¹⁵⁵ However, some believe that courts reduce the democratic nature of the system by relying on public interest lawyers to vet the complaints rather than receiving them directly. Because the *amicus curiae* are the first to evaluate the claims, some are concerned that they retain too much control over which cases are taken to court.¹⁵⁶

In some cases, such as *Uthradam Thirunal Marthanda & Anr v Union of India & Ors*, referred to as the '*Sree Padmanabhaswamy Temple case*', *amici* have played an active role in the proceedings.¹⁵⁷ In the *Sree Padmanabhaswamy Temple case*, an advocate was appointed *amicus* by the court to investigate the mismanagement of temple funds. He set up a special investigation team that reviewed the revenue records, conducted inventory of the temple valuables, and questioned the royal family and temple staff.¹⁵⁸ He thereafter submitted a report to the court detailing his findings.

Third parties can also apply to courts to be admitted as *amici* to provide neutral opinions on matters of public importance. Recently, academics have become more active participants as *amicus curiae*.¹⁵⁹ While in other jurisdictions it is common for academics to appear as *amici*, this was unheard of in India

¹⁵³ Johnson and Amerasinghe (n 140) 30; Desai and Muralidhar (n 143) 1, 6.

¹⁵⁴ Johnson and Amerasinghe (n 140) 30.

¹⁵⁵ Johnson and Amerasinghe (n 140) 30.

¹⁵⁶ Sood (n 138) 843.

¹⁵⁷ *Uthradam Thirunal Marthanda & Anr v Union of India & Ors* [2011] High Court (Kerala) W.P.(C) Nos. 36487 of 2009 & 4256 of 2010.

¹⁵⁸ '*Sree Padmanabha Swamy Temple Case: Amicus Curiae's Report to the Supreme Court*' *The Hindu* (8 November 2012) <<https://tinyurl.com/lkr8nza>>.

¹⁵⁹ Sunny Kumar, 'Comparative Study of *Amicus Curiae*' <<https://tinyurl.com/y9s35u3h>> accessed 24 April 2017.

up until 2012. At that time, Shamnad Basheer, a professor in intellectual property rights filed an intervention application before the Supreme Court in *Novartis v Union of India & Ors*.¹⁶⁰ The Supreme Court allowed him to intervene because it found that he was an expert in intellectual property rights, which was the subject matter of the case.¹⁶¹

Organizations have also intervened in issues relating to the criminalization of sexual conduct. When the Supreme Court addressed whether Section 377 of the Indian Penal Code—which criminalises consensual sex deemed ‘against the order of nature’—violated the Constitution of India, 12 organizations and individuals intervened in support of both sides of the issue.¹⁶² The Supreme Court, in holding that the section was constitutional, considered the arguments of the interveners in its analysis.¹⁶³

While the intervention of academics and organizations as *amicus curiae* in India is not as prevalent as in other jurisdictions, their role has increased over the years. Courts are still more likely to appoint lawyers as *amicus*, rather than academics or subject-matter experts.¹⁶⁴

6. United States

In the United States, *amicus* briefs are filed by non-parties in state and federal courts at both the trial and appellate level, including the Supreme Court.¹⁶⁵ There is no constitutional right to *amicus curiae*. It is a privilege and permission must either be granted by all parties to the case or by leave of the court.¹⁶⁶ *Amicus curiae* are not statutorily defined; the rules merely

¹⁶⁰ *Novartis Ag v Union Of India & Ors* [2013] Supreme Court Civ App Nos. 2706-2716 OF 2013.

¹⁶¹ Abhyudaya Agarwal, ‘Indian Professors as *Amicus Curiae*, Industry-Academia Divide and the Birth of the Practitioner-Academic’ <<https://tinyurl.com/knodqvm>> accessed 11 May 2017.

¹⁶² *Suresh Kumar Koushal & Anr v Naz Foundation & Ors* (2013) 1 SCC 1 (Supreme Court) [8].

¹⁶³ *Suresh Kumar Koushal & Anr v Naz Foundation & Ors* (n 162) [16–18, 20].

¹⁶⁴ Agarwal (n 161).

¹⁶⁵ Michael K Lowman, ‘The Litigating *Amicus Curiae*: When Does the Party Begin After the Friends Leave’ (1991) 41 Am. UL Rev. 1243, 1256.

¹⁶⁶ Frank M Covey Jr, ‘*Amicus Curiae*: Friend of the Court’ (1959) 9 DePaul L. Rev. 30, 30.

address filing procedures.¹⁶⁷ The role of *amicus curiae* is usually determined by court opinion.¹⁶⁸

Generally speaking,¹⁶⁹ the United States federal court system includes three levels. The District Courts hear cases at the trial level. The Courts of Appeal hear direct appeals from the trial courts. The Supreme Court hears appeals from the Courts of Appeal. A party can appeal as of right to the Courts of Appeal. Parties must petition the Supreme Court for permission to hear cases, and the Supreme Court has the discretion to determine which cases it hears.

Rule 37 of the Supreme Court Rules 2013 governs the use of *amicus* briefs at the Supreme Court.¹⁷⁰ A brief may be filed on a relevant matter that has not already been brought to the attention of the court and only by an attorney who is admitted to practice before the court.¹⁷¹ Submission is dependent on the consent of the parties or leave of the court.¹⁷² If a brief is presented on behalf of the United States by the Solicitor General, on behalf of any United States agency, state, commonwealth, territory, city, county, or town, then no leave from the court is necessary.¹⁷³

The Supreme Court has little to say in its opinions on the role of *amici*. In a footnote to *Sony Corp v Universal City Studios*, however, the court stated that such briefs ‘are not evidence in the case, and do not influence our decision; we examine an *amicus curiae* brief solely for whatever aid it provides in analysing the legal questions before us’.¹⁷⁴

Rule 29 of the Federal Rules of Appellate Procedure governs the submission of *amicus* briefs to Federal Courts of Appeal.¹⁷⁵ There are slightly different

¹⁶⁷ Lowman (n 165) 1256.

¹⁶⁸ *US v Gotti* (1991) 755 F Supp 1157 (Dist Court) 1158.

¹⁶⁹ The federal court system also includes several administrative courts. These courts are not discussed in this analysis.

¹⁷⁰ Rules of US Supreme Court r 37.

¹⁷¹ Rules of US Supreme Court (n 170) r 37(1).

¹⁷² Rules of US Supreme Court (n 170) r 37(2).

¹⁷³ Rules of US Supreme Court (n 170) r 37(4).

¹⁷⁴ *Sony Corp of America v Universal City Studios* (1983) 464 US 417 (Supreme Court) 434 n 16.

¹⁷⁵ Federal Rules of Appellate Procedure 2004 (Fed R App Proc) r 29.

conditions on filing depending on who is submitting the *amicus* brief. The United States, a state, territory, or the District of Columbia may file a brief as of right; they do not need the consent of the parties or leave of court to file.¹⁷⁶ Any other *amicus curiae* requires either leave of the court or consent of the parties.¹⁷⁷

There are no rules governing *amicus* submissions for district courts. However, the district courts have discussed the role of *amicus*.¹⁷⁸ In *United States v Gotti*, the Federal District Court defined *amicus curiae* first by its literal translation ‘friend of the court,’ but highlighted that *amici* are not necessarily impartial.¹⁷⁹ An *amicus* is not considered a party to the litigation; it provides supplementary information that helps the court understand difficult issues in cases of general public interest.¹⁸⁰ As they are not a party, the court has full discretion to determine the level of involvement of the *amicus* and what weight to give their contribution. Usually, however, they are given some weight in coming to a fully informed decision.¹⁸¹

Not all courts, however, share the same view on the utility of *amicus* participation. In *Ryan v Commodity Futures Trading Commission*, the Court of Appeals was particularly critical in its assessment of how courts at the federal level treat *amici*.¹⁸² The court suggested that a brief is acceptable

when a party is not represented competently or [...] at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case [...] or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.¹⁸³

¹⁷⁶ Federal Rules of Appellate Procedure (n 175) r 29(a).

¹⁷⁷ Federal Rules of Appellate Procedure (n 175) r 29(a).

¹⁷⁸ *US v Gotti* (n 168) 1158.

¹⁷⁹ (n 168) 1158.

¹⁸⁰ *Alexander v Hall* (1974) 64 FRD 152, 154.

¹⁸¹ *Alexander v Hall* (n 180).

¹⁸² *Ryan v Commodity Futures Trading Com'n* (1997) 125 F 3d 1062 (Court of Appeals, 7th Circuit) 1064.

¹⁸³ *Ryan v Commodity Futures Trading Com'n* (n 182) 1063.

A 2008 review of *amici curiae* in federal courts assesses the helpfulness of such briefs when they perform particular functions.¹⁸⁴ Judges from all three judicial levels believed that *amici* briefs that present arguments that are absent from the parties' briefs are helpful.¹⁸⁵ Other valuable interventions are when the party is under-represented and when the *amici* offer factual information not included in the record.¹⁸⁶ In contrast, *amici* whose briefs address their own specific interests that will be impacted by the decision are viewed less favourably.¹⁸⁷ Similarly, briefs that mention facts and law already included in the parties' submissions were also met with less enthusiasm.¹⁸⁸

The courts themselves provide insight into the influence *amici* can hold. For instance, the court in the First Circuit decision for *New England Patriots Football Club v University of Colorado* found itself 'indebted' to an *amicus* brief for providing a thorough factual background to the dispute.¹⁸⁹ The 1983 Supreme Court decision in *Sony Corp* indicated that *amici's* assistance was limited solely to helping it determine the legal question before the court.¹⁹⁰

The assistance in determining legal questions was apparent in the Supreme Court case of *Zadvydas v Davis*.¹⁹¹ When analysing whether indefinite detention of people subject to removal from the country violated the United States Constitution, the Supreme Court adopted the argument presented by the *amicus* rather than those presented by the parties. Although the Supreme Court did not explicitly mention that the arguments it relied on were presented through *amicus*, the arguments were made in the *amicus* submission.

¹⁸⁴ Linda Sandstrom Simard, 'An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism' (2007) 27 Rev. Litig. 669.

¹⁸⁵ Simard (n 184) 690.

¹⁸⁶ Simard (n 184) 694–95.

¹⁸⁷ Simard (n 184) 693.

¹⁸⁸ Simard (n 184) 694.

¹⁸⁹ *New England Patriots Football Club v University of Colorado* (1979) 592 F 2d 1196 (Court of Appeals, 1st Circuit) 1198.

¹⁹⁰ *Sony Corp. of America v Universal City Studios* (n 174) n 16.

¹⁹¹ *Zadvydas v Davis* (2001) 533 US 678 (Supreme Court).

In 1988, Justice Breyer indicated that *amicus* plays a significant role beyond the presentation of legal arguments.¹⁹² In a speech at the Annual Meeting of the American Association for the Advancement of Science, Justice Breyer explained that, in his view, such 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.¹⁹³

Yet, a study on the influence that *amicus* briefs have upon Supreme Court decisions suggested that only a small number of briefs have a positive impact on decisions.¹⁹⁴

State courts do not have uniform rules on *amicus* participation. In general, such briefs are more commonly used in appeals and, as a result, the statutory requirements are more likely to be found in a state's rules of appellate procedure. For example, under California appellate rules, any person can submit an *amicus* either supporting or opposing requests for appellate review.¹⁹⁵ If review is granted any person may file an *amicus* brief once they satisfy certain procedural requirements.¹⁹⁶ In the Virginia state courts, the procedure is found in the appellate rules of procedure for the Court of Appeals and the Supreme Court. Briefs may only be filed without leave of the court if made by the United States or the Commonwealth of Virginia. Any other petitioner will need permission from the court.¹⁹⁷ This is also the case in other states, such as New York, Washington, Florida,

¹⁹² Stephen Breyer, 'The Interdependence of Science and Law' (Annual Meeting of the American Association for the Advancement of Science, Philadelphia, PA, 16 February 1988) <<https://tinyurl.com/y8jd2669>> accessed 5 June 2017.

¹⁹³ Breyer (n 192) 9.

¹⁹⁴ Joseph D Kearney and Thomas W Merrill, 'The Influence of *Amicus Curiae* Briefs on the Supreme Court' (2000) 148 Univ Penn Law R 743, 830.

¹⁹⁵ California Rules of Court, Appellate Rules 2017 r 8.500(g).

¹⁹⁶ California Rules of Court, Appellate Rules (n 195) r 8.520(f).

¹⁹⁷ Rules Sup Ct Virginia r 5:30.

Colorado, North Carolina, and Texas.¹⁹⁸ There are a handful of states that have rules of procedure concerning *amicus* submissions, including Missouri, New Jersey, and Oklahoma.¹⁹⁹

In the state courts, it is appropriate for an *amicus* brief to be used in several circumstances. They can bolster arguments in the main briefs of the parties, focus on alternative legal arguments raised by the parties, draw the court's attention to any social, legal or economic consequences of a decision, and provide a legal framework upon which the court can base its decision.²⁰⁰

The use of *amici* varies from state to state. For instance, between the years 2007 and 2011, the Florida Supreme Court only mentioned *amicus* briefs 14 times in majority opinions, even though in 2010 alone 133 briefs were filed.²⁰¹ The Supreme Court of Virginia relied on the information given in the *amicus* brief from the National Organization for Women in determining whether evidence of prior acts of sexual misconduct should be permitted in a rape case.²⁰² In Washington, the Supreme Court relied on the arguments in *amicus* briefs when determining whether the state legislature had violated the U.S. Constitution.²⁰³ However, the Washington State Supreme Court also held that it will not address issues raised for the first time by *amici* – a common theme in most courts regardless of whether they are state or federal.²⁰⁴

Amicus participation plays an active role in the United States courts—perhaps the most active of any jurisdiction. Although there is no settled opinion on the utility of *amicus* briefing, *amicus* has assisted the courts in analysing legal issues, educating the courts on technical matters, and

¹⁹⁸ Sarah F Corbally and DC Bross, 'A Practical Guide for Filing *Amicus Curiae* Briefs in State Appellate Courts' [2001] National Association of Council for Children 6–12 <<https://tinyurl.com/ydg2sbaf>> accessed 6 April 2017.

¹⁹⁹ Corbally and Bross (n 198) 6–12.

²⁰⁰ Corbally and Bross (n 198) 2–3.

²⁰¹ Carrie Ann Wozniak, 'Amicus Briefs: What Have They Done for Courts Lately?' [2012] Florida Bar Journal <<https://tinyurl.com/y9ak6pts>> accessed 5 June 2017.

²⁰² *Wynne v Virginia* (1975) 216 Va 355 (Supreme Court) 446.

²⁰³ *Madison v Wash* (2007) 161 Wash 2d 85 (Supreme Court) [47]-[49].

²⁰⁴ *Wash v Gonzalez* (1988) 110 Wash 2d 738 (Supreme Court) n 2.

providing context for the decisions they will make. *Amicus* briefing appears to be most useful when it connects the interests of the *amicus* with the issues before the courts rather than merely explaining what effect the court's decision will have on the *amicus* participant.

7. Colombia

Though participation of *amici curiae* is more prevalent in common law states, some civil law systems allow their participation.²⁰⁵ In Colombia, for example, third party intervention is allowed in the Higher Administrative Court (Council of State), Supreme Higher Court, and Constitutional Court.²⁰⁶ International third parties and citizens of Colombia can participate as *amicus curiae* if they have a legitimate interest in the result of the process.²⁰⁷ While *amicus curiae* practice is becoming more prevalent, it is still 'relatively new'.²⁰⁸

Article 13 of Decree 2.067 outlines *amicus* intervention in the Constitutional Court, though the law does not use either the term *amicus curiae* or friend of the court.²⁰⁹ It provides that a trial judge may invite public entities, private organizations, and experts in the subject matter of the proceedings, to submit, in writing, points that are relevant to the court's decision.²¹⁰

The Constitutional Court also allows requests to intervene as a friend of the court. It has held that there is a presumption in favour of the acceptance of friend of the court intervention because it facilitates democratic participation, as envisaged in the Constitution.²¹¹ A brief that provides

²⁰⁵ Johnson and Amerasinghe (n 140) 4.

²⁰⁶ Alvaro Jose Correa Ordonez and Sasha Mandakovic Falconi, 'A Guide to Filing *Amicus Curiae* Briefs in Latin America' (2014) 69 INTA Bulletin 4.

²⁰⁷ Víctor Bazán, '*Amicus Curiae*, Justicia Constitucional Y Fortalecimiento Cualitativo Del Debate Jurisdiccional' [2014] Revista Derecho del Estado 3, 17 <<https://tinyurl.com/ks42w54>> accessed 9 May 2017.

²⁰⁸ Johnson and Amerasinghe (n 140) 12, 16.

²⁰⁹ Bazán (n 207) 17.

²¹⁰ Corte Constitucional De Colombia, Decreto 2067 De 1991. This memorandum uses a rough English translation of this source. The Spanish version is available at <https://tinyurl.com/ybph2puh>.

²¹¹ Smita Shah and Paul Clark, '*Presentación De Escrito De Amicus Curiae*' (Corte Constitucional De Colombia, London, 17 August 2015) 4 <<https://tinyurl.com/n8bkreo>>.

information, evidence, or opinion in cases of public interest is likely to be admitted.²¹² Additionally, briefs that are impartial and illustrate relevant points, rather than seek to decide the matter before the court, are often admitted.²¹³ An intervener's opinions are not binding on the court, but are instead advisory.²¹⁴ Although *amicus* interveners often provide legal analysis, they are not limited strictly to legal briefing.²¹⁵

8. Mexico

Although friend of the court practice was only incorporated into Mexico's Federal Code of Civil Procedure in 2011, it had been incorporated into domestic law earlier.²¹⁶ However, Mexico first enshrined the practices and procedures of friend of the court in domestic law through two General Agreements.²¹⁷ In 2007, the Supreme Court of Justice of the Nation (SCJN) issued a General Agreement that established guidelines for specialists to appear before the SCJN.²¹⁸ In 2008, the SCJN established another set of Guidelines for holding public hearings on matters of legal interest or national importance.²¹⁹ According to these Guidelines, hearings must be held in public at a designated time so that the interested parties can present their views.²²⁰ The President Minister attends this hearing, and other ministers and the general public may also attend.²²¹ According to these Guidelines, a friend of the court brief 'must contribute to the resolution of a constitutional dispute at the local Supreme Court or within its chambers/panels'.²²²

²¹² Shah and Clark (n 211) 4.

²¹³ Shah and Clark (n 211) 4.

²¹⁴ Bazán (n 207) 18.

²¹⁵ Bazán (n 207) 18.

²¹⁶ Bazán (n 207) 33–34; Constitution of the United Mexican States, 1917 (as amended) 1961.

²¹⁷ Gerardo Linden Torres, 'La Suprema Corte De Justicia De La Nacion No Tiene Buenos Amigos' 15 <<https://tinyurl.com/y73yqejp>> accessed 5 June 2017.

²¹⁸ Acuerdo General Número 10/2007 Por El Que Se Establecen Los Lineamientos, Supreme Corte de Justicia de la Nacion 2007; see also Linden Torres (n 217) 14.

²¹⁹ Acuerdo General Número 2/2008, En El Que Se Establecen Los Lineamientos Para La Celebración De Audiencias Relacionadas Con Asuntos Cuyo Tema Se Estime Relevante, De Interés Jurídico O De Importancia Nacional, Supreme Corte De Justicia De La Nacion 2008; see also Linden Torres (n 217) 14–15.

²²⁰ Linden Torres (n 217) 15.

²²¹ Linden Torres (n 217) 15.

²²² Ordóñez and Falconi (n 206).

While friend of the court petitions are relatively new in Mexico, the practice is occurring.²²³ For instance, in a case against the Federal Commission of Electricity, it was claimed that the Federal authorities ‘failed to consult with affected parties and adequately evaluate the environmental impacts of the construction of La Parota dam’.²²⁴ The Inter-American Association for Environmental Defense, in conjunction with other organizations, submitted a friend of the court to the Collegiate Tribunal of Guerrero.²²⁵ Similarly, FIAN International submitted a friend of the court brief supporting the affected communities by noting that the government failed to consult the local people and performed an inadequate environmental evaluation.²²⁶

9. Argentina

Argentina is one of the few civil law jurisdictions that has included *amicus* participation in their system. Although historically there were no established rules for acceptance and consideration of *amicus* submissions, the courts accepted briefs in many proceedings.²²⁷ The Supreme Court thereafter formally recognised these procedures through the Regulation of the Supreme Court of Justice of the Nation 02/28/04 of 14 July 2004.²²⁸ The court, under this Regulation, described *amicus curiae* as an important instrument of democratic participation and an exercise of judicial power that allows citizens to participate in the administration of justice. It should, however, be noted there are no laws that specifically govern *amicus curiae*, courts have only followed guidelines set out by precedent.²²⁹

²²³ Miguel Concha, ‘*Amicus Curiae* Briefs in Mexico’ <<https://tinyurl.com/yaspvgyg>> accessed 5 June 2017.

²²⁴ Interamerican Association for Environmental Defense, ‘Threats from Proposed Dam in La Parota, Mexico, Challenged in *Amicus Curiae* Legal Brief’ <<https://tinyurl.com/yahdprjg>> accessed 5 June 2017.

²²⁵ Interamerican Association for Environmental Defense (n 224).

²²⁶ HRH Oslo, ‘After Nine Years of Struggle, Mexican Peasants Celebrate Victory’ <<https://tinyurl.com/y98vntvs>> accessed 5 June 2017.

²²⁷ Steven Kochevar, ‘*Amici Curiae* in Civil Law Jurisdictions’ (2012) 122 Yale LJ 1653, 1653.

²²⁸ Acordada No. 28/2004-CSJ ([CXII-30455] BO 6 (Arg)).

²²⁹ Kochevar (n 227) 1653.

Some of these guidelines include:

- The purpose of *amicus curiae* is to enrich the deliberations on relevant issues with well-founded legal, technical, or scientific arguments relating to the issues discussed.
- The *amicus* cannot introduce new facts and can only discuss those that were raised at the time of litigation or that have been raised by the parties during the procedural stages.
- The *amicus curiae* is not a party to the proceedings and can therefore not assume any procedural rights. For instance, they cannot seek court fees or costs and the court is not bound by their opinions or suggestions, which are made simply to enrich the court.
- Any party that petitions to enter proceedings as an *amicus* should supply in the first chapter of their brief the following information: their interest in the matter; the parties they are representing in the matter or whose rights they intend to protect; whether they have received financial aid from such parties or any other financing from anyone; and information on the particulars of their presentation.²³⁰

10. Conclusion

Amicus curiae plays an important role in many jurisdictions, including the ones highlighted in this chapter. As each of the jurisdictions discussed makes clear, litigation often has an impact that extends far beyond the direct parties to the suit, and courts can benefit from the insights of those who may be affected by the court's decision. Whether *amicus* provides technical expertise to the court, assists an unrepresented litigant, or provides information on public policy that will be useful to the court, the *amicus curiae* has become a well-established tool for ensuring that the courts make the best decisions possible.

²³⁰ Víctor Bazán, 'La Reglamentación De La Figura Del *Amicus Curiae* Por La Corte Suprema De Justicia Argentina' [2005] *Revista Iberoamericana De Derecho Procesal Constitucional* 3, 3–4.



Chapter 5

Friend of the Court Participation in Regional Courts

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Summary

- The Inter-American Court of Human Rights has an extensive practice of friend of the court participation and since 1982 has received over 500 friend of the court briefs.
- Rules of Procedure of the Inter-American Court allow any person or institution to submit briefs at any point during the proceedings, as well as up to 15 days after the public hearing. They may even submit briefs during proceedings for monitoring compliance with court orders.
- The Inter-American Court usually mentions the friend of the court briefs that it receives in its decisions and incorporates the substance of the briefings as evidence in some cases. However, it rarely provides details about the content of the briefs.
- Although the law of the European Court of Human Rights does not explicitly allow for friend of the court briefs, both the Rules

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of the Court and the European Convention on Human Rights allow third parties to submit written comments and participate in hearings in limited circumstances.

- The Rules of the European Court note that submissions need to be ‘duly reasoned’ and made in one of the official languages.
- At the European Court, the consent of the contracting parties is not required for a third-party submission to be accepted by the court, but any submission needs to be forwarded to the parties.
- Before the European Court, the procedures for approving and submitting third-party submissions are unclear. Third parties do not have an automatic right to participate, but must first submit a request to the President of the Chamber.
- At the European Court, third-party interventions have been successfully used to help the court understand changing international and national norms, to provide comparative and foreign legal analysis, and to interpret the European Convention on Human Rights in accordance with prevailing understanding and precedent.
- The European Court has accepted interventions from persons with a ‘clear interest’ in the domestic proceeding to which the European Court proceeding relates; entities, groups, or individuals with specialist expertise or knowledge; and industry interest groups whose views are closely aligned to the applicant.
- The European Court may reject a brief if there is a precedent that renders third-party submissions unnecessary or if the brief duplicates submissions already made.
- The African Court on Human and Peoples’ Rights Rules do not directly reference friend of the court. Instead, Article 26(2) of the Protocol establishing the court notes that the court ‘may receive written and oral evidence’.

- Rule 77 of the African Court specifies that the court may authorise any ‘interested entity’ to offer written submissions.
- The President of the African Court, as well as the Registrar, have commented that the court permits friend of the court briefs ‘on the basis of the implied powers’ in these rules.
- The African Court’s Practice Directions provide for friend of the court by allowing the court to invite an individual or organization to act as friend of the court in a particular matter pending before it.
- According to the African Court’s Practice Directions, in addition to an invitation from the court, individuals or organizations may also submit requests to the court to act as friends of the court, specifying the ‘contribution’ it would make to the case.
- In the African Court case of *Lobé Issa Konaté v Burkina Faso*, the friend of the court brief greatly influenced the outcome of the case.

1. Introduction

The definition and conceptual illustration of the friend of the court phenomenon is dealt with extensively in Chapter One above. This Chapter outlines the friend of the court practice in the Inter-American Court of Human Rights, the European Court of Human Rights, the African Commission on Human and Peoples’ Rights, and the African Court on Human and Peoples’ Rights.

2. Inter-American Court of Human Rights

The Inter-American Court of Human Rights (‘Inter-American Court’) is the human rights court of the Organization of American States (OAS).¹ The OAS, the oldest regional organization, is composed of 35 states from

¹ Caroline Bettinger-López, ‘The Inter-American Human Rights System: A Primer’ (2008) 42 Clearinghouse Rev. 581, 582.

the Americas.² The court, based in San Jose, Costa Rica, is ‘an autonomous judicial institution’ of the OAS.³ The court of seven judges applies and interprets the primary human rights treaty in the region, the American Convention on Human Rights (‘American Convention’).⁴

The court has both contentious and advisory jurisdiction.⁵ Contentious jurisdiction only applies to states that have ratified the American Convention and its Optional Protocol.⁶ Presently, 20 states have acceded to the court’s jurisdiction: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay.⁷

In its advisory role, the court can exercise jurisdiction

with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable to the American States, regardless of whether it be bilateral or multilateral, whatever the principal purpose of such a treaty, and whether or not non-Member States of the Inter-American System are or have the right to become parties thereto.⁸

The court, which has an extensive practice of friend of the court participation,⁹ receives briefs in both contentious and advisory cases.¹⁰ From 1982 to 2013, the Inter-American Court received over 500 friend of the court briefs.¹¹

² Bettinger-López (n 1) 582.

³ Bettinger-López (n 1) 584.

⁴ Bettinger-López (n 1) 584.

⁵ Bettinger-López (n 1) 584.

⁶ Bettinger-López (n 1) 584.

⁷ International Justice Resource Center, ‘Inter-American Human Rights System’ <<https://tinyurl.com/yd68qx64>> accessed 12 May 2017.

⁸ ‘Other Treaties’ Subject to the Consultative Jurisdiction of the Court (Art 64 of the American Convention on Human Rights) [1982] Inter-American Court of Human Rights (IACrHR) Advisory Opinion OC-1/82, Inter-Am Ct HR Ser A No 1 [52].

⁹ Frans Viljoen and Adem Kassie Abebe, ‘*Amicus Curiae* Participation Before Regional Human Rights Bodies in Africa’ (2014) 58 *Journal of African Law* 22, 30–31.

¹⁰ Rules of Procedure of the Inter-American Court of Human Rights 2009 Art 2(3), 4; Francisco Rivera Juaristi, ‘The *Amicus Curiae* in the Inter-American Court of Human Rights (1982–2013)’ 1.

¹¹ Rivera Juaristi (n 10) 1.

Approximately 400 of those briefs were submitted in contentious cases and approximately 100 were submitted in advisory cases.¹²

In the next section, this Chapter outlines the Inter-American Court's procedural guidelines on friend of the court participation and provides examples of such participation in the court. Though friends of the court extensively participate in Inter-American Court cases, the court has not regularly commented on the influence the briefs have had on its decision-making.¹³

2.1 Inter-American Court Definition and Procedure

Throughout the court's history, seven versions of the rules of procedure have guided proceedings in the court and have shaped friend of the court participation.¹⁴ While the 1980 Rules of Procedure did not explicitly mention friend of the court, the court routinely accepted briefs, presumably under provisions allowing the court to receive statements and information from persons and institutions.¹⁵ The January 2009 Rules were the first to explicitly mention friend of the court procedures.¹⁶

The current November 2009 Rules define *amicus curiae* and outline regulations pertaining to *amici* in its rules of procedure.¹⁷ Article 2(3) defines *amicus curiae* as

the person or institution who is unrelated to the case and to the proceeding and submits to the court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing.¹⁸

¹² Rivera Juaristi (n 10) 1.

¹³ Rivera Juaristi (n 10) 5.

¹⁴ Rivera Juaristi (n 10) 7.

¹⁵ Rivera Juaristi (n 10) 7.

¹⁶ Rivera Juaristi (n 10) 8.

¹⁷ Rules of Procedure of the Inter-American Court of Human Rights (n 10) Art 44.

¹⁸ Rules of Procedure of the Inter-American Court of Human Rights (n 10) Art 2(3).

According to the Inter-American Court's Rules of Procedure, anyone wishing to act as a friend of the court may submit a brief to the court by fax, mail, electronic mail, courier, or in person.¹⁹ A person or institution may submit briefs at any point during the proceedings, as well as up to 15 days after the public hearing.²⁰ If there is no public hearing, a friend of the court may submit briefs within 15 days after the order setting deadlines for submitting final arguments.²¹ Moreover, the rules note that friends of the court may submit briefs 'during proceedings for monitoring compliance of judgments and those regarding provisional measures'.²²

The Inter-American Court has affirmed the importance of friends of the court in its case law. In *Kimel v Argentina*, in which an author convicted of libel argued that his rights to a fair trial and freedom of expression had been violated, Argentina argued that the friend of the court brief of the Civil Rights Association was time-barred.²³ The Civil Rights Association's brief was admitted after the public hearing on the case and after the parties had submitted the briefs of their closing arguments.²⁴ In dismissing Argentina's challenge, the court affirmed the ability of friends of the court to submit briefs at any point before the deliberation of the judgment, and even after the judgment, to comment on the implementation of the judgment.²⁵ Furthermore, the court in *Kimel* declared that '*amici curiae* [sic] briefs are an important element for the strengthening of the Inter-American System of Human Rights, as they reflect the views of members of society who contribute to the debate and enlarge the evidence available to the court'.²⁶

Notwithstanding the Inter-American Court's appreciation and extensive acceptance of friend of the court briefs, the court has rejected some

¹⁹ Rules of Procedure of the Inter-American Court of Human Rights (n 10) Arts 28(1), 44.

²⁰ Rules of Procedure of the Inter-American Court of Human Rights (n 10) Art 44.

²¹ Rules of Procedure of the Inter-American Court of Human Rights (n 10) Art 44.

²² Rules of Procedure of the Inter-American Court of Human Rights (n 10) Art 44.

²³ *Kimel v Argentina* (n 419) [9], [11].

²⁴ *Kimel v Argentina* (n 23) [9], [11].

²⁵ *Kimel v Argentina* (n 23) [16].

²⁶ *Kimel v Argentina* (n 23) [16].

briefs.²⁷ *Pacheco Tineo v Bolivia* concerned Bolivia's denial of refugee status to the Pacheco Tineo family and the state's subsequent deportation of the family to their home country of Peru.²⁸ The Inter-American Commission on Human Rights, which is authorised by the American Convention on Human Rights to submit cases to the Inter-American Court, concluded that Bolivia violated the Pacheco Tineo family's rights to request asylum and the guarantee of non-refoulement of refugees.²⁹ The Bolivian Episcopal Conference-United Nations High Commissioner for Refugees (CEB-UNHCR), which had assisted the Pacheco Tineo family in Bolivia, submitted a brief to the court.³⁰ The court, however, did not consider the brief because the CEB-UNHCR had 'participated in the facts of this case'.³¹ Therefore, the CEB-UNHCR was not entirely unrelated to the case, as required by Article 2(3) of the Rules of Procedure.³²

In November 2009, the Inter-American Court amended its rules of procedure to provide deadlines for filing friend of the court briefs.³³ Since then, the court has rejected briefs that were filed past the procedural deadlines.³⁴ For example, in *Nadege Dorzema et al. v Dominican Republic*, a case examining an incident of excessive force by Dominican soldiers against Haitian nationals, the court rejected the Centro de Estudios Legales and Sociales' friend of the court brief as time-barred.³⁵

Though the Inter-American Court has not defined what makes a friend of the court relevant or useful, it has routinely rejected prospective friends

²⁷ Rivera Juaristi (n 10) 11.

²⁸ *Case of Pacheco Tineo Family v Bolivia* [2013] Inter-Am Ct HR Series C No 272 (Inter-American Court of Human Rights (IACrHR)) [1].

²⁹ Organization of American States (OAS), 'American Convention on Human Rights, "Pact of San Jose"' Art 61; *Case of Pacheco Tineo Family v Bolivia* (n 28) [2(c)(i)(2)].

³⁰ *Case of Pacheco Tineo Family v Bolivia* (n 28) [10, n 9].

³¹ *Case of Pacheco Tineo Family v Bolivia* (n 28) [10, n 9].

³² *Case of Pacheco Tineo Family v Bolivia* (n 28) [10], [10 n 9], [83].

³³ Rules of Procedure of the Inter-American Court of Human Rights (n 10) r 44.

³⁴ Rivera Juaristi (n 10) 13–14; Rules of Procedure of the Inter-American Court of Human Rights (n 10) r 44.

³⁵ *Nadege Dorzema et al v Dominican Republic* [2012] Inter-Am Ct HR Series C No 251 (Inter-American Court of Human Rights (IACrHR)) [1], [9, n9].

of the court for not providing relevant information.³⁶ In *Gomes Lund et al. ('Guerrilha do Araguaia') v Brazil*, a case concerning Brazil's arbitrary detention and enforced disappearances of 70 members of the Communist Party of Brazil, the court declined a brief that it did not deem useful.³⁷ The same approach was taken in *Lopez Mendoza v Venezuela*,³⁸ which addressed the right to participate in government.³⁹ While the *López Mendoza* court did not explain why it declined these prospective friend of the court briefs, it did mention that the friend of the court briefs that it did admit from, among others the Venezuelan Association of Constitutional Law, developed 'diverse ideas regarding judicial guarantees and political rights'.⁴⁰

2.2 Impact of Friend of the Court Participation

While the Inter-American Court usually mentions the friend of the court briefs that it receives in its decisions, it rarely provides details about the content of the briefs.⁴¹ However, the court incorporates friends of the court briefs as evidence in some cases.⁴² *Mohammed v Argentina* concerned the fair trial rights of a bus driver convicted on appeal of manslaughter following a bus accident.⁴³ When discussing the facts of the case, the Inter-American Court used information on the Argentine appeals process that had been provided by the Law School of the National University of Cuyo as friend of the court.⁴⁴

As the court does not routinely cite information provided by friends of the court, ascertaining the effectiveness of friend of the court participation

³⁶ Rivera Juaristi (n 10) 15–16.

³⁷ *Gomes Lund et al. ('Guerrilha do Araguaia') v Brazil* [2010] Inter-American Court of Human Rights (IACrHR) Inter-Am. Ct. H.R. Series C No 219 [24].

³⁸ Rivera Juaristi (n 10) 16.

³⁹ *López Mendoza v Venezuela* [2011] Inter-Am Ct HR Series C No 233 (Inter-American Court of Human Rights (IACrHR)) [3].

⁴⁰ *López Mendoza v Venezuela* (n 39) [10].

⁴¹ Rivera Juaristi (n 10) 19.

⁴² Rivera Juaristi (n 10) 21.

⁴³ *Mohamed v Argentina* [23 11 2012] Inter-Am Ct HR Series C No 255 (Inter-American Court of Human Rights (IACrHR)) [2], [39].

⁴⁴ *Mohamed v Argentina* (n 43) [51, n45].

is difficult.⁴⁵ However, the popularity of friend of the court submissions could indicate the Inter-American Court is a forum in which non-parties can influence the development of international human rights law.⁴⁶

There have been exemplary cases in which friends of the court participated in the Inter-American Court proceedings, such as *Mendoza et al. v Argentina*.⁴⁷ This case concerned the treatment of children in Argentina's justice system. The petitioners had committed various crimes, including robbery and murder, as juveniles and were sentenced to life imprisonment or received other serious sanctions.⁴⁸ In submitting the case to the Inter-American Court, the Inter-American Commission for Human Rights argued that Argentina violated several of the petitioners' rights under the American Convention on Human Rights, including the right to a fair trial, the right to protection as a child, and the right not to be subjected to cruel, inhuman, or degrading punishment.⁴⁹

The Center for the Study of Sentence Execution, the Brazilian Institute of Criminal Science, the Asociación por los Derechos Civiles, Amnesty International, and the Colectivo de Derechos de Infancia y Adolescencia de Argentina submitted briefs in the case.⁵⁰ Additionally, the Human Rights Institute of Columbia Law School, Lawyers for Human Rights, and the Center for Law and Global Justice of the University of San Francisco submitted a joint brief to the court.⁵¹ This joint brief argued that juvenile life sentences violate international human rights standards and addressed several other points relevant to the case.⁵² The brief first described the dire conditions of juvenile detention in the region and then argued that

⁴⁵ Rivera Juaristi (n 10) 5.

⁴⁶ Rivera Juaristi (n 10) 5–6.

⁴⁷ *César Alberto Mendoza et al v Argentina* [2008] Inter-Am Ct HR, OEA/Ser/L/V/II130 Doc 22, rev 1 (Inter-American Court of Human Rights (IACrHR)) [1].

⁴⁸ *César Alberto Mendoza et al v Argentina* (n 47) [1], [77]–[78].

⁴⁹ *César Alberto Mendoza et al v Argentina* (n 47) [2]; Organization of American States (OAS) (n 29) arts 5, 8, 19.

⁵⁰ *César Alberto Mendoza et al v Argentina* (n 47) [13].

⁵¹ *César Alberto Mendoza et al v Argentina* (n 47) [13].

⁵² JoAnn Kamuf Ward, 'Amicus Curiae Brief, Case No. 12,651 César Alberto Mendoza et Al. (Perpetual Imprisonment and Confinement of Adolescents) Argentina' 4 <<https://tinyurl.com/lf3bcdk>> accessed 16 May 2017.

eliminating juvenile life sentences would have a positive impact on juvenile justice practices in the region.⁵³

The joint brief identified various international treaties and guidelines that provide standards on juvenile sentencing and discussed how they require special protections for juveniles, non-custodial measures as an alternative to detention for juveniles, and short detention as a last resort for juveniles.⁵⁴ For instance, regarding special protections for juveniles, the *amicus* brief cited Article 37(c) of the Convention on the Rights of the Child, which requires that every child deprived of their liberty should be treated in an age-appropriate manner.⁵⁵ In its conclusion, the joint brief asked the Inter-American Court to call on states to stop imposing life sentences for juveniles, eliminate lengthy juvenile sentences, and implement procedures for the regular review of juvenile sentences to ensure that they are of the shortest time possible under the circumstances.⁵⁶

In finding that Argentina violated the petitioners' rights through the imposition of life sentences, the court did not directly refer to the joint brief. It did, however, refer to some of the international standards that the brief highlighted.⁵⁷ The court also referred to the rules and guidelines cited in the joint brief. The court also referred to the arguments of another friend of the court, the Asociación por los Derechos Civiles. The court ordered Argentina to provide educational and training opportunities to the victims as a part of their reparations package and cited the Asociación's arguments that life imprisonment negatively affected the vocational paths of juveniles.⁵⁸

⁵³ Ward (n 52) 5.

⁵⁴ Ward (n 52) 10.

⁵⁵ Ward (n 52) 11–13; UN General Assembly, 'Convention on the Rights of the Child' (1989) 1577 United Nations, Treaty Series 3 art 37(c).

⁵⁶ Ward (n 52) 21.

⁵⁷ *César Alberto Mendoza et al v Argentina* (n 47) [149]; Ward (n 52) 149, [164].

⁵⁸ *César Alberto Mendoza et al v Argentina* (n 47) [315, n 390], [316, n 391].

3. European Court of Human Rights

The European Court of Human Rights ('European Court') 'is a regional human rights judicial body based in Strasbourg, France'.⁵⁹ The European Court applies and interprets the European Convention on Human Rights ('European Convention').⁶⁰ It hears cases submitted by individuals, states, or NGOs.⁶¹ The applicant need not be a citizen of a state party. However, the complaint must allege a violation of the European Convention by a state party.⁶² All 47 Council of Europe member states are subject to the European Court's jurisdiction.⁶³

The European Court allows third-party intervention at the discretion of the President of the Chamber.⁶⁴ Allowing such third-party interventions bolsters the legitimacy of the court because it demonstrates the court's respect for a pluralistic process led by democratic values.⁶⁵ However, it has been argued that third-party intervention is inefficient and unnecessarily delays the adjudication of cases.⁶⁶ Historically, relatively few third parties have applied to intervene in proceedings at the European Court, with only 35 applications received between 1998 and 2004, which represented one percent of the caseload of the European Court.⁶⁷ The number of third-

⁵⁹ International Justice Resource Center (n 7).

⁶⁰ International Justice Resource Center (n 7).

⁶¹ International Justice Resource Center (n 7).

⁶² International Justice Resource Center (n 7).

⁶³ 'European Court of Human Rights (ECtHR)' (*Council of Europe*) <<https://tinyurl.com/mgogwls>> accessed 17 May 2017; Centre d'Information sur les Institutions Européennes, 'Member States of the European Union and the Council of Europe' (*Strasbourg L'Europeenne*) <<https://tinyurl.com/y9lb9o4h>> accessed 17 May 2017 (These states are: Albania, Germany, Macedonia, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Croatia, Denmark, Spain, Estonia, Finland, France, Georgia, Greece, Hungary, Ireland, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Norway, The Netherlands, Poland, Portugal, Czech Republic, Romania, United Kingdom, Russia, Saint Marino, Serbia, Slovakia, Slovenia, Sweden, Switzerland, Turkey, and Ukraine).

⁶⁴ Rules of Court ECtHR 2016 r 44.

⁶⁵ Spyridon Flogaitis, Tom Zwart and Julie Fraser, *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Edward Elgar Publishing 2013) 143.

⁶⁶ Flogaitis, Zwart and Fraser (n 65) 143.

⁶⁷ Lance Bartholomeusz, 'The *Amicus Curiae* before International Courts and Tribunals' (2005) 5 *Non-State Actors and International Law* 209, 235.

party submissions increased over time, with an estimated 237 third-party submissions by 2013, across over 17,000 judgments,⁶⁸ or about 1.3 percent of cases at the European Court.⁶⁹

The next section outlines the procedure for third-party participation, as well as provides an overview of the impact this participation has had on the court. Third-party submissions have helped the court establish new legal principles, decide controversial issues, and provide relevant context, or determine the ‘general importance’ of issues.⁷⁰

3.1 European Court Procedure

While the European Court does not explicitly allow for friend of the court briefs, both the Rules of the Court and the European Convention on Human Rights allow third parties to submit written comments and participate in hearings in limited circumstances.⁷¹

Article 36 of the European Convention notes that the President of the Court may invite any signatory that is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.⁷² When deciding whether to allow a third-party submission, the President of the Court considers whether it is in the ‘interest of the proper administration of justice’ to do so.⁷³ Parties that wish to participate must apply to the court within 12 weeks after the respondent receives notice that application to the court has been submitted.⁷⁴

⁶⁸ Paul Harvey, ‘Third Party Interventions Before the ECtHR: A Rough Guide’ <<https://tinyurl.com/n7zcmlo>> accessed 17 May 2017.

⁶⁹ Laura Van den Eynde, ‘An Empirical Look at the *Amicus Curiae* Practice of Human Rights NGOs Before the European Court of Human Rights’ (2013) 31/3 *Netherlands Quarterly of Human Rights* 271, 280.

⁷⁰ Flogaitis, Zwart and Fraser (n 65) 138.

⁷¹ Rules of Court ECtHR (n 64) r 44.

⁷² Council of Europe, ‘Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended)’ art 36.

⁷³ Rules of Court ECtHR (n 64) r 44.

⁷⁴ Rules of Court ECtHR (n 64) r 44(2)(b).

The procedures for applying to intervene as a third party are somewhat vague.⁷⁵ Third parties do not have an automatic right to participate, but must first submit a request to the President of the Chamber.⁷⁶ Since the President's deliberations are confidential, it is not clear why certain parties are rejected and others accepted.⁷⁷ Although grounds for denying participation are not always evident, they could include late filing, submitting information about a non-member before the court, restating clear precedent, or duplicating material already provided to the court.⁷⁸ The rules also note that submissions must be 'duly reasoned' and made in one of the official languages of the European Court.⁷⁹ The consent of the contracting parties is not required for a third party submission to be accepted by the court, but any submission needs to be forwarded to the parties.⁸⁰ Those parties then must have an opportunity to respond to the submissions.⁸¹

3.1.1 Additional Criteria for Admissibility

Apart from the Rules of Court, the European Court has further developed criteria for friend of the court participation through its case law.⁸² The court has stipulated that third-party submissions cannot address the facts or merits of the case and should assist the court in 'the proper administration of justice'.⁸³ Submissions may also be rejected if they address issues that are pre-empted by precedent or if their views are represented or duplicated by another party.⁸⁴

⁷⁵ Flogaitis, Zwart and Fraser (n 65) 144.

⁷⁶ Bartholomeusz (n 67) 240.

⁷⁷ Flogaitis, Zwart and Fraser (n 65) 144.

⁷⁸ Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *The American Journal of International Law* 611, 632.

⁷⁹ Rules of Court ECtHR (n 64) r 44(3)(b).

⁸⁰ Rules of Court ECtHR (n 64) r 44(5).

⁸¹ Rules of Court ECtHR (n 64) r 44(5).

⁸² Abdelsalam A Mohamed, 'Individual and NGO Participation in Human Rights Litigation Before the African Court on Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights' (1999) 43 *Journal of African Law* 201, 206.

⁸³ Mohamed (n 82) 206.

⁸⁴ Harvey (n 68).

However, three criteria make it more likely for a third-party intervention to be accepted by the court: (1) the intervener has an interest in the domestic proceeding, (2) the intervener has relevant expertise or knowledge of the law or facts, or (3) the intervener represents an industry that shares similar views to one of the parties.⁸⁵ Third-party interventions have been successfully used to help the court understand changing international and national norms,⁸⁶ to provide comparative and foreign legal analysis,⁸⁷ and to interpret the European Convention in accordance with prevailing understanding and precedent.⁸⁸

3.1.2 The Proper Administration of Justice

To help fulfil the ‘proper administration of justice’ requirement, briefs submitted to the European Court must help the court decide the case and be proximately related to the issues at hand.⁸⁹ In contrast to the practice of the African Commission (see below), the European Court has rejected briefs because they did not directly relate to a case or addressed issues too attenuated from a case.⁹⁰ Submissions that address international human rights law are also more likely to be accepted.⁹¹ For instance, in *Leander v Sweden*, a case concerning the use of secret police registers in Sweden, the court refused the National Council for Civil Liberties’ application to introduce evidence related to the United Kingdom because the evidence was not sufficiently related to the underlying proceedings.⁹²

3.1.3 Additional Discretionary Criteria

Three different kinds of interveners are likely to be admitted as friends of the court: (1) persons with a ‘clear interest’ in the underlying domestic

⁸⁵ Mohamed (n 82) 206.

⁸⁶ *Soering v United Kingdom* [1989] ECHR 14 [104].

⁸⁷ *Vo v France* [2005] echr App no 53924/00, 40 ECHR 12 [60]-[73].

⁸⁸ *Ruiz-Mateos v Spain* (1993) 16 ECHR 505.

⁸⁹ Harvey (n 68).

⁹⁰ Mohamed (n 82) 206.

⁹¹ *Bartholomeusz* (n 67) 240.

⁹² *Leander v Sweden* (1987) 9 EHRR 43; Shelton (n 78) 88.

proceeding; (2) entities, groups, or individuals with specialist expertise or knowledge; and (3) industry interest groups whose views are closely aligned to the applicant.⁹³

First, the court appears to favour third-party individuals who have a ‘clear interest’ in the domestic proceedings related to the European Court case.⁹⁴ Since such parties will likely be affected by the decision, allowing them to intervene ensures they have due process and the opportunity to be heard.⁹⁵ This intervention usually involves an individual who was a successful plaintiff or defendant in the original suit, where the opposing party has now appealed to the European Court.⁹⁶

For instance, in *Py v France*, a case relating to voting rights in New Caledonia, the European Court permitted third-party comments from residents of New Caledonia who were also impacted by the law at issue.⁹⁷ In *Hatton & Ors v the United Kingdom*,⁹⁸ the applicants argued that state policies on night flights from Heathrow, as well as the denial of an effective remedy, violated their rights. The European Court accepted third-party comments from British Airways and Friends of the Earth.⁹⁹ British Airways, in particular, had a ‘clear interest’ in the case since it was the major airline operating out of Heathrow.¹⁰⁰ In its submission, British Airways argued in favour of Heathrow night flights, noting they ‘contribute significantly to the productivity of the United Kingdom economy’.¹⁰¹

Second, the European Court is more likely to accept third-party submissions from individuals or organizations with relevant expertise or legal knowledge.¹⁰² For instance, in *Timurtaş v Turkey*, a case regarding

⁹³ Bartholomeusz (n 67) 236.

⁹⁴ Bartholomeusz (n 67) 236.

⁹⁵ Bartholomeusz (n 67) 236.

⁹⁶ Bartholomeusz (n 67) 236.

⁹⁷ *Py v France* [2005] echr-section2 App No 66289/01, ECHR [7].

⁹⁸ *Hatton & Ors v United Kingdom* [2003] European Court of Human Rights [Section VI App No 36022/97, ECHR [1]-[27].

⁹⁹ *Hatton & Ors v United Kingdom* (n 98) [9].

¹⁰⁰ Bartholomeusz (n 67) 236.

¹⁰¹ *Hatton & Ors v United Kingdom* (n 98) [15].

¹⁰² Bartholomeusz (n 67) 237.

alleged disappearances, the European Court allowed the Center for Justice and International Law, an organization based in the Americas, to submit comments on the Inter-American Court's jurisprudence on enforced disappearances.¹⁰³ The European Court also permitted third-party comments in *Hugh Jordan v United Kingdom*, in which the applicant alleged unjustifiable use of lethal force by a police officer and a failure to effectively investigate afterwards.¹⁰⁴ In that case, the Northern Ireland Human Rights Commission submitted comments that outlined the requirements of an effective investigation into the use of lethal force by a state agent and concluded that the investigation failed to meet these requirements.¹⁰⁵

Third, the European Court accepts third-party submissions from 'industry interest groups' who share views similar to the applicants.¹⁰⁶ In *Pedersen and Baadsgaard v Denmark*,¹⁰⁷ the applicants were charged with defamation after producing a documentary on a murder case. The applicants alleged that the charges violated their right to freedom of expression. The President of the Court accorded the Danish Union of Journalists an opportunity to comment. The Danish Union asserted that restrictions on the press' freedom of expression should be 'construed as narrowly as possible'.¹⁰⁸

Friend of the court participation entails a great deal of time and financial resources, increasing the parties' costs, as well as the overall costs to the court.¹⁰⁹ Public interest groups have been most effective when submitting briefs that make the European Court's job easier by, for instance, conducting costly comparative analyses that the court would otherwise need to do itself.¹¹⁰ Additionally, because the European Court imposes

¹⁰³ *Timurtaş v Turkey* [2000] echr App no 23531/94, 2000-VI ECHR 222 [7].

¹⁰⁴ *Hugh Jordan v United Kingdom* [2001] echr App no 24746/94 [3], [7].

¹⁰⁵ *Hugh Jordan v United Kingdom* (n 104) [101].

¹⁰⁶ *Bartholomeusz* (n 67) 240.

¹⁰⁷ *Pedersen and Baadsgaard and Danish Union of Journalists (intervening) v Denmark* [2004] ECHR, Grand Chamber App no 49017/99, [1], [23]-[28].

¹⁰⁸ *Pedersen and Baadsgaard and Danish Union of Journalists (intervening) v Denmark* (n 107) [3].

¹⁰⁹ *Bartholomeusz* (n 67) 241.

¹¹⁰ *Bartholomeusz* (n 67) 241.

significant barriers to intervention, including refusing to grant fees for legal aid, NGOs tend to only intervene in the most important cases.¹¹¹

3.1.4 Precedent

The European Court may reject an *amicus* brief if there is precedent that renders third-party submissions unnecessary.¹¹² For instance, in the cases of *Caleffi v Italy*¹¹³ and *Vocaturò v Italy*,¹¹⁴ the court denied the application of five trade associations to file a written submission.¹¹⁵ While the European Court denied the submissions without explanation, they were likely rejected because the issue had been recently decided and the two cases involved the simple application of precedent.¹¹⁶

3.1.5 Avoiding Duplication

The European Court may also reject third-party submissions because other parties have adequately presented the views the intervening party wishes to advance.¹¹⁷ For instance, in *Capuano v Italy*, several law societies and bar associations attempted to intervene in a case involving the length of civil proceedings.¹¹⁸ Since the government was arguing the adversary process and litigation tactics of the lawyers were responsible for the delay, the court allowed one bar association to intervene, but did not want repetitive submissions from all of those who represented similar interests.¹¹⁹

3.2 Types of Interveners

Since the European Court has adopted a more liberal position on accepting friend of the court briefs, four types of interveners have become common

¹¹¹ Shelton (n 78) 638.

¹¹² Mohamed (n 82) 206.

¹¹³ *Case of Caleffi v Italy* [1991] echr App no 11890/85, ECHR 31 [7].

¹¹⁴ *Vocaturò v Italy* [1991] echr App no 11891/85, ECHR 34 [7].

¹¹⁵ Shelton (n 78) 633.

¹¹⁶ Shelton (n 78) 632.

¹¹⁷ Shelton (n 78) 633.

¹¹⁸ *Capuano v Italy* [1987] echr App no 9381/81, ECHR 10 [6].

¹¹⁹ Shelton (n 78) 633.

in the court: states, international institutions, NGOs, and individuals.¹²⁰ States may intervene under Article 36(1) when a national brings a case against another state, or as a permissive third-party intervener at the discretion of the President of the Court.¹²¹ For instance, in *Ruiz-Mateos v Spain*,¹²² the President gave leave to both Germany and Portugal to intervene. The case involved whether Article 6(1) of the European Convention applied to constitutional courts.¹²³ Both intervening states submitted briefs that outlined how their own constitutional courts interpreted Article 6.¹²⁴

International institutions and national human rights institutions may also intervene in human rights cases.¹²⁵ In the case of *Pini, Bertani, Manera, & Atripaldi v Romania*, for example, Italian applicants brought proceedings regarding the adoption of two girls from Romania to the court.¹²⁶ The court permitted the Special Rapporteur to the European Parliament to make a submission, given his special knowledge of Romanian adoption practices.¹²⁷

The third, and most common, interventions are by NGOs, including universities.¹²⁸ Several NGOs, including Liberty and Justice, have established themselves as those who ease the burden on the court.¹²⁹ For instance, in *I. v United Kingdom*, in which the court decided a case based on the legal recognition of transsexuals in comparative law, Liberty was granted leave to intervene and submit a brief on comparative practices of transsexual recognition across different states.¹³⁰ In its judgment, the court gave a detailed summary of the Liberty report and expressly referred

¹²⁰ Harvey (n 68).

¹²¹ *Soering v United Kingdom* (n 86) [1]; *Lautsi and Ors v Italy* echr App no 30814/06, ECHR 2412 [1]; *Taxquet v Belgium* [2010] echr App no 926/05, ECHR 1806 [1]; *Kyprianou v Cyprus* [2005] echr App no 73797/01 [1].

¹²² *Ruiz-Mateos v Spain* (n 88) [5].

¹²³ *Ruiz-Mateos v Spain* (n 88) [1].

¹²⁴ *Ruiz-Mateos v Spain* (n 88) [56].

¹²⁵ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [2005] echr App no 45036/98, ECHR 440 [1]; *MSS v Belgium & Greece* [2011] echr App no 30696/09, ECHR 108 [7]; *Al-Saadoon & Anr v Secretary of State for Defence* [2017] EWCA Civ 7 (echr~section4) [6].

¹²⁶ *Pini & Ors v Romania* [2004] echr App no 78028/01 & 78030/01, EHRR 312 [1]-[11].

¹²⁷ *Pini & Ors v Romania* (n 126) [7].

¹²⁸ *Bartholomeusz* (n 67) 241.

¹²⁹ *Bartholomeusz* (n 67) 241.

¹³⁰ *I v United Kingdom* [2002] echr App no 25680/94 [38]-[40].

to it in its assessment of the petitioners' claims.¹³¹ The court noted the Liberty report documented a continuing international trend toward the legal recognition of transsexuals. The court accordingly held that banning the marriage of transsexuals violated Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms,¹³² which safeguards the right to marry and found a family.¹³³

Fourth, private individuals sometimes intervene, especially when they have been a party to the original national case and their interests will be affected by any decision made by the European Court.¹³⁴ For instance, in *Koua Poirrez v France*, an Ivory Coast national who had been adopted by French parents attempted to collect disability payments from France later in life based on his long connections with the state.¹³⁵ The applicant's French father was allowed to submit a third-party brief to bolster the claims of the applicant.¹³⁶

3.3 Impact of Third-Party Submissions

The Grand Chamber, which decides the most important and leading issues, has decided over 300 cases and has allowed interventions from NGOs in at least 65 of them.¹³⁷ However, it is difficult to find, assess, and analyse the impact that third-party submissions have had on the court.¹³⁸ The European Court rarely admits submissions from third parties, but when a submission is accepted, it is usually briefly summarised in the decision.¹³⁹ Based on these summaries, third-party submissions may affect the proceedings in several ways, including by establishing new legal principles, identifying controversial ethical questions, or establishing the importance of general issues.¹⁴⁰

¹³¹ *I. v United Kingdom* (n 130) [82].

¹³² *I. v United Kingdom* (n 130) [82].

¹³³ Council of Europe, 'European Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and No. 14' art 12.

¹³⁴ *Koua Poirrez v France* [2003] echr App no 40892/9, ECHR 458 [7].

¹³⁵ *Koua Poirrez v France* (n 134) [7].

¹³⁶ *Koua Poirrez v France* (n 134) [7].

¹³⁷ *Van den Eynde* (n 69) 280.

¹³⁸ *Van den Eynde* (n 69).

¹³⁹ *Bartholomeusz* (n 67) 240.

¹⁴⁰ *Soering v United Kingdom* (n 86) [101]-[102].

3.3.1 New Legal Principles

Friend of the court briefs can help the court in establishing a new legal principle by demonstrating that changing values dictate a break with precedent.¹⁴¹ Civil society organizations are especially valuable contributors for this purpose.¹⁴² For instance, in *Soering v United Kingdom*, the court addressed whether a state must consider Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits torture and inhumane or degrading treatment, before it extradites someone who is at risk of ill-treatment in the requesting state.¹⁴³ Amnesty International submitted a third-party brief in which it argued that a state did have such a responsibility and that the death penalty was no longer consistent with the values of member states.¹⁴⁴ The court quoted from the Amnesty brief in its judgment, and while it did not agree that the death penalty was a *per se* violation of the Convention, it relied on the submission in expanding the meaning of inhumane or degrading treatment under Article 3.¹⁴⁵

NGOs have similarly been successful at influencing judgments by documenting evolving international standards or customs.¹⁴⁶ In *Rantsev v Cyprus & Russia*, the organization, Interights, submitted a brief arguing that human trafficking was modern day slavery, citing decisions from the International Criminal Tribunal for the Former Yugoslavia that expanded the modern definition of slavery.¹⁴⁷ Interights further argued that under the Convention for the Protection of Human Rights and Fundamental Freedoms, states had an obligation to pass anti-trafficking legislation and discourage the demands for human trafficking.¹⁴⁸ The court referred to the Interights report in deciding that trafficking falls under the Article 4 prohibition against slavery and forced labour.¹⁴⁹

¹⁴¹ Flogaitis, Zwart and Fraser (n 65) 138.

¹⁴² Flogaitis, Zwart and Fraser (n 65) 138.

¹⁴³ *Soering v United Kingdom* (n 86) [80]; Council of Europe (n 133) art 3.

¹⁴⁴ *Soering v United Kingdom* (n 86) [101]-[102].

¹⁴⁵ *Soering v United Kingdom* (n 86) [104].

¹⁴⁶ *Rantsev v Cyprus & Russia* echr App no 25965/04, ECHR 22 [281].

¹⁴⁷ *Rantsev v Cyprus & Russia* (n 146) [264]-[268].

¹⁴⁸ *Rantsev v Cyprus & Russia* (n 146) [264]-[268].

¹⁴⁹ *Rantsev v Cyprus & Russia* (n 146) [281].

Even though the court often welcomes assistance in interpreting changing national and international norms, it maintains a conservative approach to decision-making, focusing primarily on precedent and established legal principles.¹⁵⁰ Accordingly, those briefs that focus more on philosophical and political arguments are less effective at influencing the court.¹⁵¹

3.3.2 Controversial Ethical Questions

Friend of the court briefs can be particularly effective in influencing the European Court when it decides controversial issues, especially ethical questions.¹⁵² Briefs that provide comparative law analyses are especially helpful when deciding these questions because they identify where there may already be consensus on issues before the court.¹⁵³

In *Vo v France*, for example, the court had to determine whether a ‘person’ under Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which safeguards the right to life, covered unborn children.¹⁵⁴ The court accepted submissions from both the Family Planning Association and the Centre for Reproductive Rights.¹⁵⁵ The Centre for Reproductive Rights submitted a brief that analysed legislation and case law in Europe, Canada, and the United States.¹⁵⁶ In its decision, the court summarised the analysis to justify its judgment.¹⁵⁷

In *A.T. v Luxembourg*, the European Court considered the scope of the right of access to a lawyer under Article 6 of the Convention.¹⁵⁸ Fair Trials, a human rights NGO dedicated to protecting the right to a fair trial, briefed the court on the importance of the provisions of the European

¹⁵⁰ Harvey (n 68).

¹⁵¹ Harvey (n 68).

¹⁵² Flogaitis, Zwart and Fraser (n 65) 141.

¹⁵³ Harvey (n 68).

¹⁵⁴ *Vo v France* (n 87) [6].

¹⁵⁵ Flogaitis, Zwart and Fraser (n 65) 141.

¹⁵⁶ *Vo v France* (n 87) [60]-[66].

¹⁵⁷ *Vo v France* (n 87) [67]-[73].

¹⁵⁸ *AT v Luxembourg* echr App no 30460/13, ECHR 367 [1]-[7].

Union Directive on access to a lawyer in various states, a source quoted in the court's decision.¹⁵⁹

NGOs have also intervened to provide different perspectives on such controversial issues as whether assisted suicide was a violation of the right to life,¹⁶⁰ and the definition of sexual assault.¹⁶¹ For instance, in *Pretty v United Kingdom*, the Voluntary Euthanasia Society and the Catholic Bishops' Conference of England and Wales filed briefs that presented contrasting views on whether UK laws restricting assisted suicide constituted a breach of Article 2 by limiting the right to die.¹⁶² The court quoted from both briefs, though ultimately finding no breach of Article 2.¹⁶³

3.3.3 Context and General Importance

Third-party submissions also assist the court in establishing which issues are of general importance or in providing critical context of decision-making. Under Article 43 of the European Convention, the court is required to hear 'serious issues of general importance'.¹⁶⁴ For instance, in *Karner v Austria*, regarding the treatment of homosexuals in tenancy succession laws in Austria, three NGOs with expertise on sexual orientation and discrimination submitted a joint brief highlighting the growing recognition of equal rights for unmarried same-sex and different-sex partners.¹⁶⁵ The court explicitly referred to the NGO's evidence in its conclusion that the issue was of 'general importance' suitable for hearing at the Grand Chamber.¹⁶⁶

Additionally, the court can call on parties to provide factual support for claims that the European Convention has been violated. For instance, in *Mamatkulov & Askarov v Turkey*, two Uzbek opposition politicians were

¹⁵⁹ Justice and Freshfields Bruckhaus Deringer LLP, 'To Assist the Court: Third Party Interventions in the Public Interest' (2016) 61 <<https://tinyurl.com/y9fh5fek>> accessed 11 April 2017.

¹⁶⁰ *Pretty v United Kingdom* [2015] echr App no 2346/02, ECHR 427.

¹⁶¹ *MC v Bulgaria* echr App no 39272/98, ECHR 646.

¹⁶² *Pretty v United Kingdom* (n 160) [25]-[31].

¹⁶³ *Pretty v United Kingdom* (n 160) [41]-[42].

¹⁶⁴ Council of Europe (n 133) art 43.

¹⁶⁵ *Karner v Austria* echr App no 40016/98 [36].

¹⁶⁶ *Karner v Austria* (n 165) [27].

accused of terrorist attacks against the Uzbek government. The politicians alleged that their rights under Article 3 of the European Convention had been violated. Several prominent NGOs with expertise on human rights in Uzbekistan submitted third-party briefs to help the court better understand the context for the case.¹⁶⁷ The court referred to facts highlighted by the third-party interveners, in particular that the applicants were denied their rights to communicate and to choose their attorney.¹⁶⁸ Ultimately, however, the court held that there was no breach of Article 3.

Private parties with legitimate interests in the decisions can also provide factual context. In *Taşkin & Ors v Turkey*, ten Turkish applicants brought proceedings against Turkey alleging that it had improperly granted a permit allowing a company to operate a gold mine. The company was allowed to intervene, but only to provide context regarding the permit application process.¹⁶⁹ While the company demonstrated it was in compliance with international norms, the court nevertheless decided the government had violated Article 8 by reissuing the permit because environmental degradation caused by gold-mining violated the right to respect for private and family life.¹⁷⁰

4. African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights

Created by the African Union, the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights make up the judicial regional human rights system in Africa.¹⁷¹ The court, based in Arusha, Tanzania, has both advisory and contentious jurisdiction over 'the interpretation and application of the African Charter on Human and Peoples' Rights'.¹⁷² The court has jurisdiction over states that have ratified

¹⁶⁷ *Mamatkulov & Askarov v Turkey* [2005] echr App no 46827/99, 46951/99, ECHR 64 [65].

¹⁶⁸ *Mamatkulov & Askarov v Turkey* (n 167) [87].

¹⁶⁹ *Taşkin & Ors v Turkey* [2004] echr App no 46117/99, ECHR 621 [82]-[89].

¹⁷⁰ *Taşkin & Ors v Turkey* (n 169) [82]-[89].

¹⁷¹ International Justice Resource Center, 'African Human Rights System' <<https://tinyurl.com/ycwzof8z>> accessed 27 June 2017.

¹⁷² International Justice Resource Center (n 171).

the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.¹⁷³

There are two processes by which a case comes to the court. First, a complaint might be referred to the court by either the African Commission or by an African intergovernmental organization.¹⁷⁴ Second, the court has power 'to hear cases instituted by individuals and non-governmental organizations with observer status before the African Commission, provided that the relevant State has made the necessary declaration under Article 34 of the Protocol to allow these complaints'.¹⁷⁵

The African Commission has jurisdiction over all 54 member states of the African Union.¹⁷⁶ It hears complaints 'from individuals, groups of individuals, non-governmental organizations, and States concerning alleged violations of the African Charter on Human and Peoples' Rights'.¹⁷⁷

Friend of the court participation in the African regional human rights system, including the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights, has been limited.¹⁷⁸ This section provides an overview of the African Court's and the African Commission's provisions for friend of the court participation and highlights the few instances where friends of the court have participated in the African system.

4.1 Definition and Procedure

The African Court on Human and Peoples' Rights' Rules do not directly reference friend of the court.¹⁷⁹ However, the Organization of African Unity protocol that established the court states that the court 'may receive

¹⁷³International Justice Resource Center (n 171).

¹⁷⁴International Justice Resource Center (n 171).

¹⁷⁵International Justice Resource Center (n 171).

¹⁷⁶International Justice Resource Center (n 171).

¹⁷⁷International Justice Resource Center (n 171).

¹⁷⁸Viljoen and Abebe (n 9) 22.

¹⁷⁹Rules of Court, African Court on Human and Peoples' Rights 2010.

written and oral evidence'.¹⁸⁰ Additionally, Rule 45 of the Rules of Court specifies the court may 'obtain any evidence which in its opinion may provide clarification of the facts of the case'.¹⁸¹ Rule 77 specifies that the court may authorise any 'interested entity' to offer written submissions.¹⁸² However, the President of the Court, as well as the Registrar, have stated that the court permits friend of the court briefs 'on the basis of the implied powers' in these rules.¹⁸³ Moreover, the court's Practice Directions provide for friend of the court, by allowing the court to 'on its own motion... invite an individual or organization to act as *amicus curiae* in a particular matter pending before it'.¹⁸⁴

In addition to an invitation from the court, individuals or organizations may also submit requests to the court to act as *amici curiae*, specifying the 'contribution' they would make to the case.¹⁸⁵ The court considers this request and decides 'within a reasonable time' whether to accept the request.¹⁸⁶ Once the court grants the request, the Registrar notifies the entity that made the request and that entity is invited to make a submission 'at any point during the proceedings'.¹⁸⁷ The Practice Directions further state that the court has the discretion to grant an *amicus curiae* request.¹⁸⁸

The African Commission on Human and Peoples' Rights, the complementary body that submits cases to the court, briefly deals with friends of the court in its Rules of Procedure.¹⁸⁹ Article 99 stipulates that the Commission may receive *amici curiae* briefs on an issue before it.¹⁹⁰

¹⁸⁰ Organization of African Unity (OAU), 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights' art 26(2).

¹⁸¹ Rules of Court, African Court on Human and Peoples' Rights (n 179) r 45.

¹⁸² Rules of Court, African Court on Human and Peoples' Rights (n 179) r 70.

¹⁸³ Viljoen and Abebe (n 9) 36.

¹⁸⁴ African Commission on Human and Peoples' Rights, 'Practice Directions, African Court on Human and Peoples' Rights' r 45.

¹⁸⁵ African Commission on Human and Peoples' Rights (n 184) r 42.

¹⁸⁶ African Commission on Human and Peoples' Rights (n 184) r 43.

¹⁸⁷ African Commission on Human and Peoples' Rights (n 184) r 44.

¹⁸⁸ African Commission on Human and Peoples' Rights (n 184) r 47.

¹⁸⁹ Organization of African Unity (OAU) (n 180) arts 2, 5.

¹⁹⁰ African Commission on Human and Peoples' Rights, 'Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010' r 99(16).

The Commission may allow the brief's author to address the Commission during the communication hearing for which the brief was filed.¹⁹¹ Moreover, in its investigative capacity, the Commission may hear from any person capable of 'enlightening' it.¹⁹² In both the court and the Commission, a friend of the court may submit written briefs or participate in the oral hearings if the court or Commission so decides.¹⁹³

4.2 Impact of Friend of the Court Participation

Commentators observe the African system's use of friend of the court has been 'negligible'.¹⁹⁴ Indeed, a 2014 study of friend of the court briefs in the African system found the Commission accepted briefs in only five cases.¹⁹⁵ The study did not assess the influence the briefs may have had because the Commission did not indicate how it analysed the briefs but, instead, only recognized their submissions.¹⁹⁶ However, in *Centre for Minority Rights Development (Kenya) & Minority Rights Group on Behalf of the Endorois Welfare Council v Kenya*, a case which concerned the displacement of the Endorois community from ancestral lands in Kenya, the Commission commented on the friend of the court brief of the Centre on Housing Rights and Evictions (COHRE).¹⁹⁷ The Commission remarked that the brief echoed what was already in the complainant's submissions, namely that Kenya had dispossessed the Endorois from their land without proper compensation.¹⁹⁸ Ultimately, the Commission accepted the submission, suggesting that even though a brief may repeat some information already provided, it still may be accepted.¹⁹⁹

¹⁹¹ African Commission on Human and Peoples' Rights (n 190) r 99(16).

¹⁹² Organization of African Unity (OAU), 'African Charter on Human and Peoples' Rights ("Banjul Charter")' art 46.

¹⁹³ Viljoen and Abebe (n 9) 35–36.

¹⁹⁴ Viljoen and Abebe (n 9) 22.

¹⁹⁵ Viljoen and Abebe (n 9) 32.

¹⁹⁶ Viljoen and Abebe (n 9) 33.

¹⁹⁷ *Rights Group (on Behalf of Endorois Welfare Council) v Kenya* [2009] achpr App no 276/03 [1]; Viljoen and Abebe (n 9) 33.

¹⁹⁸ *Rights Group (on Behalf of Endorois Welfare Council) v Kenya* (n 197) [2]; Viljoen and Abebe (n 9) 33.

¹⁹⁹ Viljoen and Abebe (n 9) 33.

The 2014 study revealed that the court has accepted requests in three cases, one of which was struck from the record.²⁰⁰ In *Lohé Issa Konaté v Burkina Faso*, the court directly referred to friend of the court arguments in its decision.²⁰¹ Lohé Issa Konaté, a Burkinabe journalist, wrote three articles in 2012 highlighting the alleged corruption of the State Prosecutor. The prosecutor then filed a complaint for defamation, public insult, and contempt of court against Konaté, who was found guilty and sentenced to one-year imprisonment, damages, and court costs of over 9,000 USD.²⁰² Before the African Court on Human and Peoples' Rights, Konaté argued that the sentence violated his freedom of expression protected by Article 9 of the African Charter on Human and Peoples' Rights and Article 19 of the International Convention on Civil and Political Rights (ICCPR).²⁰³ The Pan African Lawyers Union and thirteen other civil society and non-governmental organizations submitted a joint friend of the court brief in support of Konaté.²⁰⁴ The organizations argued that criminal penalties for defamation violated freedom of expression.²⁰⁵ Specifically, they argued that the relevant provisions of the African Charter, the ICCPR, and other international documents require restrictions on the right to free expression to 'be prescribed by law, necessary to meet a legitimate state interest, and proportionate to meet that interest'.²⁰⁶ The joint brief asserted that criminal penalties for defamation are disproportionate to the state's interest in protecting the reputation of public officials.²⁰⁷ Additionally, the brief argued that governments typically used laws like the Burkinabe defamation law to repress free speech and opposition voices.²⁰⁸ The brief called on the court to find Burkina Faso's defamation law incompatible with Article 9 of the African

²⁰⁰ Viljoen and Abebe (n 9) 37.

²⁰¹ *Lohé Issa Konaté v Burkina Faso* [2014] achpr App no 004/2013 [3].

²⁰² *Lohé Issa Konaté v Burkina Faso* (n 201) [5].

²⁰³ *Lohé Issa Konaté v Burkina Faso* (n 201) [9].

²⁰⁴ Donald Deya and Simon Delaney, 'Brief of Amici Curiae Centre for Human Rights & 3 Ors' 3 <<https://tinyurl.com/ybex6auo>> accessed 27 June 2017.

²⁰⁵ Deya and Delaney (n 204) 4.

²⁰⁶ Deya and Delaney (n 204) 10.

²⁰⁷ Deya and Delaney (n 204) 4.

²⁰⁸ Deya and Delaney (n 204) 5.

Charter.²⁰⁹ Notably, the friends of the court presented oral arguments during the public hearing.²¹⁰

In its judgment, the court summarised the arguments in the brief.²¹¹ The court held that except for ‘very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people,’ violations of laws regulating speech cannot impose criminal sanctions.²¹² Using a similar analysis as the friends of the court, the court found that Burkina Faso’s government failed to demonstrate how Konaté’s strict sentence was necessary and proportionate to the protection of the prosecutor’s reputation.²¹³

5. Conclusion

The Inter-American Court of Human Rights, the European Court of Human Rights, and the African human rights system, including the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights, all, either directly or indirectly, provide for friend of the court or third-party intervener participation. Despite these provisions, the respective bodies do not often refer to friends of the court submissions, which makes it difficult to assess their impact. However, friend of the court participation continues in these systems, especially in the Inter-American Court of Human Rights, indicating that friend of the court participation can effectively influence human rights in regional bodies.

²⁰⁹ Deya and Delaney (n 204) 27.

²¹⁰ *Lohé Issa Konaté v Burkina Faso* (n 201) [25].

²¹¹ *Lohé Issa Konaté v Burkina Faso* (n 201) [141]-[144].

²¹² *Lohé Issa Konaté v Burkina Faso* (n 201) [165].

²¹³ *Lohé Issa Konaté v Burkina Faso* (n 201) [167].



Chapter 6

Friend of the Court Participation in Specific Areas of Law

1. Introduction



While the previous Chapters addressed friend of the court participation in specific jurisdictions, this Chapter discusses the role the friend of the court has played in specific areas of law. Although this Chapter is subject-matter specific, there is overlap with the previous Chapters because many of the cases that address the standards for admitting a friend of the court often end up addressing specific legal issues.

As with the other Chapters, this Chapter provides a representative sample of the types of cases in which friends of the court have played a role. It is not exhaustive and is intended to be used to exemplify the value the friend of the court brings to difficult cases as well as be the starting point for those wishing to conduct additional research.

The sections first address the context under which these areas of law may be addressed in Kenya, specifically focusing on rights enumerated in the

Constitution. They then turn to how friends of the court have participated in cases in other jurisdictions that involve similar rights. As always, the analogies are not perfect, but they should provide both potential friend of the court participants and members of the Judiciary an idea of what role a friend of the court can play in developing long-lasting and productive jurisprudence.

2. Friend of the Court Participation in Election Dispute Resolution

2.1 Election Dispute Resolution in Kenya

Every Kenyan citizen is guaranteed the fundamental right to ‘free, fair and regular elections based on universal suffrage and free expression of the will of the electors’.¹ Every citizen has the right to register as a voter, to vote by secret ballot, and to run for office.² The electoral system must ensure that these rights are satisfied and, if they are not, then any person may go to court to seek redress for the violation.³ People may file a suit in their own name; on behalf of another; as a member of or in the interest of a group; as an organization; or in the public interest. In addition, any person has the right to participate as a ‘friend of the court’ in an election dispute so long as that person has a particular expertise and seeks permission from the court beforehand.⁴ These are the basics of election dispute resolution in Kenya. Although these rules seem clear, applying them can be exceedingly complex. That is especially true in election disputes because free and fair elections are the defining element of a democracy, and democracies are at their most vulnerable during election time. Every person, regardless of whether they are a party to the suit, has a stake in the outcome and a strong opinion about what the ‘right’ decision should be.

¹ ‘The Constitution of Kenya 2010’ art 38(2).

² ‘The Constitution of Kenya 2010’ (n 1) art 38(3).

³ ‘The Constitution of Kenya 2010’ (n 1) art 22.

⁴ ‘The Constitution of Kenya 2010’ (n 1) art 22(3)(e).

The immense burden placed on the judiciary is only compounded by the strict timelines. For presidential petitions, the Constitution requires that the Supreme Court resolve the dispute within 14 days of its filing.⁵ Although other petitions do not have such constitutionally imposed deadlines, there is intense pressure to resolve cases quickly. The business of government must go on, and the longer the stasis, the greater the threat to the democratic process.

Courts, however, are not well-equipped to make fast decisions. They are viewed as contemplative bodies, and this is how it should be. A court's credibility turns on its ability to resolve disputes in a thorough, well-reasoned, and transparent manner. This takes time, and often the more heated and complicated the dispute, the more time that is needed. Asking a court to decide an election dispute within 14 days is like asking a marathoner to compete in the 100-metre dash. The marathoner will compete, and may do very well, but will not be able to perfectly transfer his considerable skill to the different race.

Given the sensitivity and seriousness of election petitions, it is important for the courts to get all the assistance possible. This is where friend of the court petitions become an indispensable asset. Electoral disputes often combine complex facts, technical minutia, and detailed legal analysis. Although the parties to a dispute always carry the burden of persuading the court, they do not always provide all the necessary information or have a full grasp of the technical details involved in conducting an election. Friend of the court briefings can help with both. Experts in election observing, for example, can provide information about what happened on the day of the polling. While experts in the collection of biometric data, electronic balloting, or any number of technical elements that are involved in free and fair elections can help the court develop the kind of expertise it will need to make quick, well-reasoned decisions. Experts in international election law can guide the court to the most

⁵ 'The Constitution of Kenya 2010' (n 1) art 140(2).

salient decisions on which it can rely as it establishes the standards for reviewing the information before it. The courts can do the job without this help, but their decisions will undoubtedly be better—and be seen as better—if they can utilise the kind of expertise that friend of the court petitions provide.

As discussed in Chapters 2 and 3, the Supreme Court’s decisions regarding friend of the court participation in the 2013 presidential election dispute caused some controversy. In *Raila Odinga & Ors v Independent Electoral & Boundaries Commission & Ors*, the Law Society of Kenya, the Katiba Institute, and the Attorney-General all applied to participate as friends of the court.⁶

The Law Society and the Katiba Institute applied under Article 22(3)(e) based on their legal expertise on the issues before the court. The Attorney-General, on the other hand, argued that it should be admitted as a friend of the court based on its duty to protect the public interest.

The court accepted the application of the Attorney-General claiming that admitting it would not prejudice the court or infringe on the best interests of the parties. On the other hand, it rejected the Law Society’s and the Katiba Institute’s applications because of their perceived biases. The court held that the Law Society was biased because the Vice Chairman of the Law Society had submitted an affidavit in support of one of the parties. It held that the Katiba Institute was biased because Professor Yash Pal Ghai of the Katiba Institute had written an article arguing that Uhuru Kenyatta and William Ruto could not run for President and Vice President because of the cases pending against them at the International Criminal Court.⁷

The Supreme Court’s decision, one of the first to address the admissibility of a friend of the court under the 2010 Constitution, only provided

⁶ *Raila Odinga v Independent Electoral & Boundaries Commission & 3 Ors* [2013] Supreme Court Pet Nos 3, 4, and 5 (Consolidated), eKLR.

⁷ *Odinga Ruling on Amicus* (n 6).

limited guidance on what constituted bias or prejudice. Other than stating that allegations of bias should be taken seriously, the court did not apply any standard or conduct any deeper analysis as to the extent of bias that would be necessary to justify the denial of a friend of the court application. Similarly, the court provided little analysis to support its reason to allow the Attorney-General to participate. Because it did not provide a substantive rationale for its decision, many questioned its legitimacy.

To be fair to the court, the 14-day deadline combined with the complex issues it faced meant that it did not have the time and resources to develop lasting jurisprudence about friend of the court participation. Although the superior courts have since had an opportunity to discuss when a prospective friend of the court is qualified to participate, the issue has yet to be reconsidered in an election dispute resolution. It is therefore important to look at how other jurisdictions have treated *amicus* submissions in order to provide some guidance to the courts as they start another season of election-related litigation.

The following section discusses election dispute resolution in different countries, with a focus on the role played by friends of the court. Although it is impossible to quantify the extent to which the courts relied on the friend of the court submissions, it is clear that they have become an important part of the process that courts use to address the fast-moving and incredibly important job of resolving election disputes.

It must be noted that this Chapter is not a survey of all election dispute resolution cases. It is, instead, a discussion of cases in which *amici curiae* were admitted by the court and had some influence on the court's decision-making. Because *amici curiae* often are not mentioned in court decisions, there are undoubtedly more cases in which *amici* were both admitted and played a valuable role in educating the courts about the election dispute issues before it.

2.2 Comparative Jurisprudence on Friend of the Court Participation in Election Dispute Resolution

2.2.1 Ghana

In *Nana Addo Dankwa Akufo-Addo & 2 Ors v John Dramani Mahama & 2 Ors*,⁸ the petitioners challenged the validity of the 2012 presidential election in Ghana. The petitioners argued that the election results should be set aside and the opposition candidate declared the winner because of irregularities in the election process.

Advocate Benoni Tony Amekudze applied to appear as friend of the court. Mr Amekudze wanted to draw the court's attention to laws that had been violated during the election and provide information that would help the court determine whether a sitting president could be sued or could join in the suit. Although Mr Amekudze was given an opportunity to address the court, he was not allowed to fully present his arguments. Instead, the court cut short his presentation after noting that he had not sworn an affidavit in support of his application to appear as a friend of the court as required under the rules of procedure. Although the court had rejected the application of the *amicus*, this case is important in that it shows that the participation of *amicus* was barred for procedural, rather than substantive reasons. The Ghanaian court appeared to understand the value that an *amicus* could bring and, other than the procedural error, was ready to consider his submission.

2.2.2 India

India has a long history of election-related litigation. Regarding *amicus* participation, however, the following cases are worth noting. In *Kailash v Nanhku & Ors*, the Supreme Court of India addressed whether, among other things, the Code of Civil Procedure applied to election petitions.⁹

⁸ *Nana Addo Dankwa Akufo-Addo & 2 Ors v John Dramani Mahama & 2 Ors* [2013] Supreme Court Writ No J1/6/2013).

⁹ [2015] SCC 480 (Supreme Court).

The Supreme Court requested that a senior counsel appear as *amicus curiae* to provide the court with his expert opinion.¹⁰ The court held that the Code of Civil Procedure should be flexibly applied to election petitions, that if a conflict existed between the Code of Civil Procedure and the rules governing election petitions, the election petition rules should take precedence, and that the filing deadlines set forth in the Code of Civil Procedure could be extended by the court in exceptional circumstances.¹¹ At the conclusion of the decision, the Supreme Court noted that it had appointed *amicus curiae* because ‘the issue raised in this appeal arises frequently before the courts and is of some significance affecting a large number of cases’.¹² The Supreme Court emphasised the role *amicus* played.

He responded to the call of the Court and presented the case from very many angles bringing to the notice of the Court a volume of case law some of which we have referred to hereinabove. We place on record our appreciation of the valuable assistance rendered by [the]... Senior Advocate.¹³

Similarly, the justices in *Manoj Narula v Union of India* not only accepted the inclusion of certain lawyers as *amicus* but also went to the extent of fully analysing their contribution in their final judgment, alongside the applications of the parties to the proceedings.¹⁴ While this case concerned the Prime Ministers’ appointment of cabinet ministers with a criminal background, a phenomenon similar to elections one would note, it highlighted the importance the court placed on the contribution of the *amicus curiae*.

In *Sanjay Narayanrao Meshram v The Election Commission Of India*, the petitioner contended that Respondent 7, Sudhir Laxmanrao who was a

¹⁰ *Kailash v Nanhku & Ors* (n 9) 2.

¹¹ *Kailash v Nanhku & Ors* (n 9) 13–14.

¹² *Kailash v Nanhku & Ors* (n 9) 14.

¹³ *Kailash v Nanhku & Ors* (n 9) 14.

¹⁴ *Manoj Narula v Union of India* [2014] Supreme Court Writ Pet (Civil) No 289 OF 2005, 9 SCC 1, 9, 12–13, 22.

Member of the State Legislative Assembly from Umred Constituency of Nagpur district could no longer hold that position as he was previously convicted of two criminal cases. Although the court disagreed with the *amicus*' argument that the subsequent acquittal of Respondent 7 was irrelevant, it did hold that Respondent 7 was disqualified from serving as a Member of Legislative Assembly from the date of his conviction.

The court issued a similar ruling in *Krishnamoorthy v Sivakumar & Ors*, which concerned whether a governmental official had failed to disclose his criminal history.¹⁵ The validity of the election of a district president was questioned because he had filed false information in order to conceal criminal cases that were pending against him.¹⁶ The court relied on statutory analysis submitted by *amicus* in arriving at a decision. It held that the failure to disclose his criminal cases interfered with the free exercise of the electoral rights of voters.

Hoti Lal v State of U.P. & Ors addressed the propriety of the election of an official to a constituency that was reserved for persons from a different caste.¹⁷ Court-appointed *amicus* addressed the constitutionality of recent statutory amendments.¹⁸ The court relied heavily on the arguments of the *amicus* and expressed its appreciation for the *amicus*' contributions.¹⁹

In *Disabled Rights Group v Chief Election Commissioner & Anr*, the petitioner argued that the lack of facilities for persons with disabilities violated his right to participate in elections.²⁰ The petitioner, together with the *amicus*, identified what facilities were needed for persons with disabilities to exercise their election rights.²¹ The court agreed that the Election Commission should direct the officials at the polling stations to provide necessary facilities

¹⁵ (2015) 3 SCC 467.

¹⁶ *Krishnamoorthy v Sivakumar & Ors* (n 15) [3].

¹⁷ (2002) 3 UPLBEC 2024.

¹⁸ *Hoti Lal v State of U.P. & Ors* (n 17) [11].

¹⁹ *Hoti Lal v State of U.P. & Ors* (n 17) [49]-[50].

²⁰ *Writ Pet (Civ) No 187 OF 2004* 5 Oct 2007.

²¹ *Disabled Rights Group v Chief Election Commissioner & Anr* (n 20) [2].

that meet the needs of the disabled voters and to also keep disabled voters informed about the availability of these facilities.²²

2.2.3 Uganda

The approach taken by Ugandan courts is discussed extensively in Chapter 3. The leading Ugandan case on *amicus* participation in election dispute cases is *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof Oloka Onyango & 8 Ors.*²³ The petitioner was one of the candidates in the presidential election that was held on 18 February 2016. Amama Mbabazi challenged the results of the election and sought a declaration that Yoweri Kaguta Museveni was not validly elected as the President of the Republic of Uganda. He requested that the court annul the election. The petitioner contended that the election did not comply with the Presidential Elections Act 2005, the Electoral Commission Act 1997 and the 1995 Constitution and that this affected the result of the elections in a substantial manner. He also stated that several illegal practices and electoral offences were committed. The court held that the 1st Respondent was validly elected as the president.

In this case, there were two applications for admission as friends of the court. The first application was by 9 law professors from the Makerere University, while the second was by a group of civil society organization in Uganda. The organizations' application was dismissed. In the Ruling, the court said that the organizations had not met requirements to be admitted as friends of the court, arguing that the expertise of Crispy Kaheru, which the applicant had relied on to justify its application, was not enough. The application by the law professors was, however, allowed by the court. The court said it was satisfied that the applicants raised relevant points of law and would benefit the court in the hearing. The court observed that the applicants were competent, and experienced in the field of law and human rights. The court also stated that the public interest outweighed

²² *Disabled Rights Group v Chief Election Commissioner & Anr* (n 20) [7].

²³ [2016] Supreme Court Civ App 02 of 2016, 2 UGSC.

the concerns and the objections raised by the respondents seeking to block the admission of the professors, on the ground some of them had in their previous writings exhibited bias against the 1st Respondent, Yoweri Kaguta Museveni. Although the neutrality of the *amicus* is a significant factor, the court held that it is not the only determining factor and, as a result, determined that *amicus* should be admitted.

2.2.4 South Africa

In *United Democratic Movement v President of the Republic of South Africa & Ors (African Christian Democratic Party & Ors Intervening; Institute for Democracy in South Africa & Anr as Amici Curiae) (No 2)*, the South African Constitutional Court addressed the Constitutionality of statutory amendments that allowed politicians to switch parties while retaining their elected positions under certain circumstances.²⁴

The Institute for Democracy in South Africa and the Research Unit for Legal and Constitutional Interpretation were granted leave to appear as *amici curiae* based on their electoral expertise.²⁵ The *amici* argued, among other things, that the amendments violated the Constitution because they implicated the rights to vote and to proportional representation and, therefore, could not be limited by statute.²⁶

The Constitutional Court addressed the arguments of the *amici* extensively in their opinion, ultimately holding that one of the challenged amendments did violate the Constitution.²⁷

²⁴ [2002] Constitutional Court CCT23/02, ZACC 21 [1]-[3], [10].

²⁵ *United Democratic Movement v President of the Republic of South Africa & Ors (African Christian Democratic Party & Ors Intervening; Institute for Democracy in South Africa & Anr as Amici Curiae) (No 2)* (n 24) [9].

²⁶ *United Democratic Movement v President of the Republic of South Africa & Ors (African Christian Democratic Party & Ors Intervening; Institute for Democracy in South Africa & Anr as Amici Curiae) (No 2)* (n 24) [15].

²⁷ *United Democratic Movement v President of the Republic of South Africa & Ors (African Christian Democratic Party & Ors Intervening; Institute for Democracy in South Africa & Anr as Amici Curiae) (No 2)* (n 24) [114], [121].

2.2.5 United States

Amicus curiae participation may be most active in the United States. That, combined with the fact that courts and *amicus* participants are more likely to publish their briefs online, makes it much easier to identify cases in which *amici* participated and to analyse their arguments. However, as noted in Chapter 4, because the United States courts often do not refer to *amici* in their decisions, it is harder to tell what impact the briefings have had on the court's decisions.

The cases discussed below are a mere sampling of the *amicus* advocacy in election dispute cases. The section begins, of course, with *Bush v Gore*, the most widely known election dispute case in the United States, and perhaps the world. It then goes on to discuss *amicus* participation in other United States Supreme Court cases addressing such issues as the statutory interpretation of voting rights legislation, and the proper standards for considering the constitutionality of legislative redistricting.

In *Bush v Gore*, the United States Supreme Court addressed challenges to the presidential election results in the state of Florida. The litigation was particularly significant because the outcome of the election in Florida would tip the electoral college votes and determine whether George W. Bush or Al Gore would become the president of the United States. *Amici* briefs were filed by nine parties, including the Attorney-General for the State of Alabama, the Florida House of Representatives, the Brennan Center for Justice, the Attorney-General of Florida, the National Bar Association, William H. Haynes, Michael Wasserman, Mary Ann Smania, and Robert Harris.²⁸ The parties to the case provided blanket consent for the receipt of *amicus* briefs. The issues addressed in the briefs ranged from the counting of overseas ballots,²⁹ the merits of the underlying

²⁸ *Bush v Gore* (2000) 531 US 98 (Supreme Court) n *.

²⁹ Bruce J Terris and Roger J Bernstein, 'Brief *Amicus Curiae* of Robert Harris, Steven Medina, and Other Florida Voters: *Bush v Gore*, No. 00-949 in the Supreme Court of the United States' 6 <<https://tinyurl.com/y78ntuwu>> accessed 14 July 2017.

decision,³⁰ the reliability of the recounts,³¹ what constitutes a legal vote,³² the constitutional consequences of failing to conduct a complete recount of votes,³³ recommendations for electoral reforms,³⁴ whether the Supreme Court had jurisdiction to hear the dispute,³⁵ whether Florida law had adequate procedures for determining voter intent,³⁶ the obligation of state legislatures to abide by state constitutional provisions,³⁷ and whether cameras should be allowed in the court during the proceedings.³⁸

Not all of these issues were addressed by the court, but it is certain that many of them will come up in other litigation, whether in state courts or federal courts in the United States. The briefs, themselves, provide excellent resources for prospective friend of the court applicants to determine how such litigation is conducted in another jurisdiction and how to frame arguments as a friend of the court.

In addition to *Bush v Gore*, *amici curiae* have participated in several other cases before the Supreme Court. For example, in *Husted v A. Philip Randolph Institute*, Judicial Watch submitted an *amicus* brief in which it discussed the proper way to interpret the National Voter Rights Act of

³⁰ Roger J Magnuson and Charles Fried, 'Brief *Amicus Curiae* of the Florida House of Representatives and Florida Senate in Support of Neither Party and Seeking Reversal: *Bush v Gore*, No. 00-949 in the Supreme Court of the United States' 3 <<https://tinyurl.com/yaqe33u9>> accessed 14 July 2017.

³¹ Magnuson and Fried (n 30) 2.

³² Michael Wasserman, 'Brief *Amicus Curiae* of Michael Wasserman in Support of Neither Party: *Bush v Gore*, No. 00-949 in the Supreme Court of the United States' 1 <<https://tinyurl.com/y8b62e3j>> accessed 18 July 2017.

³³ Evett Simmons and David Earl Honig, 'Brief *Amicus Curiae* of the National Bar Association in Support of Respondents: *Bush v Gore*, No. 00-949 in the Supreme Court of the United States' 4 <<https://tinyurl.com/ybah8kbz>> accessed 14 July 2017; Burt Neuborne, Nathaniel Persily and Phillip Gallagher, 'Brief *Amicus Curiae* of the Brennan Center for Justice at New York University School of Law in Support of Respondents: *Bush v Gore*, No. 00-949 in the Supreme Court of the United States' 16.

³⁴ Simmons and Honig (n 33) 10.

³⁵ Robert A Butterworth, 'Brief *Amicus Curiae* for Butterworth in Support of Respondents: *Bush v Gore*, No. 00-949 in the Supreme Court of the United States' 2 <<https://tinyurl.com/yca8q5hh>> accessed 14 July 2017.

³⁶ Butterworth (n 35) 10.

³⁷ Neuborne, Persily and Gallagher (n 33) 9; Bill Pryor, Charles B Campbell and Office of the Alabama Attorney-General, 'Brief *Amicus Curiae* for the State of Alabama Supporting Reversal: *Bush v Gore*, No. 00-949 in the Supreme Court of the United States' i <<https://tinyurl.com/ybatb2ma>> accessed 14 July 2017.

³⁸ Mel Pearlman, 'Brief *Amicus Curiae* for Mary Ann Smania: *Bush v Gore*, No. 00-949 in the Supreme Court of the United States' 4 <<https://tinyurl.com/y8dpxmrx>> accessed 18 July 2017.

1993.³⁹ Judicial Watch asserted that the Court of Appeals had misapplied principles of statutory construction when it interpreted National Voter Rights Act and other statutes.⁴⁰

The United States government participated as *amicus curiae* in *Bethune-Hill v State Bd of Elections*.⁴¹ The United States provided its opinion regarding the proper standards to consider when deciding whether legislative redistricting violated constitutional and statutory mandates. It asserted that, although the underlying court had applied the wrong standard for addressing the redistricting conflict, its decision should be affirmed.⁴²

In *Crawford v Marion County Election Board* petitioners challenged Indiana's law requiring voters to produce a photo ID before being allowed to cast their ballot.⁴³ More than 40 *amici* briefs were filed with court, including ones by current and former state secretaries of state, joint brief filed by the State of Texas and several states, and a brief filed by the Brennan Center for Justice.⁴⁴ The former state secretaries of state and the Brennan Center for Justice asserted that the voter ID laws would impose an undue burden on voters, whereas the State of Texas argued that concerns about voter fraud justified the voter ID requirements and that the law did not significantly burden voters.

A majority of the Supreme Court upheld the voter ID law and, in doing so, referred to the State of Texas' survey of state practice on photo

³⁹ *Husted v Randolph Institute, et al* US Sup Ct No 16-980 (cert granted 30 May 2017).

⁴⁰ Robert D Popper, 'Brief of Amicus Curiae Judicial Watch in Support of Petitioners' 4-6 <<https://tinyurl.com/y89m6jdz>> accessed 5 June 2017.

⁴¹ (2017) 137 S Ct 788 (Supreme Court).

⁴² US Solicitor General, '*Bethune-Hill v State Bd of Elections, Amicus Brief for the United States in Support of Vacatur in Part and Affirmance in Part*' 9-28 <<https://tinyurl.com/yjcwvtv5uk>> accessed 18 July 2017.

⁴³ *Crawford v Marion County Election Bd* 128 S Ct 1610 (Supreme Court) 1613.

⁴⁴ Daniel Kolb, 'Brief Amicus Curiae of Current and Former State Secretaries of State in Support of Respondents: *Crawford v Marion Cty Election Bd*, Nos. 07-21 and 07-25 in the Supreme Court of the United States' <<https://tinyurl.com/y8myn8cl>> accessed 18 July 2017; R Ted Cruz, 'Brief Amicus Curiae of the State of Texas, et Al in Support of Respondents: *Crawford v Marion Cty Election Bd*, Nos. 07-21 and 07-25 in the Supreme Court of the United States' <<https://tinyurl.com/yjcw33mpu>> accessed 18 July 2017; Sidney Rosdeitcher, 'Brief Amicus Curiae of the Brennan Center for Justice in Support of Petitioners: *Crawford v Marion Cty Election Bd*, Nos. 07-21 and 07-25 in the Supreme Court of the United States' <<https://tinyurl.com/y9lccocju>> accessed 18 July 2017.

identification.⁴⁵ Justice Souter dissented, however. In his opinion, he cited the brief from the current and former secretaries of state explaining that Indiana's voter ID laws were some of the most restrictive in the country and describing the difficulties in obtaining photo identification.⁴⁶ He cited information from the Brennan Center for Justice briefing stating that the voter ID laws would not sufficiently address the concerns of voter fraud.⁴⁷

3. Friend of The Court Participation in Economic, Social and Cultural Rights Cases

3.1 Economic, Social, and Cultural Rights in Kenya

Kenya's Bill of Rights is the 'framework for social, economic, and cultural rights'.⁴⁸ Article 43 specifically addresses economic and social rights and asserts that every person has the right:

- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
- (b) to accessible and adequate housing, and to reasonable standards of sanitation;
- (c) to be free from hunger, and to have adequate food of acceptable quality;
- (d) to clean and safe water in adequate quantities;
- (e) to social security; and
- (f) to education.

⁴⁵ *Crawford v Marion County Election Bd* (2008) 553 US 181 (Supreme Court) 1620 n 15.

⁴⁶ *Crawford v Marion County Election Bd*. (n 45) 1630, 1634–35 (Souter, J dissenting).

⁴⁷ *Crawford v Marion County Election Bd*. (n 45) 1637 (Souter, J dissenting).

⁴⁸ 'The Constitution of Kenya 2010' (n 1) art 19(1).

These rights are the basic necessities for a person to thrive as a member of society. These are the building blocks on which all other rights depend. Ensuring that these rights are realised is far from simple. In a complex and dynamic society, rights interlink and often conflict. Determining whether these rights have been violated requires the court to consider a variety of factors, many of which are beyond its expertise. Conceptual problems, such as what constitutes adequate food, or what does the right to health care services entail, combine with practical problems such as how to craft a remedy when these rights are violated. All of these problems require not just legal, but also technical and social expertise. To determine how to apply the law, the court must have a detailed understanding of the problem from a variety of perspectives.

Amicus curiae can help the court gain those perspectives and get a more global understanding of how to address the conceptual and practical problems before it. As exemplified in the cases below, friend of the court participants have provided insight into how best to enforce the rights. Although in some of the cases the courts did not always accept the position taken by the friend of the court participants, it is clear that the court decisions were better, and more thoroughly thought out, as a result of the expertise provided by the friends of the court.

3.2 Comparative Jurisprudence on the Role of the Friend of the Court in Economic, Social and Cultural Rights Cases

3.2.1 South Africa

One of the early cases to address economic, social and cultural rights under the 1996 Constitution of South Africa is *Republic of South Africa & Ors v Grootboom & Ors*.⁴⁹ This case addressed the state's duty to take reasonable measures to progressively realise the constitutional right to adequate housing.⁵⁰ Both the Legal Resources Centre and the Community

⁴⁹ [2000] Constitutional Court CCT 11/00, ZACC 19.

⁵⁰ Constitution of the Republic of South Africa, 1996 s 26.

Law Centre of the University of the Western Cape were admitted as friends of the court.⁵¹ The two centres presented a thorough critique of the government response to the rights contested in the case, combining fact and law to elucidate the technical application of the Constitution to the experiences of the Petitioners. The Constitutional Court accepted the centres' argument that the case involved the constitutional right to housing. In addition, the *amici* argued that the government should be bound to provide the minimum core obligations identified under international human rights law.⁵² The court, however, declined to determine whether there was a minimum core content to the right to adequate housing, as had been suggested by the *amici*.⁵³

In *Minister of Health & Anr v New Clicks South Africa Ltd & Ors*, the Constitutional Court addressed the government's constitutional obligation to provide access to health care services.⁵⁴ This case concerned government regulations for the pricing of medicine and, in particular, how to remedy constitutional defects in the regulations.

Treatment Action Campaign (TAC) was admitted as friend of the court. In its submissions, the TAC recommended a different remedy than the lower courts and the parties had proposed.⁵⁵ TAC illustrated its ability to rely upon affidavit evidence in its arguments regarding legislative history, administrative inaction, and the necessity to amend the Act. Additionally, the TAC made submissions on the infringement of rights, the efficacy and legality of certain judicial remedies, and the factual basis upon which their considerations are made, such that the judicial solution may be tailored to the facts. The TAC also submitted on the intended consequence of the regulations on business for small rural and courier pharmacies and how this would impact on access to medicines for poor communities. The case

⁵¹ *Republic of South Africa & Ors v Grootboom & Ors* (n 49) [17], [27].

⁵² *Republic of South Africa & Ors v Grootboom & Ors* (n 49) [18], [29]-[33].

⁵³ *Republic of South Africa & Ors v Grootboom & Ors* (n 49) [33].

⁵⁴ *Minister of Health & Anr v New Clicks South Africa (Pty) Ltd & Ors* [2005] Constitutional Court CCT 59/2004, ZACC 14 [1].

⁵⁵ *Minister of Health & Anr v New Clicks South Africa (Pty) Ltd & Ors* (n 54) [791].

ultimately turned on the submissions of the TAC, with the court finding, among other things, that dispensing fee regulations would affect access to medicines for poor communities because of their impact on small rural and courier pharmacies.

In *Schubart Park Residents Association & Ors v City of Tshwane Metropolitan Municipality & Anr*, the Socio-Economic Rights Institute of South Africa (SERI-SA) was admitted as friend of the court without any objections from the parties.⁵⁶ The case dealt with the proper interpretation of section 26(3) of the Constitution, which prohibits the eviction of one from their home without a court order. SERI-SA presented both a factual and legal argument in support of the petitioners' claim that their rights under section 26(3) had been violated. SERI-SA provided a legal analysis of the difference between 'eviction' and 'evacuation,' and applied that criterion to the facts of the case to determine that the petitioners were evicted. Further, SERI-SA rejected the City's claim that they were within their powers to even temporarily evict the petitioners. Finally, SERI-SA made submissions on the appropriate relief that the court should grant, again demonstrating its interest in a particular resolution to the case. Although the court found that there had been no eviction but a temporary removal, the court issued orders that would protect the interests of the people subject to removal and allow them to engage in the removal process.

In *The Governing Body of the Juma Masjid School & Ors v Essay N.O. & Ors*, a private property owner sought to evict a public school operating within its property.⁵⁷ The Centre for Child Law and the SERI-SA were admitted as friends of the court and made submissions on the failure of the High Court to consider as paramount the best interests of the children in rendering its decision.⁵⁸ Consistent with the *amicus*' argument, the

⁵⁶ *Schubart Park Residents' Association & Ors v City of Tshwane Metropolitan Municipality & Anr* [2012] Constitutional Court CCT 23/12, ZACC 26 [16].

⁵⁷ *Governing Body of the Juma Masjid Primary School & Ors v Essay NO & Ors* [2011] Constitutional Court CCT 29/10, ZACC 13 [1].

⁵⁸ *Governing Body of the Juma Masjid Primary School & Ors v Essay N.O. & Ors* (n 57) [10], [26].

Supreme Court found that the lower court had not properly considered the best interests of the child and the children's right to education.⁵⁹

The rights to health and education were addressed in *Head of Department, Department of Education, Free State Province v Welkom High School & Anr*; *Head of Department, Department of Education, Free State Province v Harmony High School & Anr*.⁶⁰ In this case, the Constitutional Court considered whether schools' pregnancy policies constituted an infringement of the constitutional rights of pregnant learners, including the rights to human dignity, privacy, bodily integrity, freedom from unfair discrimination, and basic education.⁶¹ Equal Education and Centre for Child Law were admitted as friends of the court. Their arguments asserting the right to education were considered by the court in its decision to vacate the lower court's order affirming the school's policies.

The right to water and electricity was addressed in *City Council of Pretoria v Walker*, in which the National Electricity Regulator was admitted as *amicus*. The National Electricity Regulator provided an analysis of cross-subsidisation—the practice of charging higher prices to one group of consumers to subsidise lower prices for other consumers—in the pricing of electricity.⁶² The court found that the discriminatory charging that favoured poor neighbourhoods was constitutional.⁶³

3.2.2 Colombia

A friend of the court was admitted in *Demanda De Inconstitucionalidad Contra El Artículo 183 De La Ley 115 De 1994 'por La Cual Se Expide La Ley General De Educación'*, which challenged the constitutionality of

⁵⁹ *Governing Body of the Juma Masjid Primary School & Ors v Essay N.O. & Ors* (n 57) [66]-[72].

⁶⁰ [2013] Constitutional Court CCT 103/12, ZACC 25.

⁶¹ *Head of Department, Department of Education, Free State Province v Welkom High School & Anr*; *Head of Department, Department of Education, Free State Province v Harmony High School & Anr* (n 60) [32].

⁶² *City Council of Pretoria v Walker* [1998] ZACC 1 [61].

⁶³ *City Council of Pretoria v Walker* (n 62) [99].

charging of fees for primary education.⁶⁴ The Cornell International Human Rights Clinic, Robert F. Kennedy Center for Justice and Human Rights, and Association Nomadesc participated as friend of the court. The friend of the court submitted that countries with similar economic positions as Colombia are fulfilling their international legal obligations to provide free education by: (1) incorporating this duty into their constitutions and national legislation; (2) interpreting constitutional and legislative guarantees consistently with these obligations; and (3) fulfilling their legal commitments to free education in practice. The Kennedy Center requested that the court consider the constitutions, legislations and practice of other Latin American countries in evaluating the constitutionality of Article 183 of Law 115 of 1994. In its decision, the court ruled that charging fees for primary education violated the Colombian Constitution and cited a number of the treaties raised by *amicus*.⁶⁵

In another collective interest case, *amici curiae* from around the world submitted briefs to advise the court in a 2006 case challenging the criminalization of abortion in Colombia.⁶⁶ The plaintiffs in C-355/2006 argued that the criminalization of abortion in all circumstances found in Articles 122, 123, and 124 of the Penal Code violated women's constitutional rights, including the rights to dignity, life, and health.⁶⁷ The court received several *amicus* briefs concerning abortion rights and restrictions.⁶⁸ Arguments offered by *amici* against the legalization of abortion included that the challenged Penal Code articles protect the fetus's right to life.⁶⁹ Additionally, *amici curiae* in favour of upholding the articles

⁶⁴ [2010] Corte Constitucional [CC] [Constitutional Court] Sentencia 376/10; expediente D-7933.

⁶⁵ *Demanda De Inconstitucionalidad Contra El Artículo 183 De La Ley 115 De 1994 'por La Cual Se Expide La Ley General De Educación'* (n 64) 2 (reference is to English language version available at <https://tinyurl.com/y76zqvmh>).

⁶⁶ [2006] Corte Constitucional [CC] [Constitutional Court] sentencia c-355/06, expedientes D-6122, 6123 y 6124; 'World Experts Submit Amicus Briefs to Stop Legalization of Abortion in Colombia' (*Catholic News Agency*) <<https://tinyurl.com/y7og6cff>> accessed 15 July 2017.

⁶⁷ *Sentencia C-355/06, Expedientes D-6122, 6123 Y 6124* (n 66); 'World Experts Submit Amicus Briefs to Stop Legalization of Abortion in Colombia' (n 66).

⁶⁸ *Sentencia C-355/06, Expedientes D-6122, 6123 Y 6124* (n 66); 'World Experts Submit Amicus Briefs to Stop Legalization of Abortion in Colombia' (n 66).

⁶⁹ *Sentencia C-355/06, Expedientes D-6122, 6123 Y 6124* (n 66); 'World Experts Submit Amicus Briefs to Stop Legalization of Abortion in Colombia' (n 66).

argued that *res judicata* barred the court from considering the issues in this case, as they had been addressed and resolved in previous Constitutional Court decisions.⁷⁰

The court also received several briefs arguing for the lifting or modification of abortion restrictions in Colombia.⁷¹ For instance, the organization Catholics for a Free Choice, wrote an *amicus* brief that challenged the Catholic Church's official position on abortion (as Colombia is predominantly Catholic⁷²) and argued that the complex teachings of the Catholic Church leave room for abortion rights.⁷³ The Center for Reproductive Rights (CRR) approached the issue differently, arguing that other states, including Portugal, Italy, and Germany, have balanced the rights of pregnant women with the rights of fetuses.⁷⁴ CRR argued that although these states differ in their approach to abortion, they all permitted abortion in three cases: (1) pregnancy resulting from rape; (2) a threat to the life or health of the pregnant woman posed by the pregnancy; and (3) where the fetus suffers from severe mental defects or physical defects.⁷⁵ For CRR, these cases represent the minimum standards for protecting a woman's right to health, dignity, and life.⁷⁶

In its decision, the court referenced and, at times, directly addressed *amici* arguments.⁷⁷ For instance, the court mentioned and refuted *amici curiae* assertions that Colombia's international law obligations through human

⁷⁰ *Sentencia C-355/06, Expedientes D-6122, 6123 Y 6124* (n 66); Women's Link Worldwide, 'C-355/2006, Excerpts of the Constitutional Court's Ruling That Liberalized Abortion in Colombia' 16 <<https://tinyurl.com/y9ttnmey>> accessed 15 July 2017.

⁷¹ *Sentencia C-355/06, Expedientes D-6122, 6123 Y 6124* (n 66); Women's Link Worldwide (n 70) 16.

⁷² Brief of Amici Curiae Catholics for a Free Choice, Catholics for a Free Choice–Canada, the Loretto Women's Network, the National (US) Coalition of American Nuns (NCAN) and the Women's Alliance for Theology, Ethics and Ritual in Support of Case D-5764: Constitutional Challenge to Article 122 of LAW 599 OF 2000, Legal Code' 16.

⁷³ Brief of Amici Curiae Catholics for a Free Choice, Catholics for a Free Choice–Canada, the Loretto Women's Network, the National (US) Coalition of American Nuns (NCAN) and the Women's Alliance for Theology, Ethics and Ritual in Support of Case D-5764: Constitutional Challenge to Article 122 of LAW 599 OF 2000, Legal Code' (n 72) 16.

⁷⁴ The Center for Reproductive Rights and others, 'Amicus Brief Presented Before the Colombian Constitutional Court (Case No. D5764)' 1, 3, 4, 7 <<https://tinyurl.com/yd5v9d3l>> accessed 15 July 2017.

⁷⁵ The Center for Reproductive Rights and others (n 74) 16.

⁷⁶ The Center for Reproductive Rights and others (n 74) 1.

⁷⁷ *Sentencia C-355/06, Expedientes D-6122, 6123 Y 6124* (n 66); Women's Link Worldwide (n 70) 16–17, 24.

rights treaties mandate the criminalization of abortion in all cases.⁷⁸ Through citing prior case law on the interpretation of international obligations, the court concluded that Colombia's international obligations do not result in an unconditional duty to protect the life of an unborn fetus.⁷⁹

Ultimately, the court upheld Article 122 with the understanding that abortion was not criminal in cases of: (1) rape, incest, or another criminal act; (2) severe malformations that render the fetus unviable, as certified by a medical doctor; and (3) pregnancy that presents risks to the life or health of the pregnant woman, as certified by a medical doctor.⁸⁰ The similarity between the court's exceptions to illegal abortion and CRR's exceptions suggests that the court seriously considered CRR's and similar *amicus*'s arguments.

3.2.3 India

In India, *Avinash Mehrotra v Union of India & Ors* case dealt with infrastructure failures at Indian schools that had resulted in the death of a number of children and put many others at risk.⁸¹ The court appointed Senior Counsel Colin Gonsalves as friend of the court to advise on guidelines that would be followed in establishing safety guidelines. The court stated that the *amicus* brief 'crystalliz[ed] a minimum set of safety for schools. By their own admission, States have not met these standards, and they have welcomed this court's guidance in achieving improvement'.⁸² Based on the *amicus*' recommendations, the court established fire safety measures, teacher training, school building specifications, and inspection requirements.⁸³ The court then directed government agencies to ensure that the schools met the standards and subsequently to report its findings to the court.⁸⁴

⁷⁸ *Sentencia C-355/06, Expedientes D-6122, 6123 Y 6124* (n 66); *Women's Link Worldwide* (n 70) 23.

⁷⁹ *Sentencia C-355/06, Expedientes D-6122, 6123 Y 6124* (n 66); *Women's Link Worldwide* (n 70) 24.

⁸⁰ *Sentencia C-355/06, Expedientes D-6122, 6123 Y 6124* (n 66); *Women's Link Worldwide* (n 70) 69.

⁸¹ *Avinash Mehrotra v Union of India & Ors* [2009] Supreme Court Writ Pet (Civil) 483 of 2004, 6 SCC 398.

⁸² *Avinash Mehrotra v Union of India & Ors* (n 81) [17].

⁸³ *Avinash Mehrotra v Union of India & Ors* (n 81) [35].

⁸⁴ *Avinash Mehrotra v Union of India & Ors* (n 81) [40]-[41].

3.2.4 Canada

In *Reference re Secession of Quebec*, the Supreme Court of Canada appointed a friend of the court to argue on behalf of the Province of Quebec when Quebec refused to participate in the case.⁸⁵ The friend of the court objected to the court's jurisdiction to hear the question, challenging the ability of the court to apply international law to the secession question. It was argued that the issue involved political questions that could not be adjudicated by the court.⁸⁶ In argument, the friend of the court further submitted points on the Province's right to self-determination and was a strong advocate on behalf of the absent party.⁸⁷ This novel role of the friend of the court is indicative of the malleable role the friend of the court may fill at common law, allowing gaps in the legal landscape to be filled with their expertise and zealous representation of legitimate legal arguments.

4. Friend of the Court Participation in Environmental Law Cases

4.1 Environmental Rights in Kenya

The Preamble to Kenya's Constitution states that 'We, the people of Kenya' are 'respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations'.⁸⁸ Article 10 establishes sustainable development as a national value and principle binding all State actions.⁸⁹ Article 11 explicitly links cultural heritage with environmental resources.⁹⁰

Article 42 establishes the right to a clean and healthy environment as a fundamental right guaranteed to present and future generations. Article

⁸⁵ *Reference re Secession of Quebec* (1998) 2 SCR 217 [4].

⁸⁶ *Reference re Secession of Quebec* (n 85) [4].

⁸⁷ *Reference re Secession of Quebec* (n 85) [90]-[91].

⁸⁸ 'The Constitution of Kenya 2010' (n 1) preamble.

⁸⁹ 'The Constitution of Kenya 2010' (n 1) art 10(1)(d).

⁹⁰ 'The Constitution of Kenya 2010' (n 1) art 11(2)(b).

69 requires the state to manage the environment sustainably, preserve tree cover and biodiversity, and ensure that development is done in a manner that does not cause undue environmental harm.⁹¹ The State, however, is not the only one charged with this duty. The Constitution also states that

Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁹²

In short, the Constitution recognises that the environment is at the heart of any community, and all rights are contingent on its protection.

The Constitution also imposes on the courts a duty to interpret and enforce these rights. The courts are the primary arbiter of allegations that the right to a clean and healthy environment has been violated, and the courts are given specific powers to enjoin activity that may harm the environment, compel public officers to take actions to protect the environment, and compensate for any harms done to the environment.⁹³ Because a harm to the environment is automatically a harm to all, an applicant before the court need not show any loss or injury because of the alleged violations.⁹⁴

4.2 Comparative Jurisprudence on the Role of the Friend of the Court in Environmental Law Cases

4.2.1 India

Environment related cases may involve complex science requiring high levels of expertise to resolve. This makes it necessary in some of these cases for the court to appoint *amici curiae*.⁹⁵ Justice Balakrishnan of the

⁹¹ 'The Constitution of Kenya 2010' (n 1) art 69(1).

⁹² 'The Constitution of Kenya 2010' (n 1) art 69(2).

⁹³ 'The Constitution of Kenya 2010' (n 1) art 70(1)-(2).

⁹⁴ 'The Constitution of Kenya 2010' (n 1) art 70(3).

⁹⁵ KG Balakrishnan, 'Seminar on "Law and Environment"' (Asia-Pacific Jurists Association (Punjab & Haryana Chapter), Chandigarh, India, 23 May 2009) 3–4 <<https://tinyurl.com/n7bqgxc>> accessed 11 May 2017.

Supreme Court explained that *amici curiae* are crucial to environmental cases because the court needs to have ‘an accurate understanding of the environmental problem as well as explore feasible solutions’.⁹⁶ The Justice noted that expertise was critical in the Supreme Court’s decisions on ‘vehicular pollution, solid waste, management and forest conservation’.⁹⁷

In *In re: Networking of Rivers*, the government proposed a project that would inter-link several rivers in order to resolve issues India was facing regarding water.⁹⁸ When the government failed to initiate the proposed project, the court directed the government to implement the project.⁹⁹ The Supreme Court appointed an *amicus curiae* to oversee the project’s implementation, allowing the *amicus curiae* to ‘file contempt petition in this court, in the event of default or non-compliance of the directions contained in this order’.¹⁰⁰

In December 2015, the Supreme Court of India issued an order regarding air pollution reduction that banned ‘the sale of diesel passenger vehicles with engine capacity of 2 litres and above’ and ‘directed taxis in Delhi and the National Capital Region to shift to CNG fuel’.¹⁰¹ The Supreme Court’s orders provided more protection against air pollution than any other previous proposal.¹⁰² To aid in the case, the Supreme Court appointed Harish Salve as *amicus curiae*, with the help of the Solicitor General Ranjit Kumar.¹⁰³ Salve drafted the directions that the Supreme Court ultimately approved.¹⁰⁴

⁹⁶ Balakrishnan (n 95) 3–4.

⁹⁷ Balakrishnan (n 95) 3–4.

⁹⁸ *In Re: Networking of Rivers*, WP (C) 512 & 668 of 2002 [2012]; Ramaswamy Iyer, ‘With All Due Respect, My Lords’ *The Hindu* (2 March 2012) <<https://tinyurl.com/kb9gv62>>.

⁹⁹ Iyer (n 98).

¹⁰⁰ Iyer (n 98).

¹⁰¹ Apurva Vishwanath, ‘Harish Salve: Friend of Court, Friend of Environment’ (<http://www.livemint.com/>, 12 January 2016) <<https://tinyurl.com/h4mmace>> accessed 7 July 2017.

¹⁰² Krishnadas Rajagopal, ‘Pay for Causing Pollution, SC to Trucks Entering Delhi’ *The Hindu* (9 October 2015) <<https://tinyurl.com/y73f5kfu>>.

¹⁰³ Rajagopal (n 102).

¹⁰⁴ Vishwanath (n 101).

In *Thirmulupad v Union of India & Ors*, an Indian citizen filed a complaint that the government failed to prevent forest destruction.¹⁰⁵ On December 12, 1996, the court ordered that all non-forestry activities be stopped and that all states must form expert committees to determine forests that fell under the Forest Conservation Act of 1980.¹⁰⁶ Due to *Thirmulupad's* breadth of issues, the court appointed four *amici curiae*.¹⁰⁷ In one instance, the court requested that *amicus curiae* review applications for intervention.¹⁰⁸ Additionally, the *amicus curiae* filed an application with the court to remove illegal forest encroachments.¹⁰⁹ In response, the court passed a resolution restricting the establishment of further encroachments.¹¹⁰ The Ministry of Environment and Forest understood the court's orders as direct orders to evict encroachers and launched campaigns to remove encroachers in many states.¹¹¹

In *Bittu Sehgal & Anr v Union of India & Ors*, the Supreme Court found a regional plan violated the Coastal Zone Regulations after the central government declared the area of Dahanu Taluka an 'ecologically-fragile' area.¹¹² M.C. Mehta aided the court as *amicus curiae* and learned counsel for the petitioner.¹¹³ Mehta referred the court to information regarding 'the protection of oceans, all kinds of seas', including the 'Status of marine pollution in coastal offshore waters'.¹¹⁴

¹⁰⁵ PK Manohar and Praveen Bhargav, 'The Architect of an Omnibus Forest-Protection Case' *The Hindu* (5 July 2016) <<https://tinyurl.com/y7rkbfql>>.

¹⁰⁶ Manohar and Bhargav (n 105).

¹⁰⁷ Nupur Chowdhury, 'From Judicial Activism to Adventurism-The Godavarman Case in the Supreme Court of India' (2014) 17 *Asia Pac. J. Envtl. L.* 177, 184–85.

¹⁰⁸ Ashok H Desai and S Muralidhar, 'Public Interest Litigation: Potential and Problems', *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford Univ Press 2004) 180 n 63.

¹⁰⁹ Chowdhury (n 107) 184–185.

¹¹⁰ Chowdhury (n 107) 184–85.

¹¹¹ Chowdhury (n 107) 184–85.

¹¹² *Bittu Sehgal & Anr v Union of India Uoi & Ors* (1996) 9 SCC 181 (Supreme Court) [3].

¹¹³ *Bittu Sehgal & Anr v Union of India Uoi & Ors* (n 112) [5].

¹¹⁴ *Bittu Sehgal & Anr v Union of India Uoi & Ors* (n 112) [5].

4.2.2 Colombia

In Colombia, the courts have allowed third party intervention for collective interest, which would include environmental protection.¹¹⁵ Any citizen can file an *amicus curiae* for environmental concerns and, in fact, many have done so.¹¹⁶ For instance, in 2015, Colombia issued a law exempting mining operations with contracts dated before 9 February 2010 and oil and gas operations with contract dates before 16 June 2011 from a prohibition of ‘agricultural activities and the exploration for oil and gas refineries’ in high altitude ecosystems in the country.¹¹⁷ Several officials brought a suit alleging that the law would constitute a violation of the right to the environment and water.¹¹⁸ The Inter-American Association for Environmental Defense (AIDA) and the NGO Asociación Ambiente y Sociedad (ASA) submitted an *amicus* brief arguing the exemption opposed the constitution, international environmental law, and international treaties.¹¹⁹ Similarly, NGO Dejusticia submitted an *amicus* brief arguing that the exemption represented a ‘regression’ in environmental protection, as such activities were prohibited before the 2015 law.¹²⁰ The Constitutional Court held that the sections of the implementing law allowing the exemption were unconstitutional.¹²¹ Additionally, the court acknowledged the ‘regression’ argument in its ruling by referencing the previous laws prohibiting such activities.¹²²

4.2.3 Mexico

While *amicus* petitions are relatively new in Mexico, the practice is occurring.¹²³ For instance, the Council of Ejidos and Communities Opposed to the La

¹¹⁵ Alvaro Jose Correa Ordóñez and Sasha Mandakovic Falconi, ‘A Guide to Filing *Amicus Curiae* Briefs in Latin America’ (2014) 69 INTA Bulletin 4; Lise Johnson and Niranjali Amerasinghe, ‘Protecting the Public Interest in International Dispute Settlement: The *Amicus Curiae* Phenomenon’ (Center for International Environmental Law 2009) 26.

¹¹⁶ Ordóñez and Falconi (n 115) 4.

¹¹⁷ David Hill, ‘Colombian Court Bans Oil, Gas and Mining Operations in Paramos’ *The Guardian* (21 February 2016) <<https://tinyurl.com/yaofhec3>> accessed 16 July 2017.

¹¹⁸ Hill (n 117).

¹¹⁹ Hill (n 117).

¹²⁰ Hill (n 117).

¹²¹ Hill (n 117).

¹²² Hill (n 117).

¹²³ Miguel Concha, ‘*Amicus Curiae* Briefs in Mexico’ <<https://tinyurl.com/yaspvggy>> accessed 5 June 2017.

Parota Dam (CECOP) and the Mexican Center for Environmental Law brought a suit against the Federal Commission of Electricity claiming that the Federal authorities ‘failed to consult with affected parties and adequately evaluate the environmental impacts of the construction of La Parota dam’.¹²⁴ AIDA, in conjunction with other organizations, submitted an *amicus curiae* to the Collegiate Tribunal of Guerrero.¹²⁵ Similarly, FIAN International submitted an *amicus curiae* supporting the affected communities by noting that the government failed to consult the local people and performed an inadequate environmental evaluation.¹²⁶

5. Friend of the Court Participation in Cases Involving Gender Discrimination and the Rights of Women

5.1 Gender Discrimination and Women’s Rights in Kenya

The 2010 Constitution emphasises the importance of gender equality to a country’s economic, social, and political well-being. Gender equality is not just a general value espoused by the Constitution but is also specifically required by:

- Eliminating gender discrimination in land rights.¹²⁷
- Making gender equality a core function of the Kenya National Human Rights and Equality Commission.¹²⁸
- Requiring equitable representation in elected or appointed positions in national and county government.¹²⁹

¹²⁴ Interamerican Association for Environmental Defense, ‘Threats from Proposed Dam in La Parota, Mexico, Challenged in *Amicus Curiae* Legal Brief’ <<https://tinyurl.com/yahdprjg>> accessed 5 June 2017.

¹²⁵ Interamerican Association for Environmental Defense (n 124).

¹²⁶ HRH Oslo, ‘After Nine Years of Struggle, Mexican Peasants Celebrate Victory’ <<https://tinyurl.com/y98vntvs>> accessed 5 June 2017.

¹²⁷ ‘The Constitution of Kenya 2010’ (n 1) art 60(1)(f).

¹²⁸ ‘The Constitution of Kenya 2010’ (n 1) art 59(2)(b), Sched 6 art 26.

¹²⁹ ‘The Constitution of Kenya 2010’ (n 1) arts 27(8) 81(b) 175(c), 177(1)(b), 197(1).

- Requiring all political parties to respect and promote gender equality.¹³⁰
- Requiring the Judicial Service Commission to promote gender equality.¹³¹
- Ensuring that independent commissions do not have a chairperson and vice chairperson of the same gender.¹³²

Gender equality has deep and pervasive roots in Kenya, and even laws that appear gender-neutral can harm women.¹³³ As disputes arise, the friend of the court can help the Judiciary understand what adverse impacts their decisions may have on women and, as a result, on the community as a whole.

The participation of *amicus curiae* in gender discrimination cases in Kenyan courts has been far reaching, with cases ranging from religious freedom to gender-based violence. The courts have in many instances, appreciated the assistance of *amici curiae*, even going as far as citing their submissions in their judgement.

Both government agencies—especially independent constitutional commissions—and NGOs have provided meaningful friend of the court support. Broadly speaking, the expertise brought by independent commissions is institutional while the NGOs often bring experiential expertise. This section will address participation by independent commissions first and then turn to NGO participation.

The National Gender and Equality Commission, a government body established by statute as part of the Kenya National Human Rights and Equality Commission¹³⁴ has been an active participant as friend of the court. The

¹³⁰ 'The Constitution of Kenya 2010' (n 1) arts 91(1)(f), 91(2)(a).

¹³¹ 'The Constitution of Kenya 2010' (n 1) art 172(2)(b).

¹³² 'The Constitution of Kenya 2010' (n 1) art 250(11).

¹³³ P Kameri-Mbote, 'Gender, Good Governance and Separation of Powers Within the Constitution' [2002] Perspectives on Gender Discourse 17.

¹³⁴ 'The Constitution of Kenya 2010' (n 1) arts 59(4) & (5); National Gender and Equality Commission Act (No 15 of 2011).

Commission was established to promote gender equality and freedom from discrimination under the Constitution. Its over-arching goal is to contribute to the reduction of gender inequalities and discrimination in Kenya.

As a friend of the court, the Commission assists courts to resolve legal issues and aids in the interpretation and application of constitutional principles on gender and gender discrimination. For example, in *Re the Principle of Gender Representation in the National Assembly and the Senate* [2012], the Commission argued that the right to gender equality in national elective bodies—referred to as the ‘two-thirds gender rule’—should be interpreted in a way that would immediately, rather than progressively, give effect to the requirement that all elective bodies be comprised of no more than two-thirds of a single gender.¹³⁵ The Commission argued that, based on the separation of powers established under the Constitution, the executive was responsible for functionalizing the two-thirds gender rule and that the court’s only role was to determine whether the Executive had satisfied its duty.¹³⁶ The Supreme Court, however, disagreed. It ruled that the gender principle should be realised progressively and that it was not applicable to the first elections under the New Constitution.¹³⁷ It further held that Parliament should enact legislation to give effect to the requirements of gender equality by 27 August 2015.¹³⁸

When Parliament failed to meet the August 2015 deadline, the issue of progressive realisation was raised once again. In *Centre for Rights Education and Awareness & 2 Ors v Speaker the National Assembly & 6 Ors*, the petitioners argued that the Speaker of the National Assembly, the Senate, and the Attorney-General failed to enact legislation that would give effect to the two-thirds gender rule.¹³⁹ The Commission, once again, appeared

¹³⁵ *Re the Principle of Gender Representation in the National Assembly and the Senate* [2012] Supreme Court Adv Op App 2 of 2012, eKLR.

¹³⁶ *Re the Principle of Gender Representation in the National Assembly and the Senate* (n 135) [37].

¹³⁷ *Re the Principle of Gender Representation in the National Assembly and the Senate* (n 135) [78]-[80].

¹³⁸ *Re the Principle of Gender Representation in the National Assembly and the Senate* (n 135) [79].

¹³⁹ *Centre for Rights Education and Awareness & 2 Ors v Speaker the National Assembly & 6 Ors* [2017] High Court Pet 371 of 2016, eKLR 3.

as friend of the court and advised the court of its efforts to work with the government to enact the necessary legislation.¹⁴⁰ In his decision, Justice Mativo issued an order of mandamus directing Parliament and the Attorney-General to take steps to ensure that the required legislation be enacted within 60 days from the date of the order, 29 March 2017, and to report progress to the Chief Justice. The court further ordered that once the 60-day period has passed, the petitioners could petition the court to have the Parliament dissolved.

The Commission also applied to appear as friend of the court in *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors*, which involved the alleged gender discrimination and forcible sterilisation of women living with HIV/AIDS. The Commission argued that friend of the court participation was appropriate based on its constitutional mandate of promoting gender equality and freedom from discrimination and its expertise on issues of gender inequality in Kenya.¹⁴¹ The respondents objected to the Commission's application, arguing, among other things, that the Commission's expertise was not relevant to the proceedings.¹⁴² Justice Lenaola, however, disagreed. The Judge admitted the Commission as friend of the court, holding that issues of gender equality 'are not irrelevant matters and are certainly useful to this Court in reaching a just determination of the Petition herein'.¹⁴³

The Commission also participated, at the court's request, as friend of the court in the case of *Muslims for Human Rights (MUHURI) on Behalf of Mohammed Aden Mohammed & 39 Ors v Minister for Immigration & 3 Ors*, which concerned the government's refusal to give identity cards to a minority group.¹⁴⁴ The court noted that because the petitioners' claims asserted violations of human rights and freedom from discrimination, it

¹⁴⁰ *Centre for Rights Education and Awareness & 2 Ors v Speaker the National Assembly & 6 Ors* (n 139) 9.

¹⁴¹ *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* [2016] High Court Pet 605 of 2014, eKLR [22]-[26].

¹⁴² *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* (n 141) [73].

¹⁴³ *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* (n 141) [73].

¹⁴⁴ *Muslims for Human Rights (MUHURI) on Behalf of Mohammed Aden Mohammed & 39 Ors v Minister for Immigration & 3 Ors* [2014] High Court Const Pet 50 of 2011, eKLR.

could benefit from the Commission's expertise.¹⁴⁵ The court requested that the Commission 'consider investigating the matter and assist both the registrar of persons and the court in reaching a fair decision'.¹⁴⁶

NGOs have also played an important role as friends of the court in gender-discrimination cases. In *SWK*, for example, the High Court admitted several institutions as friends of the court because, like the National Gender Equality Commission, the court believed their expertise was relevant to the issues raised and that the court would benefit from their expertise.¹⁴⁷

Similarly, an international NGO was admitted as a friend of the court in *WJ & Anr v Astarikoh Henry Amkoah & 9 Ors*.¹⁴⁸ This case addressed whether the state should be liable when state-employed educators violate the rights of children placed under their care. The Centre for Reproductive Rights was admitted as a friend of the court. It brought the court's attention to documents that suggested that state agencies were aware of increased sexual, physical, and psychological violence against students, that the existing law could not sufficiently address the harm such violence does to children, and that the data regarding sexual assault and violence likely under-represented its actual prevalence.¹⁴⁹ The Centre recommended that the state do more to ensure schools understand their duty to report sexual violence and that victims receive adequate treatment. Finally, the Centre recommended that the state ensure that all healthcare providers are adequately trained to recognise and treat child-victims of assault.¹⁵⁰

The court held that the Primary school that had employed the accused teacher, the Teachers Service Commission, as well as the Attorney-General

¹⁴⁵ *Muslims for Human Rights (MUHURI) on Behalf of Mohammed Aden Mohammed & 39 Ors v Minister for Immigration & 3 Ors* (n 144) [19].

¹⁴⁶ *Muslims for Human Rights (MUHURI) on Behalf of Mohammed Aden Mohammed & 39 Ors v Minister for Immigration & 3 Ors* (n 144) [20].

¹⁴⁷ *SWK & 5 Ors v Medecins Sans Frontieres-France & 10 Ors* (n 141) [73].

¹⁴⁸ [2015] High Court Pet 331 of 2011, eKLR.

¹⁴⁹ *WJ & Anr v Astarikoh Henry Amkoah & 9 Ors* (n 148) [78]-[83].

¹⁵⁰ *WJ & Anr v Astarikoh Henry Amkoah & 9 Ors* (n 148) [84].

were vicariously liable for the actions of the teacher because they failed to establish policies that would protect students.¹⁵¹ In addition, the court held that the institutions did not create a safe academic environment for female students to enjoy their right to education and health.

In the case, the data, studies, and reports submitted by the Centre provided a solid foundation for the findings of rights violations as determined by the court. The court took judicial notice of the widespread problem of defilement of children and observed that based on the information provided by, among others, the Centre:

it is clear that the problem of defilement and sexual abuse of children generally is a serious problem, that needs to be addressed with all the tools and means that are in the 3rd and 4th respondents' control.¹⁵²

The statements and the import of the orders given by the court demonstrate how important a role the friend of the court played in reaching a just result in the case and in addressing the systemic deficits perpetuated by the abuse of children.

The Kenya Human Rights Commission was admitted as a friend of the court in *Baby 'A' (Suing Through the Mother E A) & Anr v Attorney-General & 6 Ors*, which involved the legal recognition and protection of intersex children.¹⁵³ In its submissions, the Commission supplied the court with international comparative law and international legal instruments relevant to the questions for determination by the court. The Commission further submitted that it is inappropriate to define 'intersex' as an intermediate gender identity and that conflating intersex with gender diversity denies legitimacy to intersex people.¹⁵⁴

¹⁵¹ *WJ & Anr v Astarikoh Henry Amkoah & 9 Ors* (n 148) [154]-[157].

¹⁵² *WJ & Anr v Astarikoh Henry Amkoah & 9 Ors* (n 148) [131].

¹⁵³ *Baby 'A' (suing Through the Mother EA) & Anr v Attorney-General & 6 Ors* [2014] High Court Pet 266 of 2013, eKLR.

¹⁵⁴ *Baby 'A'* (n 153) [36]-[39].

Although the court did not find that the petitioner's rights had been violated, it did note that 'this case has brought to the forefront the silent issues facing intersex children and persons'.¹⁵⁵ The court further ordered that the petitioner's birth should be registered and that the Attorney-General should make efforts to address the rights of intersex persons and report back to the court on those efforts.¹⁵⁶

5.2 Comparative Jurisprudence on the Role of the Friend of the Court in Cases Involving Gender Discrimination and the Rights of Women

5.2.1 South Africa

One of the first *amicus* briefs on gender discrimination filed before South Africa's Constitutional Court was *S v Baloyi*.¹⁵⁷ This case addressed the Prevention of Family Violence Act, which required the immediate arrest of any person that had breached the terms of a protection order. *Amici curiae* briefs submitted by the Commission of Gender Equality and the Ministry of Justice focused the court's attention on the prevalence of violence against women and the need to take this into consideration when deciding the case.¹⁵⁸ Although the briefs were criticised for not providing contextual evidence of this gendered nature of violence, the courts evaluated and applied them in establishing a positive precedent on the gendered nature of violence, thus contributing to a holistic social and legal understanding of domestic violence.

Amicus participation also helped establish a positive precedent in *Carmichele v Minister of Safety and Security & Anr.*¹⁵⁹ The case concerned the tortious liability of the State in failing to protect a woman from the attack of a convict who was out on bail. The Centre for Applied Legal

¹⁵⁵ *Baby 'A'* (n 153) [69].

¹⁵⁶ *Baby 'A'* (n 153) [71].

¹⁵⁷ [1999] Constitutional Court CCT29/99, ZACC 19.

¹⁵⁸ *S v Baloyi & Ors* (n 157) [9]-[11].

¹⁵⁹ [2001] Constitutional Court CCT 48/00, ZACC 22.

Studies (CALS) appeared as *amicus curiae*. The court in its judgement directly quotes from the *amicus* submission, showing that it had considered it to be of importance.¹⁶⁰ While the judgement was not entirely centred on gender-related issues, it helped develop a normative framework relating to the State's responsibility to prevent violent attacks against women. The precedent set by this case was important because it affirmed that the state has a duty to protect women from violence.¹⁶¹

Masiya v Director of Public Prosecutions Pretoria (the State) & Anr addressed whether forced anal penetration should be considered rape under South African law.¹⁶² The CALS and Tshwaranang Legal Advocacy Centre appeared as *amici*. The *amici* argued that the law should be reformed to include forced anal penetration as rape because it was a violent act exerting power over the victim. The court agreed that, prospectively, non-consensual anal penetration would be considered an act of rape. As Justice Langa noted in his concurring opinion, the decision signalled a shift in the common law. Rape was no longer recognised as a crime because it violated proprietary rights, but because it is 'expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy'.¹⁶³ Regardless of the body parts involved or the gender of the victim, such expression of power violates the law.

S v Jordan & Ors (Sex Workers Education and Advocacy Task Force & Ors as Amici Curiae), concerned the decriminalization of prostitution and the constitutional validity of certain sections of South Africa's sexual offences act.¹⁶⁴ In this case, Ellen Jordan was arrested alongside her two employees for running a brothel in violation of the Sexual Offences Act. Jordan argued that the Act was unconstitutional and requested the decriminalization of

¹⁶⁰ *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001) (n 159) [62].

¹⁶¹ Spies A, *Amicus Curiae* Participation, Gender Equality And The South African Constitutional Court, University of the Witwatersrand, 2014.

¹⁶² [2007] Constitutional Court CCT54/06, ZACC 9.

¹⁶³ *Masiya v Director of Public Prosecutions Pretoria (the State) & Anr* (n 162) [78].

¹⁶⁴ [2002] Constitutional Court CCT 31/01, ZACC 22.

prostitution and brothel keeping. The Sex Workers Education and Advocacy Task Force and The Commission for Gender Equality appeared as *amici curiae* and supported her position. *Amici* argued that ‘the criminalization of brothel-keeping has the effect of weakening the fundamental rights of prostitutes to freedom and security of the person, and accordingly cannot be justified’.¹⁶⁵ The Commission for Gender Equality argued that the different penalties meted out for purchasing sex, as opposed to selling it, indirectly discriminated against women.

The court ruled that the Sexual Offences Act was constitutional. In doing so, it addressed the arguments of both *amici*. Both the majority and minority rejected the argument that criminalising prostitution weakened the fundamental rights of prostitutes. The court was divided, however, on the merits of the indirect discrimination claim. The minority concluded that the provisions criminalising prostitution were indirect gender discrimination because they punished prostitutes, who were mostly female, as opposed to the clients, who were mostly male. The majority disagreed, claiming that both acts were illegal, but punished under different laws.

In *Volks NO v Robinson & Ors* the court addressed the question of whether the Maintenance of Surviving Spouse Act should be extended to cover unmarried heterosexual domestic partners.¹⁶⁶ *Amici* argued that the law should be extended, claiming that failing to do so privileged marital relationships and discriminated against vulnerable women who were in less formal domestic arrangements. The court, however, while appreciating that the act discriminated against persons from other forms of partnerships, argued that this discrimination was not unfair because there was no legal impediment to heterosexual persons who wanted to get married. According to the court, the law merely provided a regime for the regulation of rights and obligations for persons that chose to get married. Although the court understood the systemic inequalities that affected women’s choices, they chose to disregard this and follow a more conservative concept of marriage.

¹⁶⁵ *S v Jordan & Ors (Sex Workers Education and Advocacy Task Force & Ors as Amici Curiae)* (n 164) (internal citation omitted).

¹⁶⁶ [2005] Constitutional Court CCT12/04, ZACC 2.

5.2.2 Botswana

In *Dow v Attorney-General*, the Supreme Court of Botswana addressed whether its Citizenship Act discriminated against women and violated their right to equal protection. The Act differentiated between the citizenship status of Botswanan men who married foreigners and Botswanan women who married foreigners because children of Botswanan men married to foreign women were granted citizenship but the children of Botswanan women were not.

Several NGOs filed *amici* briefs in support of the challenge to the law, providing legal analysis and materials that may not have otherwise been available to the court.¹⁶⁷ The court agreed, holding that the Citizenship Act unfairly discriminated against the children of Botswanan women married to foreign men.

5.2.3 India

In India *amici curiae* are court appointed and participate in public interest cases in order to

dig up relevant factual data, provide comparative examples from other courts, suggest innovative remedies and provide advice on how best to enforce them, ensure that the Court does not overlook important considerations, and keep public interest actions on track even if the original petitioners lose interest.¹⁶⁸

Amici curiae are also used by courts to verify information supplied to it by the parties to the case as a stop gap measure to ensure that the court process is not abused.¹⁶⁹

¹⁶⁷ Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Bloomsbury Publishing 2005) 288; Stephanie Willman Bordat, 'Promoting Women's Human Rights: A Resource Guide for Litigating International Law in Domestic Courts' <<http://www.popline.org/node/579294>> accessed 17 July 2017.

¹⁶⁸ Avani Mehta Sood, 'Gender Justice Through Public Interest Litigation: Case Studies from India' 842.

¹⁶⁹ Desai and Muralidhar (n 108) 159.

In *Lata Singh v State of Uttar Pradesh*, the Supreme Court addressed the prevalence of honour killings.¹⁷⁰ It invited *amicus curiae* to provide information on the measures that have been taken to combat honour killings and to make suggestions on how to prevent them.¹⁷¹

In *In Re: Indian Woman Says Gang-Raped on Orders of Village Court*, Published in *Business & Financial News* Dated 23.01.2014, the Indian Supreme Court took up, *sua sponte*, the case of a 20-year-old woman who had been gang-raped as punishment for having a relationship with a man from a different community.¹⁷² *Amicus curiae* was appointed to assist the court to review the investigation, recommend how to prevent the recurrence of such crimes, and recommend how best to compensate the victim.¹⁷³

5.2.4 Australia

The rules governing *amicus* participation with regards to human rights violations are very well detailed. The Australian Human Rights Commission has the right to intervene, with leave of the court, in proceedings involving issues of race, gender and disability discrimination, human rights issues and equal opportunity in employment. This right is enshrined in various statutes such as the Racial Discrimination Act 1975, the Sexual Discrimination Act and the Australian Human Rights and Equality Commission Act.¹⁷⁴ The Commissioner may, on the other hand, seek leave to appear as *amicus* where it is of the opinion that the orders may significantly affect the human rights of persons who are

¹⁷⁰ [2006] Supreme Court Writ Pet (crl) 208 of 2004, 5 SCC 475.

¹⁷¹ Jamia Millia Islamia, *Discriminative and Derogatory Practices Against Women by Khap Panchayats, Kangaroo Courts and Shalishi Adalats in India: An Empirical Study in the States of Haryana, Uttar Pradesh (West), West Bengal & Rajasthan* (National Commission for Women 2014) 34, 50.

¹⁷² [1947] 1 Suo Motu Writ Pet (Crim) No 24 of 2014.

¹⁷³ *In Re: Indian Woman Says Gang-Raped on Orders of Village Court* Published in *Business & Financial News* Dated 23.01.2014 (n 172) [5].

¹⁷⁴ Australian Human Rights Commission, 'Submission to Court as Intervener and *Amicus Curiae*' (*Australian Human Rights Commission*, 0 December 2012) <<https://tinyurl.com/y9jhb57r>> accessed 17 July 2017.'plainCitation': 'Australian Human Rights Commission, 'Submission to Court as Intervener and *Amicus Curiae*' (Australian Human Rights Commission, 0 December 2012

not parties to the proceedings; the proceedings may have significant implications for the administration of the law; or the proceedings involve special circumstances to the extent that the Commissioner is satisfied it would be in the public interest for the Commissioner to assist the court as *amicus*.¹⁷⁵

The Commission Guidelines for the Exercise of the *Amicus Curiae* Function under the Australian Human Rights Commission Act of 1986 govern proceedings. The Guidelines enumerate a number of factors that a Commissioner needs to pay attention to before seeking leave of the court to enter proceedings as an *amicus curiae*. These include;

- i. Whether the court would be assisted by an *amicus curiae* and, in particular, whether the Proposed Amicus Commissioner will be able to raise issues not otherwise before the court or to offer a perspective not raised by the parties.
- ii. Whether an *amicus curiae* would detract from the efficient conduct of the litigation.
- iii. Whether the court has indicated that it would be assisted by an *amicus curiae*.
- iv. Whether any party has requested that the Proposed Amicus Commissioner or a member of the Commission seek leave to appear as *amicus curiae* and whether any party would oppose the application.
- v. Whether any other person or organization is seeking leave to intervene or appear as *amicus curiae*.
- vi. The reason the complaint was terminated.

¹⁷⁵ Australian Human Rights Commission (n 174).

- vii. Whether the matters sought to be put before the court will not otherwise be adequately and fully argued, including whether the parties are represented.
- viii. Whether the issue is an interlocutory one or will result in a final determination.
- ix. Whether the proceedings are in the Federal Court or the Federal Magistrates Court.
- x. The resource implications of running the litigation.
- xi. The integrity of the Proposed Amicus Commissioner's *amicus* role in the particular case and the integrity of the use of the *amicus* powers in future cases.¹⁷⁶

The Australian Human Rights Commission has participated as *amicus curiae* in several matters concerning gender and gender discrimination. For example, in *Ellison and Anr v Karnchanit*, the Commission assisted the court in developing best practice principles about international surrogacy arrangements.¹⁷⁷ The Commission also participated as *amicus curiae* in *P & P: In the matter of; Legal Aid Commission of New South Wales*, which addressed the sterilization of young women living with disabilities.¹⁷⁸ The Commission argued that the court should develop consistent criteria and guidelines to safeguard the rights and dignity of young girls.¹⁷⁹ The Commission has also been involved in other matters of public interest through *amicus curiae* interventions in cases concerning the availability of in vitro fertilisation services,¹⁸⁰ sex-based discrimination and sexual harassment.¹⁸¹

¹⁷⁶ Australian Human Rights Commission (n 174).

¹⁷⁷ FamCA 602.

¹⁷⁸ 126 FLR 245B.

¹⁷⁹ *P & P: In the matter of Legal Aid Commission of New South Wales* (n 178).

¹⁸⁰ *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 188 ALR 1 [8]-[9].

¹⁸¹ *GrainCorp Operations Ltd v Markham* (2002) 120 IR 253 [13].

6. Conclusion

Each of the topics discussed in this Chapter—election disputes, economic, social and cultural rights, environmental litigation, and gender discrimination—are rights that are protected under Kenya’s constitution. Litigation arising from these rights, and fundamental rights like them, are different from many other cases because they raise issues that are intensely fact dependent, complex, and difficult to adjudicate without information beyond what the parties can provide. As the cases discussed show, however, the friend of the court can help navigate these difficulties in many ways. By collecting data and other facts, friends of the court provide the court with valuable information it would not otherwise have. By canvassing relevant law and conducting legal analysis, friends of the court allow the court to focus its attention on other issues. And by providing expertise from other fields, the friend of the court can enlighten the court on the potential consequences of its decision. Ultimately, it is the court that, through its decisions, gives these rights meaning. As these cases show, that meaning is much more fully established with the help of the friend of the court.



Chapter 7

Form and Structure of *Amicus* Brief

By Christopher Mbazira

T

This Chapter provides guidance on the form and structure of an *amicus* brief. The proposed structure is intended to make the Brief user-friendly, less time consuming and promote clarity.

In Uganda and Kenya, as is the case in many jurisdictions, the law does not prescribe the form that a friend of the court brief should take. This is the case even in those jurisdictions where the procedure has been legislated. Nonetheless, even in these cases, the court has the powers to order the form the brief should take once friend of the court is admitted. In Uganda for instance, in *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof Oloka Onyango & 8 Ors*¹, discussed in Chapter 3, the Supreme Court gave orders on the issues the Brief should address. In its Ruling, the Court ordered that the applicants file a written brief to the court as friend of the court, which brief should be strictly limited to points of law and specifically: (i) propose reforms relating to Presidential Elections; and (ii) propose judicial remedies related thereto.² In addition, it was ordered that the brief shall not go into matters of evidence or raise new issues that were not already before the Court.³

¹ [2016] Supreme Court Civ App 02 of 2016, 2 UGSC.

² *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 1) 20.

³ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (n 1) 20.

It is important to note that although in many jurisdictions it is not expressly stated in the rules, a practice has evolved whereby the intended brief is filed together with the application for admission as friend of the court. This practice assists the court to determine what contribution the proposed friend of the court will bring to the case and whether that contribution is novel or different from arguments already raised by the parties. The intended brief will also indicate the expertise of the applicant with some detail, as much as this may already have been indicated in the application. A judge could, therefore, discern from the intended brief the lack of novelty and thereby reject the application. In the case of *Ryan v Commodity Futures Trading Commission*,⁴ United States judge, Justice Posner had this to say about a brief:

After 16 years of reading *amicus curiae* briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinise these motions in a more careful, fish-eyed, fashion. The vast majority of amicus briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect, merely extending the length of the litigant's brief. Such *amicus* briefs should not be allowed. They are an abuse.⁵

In the United States, the rules of the court require that the intended brief is attached. For instance, Rule 30 of the Federal Rules of Appellate Procedure provides that the motion must be accompanied by the proposed brief and state: (1) the mover's interest; and (2) the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case. This is important because the absence of an intended brief denies the court the opportunity to determine the contribution of the proposed friend of the court. In Uganda, in the 2016 Presidential Elections Petition, the Supreme Court received two applications for friend of the court and rejected one because among others the applicants did not attach the intended brief. The court in *In the Matter of an Application for Leave to Intervene as Amicus*

⁴ (1997) 125 F 3d 1062 (Court of Appeals, 7th Circuit).

⁵ *Ryan v Commodity Futures Trading Com'n* (n 4) 1063.

Curiae by *Foundation for Human Rights Initiative & 7 Ors*, held that unlike in the application by *Prof J. Oloka Onyango & Ors*, the applicants neither attached an intended brief nor were they able to show the court the novel points of law they intended to address, so the court was not able to judge the extent of the applicants' intervention as a friend of the court.⁶

In the United States, the courts have developed rules which describe the form which friend of the court briefs should take. Something could be borrowed from these. An example here is Rule 29 of the *Federal Rules of Appellate Procedure* which in para (c) describes the contents and form of an *amicus* brief. The cover must identify the party or parties supported, indicate whether the brief supports affirmance or reversal, and must include the following:

- (1) If the friend of the court is a corporation, a disclosure statement like that required of parties by Rule 26.1;
- (2) A table of contents, with page references;
- (3) A table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;
- (4) A concise statement of the identity of the friend of the court, its interest in the case, and the source of its authority to file;
- (5) Unless the friend of the court is one listed in the first sentence of Rule 29(a), a statement that indicates whether: (A) a party's counsel authored the brief in whole or in part; (B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) a person—other than the friend of the court, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

⁶ *In the Matter of an Application for Leave to Intervene as Amicus Curiae by Foundation for Human Rights Initiative & 7 Ors* [2016] Supreme Court Civ App No 3 of 2016, UGSC 1 [5].

- (6) An argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review;
- (7) A certificate of compliance, if required by Rule 32(a)(7); and
- (8) The Rules also provides that except by the court's permission, a friend of the court brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief and that if the court grants a party permission to file a longer brief, that extension does not affect the length of a friend of the court brief.⁷

Based on the above, it is proposed that the Brief be structured as follows:

1. **Table of contents** - properly paginated.
2. **Statement of question to be addressed** - presented in clear and succinct manner.
3. **Table of authorities** - alphabetically arranged and distinguishing under different heads cases, statutes and other authorities, with reference to the page in the Brief where the authorities are used.
4. **Identity and interest of friend of the court** - clearly indicating legal status of *amicus* and capacity in which Brief is being presented. This is in addition to the interest *amicus* has in the case or its outcome with a statement on whether filing of Brief is supported by any of the parties.
5. **A succinct summary of argument** and its impact on outcome of case.
6. **Arguments of friend of the court** - properly itemised under distinct heads and chronologically arranged.
7. **Length of the brief** - the Court may limit the length of the Brief and shall at the time of allowing the application for admission as friend of the court determine whether only a written brief will be allowed or both a written brief and oral submissions.

⁷ Federal Rules of Appellate Procedure 2004 (Fed R App Proc) r 29(c).



Chapter 8

Deciding *Amicus* Participation: A Step-By-Step Approach

By Christopher Kerkering

B

Below is a proposed heuristic that Kenyan courts may use to determine whether to admit *amicus curiae* or friend of the court. The heuristic may not be practical in all cases in which *amicus* or friend of the court participation is challenged, but it should be a useful guide for both the courts and for litigants.

The courts have yet to identify what burden, if any, the parties carry when it comes to challenging friend of the court participation. Based on the value placed by the Constitution on public participation and inclusivity, this heuristic puts the initial burden on the friend of the court applicant to provide evidence to support its expertise. This is a burden of production—that is, the applicant need only provide enough information for the court to determine whether the applicant has sufficient and relevant expertise.

Once that burden of production has been met, the burden then shifts to the objecting party, if any, to provide sufficient evidence to challenge the

application. Under this analysis, there are three main grounds for objection: that the applicant is not qualified as an expert; that the applicant is biased, or that the applicant lacks sufficient independence. Each of these challenges must link to a claim that admission would violate the objecting parties' right to a fair trial or fair hearing.

In evaluating the arguments, the court should presume that there are less restrictive means of ensuring the rights of the objecting party short of denying the application. The objecting party should have to provide clear and convincing evidence to overcome that presumption. In the alternative, the objecting party can suggest limitations that would ensure its rights are protected. The court will then be left to determine whether to admit the application and, if so, what restrictions, if any, should be imposed on the submissions. Again, the presumption should favour admission, and the application should only be denied if there are no restrictions that could be imposed that would sufficiently protect the objecting party's right to a fair hearing or fair trial.

Procedural Requirements

1. Has applicant submitted necessary documents, including a motion to be admitted as *amicus* or friend of the court and a statement of expertise?
 - a. If yes, move to 2.
 - b. If no, deny the application with leave to resubmit with necessary documents.

Which Rules Apply

2. Does the petition involve a fundamental right or freedom guaranteed under Chapter 4 of the Constitution?
 - a. If yes, apply Article 22(3)(e) and the Mutunga Rules and move to 3.

- b. If no, the Supreme Court should apply the Supreme Court Rules, 2013. Other courts should apply their inherent authority to allow friend of the court participation. Move to 3.

Objections to Admission of Friend of the Court

3. Does any party object to the admission of the friend of the court?
 - a. If yes, move to 4.
 - b. If no, admit the applicant with the least restrictive limitations necessary to protect the rights of the litigants and ensure the smooth functioning of the courts.

Determining Expertise

4. Does the objecting party allege that the applicant does not have sufficient expertise?
 - a. If yes, move to 5.
 - b. If no, move to 8.
5. Has objecting party provided evidence to support the claim that applicant does not have sufficient expertise?
 - a. If yes, move to 6.
 - b. If no, move to 8.
6. Has the court given the applicant an opportunity to rebut evidence submitted by the objecting party?
 - a. If yes, move to 7.
 - b. If no, provide an opportunity for rebuttal, and move to 7.

7. Considering the information before the court, including the factors set forth under Article 24 of the Constitution, the applicant's submission, and any additional evidence, has the applicant demonstrated sufficient expertise on an issue relevant to either: a) a fundamental right and freedom; or b) an issue before the court?
 - a. If yes, move to 8.
 - b. If no, reject the application.

Actual Bias

8. Does an objecting party assert that the friend of the court has an actual bias that, if admitted, will result in a violation of its fundamental rights and freedoms, such as the right to a fair hearing or a fair trial?
 - a. If yes, move to 9.
 - b. If no, move to 12.
9. Has the objecting party provided clear and convincing evidence that the applicant has an actual bias?
 - a. If yes, move to 10.
 - b. If no, move to 12.
10. Has the applicant provided evidence sufficient to rebut the evidence provided by the objecting party?
 - a. If yes, move to 12.
 - b. If no, move to 11.
11. Are there any restrictions that can be imposed on the submissions of the applicant that are sufficient to overcome the objecting party's objections?

- a. If yes, identify restrictions and move to 12.
- b. If no, deny the application.

Independence

12. Does an objecting party assert that the friend of the court is not independent and that the friend of the court's admission will violate the objecting party's fundamental rights and freedoms, such as the right to a fair hearing or a fair trial?
 - a. If yes, move to 13,
 - b. If no, admit the applicant with the least restrictive limitations necessary to protect the rights of the litigants and ensure the smooth functioning of the courts.
13. Has the objecting party provided clear and convincing evidence that the applicant has an actual bias?
 - a. If yes, move to 14.
 - b. If no, admit the applicant with the least restrictive limitations necessary to protect the rights of the litigants and ensure the smooth functioning of the courts.
14. Has the applicant provided evidence sufficient to rebut the evidence provided by the objecting party?
 - a. If yes, admit the applicant with the least restrictive limitations necessary to protect the rights of the litigants and ensure the smooth functioning of the courts.
 - b. If no, deny the application.



Conclusion

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This book focuses on *amicus curiae* (or friend of the court) and the role it plays—and can play—in Kenyan law. In doing so, the book, analyses the developing jurisprudence in Kenya following the implementation of the 2010 Constitution and discusses how different jurisdictions have developed their jurisprudence to incorporate the friend of the court. Several themes emerge from this inquiry: first, it is indisputably clear that the Kenyan Judiciary’s insular approach to jurisprudence is a thing of the past. Before the adoption of the 2010 Constitution, the Kenyan court often saw the participation of *amici* as an intrusion on its authority. To the extent that there were friends of the court, there were also enemies. And the Judiciary developed its jurisprudence on *amicus curiae* in a way that promoted the voices that tended to agree with it and silenced those that were critical. The Judiciary had become cloistered and fragile: unable to venture into the world of ideas and afraid of those who banged at its gates.

The 2010 Constitution, however, breathed new life into the Judiciary by giving it significant authority and independence. If the Judiciary, and those who populate it, were previously uncertain of their place in the governmental structure, they need no longer be. The Constitution has established the Judiciary as the pre-eminent institution for enforcing the Constitution, interpreting the law, and ensuring access to justice for all members of society. In doing so, however, the Constitution also places some significant

limits on the Judiciary. For example, the Judiciary can no longer just rely on the common law as a general basis for decision-making. Instead, its decisions must be both liberal and purposive; they must promote the values articulated in the Constitution, such as the rule of law, good governance, inclusive participation, and the protection and advancement of human rights and fundamental freedoms. In short, the Constitution limits the court in both word and deed. The court must not only reach decisions that are Constitutional, but it must also act in a way that is Constitutional.

Operating in conformity with the Constitution means opening the court up to voices that it previously would not have listened to. This inclusive approach means that those with expertise in areas that were previously seen as outside the realm of jurisprudence now have the right to participate in litigation, even if they do not have a direct stake in the dispute. As Hon. Justice (Prof) James Otieno Odek explains in Chapter One, although friends of the court play a different role than other participants in the litigation, that role is no less valuable. The friend of the court not only provides the court with much-needed information but allows the public to fulfil its constitutional duty to protect and uphold the Constitution. The friend of the court helps the court embrace the complexity of a dispute, understand that any decision will affect more than just the litigants, develop a more holistic decision that solves the immediate problem before the court while, at the same time, fully considering the rights of others. The friend of the court keeps the Judiciary faithful to its Constitutional roots and ensures that it does not backslide into the days of insularity.

A second theme is that Kenya, like other jurisdictions, has struggled in transitioning from a more insular to a more inclusive jurisprudence. As indicated in Chapter Two, while the court struggles to determine how to develop their friend of the court jurisprudence, it must first turn to the Constitution for guidance. When it comes to issues of fundamental rights and freedoms, it is the Constitution, in the first instance, that defines what a friend of the court is and when a friend of the court must be admitted.

Although the court has the power to regulate the admission of the friend of the court, it cannot deny access to those who meet the Constitutional requirements. In cases involving fundamental rights and freedoms, the Constitution limits the court's ability to decide who can participate. But it leaves intact the court's ability to determine how that participation occurs. By giving the court significant regulatory authority, the Constitution allows the court to facilitate public participation without impeding on the rights of the litigants. The courts may lose power to decide who gets let in, but they retain the authority to determine how the friend of the court participates and to ensure that the friend of the court participation facilitates the values embodied in the Constitution.

Although the Constitution is the starting point of all legal inquiry, it is not the only source of law available to the court. Throughout this book, the value of looking to other jurisdictions becomes another overarching theme. The Constitution encourages the court to look to other sources of law for guidance, including international law. Nearly every jurisdiction has developed a form of friend of the court participation, and Kenya has much to learn from them. Chapters 4 and 5 discuss the development of the friend of the court in several jurisdictions, with the intention of demonstrating how those courts have balanced the necessity for friend of the court participation while managing the traditional rights of litigants. What these chapters show is that most, if not all, jurisdictions have varying degrees of friend of the court participation. They all recognise that a judicial system must include outside voices and must incorporate the expertise of others if it is to make accurate, well-informed decisions. Although each of these jurisdictions has arrived at this realisation differently, they have all developed mechanisms to allow for greater participation. This participation is not without its burdens to the court, but none of these jurisdictions, once they have opened the door to *amicus curiae*, have ever chosen to close it.

What emerges from the analysis is that, in certain areas of law, the court's decisions will almost certainly be better with the assistance of *amici curiae*.

Although *amicus* participation may occur in any number of disputes, it may be most helpful in less traditional litigation, such as challenges involving fundamental rights and freedoms, economic and social rights, gender discrimination, or election disputes. These cases are multivariable and almost always require information that lies beyond a judge's experience and training. Moreover, reaching the right decision is never more important than in these cases since the impact will be felt throughout many communities and for years to come. Yet, *amicus curiae* assists the court to remain faithful to its task. As Christopher Mbazira emphasises in his discussion of *amicus curiae* in Uganda, election dispute resolution may be one of the most significant areas of conflict where *amicus* participation is necessary. In admitting *amicus* in the legal disputes over the most recent presidential election, the Ugandan Supreme Court achieved two significant milestones. First, it recognised that *amicus* plays an important role, even in the most contentious of litigation. Second, it made it clear that *amicus* participation in no way threatened the court's ability to make a thorough and well-reasoned decision. As the Ugandan Supreme Court indicated, courts are in the best position to determine what value, if any, to place on the information before it. As a result, *amicus* briefing can benefit the court, but cannot harm it. Chapter 6 builds on Prof Mbazira's discussion by describing different areas of law in which *amicus curiae* participation has provided useful information to the courts and made a complex problem easier to understand and resolve. Each of the cases discussed demonstrate that *amicus curiae* has not only helped the court arrive at a better answer, but also helped the court be seen as more credible.

Finally, the book recognises that litigants and the court must work together to develop a robust and helpful friend of the court jurisprudence. Chapters 7 and 8 address the practical side of *amicus* participation by providing a suggested format and content for *amicus* briefs and a heuristic the court can use to decide whether to admit an *amicus*. These Chapters recognise that the court will be better off if they receive consistently structured, high-quality briefing, and the litigants will be better off if they know how the court's make their decisions. Each Chapter focuses on the value

of transparency, noting that clear and straightforward analysis is also consistent with Constitutional principles.

As the Kenyan Judiciary refines its constitutional jurisprudence, the decisions regarding the role of *amicus curiae* will prove instrumental. As it decides how to incorporate the friend of the court, the Kenyan Judiciary must decide whether to revert to its insular past or move towards a more inclusive jurisprudence. As it develops the criteria for who can participate, the court must determine whether it will honour the interpretative guidelines outlined in the Constitution or turn to a more nebulous common law. As it determines how an *amicus* participates, the Judiciary will further hone its procedural and administrative rules. And as it incorporates *amicus curiae* into the litigation process, it will develop more thorough, better reasoned, and more credible decisions. Should the judiciary embrace the friend of the court as imagined under the Constitution, it will make the court better, stronger, and a more successful defender of the rights and freedoms guaranteed to the people of Kenya.

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