

## The Amicus Curiae Phenomenon – Theory, Causes and Meanings

Shai Farber

*This Article examines the phenomenon of the “Amicus Curiae,” which is used in Common law, Civil law, and International law. This Article will demonstrate how, in a short period of time, many countries around the world, including developing countries in Latin America, Asia, Africa, Eastern Europe, and many international institutions, have either adopted the practice of the Amicus Curiae or substantially increased its use. In addition to the primary use of the Amicus Curiae procedure in courts around the world, there is an increase in the range of issues in which Amicus briefs are submitted; namely, an increase in the diversity of courts willing to allow the Amicus Curiae procedure, an increase of the Amicus in significant cases—including cases dealing with fundamental issues and increases in the range and type of entities that have begun making use of the Amicus. [As described below: The “Amicus Curiae Phenomenon.”]*

*This Article will show that the Amicus Curiae Phenomenon is tied to the changes occurring in court systems, the courts’ perception of their role in the judiciary process, and the way litigation is conducted. In the last three decades, we have witnessed a significant rise of courts’ involvement in society. This trend of greater involvement of courts in society is widespread in many countries, including countries with different legal systems and different political traditions. Courts have become increasingly aware of their social role, as well as gained a greater understanding of the needs of society, and accordingly, courts have become more involved in shaping society. In this context, there is a growing trend of reliance on different legal procedures to regulate and settle a wide range of issues, which in the past were never litigated in judiciary systems.*

*This Article will show that Amicus Curiae creates profound changes to the judiciary and the work of courts because it is part of various procedures reshaping the function of the courts. The Amicus Curiae practice has helped develop the concept that the judicial process, in many cases, turns into a multi-dimensional process with numerous players and wide-ranging implications. In many ways, this approach is the revival of the approach of the judicial process as a social process in which not only the*

*formal parties are involved, but also other entities including individuals, interest groups, experts, and professional advisors. Simultaneously with these changes, Amicus Curiae integration within the courts sheds light upon the conception of the courts themselves and their function in society.*

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## I. INTRODUCTION

One of the most significant global changes in court procedures in recent years is the appearance of the Amicus Curiae practice (the “Amicus” or “Amici”). The Amicus is a legal procedure which allows an unrelated third party with some interest in the litigation to present its views to the court on the issues at stake by filing an Amicus brief. There are differences between Amicus in various courts, legal systems, and international institutions. However, in general, the Amicus is used for the following purposes: 1) addressing additional legal and factual claims not raised by the formal parties to the litigation; 2) providing certain types of information (e.g., economic, environmental, historical, etc.) which the formal parties do not possess or are not willing to present to the court, as it might adversely impact their interests; 3) presenting the claims or arguments made by one of the formal parties in an alternative way, showing their support for such arguments and trying to persuade the court to concur with the arguments raised by the formal party which the Amicus supports.<sup>1</sup>

This Article will review, examine, and analyze the causes, meaning, and impact of the Amicus Curiae Phenomenon. In the context of this Article, the phenomenon of Amicus refers to the broad usage of Amicus in common law, civil law, and international law. First, this Article will show that there is a

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\*Dr. Shai Farber, Faculty of Law, Bar Ilan University, Israel. I would like to thank Professor Nir Kedar, Professor Arnold Anker, the Articles Editor Cara Strike and the TLCP writers and editors for their advice and assistance.

<sup>1</sup> See also Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361 (2015); Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 INT'L & COMP. L.Q. 1017 (1967); John Bellhouse & Anthony Lavers, *The Modern Amicus Curiae: A Role in Arbitration?*, 23 CIV. JUST. Q. 187 (2004); Nathan Hakman, *Lobbying the Supreme Court—An Appraisal of “Political Science Folklore,”* 35 FORDHAM L. REV. 15 (1966).

significant rise in the use of the Amicus in most common law countries. Furthermore, an increase of the use of Amicus is also widespread in many of the civil law countries from Europe and Latin America. In addition, in the last two decades, the practice of the Amicus has increased considerably and become dominant in international law, not only with respect to procedures relating to human rights (e.g., European Courts and Latin American Courts for Human Rights),<sup>2</sup> but also concerning international arbitration procedures used by international commercial organizations, which are spearheaded by the World Trade Organization.<sup>3</sup>

In addition to the increase of use in other countries, there has been an increase in the number and scope of Amicus briefs filed in various litigation processes. There are instances in which dozens of Amicus briefs are submitted in litigation cases discussed in court. The increase in the number of Amicus briefs and number of Amici joining each case around the world are not limited just to constitutional cases with public aspects, but also involve numerous issues relating to various fields of law. Moreover, in the past Amici mainly were submitted in cases conducted in the highest court within a specific country, now Amici join various courts and tribunals. In addition, the variety and type of entities that have started using the Amicus to influence a court's decision have increased significantly, including human rights, environmental, religious, and women's rights organizations. In addition to such private organizations, public entities such as governmental bodies, political parties, or economic organizations have started using Amicus as a tool to advance their interests.

The first section of this Article will outline, in general, one of the most significant developments of the judicial process in the past decades, the Amicus Curiae Phenomenon, and will explore the theory and scope of the phenomenon. The second section will discuss the questions raised by the Amicus practice, namely: what has caused the phenomenon to spread around the world and gain significance? This Article will also demonstrate how legal and social processes that impacted the judicial system in the last three decades are the intellectual foundation for understanding the Amicus Curiae Phenomenon. These

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<sup>2</sup> Lance Bartholomeusz, *The Amicus Curiae Before International Courts and Tribunals*, 5 NON-STATE ACTORS & INT'L L. 209, 236 (2005); Laura Van den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, 31 NETH. Q. HUM. RTS. 271 (2013); Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 BROOK. J. INT'L L. 911 (2011); Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 637 (1994).

<sup>3</sup> Eric De Brabandere, *NGOs and the 'Public Interest': The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12 CHI. J. INT'L L. 85 (2011); Henry S. Gao, *Amicus Curiae in WTO Dispute Settlement: Theory and Practice*, 1 CHINA RTS. F. 51 (2006); Federico Ortino, *The Impact of Amicus Curiae Briefs in the Settlement of Trade and Investment Disputes: An Analysis of the Shrimp/Turtle and Methanex Decisions*, in ECONOMIC LAW AS AN ECONOMIC GOOD 301, 316 (Karl M. Meessen et al. eds., 2009).

processes will explain the causes that led to the Amicus Curiae Phenomenon while examining the contribution of the Amicus in shaping the new discussion modes and work style of the modern judicial systems around the Western world, including among others, Israel. The third section of this Article will analyze the Amicus Curiae Phenomenon and will present arguments in favor of and against the use of Amicus Curiae in light of the comparative approach. The fourth section will discuss the impacts of the Amicus Curiae Phenomenon and will demonstrate what it teaches us about the modern jurisprudence and the role of the modern judicial system.<sup>4</sup>

## II. AMICUS CURIAE PHENOMENON

A comparative examination of judicial litigation in the last three decades of common, civil, and international law shows that in a relatively short span of time, dozens of countries around the world, including developing countries from Latin America, Africa, Asia, and Eastern Europe-and most international institutions have adopted the Amicus practice or have significantly increased its use.<sup>5</sup> Taking a broad view of such examination, the processes in most countries that have recently adopted the Amicus practice are relatively similar to one another.

This Article's comparative study shows that the process often begins as follows: in the first stage, courts object to the joining of unrelated third parties as Amici.<sup>6</sup> Such objection is usually based on broader jurisprudence principles prohibiting the intervention of third parties into a litigation process for which they are not the formal parties.<sup>7</sup>

The second stage includes a lessening of courts' strict "no-third-parties" approach. Such moderation is usually caused due to various issues and legal proceedings in which courts realize that the inclusion of such unrelated third parties is appropriate and justified (and sometimes necessary) since the litigation process impacts or might impact additional groups. In the third stage, courts initially adopt a non-official practice of Amicus but later adopt a formal Amicus practice. In the fourth stage, there is a gradual establishment

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<sup>4</sup> Since the goal of this Article is to focus on the Amicus Curiae Phenomenon and what we can learn from this phenomenon, an in-depth discussion of the *implications* of the Amicus Curiae Phenomenon is not possible. Therefore, such full examination will not be presented herein.

<sup>5</sup> See Steven Kochevar, *Amici Curiae in Civil Law Jurisdictions*, 122 YALE L.J. 1653 (2013).

<sup>6</sup> *Id.*

<sup>7</sup> As will be explained on chapter B, this approach is based on the judicial tradition of the adversarial system.

of the Amicus practice in domestic courts or implemented at the national level.<sup>8</sup> Finally, in the fifth stage, there is a significant increase in the usage of the Amicus procedure.<sup>9</sup> Such escalation of use manifests itself as follows: growth of Amicus briefs submitted to the courts (in comparison to the number of cases which are decided by such courts); increase in the type of courts Amicus briefs are submitted to; increase in the number of Amicus briefs submitted in cases dealing with fundamental issues; and, significant rise in the entities which make use of the Amicus as a way to influence the decisions of courts.<sup>10</sup>

The impact of the Amicus practice expands beyond the work of the court and the legal agents related therein. For instance, in recent years many clinics and legal courses have been established—mainly in law schools—to train and educate faculty members, students, and even laypersons on how to submit Amicus briefs to influence courts' decisions. Many law review articles, brochures, and blogs have been written regarding the use of the Amicus practice and the influence of the Amicus on the court's decision process.<sup>11</sup> Numerous videos instructing users how to write effective Amicus briefs can be viewed on the internet.<sup>12</sup> Retired justices are interviewed or write memoirs about the Amicus briefs submitted to them, and explain what information was helpful and influential.<sup>13</sup> Finally, a new field in the legal profession is well

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<sup>8</sup> See, e.g., Benjamin R.D. Alarie & Andrew J. Green, *Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance*, 48 OSGOODE HALL L.J. 381 (2010); Bellhouse & Lavers, *supra* note 1.

<sup>9</sup> See Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm*, NAT'L L.J. (Aug. 19, 2015).

<sup>10</sup> See PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 1, 48 (2008).

<sup>11</sup> For example, since 1997, the "Amicus Curiae" journal of the Institute of Advanced Study of the University of London has published numerous articles and papers that offer ways to promote various issues by submitting Amicus briefs. "We chose the name *Amicus Curiae* – friend of the court – to give emphasis to our desire to promote legal research and scholarship which is relevant to and supportive of the administration of justice. It is our view that academia has much to offer the practise of law; and practitioners certainly have much they could contribute to the advancement of scholarship. *Amicus Curiae* will, we are sure, become an important vehicle for raising and exploring issues, primarily of a topical nature, which can then be taken further by the Society and Institute." Barry Rider, *Bringing the Profession Together*, 1 AMICUS CURIAE: J. SOC'Y FOR ADVANCED LEGAL STUD. 1, 1 (1997). I have emphasized the issue of blogs because many believe that legal blogs are the future of legal writing in the coming decades. Paul L. Caron, *Are Scholars Better Bloggers? Bloggership: How Blogs are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1025 (2006).

<sup>12</sup> In recent years the use of videos on the internet to create civil awareness with citizens to influence the issues being litigated at courts has been widespread, and it is possible to find thousands of videos relating to Amicus Curiae. See, e.g., *Amicus Curiae Brief*, YOUTUBE (July 6, 2016), <https://www.youtube.com/watch?v=bKbQFGPs8-o>.

<sup>13</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the affirmative action admissions policy of the University of Michigan Law School.). Author of the *Grutter* opinion, Supreme Court Justice Ruth Bader Ginsburg, mentioned that one of the Amicus Curiae briefs that influenced her was a brief by a retired U.S. Army Officer which described the negative impact that the Army

established as a result of the Amicus Curiae Phenomenon: the Amicus Coordinator, who is an attorney solely responsible for the management and submission of Amicus briefs to prevent repetition and to present a unified and effective facade of all Amicus.<sup>14</sup>

### A. *Amicus Curiae in Common Law*

The most significant development of the Amicus Curiae has occurred in the common law countries. Starting in the 1990's, there has been a significant increase in the use of the Amicus practice in all common law countries, including the United States ("U.S."), Canada, England, Australia, South Africa, Ireland, New Zealand, Singapore, and Israel.

#### 1. United States

In the U.S., for example, one of the most significant changes in the judiciary system and specifically, the work of the U.S. Supreme Court, in the past 20 years is related to the usage and influence of the Amicus on the judicial proceedings. In the first half of the twentieth century, despite the fact that it was possible to submit Amicus briefs at the time, almost no Amicus briefs were submitted to the U.S. Supreme Court.<sup>15</sup>

Between the years 1920 to 1966, less than 10% of the cases reviewed by the U.S. Supreme Court Amicus briefs were submitted. Since the early 1970s, the rate of Amicus briefs in the Supreme Court started to increase; between the years of 1975 and 1985, Amicus briefs were filed in about 73% of the cases reviewed by the Supreme Court.<sup>16</sup> Between 1985 and 1995, Amicus briefs were filed in about 85% of the cases reviewed by the Supreme Court.<sup>17</sup> Finally, from 2011 to 2014, Amicus briefs were submitted in about 96% of all cases reviewed by the Supreme Court.<sup>18</sup> During the period of 2015 to 2016 alone, a total of 863

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would suffer from if it did not have adequate diversity between the officers. *Id.* at 331; see also Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 696 (2008).

<sup>14</sup> Janet M. Box-Steffensmeier & Dino P. Christenson, *The Evolution and Formation of Amicus Curiae Networks*, 36 SOC. NETWORKS, 82, 96 (2014); see also *Amicus Curiae Committee—Frequently Asked Questions*, PENN. ASS'N FOR JUST., <https://cdn.ymaws.com/www.pajustice.org/resource/resmgr/docs/Amicus/2018/PAJAmicus-FAQ-2017.pdf> (last visited Sept. 12, 2019).

<sup>15</sup> For an in-depth empirical study see Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000); see also Nathan Hakman, *Lobbying the Supreme Court – an Appraisal of “Political Science Folklore,”* 35 FORDHAM L. REV. 15 (1966); Sup. Ct. R. 28, 37.

<sup>16</sup> See Kearney & Merrill, *supra* note 15, § I(A).

<sup>17</sup> *Id.*

<sup>18</sup> See Kearney & Merrill, *supra* note 15.

Amicus briefs were submitted to the Supreme Court, which is about 13 Amicus briefs per case (92% of all the cases being reviewed by the Supreme Court).<sup>19</sup>

In recent years, an average of approximately 500 briefs per year, encompassing hundreds of thousands of pages, were submitted in cases before the U.S. Supreme Court.<sup>20</sup> Over 25,000 Amicus briefs were submitted in over 5,000 cases before the Supreme Court resulting in a rise of over 800% of the number of Amici submitted previously.<sup>21</sup>

Further, in the U.S., the amount of Amicus briefs, which were submitted in cases with substantial societal implications have increased considerably in the last few decades. For example, in the case dealing with the legality of the Affordable Care Act, hundreds of interest groups joined and filed 136 Amicus briefs.<sup>22</sup> In the case dealing with the constitutionality of the Defence of Marriage Act, 147 Amicus briefs were submitted to the Supreme Court, and these Amicus briefs represented thousands of non-governmental organizations and various interest groups (women's rights groups, religious organizations, etc.).<sup>23</sup>

The number of Amici submitted in cases of the Supreme Court has increased annually, and many law practitioners specializing in litigation of Supreme Court cases believe that the numbers are expected to increase significantly.<sup>24</sup> The increased number of Amici briefs submitted in recent years deal with every aspect of law and are not limited to only a few issues.<sup>25</sup> The growth in the Amicus Curiae Phenomenon is not limited to the Supreme Court. The growth has been prevalent in various state courts, and especially in federal courts.<sup>26</sup>

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<sup>19</sup> See Franze & Anderson, *supra* note 9.

<sup>20</sup> See Kearney & Merrill, *supra* note 15.

<sup>21</sup> See COLLINS, JR., *supra* note 10; see also Jenna Becker Kane, *Lobbying Justice(s)? Exploring the Nature of Amici Influence in State Supreme Court Decision Making*, 17 ST. POL. & POL'Y Q. 251 (2017).

<sup>22</sup> See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

<sup>23</sup> See Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

<sup>24</sup> See Mark Walsh, *It Was Another Big Term for Amicus Curiae Briefs at the High Court*, ABA J., Sept. 1, 2013, [http://www.abajournal.com/magazine/article/it\\_was\\_another\\_big\\_term\\_for\\_amicus\\_curiae\\_briefs\\_at\\_the\\_high\\_court](http://www.abajournal.com/magazine/article/it_was_another_big_term_for_amicus_curiae_briefs_at_the_high_court).

<sup>25</sup> See Paul M. Collins, Jr. & Lauren A. McCarthy, *Friends and Interveners: Interest Group Litigation in a Comparative Context*, 5 J. L. & COURTS 55 (2017).

<sup>26</sup> See Donald R. Songer & Ashlyn Kuersten, *The Success of Amici in State Supreme Courts*, 48 POL. RES. Q. 31 (1995); see also Simard, *supra* note 13.



## 2. Canada

In Canada, the rise of Amicus Curiae Phenomenon has manifested itself in several aspects. First, there has been a significant increase in the number and diversity of interest groups trying to influence courts' decision processes by intervening as Amicus briefs and other third parties. For example, in 2012 alone, over 60% of the litigation processes at the Supreme Court of Canada were accompanied by briefs of third parties (Amicus and additional third parties—"Interveners."<sup>27</sup>)

It should be noted that both Amicus and Intervener are third parties; however, there are differences between them. Unlike the Amicus, the Intervener is a third party with a direct interest in the case, and often might become a formal party in the litigation.<sup>28</sup> The main difference between the formal parties to the case and the Intervener is that the actual outcome of the case is the priority for the formal parties as it directly impacts them, while the Intervener is more interested in the legal precedent that might be decided in the case.<sup>29</sup>

Second, there has been an escalation in the number of Amicus briefs in fundamental cases.<sup>30</sup> And finally, there has been an increase in the number of quotes of Amicus and Interveners used in court rulings.<sup>31</sup>

In general, the growing involvement of the Canadian courts in social issues has resulted in a substantial rise in litigation of social issues, such as gender, race, religion, nationality, native rights, and environmental rights, and as a result of this trend, interests groups, regardless of their political power, have begun to present their position in connection with such social issues as third parties.<sup>32</sup>

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<sup>27</sup> PETER HOGG, CONSTITUTIONAL LAW OF CANADA 20–56 (5th ed. 2007); Lorne Neudorf, *Intervention at the UK Supreme Court*, 2 CAMBRIDGE J. INT'L & COMP. L. 16, 19 (2013).

<sup>28</sup> In Canada, the Amicus is not viewed as a tool to influence the court. Rather, the Amicus is there to assist the court in the running of a trial and is neutral to the outcome of that trial. Interveners are not neutral. See *Ontario v. Criminal Lawyers' Assoc. of Ontario*, [2013] 3 S.C.R. 3 (Can.).

<sup>29</sup> See Neudorf, *supra* note 27; see also David Berg, *The Limits of Friendship: The Amicus Curiae in Criminal Trial Courts*, 59 CRIM. L.Q. 67 (2012).

<sup>30</sup> See also Alarie & Green, *supra* note 8. See generally IAN BRODIE, FRIENDS OF THE COURT: THE PRIVILEGING OF INTEREST GROUP LITIGANTS IN CANADA (2002).

<sup>31</sup> See also Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.); *Peel v. Great Atl. & Pac. Co. of Can. Ltd.* (1990), 74 O.R. 2d 164 (Can. Ont. C.A.); Antonio Lamer, *Canada's Legal Revolution: Judging in the Age of the Charter of Rights*, 28 ISR. L. REV. 579 (1994); Bruce Ryder, *A Court in Need and a Friend Indeed: An Analysis of the Arguments of the Amicus Curiae in the Quebec Secession Reference*, 10 CONST. F. 9 (1998).

<sup>32</sup> See Lynn Smith, *Have the Equality Rights Made Any Difference?*, in PROTECTING RIGHTS AND FREEDOMS: ESSAYS ON THE CHARTER'S PLACE IN CANADA'S POLITICAL, LEGAL, AND INTELLECTUAL LIFE 60, 75 (Philip Bryden et al. eds., 1994). Researchers indicate the steady increase in the intervention of third parties in the litigation processes conducted at the Canadian Supreme Court. For instance, in 1983, the percentage of third parties joining the Supreme Court litigation was

### 3. England

In England, the 1990s and 2000s marked the change in attitude towards intervention of third parties (Amici and Interveners alike) in judicial processes. This was exemplified in the words of Lord Chancellor Irvine in the 1996 decision *R v. Khan*, which was the first case the court allowed human rights organizations to submit Amicus briefs, stating that: "So it appears to me, as at present advised . . . that our courts will be ready to permit amicus written briefs from non-governmental organizations; that is to say briefs, but not to treat them as full parties."<sup>33</sup>

The rise of the Amicus Curiae Phenomenon in the English Judicial System is reflected not only in the number of cases in which third parties were allowed to submit their position but also in the number of joining parties in each case.<sup>34</sup> Most constitutional cases reviewed by the House of Lords included a substantial number of joining third parties to the judicial processes.<sup>35</sup> For example, in the case of *JFS*, the court dealt with whether a Jewish Orthodox school could exclude applicants on the basis of religion. Lord Phillips received social information from a broad spectrum of organizations and groups, including the Board of Deputies of Jews in Britain.<sup>36</sup> The increasing trend of third parties joining judicial processes was not only present in the House of Lords and the Supreme Court which superseded it, but also in other courts throughout England.<sup>37</sup>

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about 18%. In 1987, the rate increased to 20%, and in 1990, the rate reached 30%. This trend remained stable until 1997. In 1999, about 40% of the litigation conducted by the Supreme Court third parties were allowed to join and present their position. In 2001, there was a slight decline to a rate of 35.1%. In 2007, almost 62% of the litigated cases in the Supreme Court had third parties joining in to present their position. In addition, in recent years, third parties joined in about 90% of the constitutional cases litigation by the Supreme Court. In the 1990s, the average number of interventions for each case reviewed by the Supreme Court was 5.6 third parties for each case; however, in the 2000s, the number of third parties for each case reviewed by the Supreme Court was 7.6. Additional evidence to the change in the Supreme Court's attitude to third parties joining cases reviewed by the court can be found in the new procedural rules adopted by the Canadian Supreme Court as of the late 1990s which allow intervention of third parties. *See* Alarie & Green, *supra* note 8.

<sup>33</sup> Lord Irvine, Hansard, HL Debates, 24 November 1997, col 832; *see also* Carol Harlow, *Public Law and Popular Justice*, 65 MOD. L. REV. 1, 7 (2002).

<sup>34</sup> *See* ERIC METCALFE, TO ASSIST THE COURT: THIRD PARTY INTERVENTIONS IN THE UK 13 (2009).

<sup>35</sup> *See* for example the case of *YL v. Birmingham City Council*, which dealt with the definition of "public body" in accordance with human rights and elicited submission of Amicus briefs from various interest groups including human rights organizations, elderly organizations, and women's rights groups. *YL v. Birmingham City Council*, [2007] UKHL 27 (HL), [2008] 1 AC 95 (appeal taken from Eng.).

<sup>36</sup> *See* *R (E.) v. Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728 (appeal taken from Eng.).

<sup>37</sup> *See* Henry Brooke, *Interventions in the Court of Appeal*, 2007 PUB. L. 401, 403. For example, between the years 2009 and 2016 from the 423 procedures litigated in the Supreme Court, in 141 procedures the number of joining third parties was 228 by the following distribution: 91 governmental organizations, 101 non-governmental organizations and 41 private organizations.

#### 4. Australia

In Australia, the question of third parties joining proceedings was decided by the Australian Supreme Court in the *Lange* case, which dealt with the issue of freedom of speech.<sup>38</sup> In light of the significance of the issue, many interest groups, communication companies, and human rights organizations wished to express their position.<sup>39</sup> For the first time, the Supreme Court allowed third parties to intervene in the proceedings, some as Interveners and some as Amici. The Supreme Court noted that it has the discretion to hear the point of views of such third parties and additional perspectives from the public, as such discretion stems from the natural rules of justice.<sup>40</sup> Justice McHugh explained his change of position concerning third parties by stating that:

Although this is litigation between parties, part of this Court's function is to declare the law for the nation and that means the Court has got to look at issues that go beyond [...] the particular parties [...].<sup>41</sup>

Following the *Lange* case, in 2004 the Australian Supreme Court established new procedure rules concerning the joining of third parties to existing proceedings.<sup>42</sup> The rules list several requirements for third parties to be able to file a request to join a proceeding, submission schedules, and information that the Amicus brief must contain.<sup>43</sup>

#### 5. South Africa

After the adaption of the South African Constitution in the 1990s, the use of Amicus—and other methods of intervention by third parties—in existing proceedings have significantly grown.<sup>44</sup> The Amicus in South Africa has an important role, which helps shape society and the administration of the

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JUSTICE & FRESHFIELDS BRUCKHAUS DERINGER, TO ASSIST THE COURT: THIRD PARTY INTERVENTIONS IN THE PUBLIC INTEREST 9 (2016).

<sup>38</sup> *Lange v Austl. Broad Corp* (1997) 189 CLR 520 (Austl.). This decision was handed down together with *Levy v Victoria* (1997) 189 CLR 579 (Austl.).

<sup>39</sup> *Lange* 189 CLR, at 60.

<sup>40</sup> *Id.*

<sup>41</sup> *Superclinics Austl. Pty Ltd v. CES* [1996] HCATrans 278.

<sup>42</sup> Blake Dawson Waldron, *Role of Amicus Curiae and Interveners in the Promotion and Protection of Human Rights*, HUMAN RIGHTS LAW RES. CTR, <http://clra.info/role-of-amicus-curiae-and-intervenors-in-the-promotion-and-protection-of-human-rights/> (last visited Sept. 12, 2019); George Williams, *The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis*, 28 FED. L. REV. 365 (2000).

<sup>43</sup> *Statutory Rules No. 304*, High Court Rules 2004 (Cth) pt. 44 (Austl.).

<sup>44</sup> See Christina Murray, *Litigating in the Public Interest: Intervention and the Amicus Curiae*, 10 S. AFR. J. HUM. RTS. 240, 241–44 (1994).

country.<sup>45</sup> Similarly to other common law countries, the Amicus is also used to present legal arguments on behalf of a party to the proceedings which is not represented, to represent interests of individuals who might be impacted by the court's decision, or when the proceedings involve fundamental questions.<sup>46</sup>

Amicus participate in most instances of the judicial system, including the Constitutional Court,<sup>47</sup> Supreme Court of Appeals,<sup>48</sup> the High Court,<sup>49</sup> and Labor Courts.<sup>50</sup> The South African Constitution grants a broad spectrum of bodies and organizations the right to address the courts. As a result, the high percentage of proceedings with Amici joining is not surprising, especially since the South African courts tend to rely and encourage the submission of Amicus briefs.<sup>51</sup> Professor Klaaren argued that the way the rules of the Constitutional Court were drafted was to assist various interest groups in becoming deeply involved in the decision processes of courts.<sup>52</sup>

Upon broad examination of the various courts in countries using the common law judicial system, since the 1990s, a more liberal approach has been applied with interventions in legal proceedings by third parties. Evidence of that is illustrated in the numerous types of legal issues in which Amicus briefs are being submitted, as well as an increase in the total number of briefs over the years. In the eyes of many, the Amicus is an essential tool for public organizations to join legal proceedings to advance their agendas and policies.<sup>53</sup> In recent years, the use of Amici in common law system have joined legal proceedings taking place at almost all types of courts, including family courts, labor courts, first instance courts, military tribunals, arbitrations and

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<sup>45</sup> See Frans Viljoen & Adem Kassie Abebe, *Amicus Curiae Participation Before Regional Human Rights Bodies in Africa*, 58 J. AFR. L. 22, 24 (2014); see also John C. Mubangizi & Christopher Mbazira, *Constructing the Amicus Curiae Procedure in Human Rights Litigation: What Can Uganda Learn from South Africa*, 16 L. DEMOCRACY & DEV. 199, 200 (2012).

<sup>46</sup> See, e.g., *Govender v. Manikum* 1981 (1) SA 1178 (N) at 1182 (S. Afr.). See generally Amanda Spies, *Amicus Curiae Participation, Gender Equality and the South African Constitutional Court* (June 9, 2014) (unpublished Ph.D. dissertation, University of the Witwatersrand).

<sup>47</sup> Rules of the Constitutional Court 2003, r. 10, GN R.165 of GG 25726 (31 October 2003) (S. Afr.); Jason Brickhill & Max du Plessis, *Two's Company, Three's a Crowd: Public Interest Intervention in Investor-State Arbitration (Piero Foresti v South Africa)*, 27 S. AFR. J. HUM. RTS. 152, 152 (2011).

<sup>48</sup> See Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, r. 16, GN R.1523 (27 November 1998) (S.Afr.).

<sup>49</sup> See Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, r. 16A, GN R.48 (12 January 1965) (S. Afr.).

<sup>50</sup> See Labour Appeal Court Rules, r. 7, GN 1666 of GG 17495 (14 October 1996) (S.Afr.).

<sup>51</sup> See Viljoen & Abebe, *supra* note 45.

<sup>52</sup> Jonathan Klaaren, *Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information*, 13 S. AFR. J. HUM. RTS. 499 (1997); see also J. Klaaren, J. Dugard & J. Handmaker, *Public Interest Litigation in South Africa: Special Issue Introduction*, 27 S. AFR. J. HUM. RTS. 1 (2011).

<sup>53</sup> See Kearney & Merrill, *supra* note 15.

statutory committees. Moreover, the variety, type, and character of public organizations using the Amicus procedure as a way to influence courts decisions have increased significantly. Among such organizations, are human rights, environmental, religious, LGBTQ, and social organizations, corporations, and ordinary citizens.<sup>54</sup>

### B. *The Amicus Curiae Phenomenon in International Law*

The second development of the Amicus Curiae phenomenon took place in international law courts. Until the 1980s, international tribunals were hostile to letting third parties present their position or join the legal proceedings.<sup>55</sup> However, as of the early 1990s, international tribunals including the European Court of Human Rights, have gradually changed their previous hostile position regarding third-party intervention, and have started to accept requests from Amicus—mostly international NGOs—to express their positions in legal proceedings.<sup>56</sup>

#### 1. European Human Rights Court

Taking the European Human Rights Court as an example, illustrates that the presence of NGOs as third parties in legal proceedings in Court has significantly increased in the last decade.<sup>57</sup> For example, the number of Amicus briefs submitted between 2012 and 2013 alone was much larger than the number of all Amicus curiae briefs submitted in the last decade altogether.<sup>58</sup> In recent years, Amici were submitted in about a quarter of the cases reviewed by the European Human Rights Court, and their percentage of participation in fundamental cases is increasing.<sup>59</sup>

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<sup>54</sup> See generally Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917 (2015); see also STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY 219–35 (1995); Tracey E. George & Lee Epstein, *Women's Rights Litigation in the 1980s: More of the Same?*, 74 JUDICATURE 314 (1991).

<sup>55</sup> Mónica Pinto, *NGOs and the Inter-American Court of Human Rights*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 47, 55–56 (Tullio Treves et al. eds., 2005).

<sup>56</sup> Van den Eynde, *supra* note 2, at 276.

<sup>57</sup> *Id.*

<sup>58</sup> In general, in the 1990s, very few Amicus briefs were submitted each year. Since 2005, between 20 and 45 briefs have been submitted each year. Van den Eynde, *supra* note 2, at 280; see also Marco Frigessi di Rattalma, *NGOs Before the European Court of Human Rights: Beyond Amicus Curiae Participation?*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 57 (Tullio Treves et al. eds., 2005); Bartholomeusz, *supra* note 2, at 236.

<sup>59</sup> See Van den Eynde, *supra* note 2, at 280 (stating that the number of third-party interventions in legal proceedings has been increasing since 1985. In 1985 and 1993, there were merely three

## 2. Inter-American Court of Human Rights

Much like the European Human Rights Court the Inter-American Court of Human Rights, allowed Amicus briefs to be submitted in legal proceedings conducted by the Court.<sup>60</sup> The frequency of the requests of Amicus to submit their position to the Court has risen significantly in recent years, and the Justices of the Court regularly reference or quote information presented by the Amicus in their decisions.<sup>61</sup> Moreover, studies conducted on this issue demonstrate that the Inter-American Court of Human Rights has received more briefs from third parties than the formal parties to the legal proceeding.<sup>62</sup> Amici have submitted briefs in about 35% of all legal proceedings conducted in the Court.<sup>63</sup>

The change in attitude towards Amicus in the Inter-American Court of Human Rights was also reflected in the creation of new procedural rules, which were more accommodating towards requests of third parties to present their position to courts.<sup>64</sup> As a result of these new procedural rules, organizations that were not formally attached to the court proceedings were allowed to participate in the legal proceedings, showing a steady rise of the number of Amicus in each proceeding, as well as the option of third parties to participate in oral arguments.<sup>65</sup>

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interventions in legal proceedings conducted by the Court. However, in 1998, there were 8 interventions, in 2005 there already were 25 interventions, and by 2012 there were 35 interventions just in that year alone).

<sup>60</sup> Pinto, *supra* note 55. *See generally* Inter-American Court of Human Rights [IACHR], Rules of Procedure of the Inter-American Court of Human Rights, art. 41 (2009); Mayer, *supra* note 2.

<sup>61</sup> Pinto, *supra* note 55, at 55–56.

<sup>62</sup> Francisco J. Rivera Juaristi, *The Amicus Curiae in the Inter-American Court of Human Rights (1982–2013)*, 1 (Aug. 1, 2014) (unpublished manuscript), <http://ssrn.com/abstract=2488073>. *See also* Mayer, *supra* note 2.

<sup>63</sup> *See* Rivera Juaristi, *supra* note 62, (manuscript at 4). For example, in the years 2010 to 2013, 177 Amicus briefs have been submitted, which comprise about 43 percent of all briefs submitted until then. *Id.* In total, 412 Amicus Curiae briefs have been submitted in 98 proceedings conducted by the Court since 1987 until 2013. *Id.* This means that Amicus briefs have been submitted—mainly by international NGOs—in approximately 35% of the legal proceedings before the Court. In 2012 alone, 107 Amicus Curiae briefs were submitted to the Court. *Id.*

<sup>64</sup> Inter-American Court of Human Rights [IACHR], Rules of Procedure of the Inter-American Court of Human Rights, art. 41 (2009); Pinto, *supra* note 55.

<sup>65</sup> *See* Rivera Juaristi, *supra* note 62, at 4.

### 3. International Criminal Tribunals

In addition to these tribunals, international criminal tribunals and international criminal courts established ad-hoc began, in the early 2000s, to enable Amici to join legal proceedings. For instance, Amici were allowed to join the legal proceedings at the International Criminal Tribunal for the Former Yugoslavia (“ICTY”),<sup>66</sup> as well as the International Criminal Tribunal for Rwanda (“ICTR”).<sup>67</sup> In all of these tribunals, for the first time, third parties unrelated to the litigation were allowed to present their position by joining as Amicus. As a result of these processes, in 2002, the International Criminal Court established clear rules on this subject.<sup>68</sup>

This rule specified that a third-party is entitled to invite or grant permission to a country, organization, or an individual to submit, as a third party, its position in a brief or by oral arguments on any issue that the Court finds applicable and at any stage of the legal proceeding.<sup>69</sup>

### 4. International Arbitrations

The Amicus Curiae Phenomenon in international law began to take hold not only in international public law—and specifically international criminal law—but also in international commercial issues including international commercial arbitrations. Several significant international organizations have adopted the practice of accepting briefs from Amicus Curiae, including (1) the World Trade Organization (“WTO”);<sup>70</sup> (2) The North American Free Trade

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<sup>66</sup> Int’l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.50, r. 74 (July 8, 2015).

<sup>67</sup> Int’l Crim. Trib. for Rwanda, Rules of Procedure and Evidence, ITR/3/REV.1, r. 74 (June 29, 1995).

<sup>68</sup> Int’l Crim. Ct., Rules of Procedure and Evidence, r. 103(1) (2003).

<sup>69</sup> *Id.*; see also Berg, *supra* note 29, at 71–72.

<sup>70</sup> The WTO adopted, despite considerable reservations, the Amicus Curiae procedure in dispute settlement and in appellate proceedings at the Appellate Body. The authority to approve the use of Amicus Curiae in arbitration proceedings was first debated in two precedential decisions: Hot-Rolled Lead and Asbestos. U.S. – Imposition of Countervailing Duties on Certain Hot-Rolled Lead & Bismuth Carbon Steel Prods. Originating in the U.K., Appellate Body Report, WTO Doc. WT/DS138/AB/R (May 10, 2000) [hereinafter Hot-Rolled Lead Case], and Eur. Cmty. – Measures Affecting Asbestos and Asbestos-Containing Prods., 40 I.L.M. 1193 (WTO Appellate Body 2001). In both cases, Amicus Curiae requests to join the proceedings were submitted to the Appellate Body. Despite the fact that the formal parties to the proceedings argued that the Appellate Body does not have the authority to accept Amicus Curiae briefs, the arbitrators of the Appellate Body ruled that they are indeed authorized to accept Amicus Curiae briefs, stating that: “We are of the opinion that we have the legal authority under the DSU to accept and consider amicus curiae briefs in an appeal in which we find it pertinent and useful to do so.” Hot-Rolled Lead Case, ¶ 42. In light of the many issues that arose during the years in connection with Amici’s desire to join arbitration proceedings the WTO was driven to implement a reform of the subject and establish in 2010 rules regulating this issue. Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International*

Agreement (NAFTA);<sup>71</sup> (3) The International Center for Settlement of Investment Disputes (“ICSID”);<sup>72</sup> (4) The International Chamber of Commerce (“ICC”).<sup>73</sup> The central justification behind the Amicus Curiae Phenomenon in international commercial arbitrations is that sometimes commercial arbitrations do not only deal with commercial interests of the formal parties but include important public matters: human rights, minority rights, environmental rights, animal rights and political rights of third parties.<sup>74</sup>

### C. *The Amicus Curiae Phenomenon in Civil Law*

The third course in the development of the Amicus Curiae Phenomenon began in the early 1990s in civil law countries in Europe and Latin America, and to a certain extent also in Africa and Asia. This development occurred due to the adaptation of norms from international law into the civil system. In this way, many of the European and Latin American countries adopted the Amicus practice within their internal judicial systems, allowing Amici to present their point of view in legal proceedings. In general, the adaptation of the Amicus practice into civil law and the change in attitude towards the intervention of third parties was achieved through domestic legislation and the informal trickling effect of this practice into to the judicial system.<sup>75</sup>

Latin American countries did not officially recognize the Amicus practice until the end of the 1990s. In 1999, Brazil allowed the intervention of Amici Curiae for the first time in the Constitutional Court.<sup>76</sup> Even before the official recognition of the right of third-parties to submit Amicus briefs, there was a non-formal tradition of submitting briefs to the Constitutional Court by State

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*Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT'L L.J. 510, 510 (2012); see also Josh Robbins, *False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals Under the Hot-Rolled Lead/Asbestos Doctrine*, 44 HARV. INT'L L.J. 317, 317 (2003).

<sup>71</sup> *Methanex Corp. v. United States*, NAFTA Arb. (Jan. 15, 2001); Barton Legum, *Introductory Note to Methanex Corporation v. United States of America*, 44 I.L.M. 1343, 1343 (2005).

<sup>72</sup> Rules of Procedure for Arbitration Proceedings, ICSID Convention, Regulations and Rules r.37 (Apr. 10, 2006), <http://icsidfiles.worldbank.org/icsid/icsid/StaticFiles/basicdoc/basic-en.htm>; *Aguas Argentinas S.A. v. Arg. Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (May 19, 2005), 21 ICSID Rev. 342 (2006).

<sup>73</sup> See De Brabandere, *supra* note 3, at 85.

<sup>74</sup> *Id.*; see also Bartholomeusz, *supra* note 2, at 236.

<sup>75</sup> Rachel A. Cichowski, *The European Court of Human Rights, Amicus Curiae, and Violence Against Women*, 50 L. & SOC'Y REV. 890, 890 (2016); see Kochevar, *supra* note 5.

<sup>76</sup> Kochevar, *supra* note 5; see also Daniela Brasil Medeiros, *Amicus Curiae: Um Panorama Do Terceiro Colaborador*, 7 REVISTA DA ESMARN 279, 279 (2008) (Braz.).



agencies as a kind of Amicus brief.<sup>77</sup> The incorporation of the Amicus procedure in 1999 was not conjured out of thin air, but was based on a non-formal tradition, which applied to State agencies.<sup>78</sup> However, the real change was the option to add NGOs as Amicus Curiae and incorporating these rules into the law.<sup>79</sup> In 2004, the Supreme Court of Argentina<sup>80</sup> and the Supreme Court of Peru<sup>81</sup> explicitly acknowledged the practice of adding third parties as Amicus to legal proceedings and established clear rules to that effect. Both in Argentina and Peru, the formal incorporation of the Amicus procedure was based on a semi-official tradition, which allowed certain Amici, mainly government agencies, to present their position in a non-formal way.<sup>82</sup> In addition to this trend, in 2011, additional countries in Latin America (e.g., Mexico) explicitly allowed the participation of Amicus Curiae in legal proceedings, including NGOs.<sup>83</sup>

Furthermore, various European countries in the past twenty years have adopted, for the first time, the Amicus practice. In 1988, France was the first country to adopt the Amicus practice.<sup>84</sup> During a case dealing with the professional liability of lawyers, the Chief Justice of the Appellate Court requested that the President of the Paris Bar Association present an Amicus brief stating the position of the Paris Bar Association. The Appellate Court stated that the Bar Association was requested to provide the brief to assist the Court in reaching a decision without becoming a formal party to the case.<sup>85</sup>

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<sup>77</sup> See Kochevar, *supra* note 5; see also Alvaro Correa-Ordoñez & Sasha Mandakovic Falconi, A Guide to Filing *Amicus Curiae* Briefs in Latin America (Latin Am. Subcomm., INTA Int'l Amicus Comm. Oct. 15, 2014).

<sup>78</sup> See Kochevar, *supra* note 5; see also Correa-Ordoñez & Mandakovic Falconi, *supra* note 77.

<sup>79</sup> *Id.*

<sup>80</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/7/2004, "Acordadas, amicus curiae, competencia de la Corte Suprema, deber de imparcialidad / Summario de Fallo," Acordada No. 28/2004 30455 B.O. (Arg.); see also Correa-Ordoñez & Mandakovic Falconi, *supra* note 77.

<sup>81</sup> Reglamento Normativo del Tribunal Constitucional, Resolución Administrativa No. 095-2004-P/TC, Sept. 14, 2004, art. 13-A (Peru); Defensoría Del Pueblo, El amicus curiae: ¿qué es y para qué sirve? 45–46 (2009) (Mex.).

<sup>82</sup> See Kochevar, *supra* note 5.

<sup>83</sup> The change in the attitude of the court for interest groups to present their position in South American countries is also rooted in a set of democratic and economic reforms which have taken place in most of these countries at the same time, which includes modernization, change of political systems, expansion of the private sector, increase in transparency. See AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA – REVISITED (Howard J. Wiarda ed., 2004).

<sup>84</sup> See David W. Duncan, *A Little Tour in France: Surrogate Motherhood and Amici Curiae in the French Legal System*, 21 W. ST. U.L. REV. 447, 447 (1994).

<sup>85</sup> Christelle Coslin & Delphine Lapillonne, *France and the Concept of Amicus Curiae: What Lies Ahead?*, 4 PARIS INT'L LITIG. BULL. 14 (2012); Dinah Shelton, *supra* note 2.

Three years later, the Supreme Court of France (Cour de cassation) acknowledged the Amicus procedure, and gradually allowed third parties to submit their positions as Amicus in a number of cases including: in agreements of surrogate mothers,<sup>86</sup> in compensation provided to a patient with HIV,<sup>87</sup> and in several criminal cases.<sup>88</sup> The Amicus practice was adopted in other courts in France.<sup>89</sup>

The Amicus practice was also adopted through the requests of international organizations, which submitted Amicus briefs to courts that did not recognize the practice of Amicus. As a result, courts had to align their actions with other courts in different countries who have adopted the Amicus practice—such as South Korea,<sup>90</sup> Thailand,<sup>91</sup> Russia,<sup>92</sup> and African countries such as Rwanda and Ethiopia.<sup>93</sup> In this way, the Amicus practice was adopted, sometimes in an official way and in others in a semi-official way. The assumption behind the position to allow intervention of third parties as Amicus, even without official adaptation, was that even if the Amicus brief was rejected, the content of the Amicus position was provided to the court, and such information could be used in the decision process.

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The global Amicus Curiae Phenomenon has three parallel paths existing simultaneously and impacting each other. The global development of the Amicus Curiae Phenomenon is based on a similar pattern. Initially, courts are hostile to the addition of third parties to legal proceedings. The background for such hostility is rooted in various arguments. First and foremost is the long

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<sup>86</sup> Coslin & Lapillonne, *supra* note 85, at 14 (citing Cour de cassation [Cass.][supreme court for judicial matters] ass. plén., May 31, 1991, Bull. ass. plén. No. 4 (Fr.)).

<sup>87</sup> *Id.* (citing Cour d'appel [CA][regional court of appeal] Paris, Oct. 16, 1992, D. 1993, 172, note Y. Laurin (Fr.)).

<sup>88</sup> Cour de cassation [Cass.][supreme court for judicial matters] ass. plén., June 29, 2001, Bull. crim., No. 165 (Fr.).

<sup>89</sup> See generally Bernardo Cortese, *Defining the Role of Courts and Administrative Bodies in Private Enforcement in Europe: United in Diversity?*, in EU COMPETITION LAW: BETWEEN PUBLIC AND PRIVATE ENFORCEMENT 145, 148 (Bernardo Cortese ed., 2013).

<sup>90</sup> See, e.g., Brief for Int'l Trademark Ass'n as Amicus Curiae, *Prefel S.A. v. Jae Ik Choi*, Supreme Court [S.Ct.] (July 23, 2002).

<sup>91</sup> See, e.g., Brief for ARTICLE 19 as Amicus Curiae, *Public Prosecutor, Office of the Attorney Gen. v. Pruksakasemsuk* (Apr. 24, 2012).

<sup>92</sup> See, e.g., Brief for Int'l Trademark Ass'n as Amicus Curiae, *Richemont Int'l S.A. v. Russ. Patent & Trademark Office*, No. A40-73286/10-143-625, Moscow Arbitrazh Ct. (Dec. 20, 2011).

<sup>93</sup> See, e.g., Brief for ARTICLE 19 as Amicus Curiae, *In re Uwimana Nkusi*, No. RP 0082/10/HC/KIG (Oct. 24, 2011). See also Jeffrey Herbst, *Political Liberalization in Africa After Ten Years*, 33 COMP. POL. 357 (2001); RUSSIAN CIVIL SOCIETY: A CRITICAL ASSESSMENT (Alfred B. Evans, Jr. et al. eds., 2006).

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

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

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

### III. THE CAUSES OF THE AMICUS CURIAE PHENOMENON

As detailed in the first section, in the past several decades, many countries around the world experienced significant developments in the usage of the Amicus. These developments in legal litigation were called, by this Article, the "Amicus Curiae Phenomenon." The Amicus Curiae Phenomenon is related to the fundamental changes in the conception and the function of the work of courts since the 1980s and 1990s. As mentioned, in the past few decades there has been a sharp and continuous rise in the importance of the judicial system in society, while the judicial systems have become more aware of their modern function. As part of this trend, there is a growing dependence on courts and legal procedures to regulate and handle a broad variety of issues never handled by courts before.<sup>94</sup>

As a result of the involvement of the judicial system in the public sphere, several substantial and procedural changes have occurred in the work of the courts, including an adaptation of new work methods and new litigation forms. A significant part of the legal discussions turned from classic litigation (i.e.,

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<sup>94</sup> See generally RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Rachel Sieder et al. eds., 2005); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995); Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721 (2006).

dealing with questions about legal rights of individual controversies) into broader discussions encompassing issues that relate to a broader spectrum of the public. Many times, these discussions include the use of interdisciplinary sources and diverse legal sources. In connection to the form of such discussions, new work methods were adopted, such as the use of mediation as a dispute resolution tool. Also, new procedural causes were adopted, certain remedies and equitable reliefs have been adapted to the ever-changing circumstances, and many proceedings are conducted outside of courts but supervised closely by judges. These new methods caused procedural changes resulting in the inclusion of more participants taking part in the proceedings, such as the formal parties to the proceeding, court-appointed experts, various NGOs, and various interest groups. One of the main consequences of these changes is that many courts around the world have adopted and improved a new practice, which is simultaneously also a cause for these changes, the *Amicus Curiae*. The *Amicus* practice is one of the most significant changes in the practical work of courts, which simultaneously affects and was affected by other changes to the work of the courts.<sup>95</sup>

#### A. *The Changes in the Judicial System*

The judicial process in many courts around the world since the 1980s has been significantly different from the previous judicial process. The court's involvement changes on a daily basis in many industrialized countries with different legal traditions and different political systems.<sup>96</sup>

These significant changes in the function of the judicial system in the past decades are varied and include a broad spectrum of issues. For the sake of convenience, this Article will divide these issues into two central issues: (1) substantive changes related primarily to the perception of the judicial role of

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<sup>95</sup> Different judicial systems and institutional conditions create different judicial realities such that it is hard to draw clear broad conclusions across these different systems. Despite such difficulties, this Article shall present networks of significant connections between judicial systems and the *Amicus*. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

<sup>96</sup> Many commentators place the changes in the courts beginning in the 1980s. However, some think that this phenomenon began in the 1970s, or even a bit earlier. Mauro Cappelletti described a wave of constitutional revolutions that countries with different social, cultural, and economic structures and geopolitical circumstances adopted following World War II. These judicial systems have the basic assumption that constitutional law is superior law, and the institutional derivatives of courts are tasked with defending the constitution. See generally MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971). The waves of democratization that took place after the collapse of the Soviet Union and the end of the Cold War, which included many countries in Eastern Europe, Latin America and parts of Africa, strengthened the superiority of constitutional law. See generally SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 4 (1991); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1–64 (1986); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000).

courts; and, (2) changes and the development of new procedural forms of litigation.

Such a division between substantive and procedural changes is not a dichotomous one, and it is usually the case that substantive changes are intertwined with procedural changes and vice versa. Moreover, when this Article refers to changes in the judicial process, it is in regards to changes within the judicial system and not to changes which are similar or parallel to legal proceedings, but do not occur within the judicial system, such as changes to alternative dispute resolution proceedings.

### 1. Substantive Changes

One of the most substantial changes in many countries around the world, especially since the 1980s and 1990s, is the significant increase in the involvement of the judicial systems in shaping society. This change manifests mostly in the growing reliance on courts to regulate and address a broad spectrum of issues, some of which have not been regulated or addressed in the past. Courts are being asked to address and resolve a broad spectrum of issues from religious freedoms, equal rights, migration, and the environment.<sup>97</sup> In some cases, courts do not focus on the substantive elements of the issue, but rather focus on its procedural aspects.<sup>98</sup> Accordingly, many courts around the world address issues and require that norms are applied during the decision-making processes, including, procedural integrity, fairness, equality of opportunity, and transparency.<sup>99</sup>

Even the legal culture and legal language have become dominant outside the judicial spheres, such as in social relationships, popular culture, cultural traditions and in social conflicts, and as a result, some of these issues have been legally “framed” and transferred to the judicial plane to be decided by the courts.<sup>100</sup> In general, in the last two decades, the use of extra-legal tools of discourse, negotiations, customs, and non-legal decisions have greatly been reduced.<sup>101</sup>

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<sup>97</sup> HIRSCHL *supra* note 94, at 1–16; THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 94.

<sup>98</sup> See 3 LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 1–16 (David A. Schultz ed., 1998).

<sup>99</sup> SHAPIRO, *supra* note 96; THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 94.

<sup>100</sup> THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 94.

<sup>101</sup> In recent years, there is a growing dependence on mediation and resolution of courts in addressing the regulation of issues, which tended to be based on traditions and cultural systems (for example in employment relationships). See Julia López, *Beyond the National Case: The Role of Transnational Labor Law in Shaping Domestic Regulation*, 28 COMP. LAB. L. & POL'Y J. 547 (2007).

Courts have increasingly become a body to deal with political issues, including core disputes of societies and administrations.<sup>102</sup> An example includes when courts intervene in fundamental areas, such as macroeconomic planning.<sup>103</sup> In the past, courts have had to deal with such issues as Germany's place in the European Union,<sup>104</sup> transitional justice in Latin America,<sup>105</sup> the political future of Quebec within the Canadian Federation,<sup>106</sup> and the definition of the State of Israel as "Jewish and democratic."<sup>107</sup> All of these issues have been "framed" into legal categories and become a subject for legal discussion by the courts.<sup>108</sup>

The tendency to rely on courts to resolve fundamental issues has turned courts into significant forums, and in certain cases, the main forums, to address constitutional, economic, cultural, and social issues. The result of this process is the transformation of courts around the world into an integral part of the national identity and policy-making process for many countries.<sup>109</sup>

Such increasing reliance on courts has also occurred at the international level, with the establishment of international courts possessing broad authority—and sometimes exclusive authority—to address human rights issues, environmental issues, government issues, and monetary issues.<sup>110</sup> In this context, international norms of institutions such as the European Court of Human Rights or the European Court of Justice have been interpreted into State constitutional issues. Accordingly, State and international courts have established their role as important institutions in society.<sup>111</sup>

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<sup>102</sup> THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 94.

<sup>103</sup> *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/10/2004, "Bustos c. Estado Nacional," Fallos (2004-327-4495) (Arg.). In this case Supreme Court of Argentina's October 2004 ruling (the so-called "Corralito Case") on the constitutionality of the government's "pesification" plan (total convergence of the Argentine economy into pesos with a fixed exchange rate).

<sup>104</sup> DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 182–86 (2d ed. 1997) (citing Maastricht Case, 89 BVerfGE 155 (1993)).

<sup>105</sup> *See generally* LEGALIZATION AND WORLD POLITICS (Judith Goldstein et al. eds., 2001); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

<sup>106</sup> Reference re Secession of Que., [1998] 2 S.C.R. 217 (Can.); *see also* A.G. Que. v. Que. Protestant Sch. Bds., [1984] 2 S.C.R. 66 (Can.).

<sup>107</sup> HCJ 264/87 Shas v. Director of Population Registration 43(2) IsrSC 723, 731 (1989) (Isr.).

<sup>108</sup> *See generally* LEGALIZATION AND WORLD POLITICS, *supra* note 105, for criticism of such processes.

<sup>109</sup> HIRSCHL, *supra* note 94.

<sup>110</sup> For an overview of such processes in the WTO and NAFTA *see* Slaughter, *supra* note 105.

<sup>111</sup> *Id.*

In conclusion, such substantial changes to courts have impacted the function of the judicial system, the judicial system's increasing involvement in society, and its participation in the Decision-Making Process, both at the State and international level.

## 2. Procedural Changes

Following the foregoing *substantive* changes in the legal proceeding, and to a large extent as a result of such changes, many *procedural* changes have taken place in legal proceedings. These changes have included, specifically, making the judicial process more flexible by opening it to additional audiences, and by developing new work methods (practices) designed to create essential adjustments to the work of courts in light of the marked change in the court's function.<sup>112</sup> The common basis for these practices is the understanding that the legal landscape is becoming increasingly more complex and as a result the existing judicial tools are not optimal to address the changing legal landscape.<sup>113</sup>

### a. The Court as an "Umbrella" for Dispute Resolution

One form of discussion that has become common is a form of court management referred to as "rolling procedures." The intention behind "rolling proceedings" is that courts encourage the parties to litigate and reach agreements amongst themselves as a way to avoid, to the extent possible, zero-sum judgments while courts closely monitor and observe the discussion between the parties.<sup>114</sup>

In many cases, negotiations and meetings between the parties "roll" until there is some kind of pressure to reach a judicial decision. In other cases, courts are more assertively involved in important negotiations conducted between the parties to force them to make "painful" compromises.<sup>115</sup> Accordingly, the court is perceived as functioning like an "umbrella" under which the conflict is conducted, while the court maintains close supervision of the proceedings. On

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<sup>112</sup> See generally CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

<sup>113</sup> See generally Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* 77 (Donald W. Jackson & C. Neal Tate eds., 1992).

<sup>114</sup> *Id.*

<sup>115</sup> See also Baar, *supra* note 113. See generally KARNI PERLMAN, *DISPUTE RESOLUTION: APPLYING NON-ADVERSARIAL AND THERAPEUTIC JUSTICE* (2015); Niels Petersen, *Avoiding the Common-Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication*, 11 *INT'L J. CONST. L.* 294 (2013).

the one hand, this approach makes it possible to try to bridge the gap between the parties in a flexible manner and without the requirement to reach a rigid judicial resolution. On the other hand, the courts' behavior, which functions as a kind of "guardian" of the formal parties, indicates that courts have to some extent abandoned their classic role as an institution deciding legal issues based solely on the letter of the law, and are transitioning into legal proceedings that are similar in nature to administrative proceedings.<sup>116</sup>

The underlying assumption of the "rolling proceedings" judicial approach is that the issues brought before the courts are complex and have significantly broad implications, for which a zero-sum decision shall not necessarily produce the adequate social outcome. It is, therefore, necessary to seek an alternative solution that will be more acceptable to both parties, as much as possible, as well as deviate from classic zero-sum decisions.<sup>117</sup>

b. The Development of "Problem Solving Courts," "Therapeutic Courts," and "Community Courts"

An additional change in the work method of courts is the development of unique judicial roles within special courts, usually referred to as therapeutic courts or "problem-solving courts." The term "therapeutic court" tends to be defined against the background of the "Therapeutic Jurisprudence" movement. This movement, which gained attention mainly in the U.S. in the 1990s, strove to achieve therapeutic results in the application of the law, both at the

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<sup>116</sup> Petersen, *supra* note 115; *see also* SHAPIRO, *supra* note 96.

<sup>117</sup> The courts therefore operate quite differently from the classical judicial process, in ways that sometimes remind us the way alternative dispute resolution mechanisms operate. *See* SHAPIRO, *supra* note 96. It should be mentioned that the tendency of courts to reach fewer resolutions is also related to institutional and economical necessities, which have been referred to as the "vanishing trial." The vanishing trial describes a trend that most of the legal proceedings commenced in the last decade in the judicial system are not being resolved in an adjudicatory judicial process, and as such do not conclude in judicial decisions. The prevailing judicial process in such courts reflects judicial conduct that seeks to reach an agreed upon solution and to create arrangements between the parties instead of a final judicial decision. This trend strengthens the importance of the Amicus in the proceedings in which they take part for several reasons. First, the decline in the writing of judicial decisions together with the fact that in cases that are actually addressed in courts, there is an increase in the use of Amicus, therefore increasing the importance of Amicus in the work of the courts. Second, the decline in the number of cases that end with a judicial decision is usually related to proceedings that have a lesser societal impact. Amicus briefs are often filed in cases that influence fundamental societal issues. *See also* Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165 (2006). *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).



individual and systemic level.<sup>118</sup> Also, it supports the implementation of changes to legal practices and the role of lawyers and judges.<sup>119</sup>

In this framework, the view of the judicial system does not focus solely on the examination of legal rights and obligations and formalistic questions but seeks to expand the judicial view to include needs, goals, emotions, and relationships.<sup>120</sup> In general, problem-solving courts are reminiscent of alternate dispute resolution mechanisms, which seek to address social problems or fundamental problems outside of the courtroom. The following section will present the development of the Amicus practice associated to a certain degree to the therapeutic judicial conduct. This conduct creates an emphasis on empathetic conduct, which include understanding the viewpoint of the litigants and the overall social needs related to the proceedings.

Furthermore, we can observe another change to the work of courts manifested in the development of “Community Courts” designed to place greater emphasis on the rehabilitation of offenders instead of punishing them.<sup>121</sup> The rationale of this approach is that some criminal offenses are committed as a derivative of broader social and economic problems, such as poverty, lack of family support, etc. As such, the treatment of criminal activity should include, as much as possible, solutions to these in-depth problems of the offenders.<sup>122</sup> Community Courts tend to provide various rehabilitation programs, which offer solutions such as drug and alcohol rehabilitation, completion of education, integration into the workplace, debt settlement, and exercising the fulfilment of rights vis-a-vis government officials under the supervision of the Community Court. The Community Court is assisted by police probation officers, municipal social workers, and local welfare and community services that draft the adequate rehabilitation program for each offender and accompany the offender until completion of the program.

### c. Changes in the Form of Reasoning

Concurrently, and following courts’ conduct in new and complex legal fields, there is a growing realization that in certain areas judges do not decide,

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<sup>118</sup> See generally David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279 (1993).

<sup>119</sup> *Id.*

<sup>120</sup> See SUSAN GOLDBERG, *JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH* (2005), <http://www.joasa.org.za/articles/Judgingfor21stcenturyDe.pdf>. See generally Susan Daicoff, *The Future of the Legal Profession*, 37 MONASH U. L. REV. 7, 18–21 (2011).

<sup>121</sup> Bruce J. Winick, *Therapeutic Jurisprudence and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1103 (2003); see also *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David B. Wexler eds., 2003).

<sup>122</sup> GOLDBERG, *supra* note 120.

and sometimes cannot decide, legal issues based solely on lawful sources, but must involve other fields of knowledge.<sup>123</sup> In complex issues with fundamental implications, the work products of judicial systems around the world are decided and reasoned based not only on legal doctrines, but also on the basis of information and doctrines from various fields of knowledge, such as economics, criminology, sociology, psychology, environment, and technology.<sup>124</sup>

In the last few decades, courts' decisions have departed from the classic approach of dry and formal legal reasoning. In those areas dealing with public, new, complex, or sensitive issues, judges have deviated from the classic rulings by using different fields of knowledge and disciplines to explain their approach to formal parties, their lawyers, and the general public.<sup>125</sup> Therefore, such rulings not only include the use of non-legal sources of information, but also include extensive discussion on the implementation of the ruling concerning additional groups, which may be or are affected by the rulings.<sup>126</sup> Even from the public's standpoint, it seems as though the public is increasingly not satisfied with judicial reasoning based solely on "pure law" or "common sense" and as such judicial decisions require well-founded and well-reasoned arguments supported socially and scientifically.<sup>127</sup> This trend has caused judgments in various fields of law to be laden with a broad theoretical analysis.<sup>128</sup> This is especially true when comparing past approaches of courts, when they dealt with the illustration and development of legal norms to philosophical, economic, national security, theological, and environmental fundamental assumptions.<sup>129</sup> This knowledge expansion process in legal proceedings and in the interdisciplinary content has spread throughout the industrialized world in such places as the U.S., Canada, Germany, U.K., Australia, India, and even international arbitration.<sup>130</sup>

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<sup>123</sup> TEACHING LAW AND LITERATURE (Austin Sarat et al. eds., 2011).

<sup>124</sup> For an overview of this phenomenon in various countries see Petersen, *supra* note 115.

<sup>125</sup> Simon Stern, *Narrative in the Legal Text: Judicial Opinions and Their Narratives*, in NARRATIVE AND METAPHOR IN LAW (Michael Hanne & Robert Weisberg eds., 2017).

<sup>126</sup> The criticism, generally, is that judges lack formal education in various disciplines such as sociology, gender, economics and philosophy. Their education is mainly legal education.

<sup>127</sup> David Dyzenhaus, Murray Hunt & Michael Taggart, *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation*, 1 OXFORD U. COMMONWEALTH L.J. 5, 29 (2001).

<sup>128</sup> *Id.*

<sup>129</sup> See Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335 (1988).

<sup>130</sup> The interdisciplinary content of courts is also related to additional developments in the law, such as the rise of the social science approach to the law, the rise of law and economics, and law and psychology. This diversity in context is also connected to the weakening of judicial formalism and transitioning from a strict formalistic judicial process to a more non-formalistic judicial process. See *id.*; see also Petersen, *supra* note 115.

#### d. Purposive Interpretation of the Law

While new remedies were developed in legal proceedings, judicial interpretation of the *purpose* of text gained greater traction. The model of the “purposive interpretation,” wherein judges focus on the embedded norm within the legal text, became dominant, and sometimes became the default interpretation in many courts across the world. The transition from formalist interpretation<sup>131</sup> to purposive interpretation grants judges greater flexibility and space to interpret the law.<sup>132</sup>

This flexibility is reflected both in the type of considerations that judges may take into account in the interpretation process, and how they weigh each of those considerations. The purposive interpretation concept did not appear naturally but was the result of various developments in the judicial system. For example, in Israel—and also to a certain extent in other countries throughout the common law—in contract law, the formulation of the purposive interpretation traced the original intent of the parties concerning some aspects of the contract.<sup>133</sup>

In the second stage, courts granted themselves the discretion to interpret the intent of the parties. This was expanded by arguing that a means of a determination of the purpose of the contract text was preferable to the actual text of the contract, thus, allowing the court to interpret a contract in such a way which was contrary to its actual text.<sup>134</sup> In the third stage, courts granted themselves the discretion to establish the desired contractual agreement between the parties, at the expense of the original intention of the parties.<sup>135</sup>

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<sup>131</sup> See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 511, 539 (1988) (for an in-depth discussion of the formalist interpretation). See generally RICHARD A. POSNER, HOW JUDGES THINK 41 (2008).

<sup>132</sup> See generally Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513 (1996) (for an in-depth discussion of the purposive interpretation).

<sup>133</sup> See also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). See generally HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958).

<sup>134</sup> Nir Kedar, *A Scholar, Teacher, Judge, and Jurist in a Mixed Jurisdiction: The Case of Aharon Barak*, 62 LOY. L. REV. 659 (2016).

<sup>135</sup> See Bruno Caruso, *The Concept of Flexibility in Labour Law. The Italian Case in the European Context* (Centro studi di Diritto del Lavoro Europeo “Massimo D’Antona” Working Paper C.S.D.L.E., Paper No. 39, 2004), [http://aei.pitt.edu/6098/1/n39\\_caruso.pdf](http://aei.pitt.edu/6098/1/n39_caruso.pdf) (describing the trend towards introducing flexibility to non-dispositive legal rules in Europe).

## e. Transforming the Judicial Process to a Multi-Party Process

In addition to the changes already mentioned, the Amicus practice transformed the classic two-sided legal proceeding (e.g., plaintiff-defendant, accuser-defendant, petitioner-respondent) into a multi-party and multi-dimensional process. Namely, courts hear and provide a voice not only to the positions and interests of the formal parties of the proceeding, but also to third parties with an interest in the issue at hand and wish to influence the Decision-Making Process of the court, which is likely to impact their environment and life. In the last two decades, third parties became significant central actors and sometimes an inseparable part of the legal proceeding.<sup>136</sup> Furthermore, in cases in which the general public has a position on the issues at hand, the number, scope, and influence of third parties who are authorized to intervene in the proceeding, in many cases, greatly exceed the number of formal parties.<sup>137</sup>

One of the prominent examples of the development of relatively new practices is the mechanism of the class action, which expanded the public's participation in consumer, administrative and civil issues.<sup>138</sup> In general, a class action is used in civil law claims in which an individual presents claims on behalf of a group. The class action mechanism assists in cases in which there are many plaintiffs, but each of them suffered minor harm, and therefore it is inefficient for each of the plaintiffs to file a lawsuit due to the costs and inconvenience involved in comparison to the minor damages suffered.<sup>139</sup>

Therefore, the class action allows the class action plaintiff, as part of the group of those affected, to sue on behalf of the entire group, and receive a special increased compensation for his efforts in pursuing such class action lawsuit.<sup>140</sup>

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<sup>136</sup> An example of third parties becoming an inseparable part of the legal proceeding can be found in the designing and building of new court rooms in Canada and Australia, which includes special seating for third parties who have filed Amicus, even though they are not formal parties to the proceeding. Such consideration demonstrates the importance of the Amicus in the eyes of the judicial system by making them semi-formal parties to the proceeding.

<sup>137</sup> Rivera Juaristi, *supra* note 62, at 1 (for example, the Inter-American Court of Human Rights has received more briefs from third parties than those of formal parties).

<sup>138</sup> The original of the class action is dated back to the seventieth century English procedure called the "bill of peace." See generally RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* (2004).

<sup>139</sup> It should be noted that sometimes class action suits are less about there being a minor harm to the plaintiffs, and more about a lack of access to the justice system and judicial barriers for potential plaintiffs. *COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS?* 11 (Stefan Wrba et al., eds., 2012).

<sup>140</sup> Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 *ANNALS AM. ACAD. POL. & SOC. SCI.* 7, 9–10 (2009).

In general, the class action allows courts to conduct a legal proceeding that would not be carried out if each of the affected parties represented himself.<sup>141</sup> Moreover, the class action mechanism considerably reduces litigation expenses and administrative costs since a large number of claims are grouped into one legal proceeding. As shall be explained hereafter, the development of legal institutions such as the “public petition,” “class action,” “derivative lawsuit,” and later on “the Amicus” in such proximity in time is not merely a procedural matter but rather reflects a fundamental change in the judicial policy of the courts, the work mechanism of the courts, and the courts’ perception of their role in society.<sup>142</sup>

### 3. The Reasons for the Changes in the Courts Work

The courts’ substantial involvement and the changes related to the growing importance of the judicial system in society are mainly rooted in two central processes: the expansion of the authority of the modern State (also known as the “Activist State”)<sup>143</sup> and the growing complexity of modern societies, especially in connection to economic, technological, demographic, and environmental issues.<sup>144</sup> The basic assumption for this discussion is that various courts around the world have undergone a significant revolution in their perception of their role, their work form, and concerning their methods of conduct.

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<sup>141</sup> Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV., 1, 8–9 (1991).

<sup>142</sup> See Mariolina Eliantonio et al., *Standing up for Your Right(s) in Europe: A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States’ Courts*, EUR. PARL. DIRECTORATE GEN. FOR INTERNAL POLICIES PE 462.478 (2012) (for a review of the changes to the status of the Locus Standi doctrine).

<sup>143</sup> Sometimes also referred to as the “regulatory state.” See Bruce A. Ackerman, *Foreword: Law in an Activist State*, 92 YALE L.J. 1083, 1083 (1983); Jürgen Habermas, *Law as Medium and Law as Institution*, in DILEMMAS OF LAW IN THE WELFARE STATE 206 (Gunther Teubner ed., 1986); Erik-Hans Klijn & Joop F.M. Koppenjan, *Interactive Decision Making and Representative Democracy: Institutional Collisions and Solutions*, in GOVERNANCE IN MODERN SOCIETY 1 (Oscar van Heffen et. als. 2000).

<sup>144</sup> It is apparent that apart from the expanding authority of the modern state and the ever-increasing complexity of modern societies, there are additional explanations that can explain the changes taking place in the judicial system in the last decades. For example, the tendency of the political institution to shift hard decisions to the courts for fear of political backlash; the inevitable reaction to the institutional necessity to adopt consistent legal norms in the age of globalization; certain social changes in modern society; increased use of lobbyists and interest groups in the framework of “politics of rights;” the legislation of constitutions and certain laws delegating special status to courts to protect rights of citizens. See generally Kenneth M. Holland, *Introduction, in JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE* 2–7 (Kenneth M. Holland ed., 1991); THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 94.

## a. The Expanding Role of the Modern State

The first cause for the growing intervention and changes in the work of courts is the expansion of the administrative authority of the State. The laws of the Activist State influence citizens in almost every aspect of their lives, from the moment of their birth to their death.<sup>145</sup> Such laws consist of dozens of fields that span thousands of sub-fields, including, among others, health, education, welfare, employment, housing, construction, immigration, and so forth.<sup>146</sup> Modern law substantially impacts the lives of citizens at almost every level through extensive regulations.<sup>147</sup> Since most developed countries are Activist States, even if some of those countries do not recognize themselves as such, they substantially intervene in society and the law, and as a result, courts become an integral part of State intervention.<sup>148</sup> The degree to which courts intervene is in direct proportion to the level the State itself intervenes. Consequently, the power of the role of law and the courts grows.<sup>149</sup> The degree of intervention of the courts is in direct proportion to the State's intervention, and as a result, the power of the rule of law and the courts grows accordingly.<sup>150</sup>

## b. The Complexity of the Law

The second reason for changes in the courts is the growing complexity of modern societies, which cause the law to become complex, broad, diverse, and encompass many different contexts. This Article will refer to this trend as the "Complexity of the Law." The Complexity of the Law is a direct result of the

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<sup>145</sup> See generally Klijn & Koppenjan, *supra* note 143.

<sup>146</sup> *Id.*; see also Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239, 247 (1983).

<sup>147</sup> Ruth Buchanan et al., *Introduction*, in *READING MODERN LAW: CRITICAL METHODOLOGIES AND SOVEREIGN FORMATIONS 2* (Ruth Buchanan et al. eds., 2012).

<sup>148</sup> See generally ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY TOWARD A CRITICISM OF SOCIAL THEORY* (1976); Ackerman, *supra* note 143.

<sup>149</sup> See Jackie Smith et al., *Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s*, 20 HUM. RTS. Q. 379, 411 (1998) (as will be explained below, the expansion of state law in the social fabric is also related to additional causes among them the rise of the centrality and influence of NGOs on the judicial system in the last three decades).

<sup>150</sup> As will be explained below, the expansion of state law in the social fabric is also related to additional causes, among them the rise of the centrality and influence of NGOs on the judicial system in the last three decades. See *id.*

growing complexity of modern societies from demographic,<sup>151</sup> economic,<sup>152</sup> employment,<sup>153</sup> and technological<sup>154</sup> aspects, which introduces to the court diverse issues and new challenges. For example, with respect to technology issues, courts are reviewing new fields as a result of the significant advancements in technology, which require courts to handle new and complex issues.<sup>155</sup>

Many everyday routines involve technology issues, such as using social networks, browsing the internet, paying bills, consumption of culture, and using e-commerce. The latest technological developments generate social, economic, and even political revolutions. Such technological developments require the courts to examine the applicability of existing legal tools to new technological developments, usually because such new technological advancements create new circumstances which existing law has yet to address.<sup>156</sup>

The frequent global changes together with the growing involvement of courts in almost every aspect of life have caused and continue to cause increased diversification of the contents of the law. In addition, the creation of new branches of law and legal disciplines require the judicial system to deal with new issues and areas of knowledge.<sup>157</sup> Such areas of knowledge include cyber law, hi-tech law, renewable energy law, space law, privacy law, and various other new fields of law. The complexity of the modern State has also rendered relatively traditional areas of law—such as tort law, contract law and family law—far more complex than in the past due to advanced social arrangements, economic developments, and dynamic regulation.<sup>158</sup> Because of

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<sup>151</sup> Dep't of Econ. & Soc. Affairs, Population Div., World Population Prospects: The 2012 Revision, U.N. Doc. ESA/P/WP.228 (2013); University of Washington, *World Population Could Be Nearly 11 Billion by 2100*, SCIENCEDAILY (June 13, 2013), <http://www.sciencedaily.com/releases/2013/06/130613111942.htm>.

<sup>152</sup> For instance, a significant increase in the scope of international trade, liberalization of currency exchange, significant changes in the communication databases of stock exchanges, the increase of scope for conglomerates, mobility of factors between different countries, central banks of various countries inability to fully control the local currency.

<sup>153</sup> See Gerasimos Papadopoulos et al., *Occupational and Public Health and Safety in a Changing Work Environment: An Integrated Approach for Risk Assessment and Prevention*, 48 SAFETY SCI. 943 (2010).

<sup>154</sup> Michael D. Birnhack & Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH. 6 (2003); Lee H. Rosenthal et al., *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 2 (2007). See generally JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY (1997).

<sup>155</sup> Birnhack & Elkin-Koren, *supra* note 154.

<sup>156</sup> Rosenthal, et al., *supra* note 154, at 9–10.

<sup>157</sup> Birnhack & Elkin-Koren, *supra* note 154.

<sup>158</sup> Such as taxation aspects in mergers and acquisitions, project funding, derivatives, initial public offering, private placement of capital, and structure holding structure.

various social norms, which relate to the growing complexity in the modern State, the legal norms had to adjust, and as a result, have become broader and richer.

*B. Changes in the Judicial System and the Amicus Curiae Phenomenon*

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

1. The Amicus Curiae Phenomenon

Due to the expansion of the law and the complexity of the judicial process, courts are not experts—and are not supposed to be experts—in all fields of knowledge presented to them. Judges do not command the expertise, and of course, cannot command expertise in all existing legal subdivisions, which continue to regularly evolve and change. When judges are appointed to the bench, it is because the judge is an expert in the field of law.<sup>159</sup> They are not economists, psychologists, sociologists, or philosophers, but jurists who have been appointed to the bench for adjudication. Needless to say that even the broadest education is incapable of providing judges with the profound understanding required in many areas of knowledge in connection with the legal issues they are supposed to address.<sup>160</sup> In order for judges to successfully fulfil and address their modern judicial role with the diverse and complex issues that they are presented, judges require broad and extensive information and the assistance of parties with different perspectives and expertise. This information is often not available merely by the formal parties in the proceeding—or in cases where the formal parties have the relevant information but do not wish to present it to the court to preserve their interests. Therefore, courts require “external” information which is not only relevant to

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<sup>159</sup> Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 533–40 (2008).

<sup>160</sup> John Hardwig, *The Role of Trust in Knowledge*, 88 J. PHIL. 693, 698–701 (1991).



the specific proceeding before them, but which also assists them in formulating adequate legal policy by being forward-looking and anticipating the direct impacts on non-represented third parties in the proceeding.

It should be noted that the information presented by Amicus is unique and different from the information presented to courts by expert witnesses for several reasons. Firstly, the purpose of the expert witness is entirely different from that of the Amicus. While the role of the expert witness is to discuss the significance of the specific facts presented to the court from a professional standpoint, (e.g., medical doctor or ballistics specialist), the role of the Amicus (e.g., a human rights organization or women's rights organization) is to represent an interest or perspective of the public at large. This information should be heard by the court, especially, when it concerns a public issue that might impact broad sections of society other than the formal litigants to the legal proceeding.<sup>161</sup>

Secondly, in most areas in which courts are interested in receiving social information and different perspectives, there are no “expert witnesses” that can be used; this stems mainly from existing practice which does not accommodate submission of expert testimony in such circumstances.<sup>162</sup> Thirdly, not all organizations or individuals who wish to present their position in an Amicus meet the criteria required to recognize their knowledge as knowledge that reaches the level of expertise admissible in courts. In contrast to testimony of an expert witness, the expertise of the Amicus is not a condition for submitting a brief as is required for expert testimony.<sup>163</sup>

That is, the Amicus plays this vital role. As a result of courts increased involvement in society and the new and dynamic legal fields that are inherent in the modern State, courts require a wide range of Amicus to assist them in the ever-growing fields and issues that they are required to address. Such Amicus can be academics,<sup>164</sup> government organizations, NGOs (such as human

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<sup>161</sup> The leading decision in this matter is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The United States Supreme Court set various criteria required for the court to acknowledge that the individual has such scientific knowledge that the court could consider the individual an expert. The Court decided that scientific knowledge, unlike a scientific degree, can be the basis for expert witness to be heard by courts only when certain conditions are fulfilled. See David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, 93 IOWA L. REV. 451, 481 (2008).

<sup>162</sup> See also Shana M. Solomon & Edward J. Hackett, *Setting Boundaries Between Science and Law: Lessons from Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 21 SCI. TECH. & HUM. VALUES 131, 146 (1996).

<sup>163</sup> *Id.*

<sup>164</sup> In general, the addition of academics as individuals drafting Amicus have a good chance to influence court's rulings. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978). Here, Justice Powell relied on information presented in an Amicus brief written jointly by the Deans of the following universities: Harvard, Columbia, Stanford and Pennsylvania. See also Paul

rights organizations or environmental organizations), or representatives of a professional association (e.g., bar association).<sup>165</sup> Amicus assist courts that review a wide range of social issues in various areas of knowledge, some of which are cutting-edge and have never been reviewed in the past by the courts, including a broad spectrum of new sources of information and different viewpoints from those presented by the formal parties to the legal proceeding. For example, the United States Supreme Court Justice Stephen Breyer emphasized this by calling upon the American public and various interest groups to submit Amicus briefs to courts to assist judges with their work: “[Amicus] briefs play an important role in educating the judges on potentially relevant technical matters, helping to make us not experts, but moderately educated lay persons, and that education helps to improve the quality of our decisions.”<sup>166</sup>

The frequent changes in courts’ work and the complexity of the law, described above, have further strengthened the understanding that the information presented to courts is never complete. In light of that—to carry out their work in the best way—sometimes courts require various types of information (e.g., economic, social, psychological, environmental, etc.) presented not only by the formal parties but also by third parties.<sup>167</sup>

Even though courts have traditionally used facts and evidence to come to their decisions, the use of Amicus shows that court’s capacity and willingness to use information from a broad spectrum of fields has increased.<sup>168</sup> From the court’s perspective, law and fact alone leave the court in a state of incompleteness, and the additional knowledge from Amicus may help the court reach a more complete decision.<sup>169</sup>

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M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC’Y REV. 807, 814 (2004).

<sup>165</sup> See, e.g., Brief for Respondent, *Fisher v. Univ. of Tex. at Austin*, 579 U.S. (2016) (No. 11-345), 2012 WL 3540402 (supporting the need for diversity in education).

<sup>166</sup> Stephen Breyer, *The Interdependence of Science and Law*, 82 JUDICATURE 24, 26 (1998). Justice Breyer emphasized that Amicus are helping courts fulfill their function in modern society. Justice Breyer also holds the record as the Justice with most citations of Amicus briefs by citing Amicus briefs in approximately 63% of his decisions between the years 2014 and 2015. Franze & Anderson, *supra* note 9, at 2.

<sup>167</sup> James F. Spriggs & Paul I. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365, 366–69 (1997); see also Paul M. Smith, *The Sometimes Troubled Relationship Between Courts and Their “Friends,”* 24 LITIG. 24, 26 (1998).

<sup>168</sup> The philosopher Luciano Floridi argued that the age of information has blurred the boundaries between the individual and the information environment—or as he called it, the “info-sphere.” See LUCIANO FLORIDI, INFORMATION: A VERY SHORT INTRODUCTION (2010); TEDx Talks, *Luciano Floridi – “The Fourth Technological Revolution,”* YOUTUBE (Apr. 6, 2011), [https://www.youtube.com/watch?time\\_continue=290&v=c-kJsyU8tgI](https://www.youtube.com/watch?time_continue=290&v=c-kJsyU8tgI).

<sup>169</sup> As will be described below, the criticism of this approach is that the quality and information presented by Amicus briefs could be slanted, flawed, or even mistaken and could negatively impact

The supplementary information presented by Amicus assists courts not only in studying the overall complexity of the issue at hand but also in identifying a variety of possible forward-looking solutions to such issues. Such broad and comprehensive information, especially in fields that courts have not addressed before, and which courts do not have sufficient expertise or understanding to address, helps to expand the perspective of the court in making novel decisions.<sup>170</sup> This is achieved by allowing the court to accept factual arguments that are not familiar to them, social arguments stemming from different perspectives, or legal arguments that enable courts to formulate an adequate judicial policy. Amicus can even help minimize and reduce judicial errors by allowing the judge to receive extensive social knowledge, which is held by bodies that are not part of the formal judicial process.<sup>171</sup> In this way, the information presented by Amicus may prevent reliance on exclusive sources of knowledge.

When courts discuss broad social issues instead of viewing the conflict from the narrow viewpoint of the individual dispute, their awareness for the broad implications of their decisions on unrepresented third parties is amplified. The idea behind it is that almost every decision in an individual conflict impacts third parties not taking part in the litigation. This mindset requires a willingness to accept differing viewpoints of additional parties who are not part of the formal dispute but are likely to be affected by the court's rulings.

When we consider the courts' increased involvement in society as explained previously, we find that Amici help courts fully realize the political, social, ecological, and economic implications of their judicial decisions that exceed the narrow boundaries of the two parties at the heart of the conflict. This could mean court decisions impact a wider circle of individuals, like different interest groups and the public at large.

There are other illustrations of the courts' increasing awareness to the overall implications of their decision and the use of the Amicus practice as a way to accommodate such awareness. This is evident throughout many judicial systems around the world including in common law countries,<sup>172</sup> the European Court of Human Rights,<sup>173</sup> Latin American courts for Human Rights,<sup>174</sup>

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the courts, especially since the judge is often not an expert in the material and is unable to easily discern the true quality of the information presented in the brief.

<sup>170</sup> See generally Spriggs & Wahlbeck, *supra* note 167.

<sup>171</sup> *Id.*

<sup>172</sup> See Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.); *Zaoui v. Superintendent, Auckland Central Remand Prison* [2004] NZSC 13 (N.Z.); *Hoffmann v. S. Afr. Airways* 2000 (1) SA 1 (CC) (S. Afr.); *YL v. Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95 (appeal taken from Eng.); *S v. Zemburuka* (1) 2003 NR 112 (HC) [Namibia].

<sup>173</sup> *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413, (1996) pr. 6.

<sup>174</sup> See Pinto, *supra* note 55, at 53.

international arbitration proceedings,<sup>175</sup> and in the International Criminal Court.<sup>176</sup>

The institutional explanation, by which the courts receive information from different groups, as reflected in the current dynamic legal reality, also helps to explain the ever-growing use of Amicus practice in international law. As outlined in the first section, starting in the early 1990s, various organizations for the first time, were allowed, in contradiction of the long-running judicial tradition, to intervene as Amicus in legal proceedings conducted in international courts (e.g., European Court of Human Rights).<sup>177</sup>

Similarly, the special international criminal tribunals set up to investigate war crimes committed in Yugoslavia, Rwanda, and Sierra Leone also reached similar outcomes with allowing Amicus intervention.<sup>178</sup> Such special international tribunals also sought to obtain social, legal, or comparative information, from Amicus Briefs, that the formal parties to the proceeding did not provide, either because of the inability of the former parties, or the desire of the formal parties to preserve their interests.<sup>179</sup>

The increasing awareness of the courts to the consequences of their rulings on third parties not directly related to the proceeding can also explain the increasing use of the Amicus practice in European and Latin American countries.<sup>180</sup> In contrast to a judicial tradition that recognized the Amicus practice but did not adopt it, various courts throughout civil law countries have adopted the Amicus practice.<sup>181</sup> Thus, for instance, French courts have begun to add third parties as Amicus in a series of legal cases in connection to surrogacy agreements, compensation for HIV patients, euthanasia cases, and so forth.<sup>182</sup> It can be argued, with due caution, that this development is a

<sup>175</sup> Robbins, *supra* note 70, at 322, 328.

<sup>176</sup> See also Gómez, *supra* note 70, at 521.

<sup>177</sup> See Gómez, *supra* note 70; Jackie Smith et al., *Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s*, 20 HUM. RTS. Q. 379 (1998).

<sup>178</sup> See International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.50, r. 74 (July 8, 2015); Special Court for Sierra Leone, Rules of Procedure and Evidence, r. 74 (Jan 16, 2002).

<sup>179</sup> For a critique on the use of Amicus in international criminal law see Jona Razzaque, *Changing Role of Friends of the Court in the International Courts and Tribunals*, 1 NON-STATE ACTORS & INT'L L. 169 (2002).

<sup>180</sup> See Kochevar, *supra* note 5, at 1659–63.

<sup>181</sup> Such as, Ethiopia, Uganda, Namibia, South Korea, Thailand and various other countries in Latin America (Mexico, Argentina, Peru and Brazil). See generally Kochevar, *supra* note 5; Medeiros, *supra* note 76; Yoseph Mulugeta Badwaza, *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* (Oct. 5, 2005) (unpublished L.L.M. paper) (on file with the University of Pretoria Center for Human Rights).

<sup>182</sup> See Supreme Court [S. Ct.], Brief of the Int'l Trademark Ass'n as Amicus Curiae, *Prefel S.A. v. Jae Ik Choi*, July 23, 2002, (S. Kor.),

somewhat surprising development in the changes of civil law in such countries. This is a somewhat surprising development because civil law provides its judges certain procedural tools that provide a similar function to that of the Amicus already—such as the ability to receive certain types of information without the approval of the formal parties.<sup>183</sup> This development in the work of the civil law courts, further elaborated on in section below, demonstrates that the existing legal procedures in place in civil law countries are insufficient and that the Amicus as an additional new tool is required to enable courts to fulfil their role.

## 2. The Amicus Curiae Phenomenon – Social Causes

In addition to the understanding that Amicus allow the judicial system to better understand broader implications of judicial rulings and to formulate adequate judicial policy, there is also a social explanation as to why courts benefit from receiving additional perspectives from Amicus. The courts' need for Amicus is to a large degree the need (or will) of various groups in society seeking to influence society through participation in legal proceedings. Participation of third parties as Amicus in existing legal proceedings, in fact, grants access to the judicial system to greater influence and involvement of society on the decisions reached by courts. The Amicus practice constitutes another significant channel for civic participation manifested by various interest groups in society in addition to existing civic participation channels (such as parliamentary elections).

The use of Amicus enables not only greater involvement in the Decision-Making Processes of courts, but the submission of Amicus briefs to a large extent constitutes the fulfilment of the citizens' right to shape their society.<sup>184</sup> Similar to the right to vote, which constitutes the right to influence social structure through the ballot, is the opportunity for third parties who are not part of the formal proceeding to submit Amicus briefs to the courts to also

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<http://www.inta.org/Advocacy/Documents/INTAPrefelChoi.pdf>; Amicus Brief of ARTICLE 19, Pub. Prosecutor, Office of the Attorney Gen. v. Pruksakasemsuk (Apr. 24, 2012) (Thail.), <http://www.article19.org/data/files/medialibrary/3075/12-04-30-LM-thailand.pdf>; Cortese, *supra* note 89; Coslin & Lapillonne, *supra* note 85; Duncan, *supra* note 84.

<sup>183</sup> John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826, 833–39 (1985) (As well known, in the Inquisitorial system in most of the Civil law countries, the judges play an active role in determining the facts in the case before them, as opposed to the Adversary system in which the judge has a passive role). See generally, R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (1978).

<sup>184</sup> See DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES? (Susan J. Pharr & Robert D. Putnam eds., 2000).

provide third-parties with another channel to influence their society.<sup>185</sup> Conceptually, the “right” of third parties to be involved in decisions that impact their lives by joining legal proceedings as Amicus, even if not directly related to them, is to a large extent similar to the advocacy for granting individuals the right to access the courts as formal parties.<sup>186</sup> This is a fundamental constitutional right in most countries around the world; however, the right to join as Amicus is different from the latter since it does not involve a direct interest of the formal party.<sup>187</sup>

The use of the Amicus practice is, to a large extent, the modern expression of “Deliberative Democracy.”<sup>188</sup> Deliberative Democracy has been a central stream in liberal thought in the past few decades, which focuses on the process of discourse, communication, and cooperation which leads to the decision stage.<sup>189</sup> According to Deliberative Democracy, citizens are obliged to regulate their lives through public discourse, one that is open and free, as such regulation establishes the public institutions.<sup>190</sup>

Deliberative Democracy considers the participation of various representatives in the discussions preceding the decision (the “Decision Making Process”) as the source of legitimacy for the final decision.<sup>191</sup> Because courts have become significant forums for Decision Making Processes in the public sphere, the Amicus Curiae Phenomenon is growing stronger. This process occurs because the very participation of citizens in the legal process

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<sup>185</sup> See also Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 266–69 (1999).

<sup>186</sup> For social and cultural justification for the right to access the courts see LAWRENCE M. FRIEDMAN, ACCESS TO JUSTICE: SOCIAL AND HISTORICAL CONTEXT, in 2 ACCESS TO JUSTICE: PROMISING INSTITUTIONS 3 (Mauro Cappelletti & John Weisner eds., 1978) (recognizing that the issue of whether individuals have a “right” to use Amicus in the judicial setting to have their voices be heard is a profound theoretical question, which I leave for future discussion. For the purpose of this Article, it is sufficient to say that this practice has many similarities to the right to vote).

<sup>187</sup> *Id.*

<sup>188</sup> See AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 134 (2004); Joseph Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980) (recognizing additional scholars who have shaped the debate on this issue are John Elster, Jurgen Habermas, John Rawls, and James Fishkin); David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEX. L. REV. 1437 (1993).

<sup>189</sup> Estlund, *supra* note 188, at 1437.

<sup>190</sup> *Id.*

<sup>191</sup> See generally JON ELSTER, INTRODUCTION TO DELIBERATIVE DEMOCRACY 1 (Jon Elster ed., 1998). For arguments that the courts serve as arenas that encourage dialogue between groups, see Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 YALE J.L. & FEMINISM 29, 31 (2017).

constitutes, in itself, a certain realization of the democratic idea.<sup>192</sup> Society's desire to influence the Decision-Making Processes is composed of three interrelated aspects that power the Amicus Curiae Phenomenon: a) economic considerations that encourage the use of Amicus; b) the strengthening of interest groups within society—especially NGOs; and, c) the empowerment of the role of lawyers and their ubiquity in society—including changes in the perception of their role.

a. Economic Aspects of the Amicus Curiae

One of the main social factors for the Amicus Curiae Phenomenon is the economic factor. To influence courts, economic resources are required. The Amicus practice has a certain advantage over other legal practices, as the use of Amicus entails rather minimal economic resources for two reasons: (i) the costs of joining as an Amicus are usually low; and (ii) the Amicus' exposure to economic risks is rather low.<sup>193</sup> These two factors incentivize greater use of the Amicus procedure.

Writing an Amicus brief tends to be relatively easy for interest groups. Usually, most Amicus briefs rely on existing materials, data, and research, so there is no need to generate new information but rather just to provide opinions, interpretation, or perspective concerning a particular issue presented to the court by the formal parties.<sup>194</sup> The procedure for writing the Amicus brief tends to be shorter and simpler than other litigation alternatives, which tend to require far more resources and time to produce.<sup>195</sup> For example, an Amicus brief does not need to address all the claims of the parties and debunk, contradict, or dispute them. Thus, the Amicus may address only one fundamental issue while the formal parties to the proceeding are required to argue all issues arising in the case before the court. As for the Amicus, all that is required is to draft a brief that presents the viewpoint of the organization or individual submitting the Amicus, or to provide additional information not presented to the court by the formal parties based on existing sources.<sup>196</sup>

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<sup>192</sup> See generally Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 810–16 (2004); Jane Mansbridge, *Conflict and Self-Interest in Deliberation*, in DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS 107 (Samantha Besson & José Luis Martí eds., 2006).

<sup>193</sup> REAGAN WM. SIMPSON & MARY R. VASALY, *THE AMICUS BRIEF: HOW TO BE A GOOD FRIEND OF THE COURT* (2d ed. 2004).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*; see also, Anderson, *supra* note 1.

Furthermore, the formal parties participate actively in court discussions of their case. In many instances, Amicus briefs are written by citizens without legal education, and as a result, their brief tends to be less costly.<sup>197</sup> For instance, in the U.S., it is quite common for citizens to file Amicus briefs and seek to present their perspective on a particular issue.<sup>198</sup> This was evident, for example, when the Supreme Court of California decided whether the California State Constitution allowed for same-sex marriage.<sup>199</sup> In other instances, Amicus briefs are written by students in law school clinics and the cost of drafting such briefs is relatively low.<sup>200</sup>

In addition, there is a practice in which various Amici join together to draft a joint brief, not only because of the shared values of the Amici but also to reduce costs.<sup>201</sup> Many times, small or niche NGOs join briefs of large organizations for economic reasons. A classic example of this can be seen in the fact that many small NGOs tend to join the Amicus drafted by the American Civil Liberties Union ("ACLU"), so they can share the prestige and resources of a significant Amicus in connection with the fundamental issues it addresses in its Amicus briefs to the courts.<sup>202</sup> This is a relatively inexpensive way, certainly compared with other legal alternatives—such as filing an independent petition or joining as a respondent—to influence the decision-making process of the courts.<sup>203</sup>

Secondly, from the viewpoint of interest groups and individuals who wish to submit Amicus briefs, the use of the Amicus practice tends to have low costs. This is especially true when compared with other procedural alternatives, such as submitting an independent petition or joining as a formal party to the legal proceeding, which usually requires continuous and costly legal representation.

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<sup>197</sup> See for example, the Amicus brief drafted by a citizen from San Francisco to the Supreme Court of the U. S. with respect to same-sex marriage, Brief for Divine Queen Mariette Do-Nguyen as Amicus Curiae supporting Petitioner, *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004) (No. S122923).

<sup>198</sup> COLLINS, *supra* note 10.

<sup>199</sup> *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004).

<sup>200</sup> *The Center's Civil Rights & Criminal Justice Advocacy*, SEATTLE U. SCH. L. (2016), <https://law.seattleu.edu/centers-and-institutes/korematsu-center/litigation/the-centers-cases-x6233> (last visited Dec. 26, 2019).

<sup>201</sup> In addition, drafting a joint brief and jointly submitting it to the court fosters collaboration and coalitions between various groups. The joint work carried out on a joint brief and the meetings conducted to plan the strategy creates work relationships between organizations that work for different public interests.

<sup>202</sup> See Susan Behuniak-Long, *Friendly Fire: Amici Curiae and Webster v. Reproductive Health Services*, 74 JUDICATURE 261 (1991).

<sup>203</sup> When several groups join together and present a united front, this might greater persuade the court. However, it is difficult to base a broad consensus with respect to the content of the position presented, the tactics, and the method of operation of this united front.



For example, Amici are not required to pay a court fee for the commencement of court proceedings or court fees with respect to other applications required as part of the litigation.<sup>204</sup> Furthermore, Amici are not bound by additional court fees inherent in the legal process, such as appeal fees imposed on the formal litigants, because such fees are paid by the formal parties, and the Amici only joins the proceeding.<sup>205</sup>

Moreover, in a case when the proceeding to which the Amicus has joined is resolved by an awarding of legal fees, then the formal party which the court decided against shall solely bear the burden of paying such costs.<sup>206</sup> In various courts around the world, there are several accepted methods for calculating the court costs and the manner in which they are divided between the parties (e.g., “equal distribution” or “the loser pays the costs of the winner”).<sup>207</sup> In any case, because the Amici are not parties in the formal sense, they do not share in the payment of the court costs.<sup>208</sup> In other words, economic barriers that may prevent or impede accessibility to the judicial process do not generally exist with respect to the Amicus practice. These circumstances create a situation in which Amicus’ economic risk in connection with the legal process is very low. Various studies have shown that the knowledge of various interest groups, especially NGOs, that joining as an Amicus entails low economic risks has incentivized them to submit their views via Amicus.<sup>209</sup>

#### b. The Rise of NGOs

Concurrently with the courts’ need to obtain different perspectives from non-represented third parties and economic factors related therewith, various interest groups, including NGOs, consider the ability to join existing legal proceedings as Amicus an important method for the advancement of their goals.<sup>210</sup> Submission of Amicus briefs allows such groups to express their

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<sup>204</sup> Except for interveners in common law, and even then, in sparse and special cases, the court clerk can reduce court costs or remove them completely. *See* The Supreme Court Fees Order 2009, SI 2009/2131, art. 3.

<sup>205</sup> JUSTICE & FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 37.

<sup>206</sup> It should be noted that in various courts around the world there is a practice of awarding court costs against third parties (usually, it is done with respect to interveners with a direct interest in the case but in special cases it is possible to award court costs against the amicus). Often, when a potential third party addresses the formal parties and asks their permission to submit a brief, then the third party will also ask that they seek to award court costs against him. This means that all existing costs in the proceedings which might be awarded against the formal parties are not awarded against the Amicus. *See* Correa-Ordoñez & Mandakovic Falconi, *supra* note 77.

<sup>207</sup> Herbert M. Kritzer, *Fee Regimes and the Cost of Civil Justice*, 28 CIV. JUST. Q. 342 (2009).

<sup>208</sup> JUSTICE & FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 37.

<sup>209</sup> ANDREW JAY KOSHNER, SOLVING THE PUZZLE OF INTEREST GROUP LITIGATION 7–11 (1998).

<sup>210</sup> *See* De Brabandere, *supra* note 3.

interests through the courts. In the past two decades, there has been a significant increase in the power and number of NGOs both at national and international levels.<sup>211</sup> NGOs have become significant and sometimes exclusive players in many areas, especially in connection to human rights and civil rights issues.<sup>212</sup> Due to the change in the role of the courts in society and NGO's increased involvement in society, NGOs consider joining legal proceedings as an Amicus as an effective and sometimes even exclusive tool to promote their cause.<sup>213</sup> In some of the struggles experienced by NGOs, the Amicus practice is perceived as the official legal edge in a multi-level political and moral struggle, which includes, among other tactics, petitions, lobbying the legislative, demonstrations, and media use.<sup>214</sup>

The intensive use of the Amicus practice by NGOs started to gain more traction in the mid-20th century in the U.S.,<sup>215</sup> and has since spread internationally to countries such as Canada, Britain, Australia, as well as the International Criminal Court, Latin American Courts for Human Rights, international criminal courts, international arbitration proceedings and in Latin American countries and on a smaller scale in countries with authoritarian regimes (e.g., Russia and some Eastern European countries).<sup>216</sup>

The impact of NGOs on the adoption of the Amicus practice in Latin American countries is particularly interesting. NGOs, mainly human rights organizations, have strongly pushed the courts to adopt the Amicus practice in various Latin American countries.<sup>217</sup> Various international organizations operating in Latin America have submitted Amicus briefs to state courts on a

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<sup>211</sup> See generally KOSHNER, *supra* note 209; Kim D. Reimann, *A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs*, 50 INT'L STUD. Q. 45 (2006).

<sup>212</sup> See generally Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997); see also COLLINS, *supra* note 192.

<sup>213</sup> See generally COLLINS, *supra* note 10.

<sup>214</sup> See *id.*

<sup>215</sup> Although interest groups have used Amicus briefs in the twentieth century, the use of this tool by NGOs, advocacy groups, and human rights groups has attracted greater public attention to the development of the modern Amicus. The first case in which an Amicus was submitted by a human rights organization was in the early twentieth century in the case of *Ah How v. United States*, 193 U.S. 65, 69 (1904). In this case, the Supreme Court was asked to approve or deny the deportation of an Asian man. The human rights organization "New York Chinese Charitable and Benevolent Association" submitted an Amicus brief to the court. See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695–96, 707 (1963).

<sup>216</sup> This development in civil society and the rise of NGOs trying to influence the decision-making process relates also to broader changes which have occurred in these countries, including democratization and economic changes. See generally RUSSIAN CIVIL SOCIETY: A CRITICAL ASSESSMENT (Alfred B. Evans, Jr., Laura A. Henry & Lisa McIntosh Sundstrom eds., 2006); Jeffrey Herbst, *Political Liberalization in Africa After Ten Years*, 33 COMP. POL. 357 (2001).

<sup>217</sup> See Kochevar, *supra* note 5, at 1665–66.

broad spectrum of issues.<sup>218</sup> As a result, these submissions have caused and even compelled courts to adopt the Amicus practice, despite the fact that such practice was not regulated at all.<sup>219</sup>

Even though in the civil law system, as a rule, third parties do not intervene in legal proceedings without the existence of direct interest, the Amicus briefs of these organizations have led to a robust legal and public discussion on this matter, and eventually, managed to gain formal recognition for the Amicus practice. The most prominent examples of such trends include the successes of international organizations to join as Amici, to submit Amicus briefs, and to influence public issues in Brazil, Uruguay, Argentina, Mexico, and Peru.<sup>220</sup> The Amicus briefs submitted by various organizations led state courts to adopt this practice, sometimes reluctantly, and sometimes in spite of the objections of the formal parties to the proceeding. In some Latin American countries, assertive NGOs were not only one of the causes of the Amicus Curiae Phenomenon—but the main driver behind it.<sup>221</sup>

c. The Growing Power of the Law Profession and the Change in Perception of the Role of the Lawyers

The desire of interest groups within society to influence the Decision-Making Processes is also related to the strengthening of the desire of lawyers to influence society, concurrently with significant growth in the number of lawyers around the world as measured per capita.<sup>222</sup> Due to the increased awareness of liberal rights—such as freedom of speech or political rights—closely linked to capitalism, personal wealth, industrialization, and economic

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 1659–60.

<sup>221</sup> *Id.* at 1665–66.

<sup>222</sup> CCBE Lawyers' Statistics 2015, CCBE (May 2015), [https://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/2015\\_Table\\_of\\_Lawyer1\\_1433140834.pdf](https://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2015_Table_of_Lawyer1_1433140834.pdf); J. Mark Ramseyer & Eric B. Rasmusen, Comparative Litigation Rates, The Harv. John M. Olin Discussion Paper Series (Dec. 2010). For a discussion in the increasing use of Amicus practice in various areas of law for the interest of representing their clients see Carrie Menkel-Meadow, *Too Many Lawyers? Or Should Lawyers Be Doing Other Things?*, 19 INT'L J. LEGAL PROF. 147, 151 (2012); Kian Ganz, *RTI reveals: 1.3m advocates; 1 in 300 Delhi-ites a lawyer; Maharashtra lawyers 'richest'; Jharkand, Assam, J&K fastest*, LEGALLY INDIA (Feb. 18, 2013), <https://www.legallyindia.com/the-bench-and-the-bar/rTI-reveals-number-of-lawyers-india-20130218-3448>; Matt Leichter, *Lawyers Per Capita by State*, LAST GEN X AMERICAN (Sept. 16, 2019, 2:58 PM), <https://lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/>; Debra Cassens Weiss, *Lawyer Population 15% Higher than 10 Years Ago New ABA Data Shows*, ABA J. (May 3, 2018, 2:31 PM), [http://www.abajournal.com/news/article/lawyer\\_population\\_15\\_higher\\_than\\_10\\_years\\_ago\\_new\\_aba\\_data\\_shows](http://www.abajournal.com/news/article/lawyer_population_15_higher_than_10_years_ago_new_aba_data_shows).

development, the number of lawyers has grown significantly in recent years in western countries.<sup>223</sup> The growing number of lawyers in the world, and in particular the increase in the number of jurists engaging in advancing certain social causes, sometimes referred to as "cause lawyering," "public interest law," or "social lawyering," has contributed to the rise of the Amicus Curiae Phenomenon. Illustrating this point is the fact that the number of lawyers in the U.S. has increased to approximately 1,300,000 lawyers.<sup>224</sup> In the U.S. there is approximately one lawyer for every 248 Americans.<sup>225</sup> In the State of New York, for example, the ratio is even higher.<sup>226</sup> Similarly, in Europe and especially in Spain, Germany, and England, there has been a significant increase in the number of lawyers in recent years as compared to the population growth.<sup>227</sup>

In general, in common law countries, the number of lawyers tends to be greater because lawyers' training leads them to view their practice as one that allows them to be employed in a large number of different jobs.<sup>228</sup> Moreover, the relative autonomy of the common law courts provides fertile ground for the work of lawyers in social fields. In contrast, the function of the lawyer in civil law countries tends to be more limited and technical in nature.<sup>229</sup> As such, the independence of the civil law courts is less powerful than that of the common law courts, and they tend not to intervene frequently in government policy. Therefore, the number of lawyers dealing with social issues in civil law courts is relatively lower.<sup>230</sup>

From the perspective of lawyers, in particular those who advocate for social change, the use of Amicus is one of the prevailing tools in the law which helps promote social interests. Lawyers of groups seeking social change tend to see legal proceedings as a space in which different strategies and techniques are used for purposes beyond those of the litigation at hand.<sup>231</sup> For lawyers who advocate for social change, whether to be involved in a legal proceeding is not

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<sup>223</sup> CCBE Lawyers' Statistics 2015, *supra* note 222; Menkel-Meadow, *supra* note 222.

<sup>224</sup> For the number of lawyers in the United States see Leichter, *supra* note 222.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> For the increase in the number of lawyers in Europe see CCBE Lawyers' Statistics 2015, *supra* note 222; see also CCBE Lawyers' Statistic 2018, CCBE (Oct. 2018), [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/Statistics/EN\\_STAT\\_2018\\_Number-of-lawyers-in-European-countries.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Statistics/EN_STAT_2018_Number-of-lawyers-in-European-countries.pdf).

<sup>228</sup> Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 6 (Austin Sarat & Stuart Scheingold eds., 1998).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See generally MICHAEL W. McCANN, RIGHTS AT WORK 48-91 (1994).

merely a matter of winning the case. Sometimes, joining an existing legal proceeding as an Amicus is done to convey awareness of a particular social issue even if such measure entails losing the specific legal proceeding. In light of frequent changes in the law, lawyers in various legal fields, and particularly lawyers who focus on being advocates for social change, are always searching for strategic practices, such as arguing as Amicus, to promote the interests they represent.

One manifestation of this is the creation of a new field in lawyers' work. In the U.S., and in recent years in international institutions, interest groups have begun to hire an attorney named an "Amicus Coordinator." The role of the Amicus Coordinator, for the most part, is to coordinate and monitor the totality of the arguments raised by all Amici from the same side and to make sure that the arguments do not repeat themselves.<sup>232</sup> The primary goal of the Amicus Coordinator is that a united front is presented to the court, which creates the impression of consensus across the different arguments but at the same time showing the diversity of the arguments to increase the chances of success.<sup>233</sup>

#### IV. EVALUATING THE USE OF THE AMICUS CURIAE

##### A. *The Influence on the Decision-Making Process of the Courts*

Some critics claim that citations or references to information presented by the Amicus in court decisions serve to indicate that the information presented by the Amicus affects the work of courts and their decisions.<sup>234</sup> For instance, between the years 2010 to 2016, in about 50% of the cases in which the court handed down its decision, the Supreme Court of the United States cited or referred to information Amicus presented to it.<sup>235</sup> And between the years 2015 and 2016, 54% of its decisions, the Supreme Court of the United States explicitly referred to various types of information presented by Amicus.<sup>236</sup>

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<sup>232</sup> The role of the Amicus Coordinator is mainly required in fundamental cases in which dozens of briefs are submitted by hundreds of different organizations and there is considerable work to coordinate between all the briefs and participating organizations *see* Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 56–66 (2004).

<sup>233</sup> *Id.*

<sup>234</sup> Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33 (2004).

<sup>235</sup> *Id.*; *see also* Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917 (2015). Between the years 2010–2016, Justice Ginsburg cited Amicus briefs in approximately 45% of her decisions. Justice Kennedy cited Amicus briefs in about 42% of his decisions. Further, Justice Sotomayor 40%, Justice Roberts 40%, Justice Breyer 39%, Justice Kagan 35%, Justice Alito 27%, Justice Scalia 24%, and Justice Thomas 22%. *See* Franze & Anderson, *supra* note 9, at 2.

<sup>236</sup> *See* Anthony J. Franze & R. Reeves Anderson, *In Unusual Term, Big Year for Amicus Curiae at the Supreme Court*, NAT'L L.J., 2 (Sep. 21, 2016) [hereinafter Franze & Anderson, *Unusual Term*].

Similar statistics from international courts, such as the Latin American Courts for Human Rights,<sup>237</sup> indicate a great reliance on the information presented by Amicus briefs.

Such statistics help strengthen the assumption that courts were influenced by the Amicus briefs submitted to them, although it cannot be determined exactly how influential the briefs were in the outcome of the decision. It is possible to dispute the extent to which the Amicus briefs had influenced the decision of the courts; however, citations and reference to such Amicus briefs within the courts' decisions indicate that courts at least took into account the information or arguments presented within the Amicus briefs.<sup>238</sup>

Interviews with judges regarding Amicus briefs likewise support the notion that Amicus briefs are influential in the court's decision. For example, Professor Simard's study of the addition of Amici to Federal courts in the United States showed that most federal judges—approximately 77% of the Circuit Court judges and 82% of District Court judges—believe that Amicus briefs submitted to courts assist the court to better understand the general expected implications of the court's rulings on the interests of third parties.<sup>239</sup>

In light of these findings, and similar findings of other studies,<sup>240</sup> the citation of the Amicus briefs in courts' decisions demonstrates that courts take into consideration, in some way, the positions presented to them by the Amicus. Even if the court's position did not conform to the position of the Amicus, there is still great importance in the actual participation of Amicus in the proceeding, as the very participation itself helps to—in certain cases—ignite additional processes and at the same time strengthen the legitimacy of these rulings.

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For updated details see Anthony J. Franze & R. Reeves Anderson, *Supreme Court Amicus Curiae Review: 'Friends of the Court' Roared Back in 2017–18 Term*, NAT'L L.J. (Oct. 16, 2019) [hereinafter Franze & Anderson, *Review*], <https://www.arnoldporter.com/-/media/files/perspectives/publications/2018/10/supreme-court-amicus-curiae-review.pdf?>

<sup>237</sup> See Rivera Juaristi, *supra* note 62, at 1.

<sup>238</sup> However, this assessment should be treated with great caution for a number of reasons. First, judges sometimes cite Amicus briefs of both sides to present the appearance of neutrality. Sometimes, judges cite Amicus in their decisions to show that the Amicus position and the position of the formal litigants are the same—so there is in fact no reason to accept the brief formally. On the other hand, judges sometimes give Amicus the opportunity to present at oral argument and therefore find no other need to address the content of their arguments in the decision. Yet, in other cases, judges do not cite certain briefs because of the public image of these organizations and the fear of expressing public support implicitly in their actions. In other words, the citation of Amicus can have explanations other than direct influence on the outcome of the decision. In any event, it is possible to disagree with the extent of the influence of the Amicus briefs on the court, but its citations or references indicate, with due caution, that the court took into account the brief in some way among its other considerations. The citations or references to the information presented by the Amicus show that it is a useful tool. See Franze & Anderson, *Unusual Term*, *supra* note 236.

<sup>239</sup> Simard, *supra* note 13, at 690.

<sup>240</sup> *Id.*

### B. *The Potential for More Complete Judicial Decisions*

The use of information—whether factual, legal, or other types of information—presented by the Amicus has the potential to cause courts to reach more complete judicial decisions based on all existing materials and not necessarily based solely on information presented by the formal parties. The Amicus practice enables courts to introduce extensive knowledge from various fields, different from those presented by the formal parties, and additionally from a wide range of third parties possessing certain interests in the proceedings. In light of this, the Amicus may prevent reliance on exclusive sources of knowledge that are presented to the court by the formal litigants.

It should be noted, as will be further elaborated, that sometimes the provisions of great amounts of information can create an information overload, and as such, it is not always helpful as the court “cannot see the forest for the trees.” In any event, the use of the Amicus practice does not guarantee that the judicial decision-making process shall be free of errors, but it may improve the process.<sup>241</sup> Examined from an institutional viewpoint, it is reasonable to assume that if judges believe that the inclusion of Amicus may increase the chances of a more complete and sound decision by enabling third parties to present significant information not presented by the formal parties, then their tendency will be to approve the requests to join the proceeding.<sup>242</sup>

### C. *Economic Incentives*

As previously stated, drafting Amicus briefs is relatively cheap compared with other existing alternatives.<sup>243</sup> The judicial procedures concerning the usage of the Amicus practice could incentivize the use of the Amicus for two main reasons: low procedural costs, and minimal economic exposure.

The process of drafting an Amicus brief tends to be shorter than other litigation alternatives. The Amicus brief is not required to address all the arguments of the formal parties to the litigation, but may just present the interests of the party drafting the Amicus as they relate to the legal proceeding. Furthermore, the Amicus brief is often written by citizens or law students without the costs of additional legal services, which further reduce the costs associated with drafting the brief. Often, the costs associated with usage of the Amicus are relatively low, as Amici are not required to pay various court costs. Amici are not obligated to pay court costs required in connection the proceeding

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<sup>241</sup> See generally Spriggs & Wahlbeck, *supra* note 167.

<sup>242</sup> See Alarie & Green, *supra* note 8, at 387.

<sup>243</sup> *Id.* at 409–10.

because these costs are paid for by the formal parties and the Amici only join the proceeding. Additional costs that might arise in a proceeding do not apply to the Amicus either, for instance, Amici are not required to guarantee the expenses of other parties in the proceeding.

There is no estoppel against the Amicus, not with regard to estoppel by acquiescence or judicial estoppel.<sup>244</sup> Whoever is not a party to the proceeding (i.e., the Amicus) cannot claim estoppel by acquiescence against others nor can it be claimed against the Amicus. Estoppels, such as the judicial estoppel, or motions due to lack of good faith, are not applicable to Amicus. Therefore, the risks of exposure associated with the Amicus joining the proceeding are negligible.<sup>245</sup>

#### D. Cooperation Between Organizations

Joining an existing legal proceeding as Amicus could become a fertile ground for establishing cooperation and can serve to strengthen working relationships between various organizations, especially in the public interest sector. Such collaborations strengthen civil society and should not be viewed merely as a means to achieve a certain purpose, but also as a worthy end unto itself.

Collaborations between organizations, particularly social impact organizations, with respect to joining legal proceedings as Amicus and the creation of coalitions of Amici can manifest by several means. This may include, multiple organizations drafting a joint Amicus brief, joint brainstorming, work meeting, or routine mutual consultations between the representatives of organizations about the arguments that should be presented in the Amicus brief.<sup>246</sup> Often, such work relations between organizations in their capacity as Amicus result in finding relevant legal sources, scientific or social research, or the provision of experts (for example, experts in social science or labor law) for the benefit of the organizations collaborating in such coalition. Sometimes, collaborations between social organizations in

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<sup>244</sup> See generally Kira A. Davis, *Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law*, 89 CORNELL L. REV. 191 (2003).

<sup>245</sup> In certain places, there is a principle authority to award court costs against third parties—usually, the imposition of costs on interveners but also on Amicus. Yet, the use of this authority is relatively rare. For example, in England the English Criminal Justice and Courts Act of 2015 were enacted. (c. 2, § 87). This Act sets out rules for the award of expenses against interveners in the proceedings of the Administrative Courts and the Court of Appeals of England and Wales. This new regime is intended to prevent the misuse of the procedure by interveners and to direct their behavior so as to assist the court in the public issue for which they sought to join the proceeding. For criticism of this law see JUSTICE & FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 37.

<sup>246</sup> Kathryn Kolbert, *The Webster Amicus Curiae Briefs: Perspectives on the Abortion Controversy and the Role of the Supreme Court – Introduction: Did the Amici Effort Make a Difference?*, 15 AM. J.L. & MED. 153 (1989).



connection with the use of the Amicus practice include building a joint strategy for action to manage the proceedings—not necessarily limited to be from just a legal standpoint.<sup>247</sup> The invitation to cooperate in the submission of Amicus briefs is not only relevant among NGOs, but is often extended across sectors, and also takes place between agencies of the State and various social impact organizations.<sup>248</sup>

Moreover, when a number of organizations join together to form a united front in the court serving as a coalition of Amici, this course of action might be more impactful to the court, and the public in general. Nevertheless, there is some difficulty in establishing a broad consensus on the content of the position which will be presented, and on the tactics and methods of operation to be used as a united front.<sup>249</sup> In addition, not only could organizations joining together to draft a joint Amicus strengthen the Amicus brief and potentially reduce the total costs of submitting the Amicus, it might also reduce the burden of the court by reducing the number of briefs and as a result, preventing judicial inefficiency.

#### *E. Limited Control of the Amicus on the Proceeding*

The Amicus benefits form clear procedural advantages, such as low procedural costs or avoidance of court costs. The Amicus allows third parties who are unable (e.g., financially) to file an independent petition, or who are concerned about the costs associated with being a formal party to the proceeding, to present their position. However, those who choose to present their position as Amicus essentially choose to be a relatively passive partner in the legal proceeding. Apart from presenting their position in writing, the Amicus have no real ability to control the judicial process.<sup>250</sup> The involvement of the Amicus in the proceedings tends to be limited to the submission of a written Amicus brief, and in rare instances, the Amici might be allowed to argue at oral arguments.<sup>251</sup> The formal litigants to the proceeding are who conduct the proceedings under the auspices of the court, and are able, at their discretion, to strike, reject, withdraw a petition, or to settle the case, all without consulting with the Amicus.

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<sup>247</sup> See generally Behuniak-Long, *supra* note 202.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> See generally SIMPSON & VASALY, *supra* note 193.

<sup>251</sup> *Id.*

*F. Concern for Negatively Impacting the Formal Parties*

Some argue that adding Amicus to existing proceedings may burden the courts with a great deal of information that not only is not essential to their work, but also leads to wasting judicial resources which in turn harms the right of formal parties to be granted an efficient and expeditious process.<sup>252</sup> The possibility of submitting an Amicus brief, when there are no clear procedural limitations, places too many unnecessary burdens on the courts as a result of the high number of Amicus briefs submitted. As a result, this situation may cause substantial harm to the efficiency of the judicial process and possibly violate the procedural rights of the formal parties.

Recently there has been a tendency to include Amicus in arbitration proceedings, particularly in international arbitration proceedings.<sup>253</sup> However, as it relates to Amicus practice in arbitration proceedings, it is important to remember that an arbitration proceeding is by nature a process of consent and free will between two parties. Therefore, adding Amicus cannot be forced on the formal parties as such coercion contradicts the rationale of the arbitration process.<sup>254</sup> Another example of concern for violation of the rights of the formal parties can be seen in the fact that sometimes, to achieve their goals, Amici seek access to commercial documents and various materials that the formal parties to the arbitration do not necessarily wish to transfer to such third parties. As a result, such Amici might be undermining the autonomy of the parties to conduct the arbitration in a manner consistent with their interests.<sup>255</sup>

*G. Increasing the Total Costs of the Legal Proceeding*

Another argument against the use of Amicus practice is that the filing of Amicus briefs results in increasing the overall costs of the legal proceeding.<sup>256</sup> As the filing rate of Amicus briefs increases and the participation of interest groups also increases considerably, it leads to higher overall costs associated

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<sup>252</sup> See *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

<sup>253</sup> See *United Parcel Serv. of Am., Inc. v. Canada*, ICSID Case No. UNCT/02/1, First Mexican 1128 Submission, ¶ 5 (June 11, 2001). In arbitration proceedings, Mexico expressed concerns regarding the addition of Amicus to the arbitration proceedings and that such development in procedural rules is a dangerous course, which contradicts the tradition of the organization. See also Ruth Mackenzie, *The Amicus Curiae in International Courts: Toward Common Procedural Approaches?*, in *CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES* 295, 296 (Tullio Treves et al. eds., 2005).

<sup>254</sup> *Id.*

<sup>255</sup> Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT'L & COMP. L.Q. 373, 393 (2010).

<sup>256</sup> Richard A. Posner, *What Do Judges and Justices Maximize?: (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 11 (1993).

with conducting the legal proceedings, which in turn become too cumbersome and prolonged.<sup>257</sup> In certain proceedings, there is a concern that Amicus will flood the courts with information and non-essential materials that will ultimately hamper the ability of the courts to act quickly and efficiently.<sup>258</sup> For instance, parties who choose to conduct legal proceedings related to contract law usually can estimate beforehand what will be the approximate legal costs of such proceeding. However, as the addition of third parties as Amici changes, the formal parties' estimation of such costs is more ambiguous, as they do not know what the costs of the additional "players" will be.

In addition, in arbitration proceedings—and in any alternative proceeding based on the prior consent of the parties—in which Amicus are added, it is contended that the Amicus cause unnecessary delays in the arbitration process, which are intended to be short and efficient, thereby increasing the costs imposed on the parties. A result the formal parties intended to avoid by choosing the arbitration channel in the first place.<sup>259</sup>

#### H. Use of Unsound Research Methods

An additional argument against the Amicus practice is that some of the Amicus—especially in the U.S. make use of scientifically unsound research methods, and the court does not have the ability to examine or corroborate such information.<sup>260</sup> Accordingly, courts must be aware that not all information presented by the Amicus is scientifically reliable. For instance, Professor Larsen cautions against judicial decisions which cite information presented by Amicus and rely on such information as uncontested facts, even though they are scientifically questionable. Larsen suggests that Amici should be used in appropriate cases to present to the court a detailed scientific explanation of the ways, methods, and scientific reviews of the information presented in the Amicus brief.<sup>261</sup>

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<sup>257</sup> See Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 911–12 (2011). Former Judge Posner from the Federal Courts of Appeals was a critic of the Amicus. He ruled in a number of cases that the representations mechanism of the Amicus—as interpreted by most courts in the U.S.—has failed to assist the courts. Posner argues that the Amicus burden the courts work, waste valuable judicial time, and increase the costs of the legal proceeding. See also *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

<sup>258</sup> *Id.*

<sup>259</sup> See Aníbal Sabater, *Towards Transparency in Arbitration (A Cautious Approach)*, 5 BERKELEY J. INT'L L. PUBLICIST 47, 51–52 (2010).

<sup>260</sup> See Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1760 (2014).

<sup>261</sup> See *id.* Larsen relies, to a certain extent, on the list of steps suggested by Huber to prevent misuse of the legal proceeding with invalid science. Huber claims that there is valid and quality science that legal proceedings should rely upon, and then there is "garbage science"—fake science

I. *The Amicus Practice as Encouraging Politicization of the Legal Proceeding*

There is concern that the Amicus practice may lead to the politicization of the courts, turning courts into an arena for the promotion of certain political interests.<sup>262</sup> This concern stems from the possibility that some of the Amicus will bring political arguments from the legislative and executive spheres of government into to the judiciary, and as a result, will cause the judicial system to be perceived by the public as overtly politicized.<sup>263</sup> In the U.S., for example, there seems to be an attempt to influence the courts by recruiting and drafting politicized Amicus. Formal parties with the ability to recruit organizations and individuals to submit numerous, powerful Amicus, have a better chance of winning the case. Those who believe this is the case propose that it is preferable to return to the traditional (classical) interpretation of the Amicus practice. The classical approach states that the court will only accept the Amicus if the submitter has relevant information which will be helpful to the judicial process, and which has not previously been presented by the formal parties.<sup>264</sup>

V. THE MEANING OF THE AMICUS CURIAE PHENOMENON

The various aspects of the Amicus Curiae Phenomenon, as detailed in the previous sections, each by itself and certainly when accumulated together, demonstrate that the Amicus Curiae Phenomenon has become relevant and significant in the court's analytical process in recent years. To illustrate, if we examine one of the criteria composing the Amicus Curiae Phenomenon, namely the increased use of the information presented by Amicus, we will discover that in more than half of the cases reviewed by the Supreme Court of the United States, the Court has cited or referred to an Amicus brief.<sup>265</sup> Similar data about the citation of Amicus briefs appears in international courts such as the Latin American Courts for Human Rights,<sup>266</sup> and the European Court of Human

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masquerading as real science. PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991).

<sup>262</sup> See HENRY R. GLICK, *COURTS, POLITICS, AND JUSTICE* (1st ed. 1983); Anderson, *supra* note 1. Some refer to U.S. judges as "politicians in black robes."

<sup>263</sup> See Anderson, *supra* note 1; see also Michael E. Solimine, *Retooling the Amicus Machine*, 102 VA. L. REV. ONLINE 151 (2016).

<sup>264</sup> See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 35–36 (1996) (Scalia, J., dissenting).

<sup>265</sup> See Franze & Anderson, *supra* note 9.

<sup>266</sup> See generally Rivera Juaristi, *supra* note 62.

Rights.<sup>267</sup> These statistics are based on the assumption that courts are affected in one way or another by the information presented to them in the Amici, but to what extent, it is very tough to determine. As stated previously, the influence of the Amicus on courts' decisions can be disputed. However, the court citing or referring to the Amicus brief in its decision suggests that the brief has been taken into account in some way.<sup>268</sup>

Although formally Amicus are considered "secondary players" to formal litigants and are merely accompanying the formal parties, in practice, their centrality, power, and importance to the Decision-Making Processes of the courts are significant. There are many instances where the influence of the Amicus have been even greater than that of the formal litigants.<sup>269</sup> For example, some of the most important U.S. rulings and other important rulings around the world have been decided on the basis of information presented exclusively by Amici.

It seems likely that courts throughout the world will continue to use the Amicus practice in the coming years. The evolving legal dynamics will require adjustments to be made in connection with the court's work, and the Amicus practice is a procedural practice that helps bridge these gaps. The diverse flow of information presented by the Amicus will continue to reach courts even in the future via the Amicus briefs. This, in turn, enables courts to fulfil their work by bridging the gap between the dynamic social reality and the work of the court. When courts are deeply involved in the shaping of public and private spheres—as was the case in many decisions reviewed previously in this Article—courts' awareness to the broad spectrum of interests and the broad implications of their decisions of large swaths of the public beyond the formal parties to the legal proceeding increases. This judicial approach requires greater openness to social information and different perspectives from other parties not directly involved in the formal proceeding that may be affected by court decisions. Lawyers who specialize in litigation in the Supreme Court of the United States have noted, and rightly so, that as far as the use of Amicus is concerned, it has yet to reach its peak.<sup>270</sup>

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<sup>267</sup> See Van den Eynde, *supra* note 2.

<sup>268</sup> See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 2735, 2762 (1978) (Powell, J.) (citing from joint Amicus briefs written by the Deans of Harvard, Columbia, Stanford, and Pennsylvania University).

<sup>269</sup> Amicus briefs have been used in some of the most significant court cases in the history of the U.S. These briefs were submitted by various organizations and interest groups and were a substantial factor in shaping the ruling on issues such as abortion rights (*Roe v. Wade*, 410 U.S. 113 (1973)); affirmative action (*Fisher v. Univ. of Tex. at Austin*, 136 S.Ct. 2198 (2016)); LGTBQ rights (*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)); see also *Cruzan v. Dir. Mo. Dep't Health*, 497 U.S. 261 (1990); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986); John Howard, *Retaliation, Reinstatement, and Friends of the Court: Amicus Participation in Brock v. Roadway Express, Inc.*, 31 HOW. L.J. 241 (1988).

<sup>270</sup> Walsh, *supra* note 24.

The adoption of the Amicus practice in various countries belonging to judicial systems traditionally hostile to such practice, especially in the civil law, demonstrates that the existing legal procedures are insufficient and that additional tools are required to help the judiciary to understand and study the interests and desires of third parties. The significant involvement of courts in transforming societies means that even courts which did not rely on Amici are now using the Amicus practice to receive more information on the broader implications of the court's decision as they impact other groups in society.

The innovative research, additional perspectives, and overall insights conveyed to courts by the Amicus are, to a great extent, a kind of "elixir" to the judiciary since they connect the judiciary to the wishes of society. On the other hand, courts are aware of the "meta" element of the power of the Amicus that far exceeds the supply of information that was not presented to courts by the formal parties. In the modern age, courts will continue to receive Amicus briefs, even if some of them do not supply any new information to the court, because they serve as a conduit for information about the public lobby and interest groups behind the issue being litigated. The Amicus brief illustrates the organizations that will probably continue to oppose the issue in the public, legal, media, and political spheres if their position is not accepted by the court. Thus, courts attribute importance to briefs, even if formally they do not add significant information, because they operate as an indicator of societal opinion of the issue.<sup>271</sup>

The use of Amicus practice generates not only a localized change in the concrete rulings of the courts, but also a significant change in the form of the discussion, the legal thinking, and the nature of litigation. Today, when a case with significant public policy implications is litigated by courts, undoubtedly many Amici will present their opinions. At times, judges are exposed to more Amicus materials, both in quantity and sometimes in quality, than they are exposed to those of the formal parties.<sup>272</sup> For example, in *Obergefell*, the case which legalized same-sex marriage in the U.S., hundreds of NGOs and interest groups joined together and submitted a total of 147 Amicus briefs that encompassed thousands of pages all together.<sup>273</sup> Similarly, the Latin American Courts for Human Rights received more court proceedings from third parties than the formal parties to the proceedings.<sup>274</sup>

The uniqueness of the Amicus practice, along with other public practices, is that it enables groups in society to advocate how cases before the court will influence their lives and their welfare through the judicial system. The Amicus

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<sup>271</sup> Kearney & Merrill, *supra* note 15.

<sup>272</sup> See generally LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS (1994); see also Franze & Anderson, *Unusual Term*, *supra* note 236.

<sup>273</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>274</sup> Rivera Juaristi, *supra* note 62; Mayer, *supra* note 2.

provide a window through which interests, information, and perspectives that previously could not enter are able to penetrate through into the court system. In connection with different interest groups in society—such as green organizations or women’s rights organizations—joining the proceedings as Amicus is an effective way for interest groups to influence decisions that may be impactful to their advocacy efforts. These interest groups perceive, and will continue to perceive, the submission of the Amicus briefs as a strategy, usually an exclusive one, to advance their goals in courts. Such interest groups regard the Amicus as a platform in which they are able to influence public opinion makers and decision makers, alongside non-legal tools such as petitions, lobbying, protests, and media. At times, the Amicus briefs presented by the various Amici are not intended to achieve an immediate “victory” but are submitted to advance broad and significant public processes at a later date, and sometimes even outside the court system.

Thus, and in light of the strengthening of public NGOs in the national and international legal realm, and NGO’s frequent use of the Amicus practice in promoting their interests, we can expect the use of the Amicus practice to continue and increase.<sup>275</sup>

The use of Amicus has a particular importance in modern law. This is because in addition to the various types of information transmitted to the courts through Amici—legal, social, or technical information—and to receiving an overview of the broad implications of the legal proceedings, the Amicus briefs constitute for some judges a “social benchmark” for the public’s views on the matter being decided by the court.<sup>276</sup> In some respects, the role of the Amicus has not relegated merely a presentation of information to the court, as in certain cases several Amici band together to create a united group which in turn can create increased pressure on the judges to be more accommodating of their positions.<sup>277</sup> This approach of trying to “transmit” to courts the view of large swaths of the public is based on the assumption that judges tend not to deviate too far from the prevailing public consensus. Also, judges are attuned to the public’s positions, and they take into serious consideration the positions of certain groups in society, particularly powerful interest groups.<sup>278</sup>

It would seem, therefore, that courts will continue to allow third-party submissions of Amici not only because of the content of the Amicus briefs which are supposed to assist them in their work, but also because of the courts’

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<sup>275</sup> See Charnovitz, *supra* note 212; Collins, Jr., *supra* note 10.

<sup>276</sup> Francesca Zannotti, *The Judicialization of Judicial Salary Policy in Italy and the United States*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 181 (C. Neal Tate & Torbjörn Vallinder eds., 1995); Collins, Jr., *supra* note 192.

<sup>277</sup> See Kearney & Merrill, *supra* note 15.

<sup>278</sup> See Kearney & Merrill, *supra* note 15, at 786 (“Insofar as the Justices are assumed to try to resolve cases in accordance with the weight of public opinion, they should look to amicus briefs as a barometer of opinion on both sides of the issue.”).

respect of the interest groups on behalf of which such briefs are often submitted. As a whole, courts tend to function according to the accepted narratives and prevailing State ideology, both of which shape the boundaries of the judicial process.<sup>279</sup> In addition, courts take institutional constraints stemming from possible modes of responses of such entities as the government, the legislature, or national security forces into account. In light of the fact that in connection to certain matters, particularly if they will impact the public, judges tend to consider public opinion more than they might regard it in ordinary disputes in which the public element is weak or lacking. Therefore, they perceive the Amicus briefs that are presented to them as a kind of social litmus test which assists them to better understand the expected implications in connection with their decision. This outcome is because Amici tend to reflect a range of vital opinions and perspectives much broader than those presented by the formal parties.<sup>280</sup>

As noted before, studies have shown that a large number of judges do not carefully read the briefs submitted to them by the Amici—often because of the large number of briefs encompassing thousands of pages—but rather skim through the covers of the briefs to understand the main arguments. As such, judges skim through the briefs and lists of Amici to try and understand which organizations, people, politicians, companies, and major interest groups in society have “a special interest” in this case. They try to infer the overall implications of their decision, and the future intent of the parties that have submitted the briefs.<sup>281</sup>

The review process usually goes as follows: a judge reviews the briefs, and often the judge’s law clerk prepares a summary of the “special interest” groups in the case, providing the court with vital information regarding the interest groups that may be affected by the decision, even if indirectly. This summary provides the court with fairly well-founded assumptions as to which interest groups will continue to be involved if the verdict is inconsistent with their agenda, whether in the media, government, legislature, and even other legal proceedings. In this respect, the Amicus briefs help courts understand a series of questions outside of the actual grasp of the formal parties or with which the formal parties are unable or unwilling to assist. Some questions that courts may ponder include: will the media be involved in the issue (and to what extent) or how will interest groups affected by the court’s decision give the decision a support in other legal proceedings? Many times, the importance of joining as Amici is not limited to the arguments presented, but rather to the

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<sup>279</sup> *Id.*; see also Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note*, 41 W. POL. Q. 135, 136 (1988).

<sup>280</sup> See also Collins, Jr., Corley, & Hamner, *supra* note 54.

<sup>281</sup> See Simard, *supra* note 13.



understanding of judges that their rulings have implications for various interest groups.<sup>282</sup>

Another layer of importance to the Amicus practice is that by using the Amicus, the institutional legitimacy of courts may be strengthened. The Amicus may lead to a greater commitment of the Amici to the decision of the courts because the Amici are part of the proceeding, even if their position was rejected. In other words, courts have expanded public participation in legal proceedings by allowing Amici to join. Such expansion of public participation in the judicial process is the result of courts seeking to expand the basis of participation of the public in proceedings and the public's interest in extending its influence on judicial opinions that will affect public life.<sup>283</sup>

The perception of courts in the eyes of the public and the manner in which the public relates to courts and their decisions is a central element in the significance of courts in a democratic state.<sup>284</sup> Viewed through the eyes of courts, the willingness to hear positions presented by Amici, which represent various interest groups of the public, even if the Amici's position is rejected, might strengthen courts' institutional legitimacy. The mere fact that courts are willing to take the Amici into consideration demonstrates courts' legitimacy in listening to the views of the public, and as a result might build greater commitment for public opinion in respecting courts' decisions. Courts reviewing the positions of the Amici is an expression of the fact that courts represent the legal and social conventions of the cultural community in which it functions. It also grants each interested Amicus party both the opportunity to have its day in court and advance their interests, even if they are not a formal party in the proceeding. Therefore, the Amicus practice helps to ensure that even those who might "lose" in the final decision handed down by the court will feel that their voices have been heard.

When courts provide third parties with a chance to participate through Amici, it helps strengthen the legitimacy of courts.<sup>285</sup> The notion that the

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<sup>282</sup> This can also be an argument against Amicus briefs, as it seems judges do not read the arguments fully but work on external motivation outside of the legal framework.

<sup>283</sup> Judges worry that their names might appear in the media in unflattering contexts. Certain critical legal approaches, such as Critical Legal Studies, claim that when judges think about their professional futures, it shapes the judicial decision. See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994).

<sup>284</sup> In contrast, some argue that Amici are a kind of "fig leaf" which legitimizes the courts' decisions. Institutional legitimacy refers to the level of respect and compliance of the public and its elected officials for courts' decisions.

<sup>285</sup> For instance, various studies indicate a growing level of distrust in all social institutions, including courts and law enforcement. Greg M. Shaw & Kathryn E. Brannan, *The Polls—Trends: Confidence in Law Enforcement*, 73 PUB. OPINION Q. 199, 213 (2009). In general, the level of trust by the public in their politicians and state institutions has continually decreased over the years. See Pharr & Putnam, *supra* note 184; Tom R. Tyler, *Procedural Justice*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 435 (Austin Sarat ed., 2004).

judges seriously considered Amicus' claims, "voice," and the stories of additional audiences other than the formal litigants, has a positive effect that may strengthen the public's trust in the judicial system and its decisions. It may also lead such interest groups to respect the judgments.<sup>286</sup>

This point is even more pertinent when the court to which the Amicus brief was filed actually makes use of the information or cites the information presented to it by the Amicus. In such instances, the Amici feel that the court has validated their efforts in the judicial arena and that their presence in the court as Amicus is essential and justified.<sup>287</sup> It can be argued that the more open courts are to various positions, the greater chance that the court's final decision will be considered legitimate by broader sections of the public. When interest groups express their position as Amici, they accept as an axiom the legitimacy of courts. Examples of adopting the Amicus practice as a procedural practice which has the potential to increase democratic values of legitimacy and commitment to the court's decisions can be found in the World Trade Organization,<sup>288</sup> NAFTA,<sup>289</sup> ICSID,<sup>290</sup> in Latin American countries (Mexico, Colombia, Argentina),<sup>291</sup> and African countries (South Africa, Ethiopia and Namibia).<sup>292</sup>

Many of the issues discussed in courts are not necessarily the exclusive domain of the formal parties to the dispute but may very well relate to a broad spectrum of the public. Many of the modern judicial proceedings have wider political, social, economic, security, and ecological implications than the narrow interests of formal litigants. Therefore, other groups and individuals may argue that they are entitled to express their positions in any proceeding that may impact their interests. In many ways, this is a revival of the concept of the legal process as a broad social process which involves not only the formal

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<sup>286</sup> For a discussion regarding public trust and procedural justice, see John Koch, *Making Room: New Directions in Third Party Intervention*, 48 U. TORONTO FAC. L. REV. 151 (1990); Roger K. Warren, *Public Trust and Procedural Justice*, 37 CT. REV. 12 (2000).

<sup>287</sup> See generally Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore,"* 16 LAW & SOC'Y REV. 311 (1981-82).

<sup>288</sup> See Ortino, *supra* note 3.

<sup>289</sup> See J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681 (2007).

<sup>290</sup> See Gómez, *supra* note 70; see also De Brabandere, *supra* note 3; Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200 (2011).

<sup>291</sup> See Medeiros, *supra* note 76.

<sup>292</sup> See Zoila Hinson & Dianne Hubbard, *Amicus Curiae Participation, in ACCESS TO JUSTICE IN NAMIBIA: PROPOSALS FOR IMPROVING PUBLIC ACCESS TO COURTS COSTS AND CONTINGENCY FEES* (2012).

parties, but also many other parties—including experts and professional advisors.<sup>293</sup>

The Amicus Curiae Phenomenon is causing profound changes in the judicial system, and in particular, influencing the variety of procedures that shape the court's work. The increasing use of Amicus have caused the once single dimensional judicial process—the “old world” of litigation—to become multidimensional—the “new world” of litigation. In recent years, any interest groups or individuals who are not formal parties but who want to influence the judicial system use an Amicus brief. Examples of such interest groups or individuals includes: professional associations, human rights organizations, academics, citizens, students, politicians, business corporations, and journalists.

The use of Amicus practice as a strategy to influence the decision of courts causes a significant change not only in the fact that the proceedings become multidimensional, but also in the style of the work of the judges and the parties in the courtrooms.<sup>294</sup> Moreover, courts have softened their rules of civil procedure which were originally hostile to the intervention of third parties, now allowing the interests of groups other than the formal parties.<sup>295</sup> In addition to the foregoing, the changes are also reflected in the change of the judges' mode of thinking with respect to the newfound acceptance to the use of new types of information and sources presented to them by the Amici.<sup>296</sup> Lastly, the judicial system has changed, and that change has affected the nature of the litigation, which makes it more polarized and divided.

The Amicus is more than just a procedural tool, but it is a popular social tool as well, used by ordinary citizens, to present positions of various groups within society in various court proceedings. The extensive use of Amicus demonstrates that the wide-reaching societal effects of legal decisions have

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<sup>293</sup> Some might argue that the Amicus institution was created with the background of the court's willingness to consult with external expert consultants. Dating back to Roman times, the Roman court's legal counsels, called *Juris Consulti*, were appointed to the court. Such consultants were scholars and people of stature in Rome, and they provided legal opinions, in an objective manner, to the courts and magistrates charged with running the judicial system. See John Crook, *Roman Legal History*, 17 *CLASSICAL REV.* 201 (1967).

<sup>294</sup> The Latin American Courts for Human Rights in the last twenty years have received more Amicus documents than documents from formal parties to proceedings. See Rivera Juaristi, *supra* note 62, at 1; Mayer, *supra* note 2, at 930.

<sup>295</sup> Amicus briefs submitted by various international organizations have caused state courts in South America to adopt this practice, sometimes reluctantly, and sometimes in contrast to the position of formal parties to the proceeding. In some Latin American countries, NGOs were the main cause of the Amicus Curiae Phenomenon.

<sup>296</sup> For example, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court cited information presented by many Amicus briefs, including a brief describing the history of health care reform. Further, one of the briefs used a study conducted in the Harvard Medical School, which demonstrated that over 45,000 Americans die every year because they do not have health insurance.

spurred the public to demand the ability to intervene in legal proceedings. In many ways, through the submission of Amicus briefs, the participation of the public reinforces the democratization of the judicial system and ensures that courts take into account diverse social interests.<sup>297</sup>

Concurrently with the changes that the Amicus bring into legal discourse and to the work of the court, the Amicus sheds light on the role of courts in society and the way judges perceive their function in the judicial system. The attitude of courts towards the desire of third parties to join legal proceedings as Amicus is to a large extent a reflection of the way judges perceive their societal role. There is a direct correlation between the perception of the judges of their judicial role and the Amicus Curiae Phenomenon. In places where courts have broad powers and a relatively considerable involvement in the society—such as the U.S. or South Africa—there is robust Amicus activity trying to influence the policy of courts. Courts who are interested in receiving different viewpoints of Amicus tend to be more aware of their dominant role in shaping the law of the country.

When viewing Amicus through a formalistic lens, the Amicus is merely a legal procedure used in connection with court proceedings by lawyers after fulfilling the rules of procedure. However, an in-depth examination of this procedure reveals that the use of Amicus embodies wide-ranging processes that have taken place in recent years in the perception of judges of their judicial role. The interests, perspectives, insights, and information presented to courts by the Amicus expose the judges to a wide range of information and to many disciplines foreign to them, all of which assists them to decide complex legal issues. As a result, the role of courts in society has become broader and deeper because of the recognition of the Amicus and which opens the courts' gates to third parties interested in advancing their interests through the use of the Amicus practice.

## VI. CONCLUSION

This Article strives to explain and give meaning to the processes and legal, social, and intellectual factors causing the increased importance of the Amicus in the last two decades. This Article describes various dimensions of the use of Amicus and links the Amicus Curiae Phenomenon to the changes that have taken place in the courts with respect to judges' perception of their judicial role and the style of their work. In addition, it demonstrates that one of the central changes in courts, which at the same time is also its cause, is that courts around the world have adopted and perfected the practice of the Amicus. This Article has outlined the importance and centrality of the Amicus practice in law, which demonstrates the influence of the inclusion of third parties as Amicus on society and the work of the courts. Thus, the use of Amicus is one of

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<sup>297</sup> See generally Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315 (2008).

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the most significant changes in the work of the courts in many countries in recent years. Many times, the influence of the Amicus is significantly higher than that of formal litigants. In some of the proceedings conducted in courts, most of the significant information presented to the courts was presented by the Amicus rather than by the formal parties. De jure, the Amici are third parties without formal status in the proceeding and they constitute a kind of “secondary actors.” De facto, their centrality, their power and their importance in the Decision-Making Processes of the courts is considerable.