

DE JURE NEXUS LAW JOURNAL

Author:

Anugra Anna Shaju

Student at Nuals, Kochi.

**AMICUS CURIAE: DEMARCATING THEIR ROLE AND
FORMULATING GUIDELINES**

Introduction

The Solicitor General, Tushar Mehta recently asked the Supreme Court to demarcate the role of the amicus curiae or the advocates appointed to assist the court, especially in sensitive cases.¹ He argued that they were stepping beyond their assigned roles and that it was necessary to frame guidelines for them. The argument came while dealing with the case of alleged extra-judicial killings by the army, Assam rifles and the state police in Manipur. The court asked the view of the amicus curiae in the case, Menaka Guruswamy about substitution of a CBI officer in the court-appointed special investigation team (SIT). The SG argued that this is interference in the running of organizations like the CBI and that the amicus curiae's job is not to run the administration or dictate the executive but to assist the court in the case.

The Court dismissed the matter for the time being but it is necessary that there are proper guidelines demarcating their role. This calls to look into the role played by amicus curiae in the legal system and how their roles can be demarcated.

Who Are Amici Curiae And What Are Their Roles?

¹ Krishnadas Rajagopal, *Solicitor General urges Supreme Court to demarcate role of amicus curiae*, THE HINDU, Mar. 17, 2021, <https://www.thehindu.com/news/national/sc-allows-discharge-of-officer-from-sit-probing-alleged-fake-encounters-in-manipur/article34089307.ece>.

Amicus Curiae, Latin for “friend of the court” is a part of the court systems around the world and even the UN bodies. The genesis of amicus curiae lies in the 14th century Anglo-American common law and Roman law.² The various roles played by amicus curiae are:

- **Represent The Public’s Interests**

They play an important role in representing the third party’s interests that might be affected in the case, especially in an adversarial system. Certain cases may have broad implications but the attorneys would be concerned about their respective parties only. Here amicus curiae help bring out the concerns of the larger public or third parties before the court which otherwise could escape the judges’ consideration and the judge may never know these issues. They are also a powerful and effective tool in developing public policy. As Justice Keane notes, “*there may be cases in which it would be advantageous to have the written and oral submissions of a party with a bona fide interest in the issue before the court*”.³

In the case of *Manoj Narula v. Union of India and Others*⁴, the issue of people with criminal background holding ministerial positions in the central and state governments came up. In this case as the question before the court was of great public importance, an amicus curiae was appointed and based on their recommendation the Union government was asked to file an affidavit within four weeks of service of the notice. Similarly in the case of *Public Union for Civil Liberties v. State of Tamil Nadu and Others*⁵, the amicus curiae, Kapil Saibal had to collect affidavit of surveys from the different states to look into Bonded Labour in the country and to implement the Bonded Labour System (Abolition) Act, 1976. All the states were required to comply with the briefs and written statements submitted by the amicus curiae in the case.

- **Assist The Courts**

Lawyers are appointed in specific, important cases to help the courts. They are appointed by the court to act like a neutral lawyer, assist the court in different matters and cases like on matters of law or public interest and help the courts analyse issues with real world experience and expertise. Some cases might involve multiple parties and stakeholders with diverse interests and views, here the amicus curiae play an important role by helping the courts

² Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave*, 41 THE AMERICAN UNIVERSITY LAW REVIEW 1243, 1244 (1992).

³ I v. Minister for Justice, Equality and Law Reform: (2003) IESC 42.

⁴ *Manoj Narula v. Union of India and Others*: (2014) 9 SCC 1.

⁵ *Public Union for Civil Liberties v. State of Tamil Nadu and Others*: (2004)12 SCC 381.

garner a diverse overview on the case at hand. They help compile facts and research on the law in question with a non-partisan view. So in a traditional sense, they make suggestions and bring forward all issues and facts relating to the case before the court.

In the case of *Ali Ibrahim v. State of Kerala*⁶, owing to the grave nature of the case, it was handed over to the CBI and amicus curiae was appointed. The amicus curiae was able to draw out various pertinent factors related to the case and formulate how the investigation was to be done, what resources and expertise was required in the case and that the case was not to be given to the National Investigation Agency as they deal only with cases having national ramifications. All the findings of the amicus curiae was accepted by the court.

- **Counsel For The Unrepresented**

Usually amicus curiae are expected to be impartial and provide a non-partisan view. They are to be an impartial judicial servant and away from litigation, where a partisan view is required. However certain times they might be expected to take partisan views when they are asked to be counsel for the unrepresented. In the case of *Md. Sukur Ali v. State of Assam*⁷ the court relied on the case of *Powell v. Alabama*⁸ to appoint amicus curiae for the accused. It was held that the right to fair representation is a constitutional right and no person should be denied of this right.

The case of *Anokhilal v. State of Madhya Pradesh*⁹ saw the formulation of norms when amicus curia is tasked to represent a party. The norms include provisions to ensure that the advocate appointed has enough meetings and discussions with the party to understand their case completely and defend them effectively and that they have sufficient time (minimum of seven days) to prepare the arguments after due consideration with the parties. It also urged that in case of possibility of life or death sentences, advocates with ten years of practice at the Bar alone should be considered and in case of death sentence, senior advocates are to be considered first. In the case the amicus curie was not given adequate time to prepare the case and the accused was given death sentence. So the court ordered de novo consideration of the case.

⁶ *Ali Ibrahim v. State of Kerala*: 1979 KLT 857.

⁷ *Md. Sukur Ali v. State of Assam*: (2011) 4 SCC 729.

⁸ *Powell v. Alabama*: (1932) 287 U.S. 45.

⁹ *Anokhilal v. State of Madhya Pradesh*: AIR 2020 SC 232.

Why Demarcation of Amicus Curiae's Role and Formulation of Guidelines Are Necessary?

The Supreme Court definition of amicus curiae¹⁰ under its jurisdiction determines amicus curiae's legal status. Amicus curiae works under the limitation of this definition, it is not wide under the legal framework.

However with changing time, the role and scope of amicus curiae have increased. They are no longer mere helpers or friends of the court but have become lobbyists, vindicator of the politically powerless, voice of the disadvantaged, advocates and litigators. They now play an active role in oral arguments, examining witnesses, evidence collection and discovery and even in enforcing court decisions. It is also seen that their powers are vaguely demarcated, flexible and discretionary to an extent. They are largely unregulated and can take control of cases in which litigants who will be bound by the decision of the court can be adversely affected due to the amicus curiae's actions and views. This nature of their powers and their increased role in the system has resulted in confusion and interference of them in other organs' powers, affecting constitutional framework and interests of the parties before the court. A balance of their powers is necessary and for this guidelines need to be formulated keeping in mind the important role they play and their usefulness in the system.

What Are the Things to Consider While Demarcating Amicus Curiae's Roles and Formulating Guidelines?

First of all it is necessary that the reports and findings of the amicus curiae ease the work of the courts rather than overburdening the courts. The findings or report should aim to bring out relevant factors that were not considered or brought before the court. Irrelevant factors should be kept out of their reports and arguments. So their submissions should be controlled such that only appropriate arguments for the fair administration of justice and for vindication of rights of the citizens are put forward and that there aren't any excessive or repetitive arguments. This is an important factor that is considered in the amicus curiae briefs submitted in the United States.

¹⁰ If a petition is received from the jail or in any other criminal matter if the accused is unrepresented then an Advocate is appointed as amicus curiae by the Court to defend and argue the case of the accused. In civil matters also the Court can appoint an Advocate as amicus curiae if it thinks it necessary in case of an unrepresented party; the Court can also appoint amicus curiae in any matter of general public importance or in which the interest of the public at large is involved. *Amicus Curiae*, SUPREME COURT OF INDIA (Mar. 28, 2021, 9:27 AM), <https://main.sci.gov.in/jurisdiction>.

Their role should be limited to that of a party to a case. They should be the third party for whom there might be a question of law or issue arising from or in relation to the claims of the two parties in a case. They will have the same rights as the parties and just claims as between the parties. It would be really beneficial for the parties, the court as well as the amicus curiae if the court can describe initially itself how an intervener i.e., the amicus curiae in a case should function. It should consider how the amicus curiae wishes to participate in the proceedings and how such participation is necessary or is helpful for the court. The court should see whether such participation would help it to determine the legal issues or facts more effectively and frame rules about their role in the case and the procedures to be followed by them.

When called to assist the court, their main concern should be to bring forward arguments on the matter which the court seeks assistance for, they should be like a party who is required to ensure that all necessary concerns and issues are brought before the court for adjudication and that they are determined effectually and completely. They should aim to assist the court on the relevant law and their application to the facts of the case.

It is also important to see that when amicus curiae represents a person or party's interests, their arguments and reports aren't arbitrary and are done with the consent of these parties. Interference in the functions and working of other organs of the government should also be avoided and demarcated.

The Indian courts should also work to develop a culture to involve organizations and interest groups with just claims in the particular case rather than restricting the role of amicus curiae only to the lawyers in its panel. This would help bring a first-hand account to the issues these organisations or groups face and ensure that relevant factors that actually affect them aren't submerged under the legal prowess of the advocate. South Africa allows non-parties that have interest in any matter before the Court to be part of the case as amicus curiae.¹¹ Like South Africa, Canada also permits public interest interventions.¹² The UK courts also allow third parties (public bodies, private individuals or companies, NGOs) to raise issues of public importance.¹³ Moreover the sole reason the courts depend upon amicus curiae is to get expert opinion on the subject or case at hand. To get expert knowledge, involving only lawyers from

¹¹ Sunny Kumar, *Comparative Study of Amicus Curiae*, INDIAN NATIONAL BAR ASSOCIATION (Mar. 28, 2021, 9:27 AM),

<https://www.indianbarassociation.org/comparative-study-of-amicus-curiae/>.

¹² *Id.*

¹³ *Id.*

the panel isn't enough. Involving the third party's whose interests may get affected in the case is a more viable and effective option to understand all the issues pertinent in the case.

Conclusion

Christina Murray very correctly states that it is easier to define what amicus curiae is not rather than what it is.¹⁴ She says that the institution is versatile and fulfils a wide range of diverse and important functions.¹⁵ This is very true about their role in the legal systems around the world and it is quite evident that the role played by amicus curiae in the Indian legal system is inexplicable. They have enjoyed a long history of support in the legal system given how they represent important legal and social issues. They play an active role in the Indian courts and its proceedings, especially in those cases involving public interest. The involvement of amicus curiae in the court proceedings allow the court to get not only expert opinions on the case before it but also do full justice to the case. The amicus curiae represents the larger interest of the people, they represent the will and opinion of the society on particular issues which may otherwise go unheard. All this shows that the amicus curiae is here to stay and are an integral part of the legal system, especially in an adversarial system. What is needed is to develop a system of rules or guidelines demarcating their role and scope and create a workable system that would allow the courts to get their opinions on matters of public interest and get expert opinions on certain cases while ensuring that it does not create confusion or interference in the work of the other organs.

¹⁴ Christina Murray, *Litigating in the Public Interest: Intervention and the Amicus Curiae*, 10(2) SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 240, 242 (1994).

¹⁵ *Id.*