

## THE *AMICUS CURIAE*: FRIENDS NO MORE?

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This article discusses the controversial origins of the ancient institution of the *amicus curiae* or ‘friend of the court’ and its subsequent development in a number of jurisdictions. It explores to what extent this ‘friend of the court’ still remains a friend in present times.

### I. INTRODUCTION

A term commonly used in both common law and civil law jurisdictions and in domestic and international tribunals is the Latin term *amicus curiae* or a ‘friend of the court.’ Who is this friend of the court and what is his role in legal proceedings? Largely because of the remarkable manner in which this ancient institution has developed in different legal systems and been used differently even in countries sharing a common legal tradition, such as the United States and the Commonwealth countries, the important question is whether the *amicus curiae* can still be considered a ‘friend’ of any tribunal or decision maker. Has this friendship been well maintained or significantly abused over the years?

The importing of a long-standing but ill-defined institution without adequate regard for its historical beginnings may well explain the innovative uses and/or the abuses of the *amicus curiae* practice. Discussing the role of the *amicus curiae* in litigation in South Africa, Christina Murray argues that it is easier to discover what the *amicus curiae* is not, rather than what he or she is. She concludes that the institution is therefore “versatile and that the amicus fulfills a wide range of diverse and important functions”<sup>1</sup>.

This ambiguity in the concept of the *amicus curiae*, coupled with the absence of rules governing the appointment, appearance and purpose of the institution in

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<sup>1</sup> Christina Murray, “Litigating in the Public Interest: Intervention and the *Amicus Curiae*” (1994) 10 S.A.J.H.R. 240 at 242.

many jurisdictions, although aiding its flexibility and development, has nevertheless occasionally produced some strange results. In *Ex parte Lloyd*<sup>2</sup>, for example, a lawyer who had accepted retainers from both parties found himself in a predicament. The Lord Chancellor hearing the case felt he had no authority to advise the lawyer as to which party he ought to represent. He thought he would overcome this problem, however, by appointing himself as *amicus curiae* and then advising the lawyer on the matter. The court thus became its own friend!

In recent years, the appearance of other non-parties to a civil dispute or proceedings in the form of the intervenor and the lawyer holding a watching or talking brief has further helped to blur the identity of the *amicus*. Then there is the further confusion in some jurisdictions over the appointment of lawyers *pro bono* to represent one party in the proceedings as *amicus curiae*. And, as will be considered in the course of this article, the expanded role of the *amicus curiae* and the different directions of its modern development in many jurisdictions and in international tribunals raise a number of other questions.

How and why has this simple Roman judicial device of a ‘friend of the court’ become so many different things to so many different people? Does the court still have a friend out there?

## II. THE MEANING OF “*AMICUS CURIAE*”

As Bellhouse and Lavers have observed, there are few legal terms as “unhelpful” and as “imprecise” as the ‘*amicus curiae*’.<sup>3</sup> The literal translation of the term from Latin, ‘friend of the court’, often causes confusion as to its present nature and scope and its true origins. Part of the uncertainty over the meaning of this term is the result of many different definitions of this ancient institution in various legal dictionaries and judicial pronouncements. These in turn may well be due to the vastly different development of this historical institution over the years in many countries including the United Kingdom and the United States. The literal translation of the Latin term *amicus curiae* as ‘a friend’ of the court is thus best described as being “deceptively simple”<sup>4</sup>.

### A. Dictionary Definitions

A reference to a dictionary definition for an understanding of the meaning of the words ‘*amicus curiae*’, beyond its literal English translation as a ‘friend of the court’, may not be entirely helpful in comprehending the nature of the institution. The variety of definitions in different jurisdictions, or even within the same jurisdiction, could well be confusing even to a person familiar with the term, as shown by the illustrations below.

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<sup>2</sup> A 19<sup>th</sup> century case reported in *Ex parte Brockman*, 134 S.W. 977, 233 Missouri Reports 135 (Sup. Ct. 1911) and referred to by Samuel Krislov, “The *Amicus Curiae* Brief: From Friendship to Advocacy” (1963) 72 Yale L.J. 694 at 695.

<sup>3</sup> John Bellhouse & Anthony Lavers, “The Modern *Amicus Curiae*: A Role in Arbitration?” (2004) 23 C.J.Q. 187.

<sup>4</sup> *Ibid.*

According to a modern *Law Lexicon* that is inspired by old English legal commentaries, an *amicus curiae* is:

one, who volunteers or on invitation of the Court, instructs the Court on a matter of law concerning which the latter is doubtful or mistaken, or informs him on facts, a knowledge of which is necessary to a proper disposition of the case.<sup>5</sup>

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

one who, not a party, but, just as any stranger might, gives information for the assistance of the court on some matter of law in regard to which the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts.<sup>6</sup>

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

Individuals or groups who are not parties to a litigation, but who are nevertheless permitted to present their views on the issues involved in a pending case to the court in written briefs or via oral presentation.<sup>7</sup>

*Mellinkoff’s Dictionary of American Legal Usage*, on the other hand, states that this friend of the court is “someone not a party to the litigation, but usually favouring one of the parties, and permitted to make an argument to the court”<sup>8</sup>.

Such definitions raise more questions as to who an *amicus curiae* really is. Is he, for example, a respected invitee, a mere volunteer or a complete stranger in the form of a spectator or bystander? Must he be legally trained? Is he an independent advisor to the court or does he represent partisan views like all the ‘learned friends’ who appear before the court but are said to be there primarily to assist the court? Does the *amicus* assist the court on the law or the facts or both?

In short, who is this ‘friend’ of the court and how does he become a friend? Is the *amicus* a friend of the court or to the court? This goes beyond semantics. A friend of the court assists by providing information so that the court will not fall into error. He does not seek to influence the final outcome. A friend to the court attempts to persuade the court to adopt a particular point of view whether or not he has a direct interest in the outcome. Is his right role to assist or to advise?

<sup>5</sup> P. Ramanatha Aiyar, *The Law Lexicon*, 2d ed. (Nagpur: Wadhwa and Co., 1997) at 102, with reference to Edward Coke, *The First Part of the Institutes of the Laws of England, or, a Commentary upon Littleton*, vol. 2 (London: J. Flesher, 1622) at 178. The definition in *The Law Lexicon* was considered by the Malaysian High Court in *Tai Choi Yu v. Ian Chin Hon Chong* [2002] 5 M.L.J. 518 (H.C.) [*Tai Choi Yu*]. In Australia, according to the Macquarie Dictionary, an *amicus curiae* “is a person not a party to the litigation who volunteers or is invited by the court to give advice to the court upon some matter pending before it”: David Hay, *Words and Phrases Legally Defined*, 4th ed. (London: LexisNexis UK, 2008) vol. 1 at 125.

<sup>6</sup> (St. Paul, Minn.: Thomson West, 2003) vol. 3B at 170.

<sup>7</sup> Gerry W. Beyer & Kenneth R. Redden, *Modern Dictionary for the Legal Profession*, 3d ed. (Buffalo, New York: Williams S. Hein & Co. Inc., 2001) at 41.

<sup>8</sup> David Mellinkoff, *Dictionary of American Legal Usage* (St. Paul, Minn.: West Publishing Co. 1992) at 27.

### B. Other Definitions

The many academic and judicial definitions<sup>9</sup> may well reflect the subsequent development of the institution in the common law jurisdictions. In Roman law, an appointee was a learned jurist who advised the court at its request. In the common law of the Middle Ages, the *amicus* acquired an additional role that he did not have in Roman law. As judicial proceedings were in the public city square, spectators could readily intervene as *amici* to share any relevant information with the judge.<sup>10</sup>

### III. THE ORIGINS OF THE *AMICUS CURIAE*: TWO VIEWS

To many scholars the exact origin of the *amicus curiae* is unclear and remains controversial. One commonly held view is that it had its origins in the common law despite its presence in civil law jurisdictions.<sup>11</sup> The other view, shared by the writer, which will be considered in detail subsequently in this article, is that it most probably originated during Roman times.<sup>12</sup> This is because the Roman practice of appointing a *consilium* or group of independent advisors to magistrates is in keeping with the

<sup>9</sup> See e.g., judicial definitions in the following jurisdictions: Australia: *In the marriage of PW and CA Rogers and Fernandez* [1988] 12 Fam. L.R. 467 (Family Court of Australia) (a legal practitioner or some other person who has the appropriate qualifications to assist the court); Canada: *Grice v. R* [1957] 11 D.L.R. (2d) 699 (Ont. S.C.) [*Grice*] (bystander informing judge in a matter of law); *R. v. Lee* [1998] 125 C.C.C. (3d) 363 (N.W.T. S.C.) (a barrister who assists the court, at the court's request, and is disinterested); England: *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229 at 266 (C.A.) [*Allen*] (role of an *amicus curiae* was to help the court by expounding the law impartially); Hong Kong: *Hong Kong v. David Ma Wai-kwan* [1997] 2 Hong Kong Cases 315 at 359 (C.A.) [*David Ma Wai-kwan*] (difficult for court to accept as *amicus* counsel who appears without invitation); Malaysia: *Re Application by Hamid bin Hassan; Hamid bin Hassan v. Returning Officer, Karak* [1979] 2 M.L.J. 183 [*Re Application by Hamid bin Hassan*]; *Tai Choi Yu*, *supra* note 5 (one who is invited by the court to assist the court and not a volunteer); *Nadarajan s/o Verayan v. Hong Tuan Teck* [2007] 7 M.L.J. 640 (H.C.) [*Nadarajan s/o Verayan*] (counsel for the Disciplinary Board of the Bar Association invited to be *amicus curiae* to assist court to arrive at a "just decision" in the public interest); South Africa: *Grinshaw v. Mica Mines Ltd.* [1912] Transvaal Provincial Division Decisions 450 [*Grinshaw*]; *Connock's Motor Co. Ltd. (SA) v. Pretorius* [1939] Transvaal Provincial Division Decisions 355 [*Connock's Motor Co. Ltd. (SA)*] (not the function of an *amicus* to seek to undertake the management of a cause); United States: *Village of North Atlanta v. Cook*, 133 S.E.2d 585, 219 Georgia Reports 316 (Sup. Ct. 1963) (one who interposes in judicial proceedings to assist the court by giving information or otherwise); *Airlines v. Wolens*, 513 U.S. 219 (1995) (a person or group seeking permission of the court to submit a brief in the action with the intent of influencing the court).

<sup>10</sup> Michael K. Lowman, "The Litigating *Amicus Curiae*: When Does the Party Begin after the Friends Leave?" (1991 – 1992) 41 Am. U. L. Rev. 1243, cited in Israel Doron & Manal Totry-Jubran, "Too Little, Too Late? An American *Amicus* in an Israeli Court" (2005) 19 Temp. Int'l & Comp. L.J. 105.

<sup>11</sup> See e.g., Frank M. Covey, Jr., "*Amicus Curiae*: Friend of the Court" (1959 – 1960) 9 DePaul L. Rev. 30 at 34-35; Alan Levy, "*The Amicus Curiae*: An Offer of Assistance to the Court" (1972) Chitty's L.J. 94.

<sup>12</sup> See e.g., Krislov, *supra* note 2; "The *Amicus Curiae*" (1960 – 1961) 55 Nw. U.L. Rev. 469; Fowler V. Harper & Edwin D. Etherington, "Lobbyists before the Court" (1952 – 1953) 101 U. Pa. L. Rev. 1172; Lowman, *supra* note 10 at 1244; Ernest Angell, "The *Amicus Curiae*: American Development of English Institutions" (1967) 16 I.C.L.Q. 1017; Michael J. Harris, "*Amicus Curiae*: Friend or Foe? The Limits of Friendship in American Jurisprudence" (2000) Suffolk J. Trial & Appellate Advoc. 1; Wayne W. Schmidt, "History, Purpose and Philosophy of Amicus Advocacy: The AELE Amicus Program" (21 September 2008), online: Americans for Effective Law Enforcement <<http://www.aele.org/history.html>> (accessed on 8 January 2010); George Williams, "The *Amicus Curiae* and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 Federal Law Review 365 at 367.

appointment and use of the *amici*<sup>13</sup> in all aspects of Roman life. Occasionally, the *amicus curiae*'s origin is attributed to both the common law and Roman law.<sup>14</sup>

#### A. *The Amicus Curiae at Common Law*

The *amicus curiae* practice was an early institution used at common law. This can be seen from old definitions and descriptions<sup>15</sup> and early cases recorded in the Year Books. According to *Bouvier's Law Dictionary*, for example, the *amicus curiae* is:

A friend of the court. One who, for the assistance of the court, gives information of some matter of law in regard to which the court is doubtful or mistaken; such as a case not reported or which the judge has not seen or does not at the moment recollect.<sup>16</sup>

Holthouse's *Law Dictionary* describes the *amicus* in different but definite terms:

When a judge is doubtful or mistaken in matters of law, a bystander may inform the court as *amicus curiae*. Counsel in court frequently act in this capacity when they happen to be in possession of a case which the judge has not seen or does not at the moment remember.<sup>17</sup>

In the Canadian case of *Grice*, Ferguson J. considered an *amicus curiae* as:

one, who as a bystander, where a judge is doubtful or mistaken in a matter of law, may inform the court. In its ordinary use the term implies the friendly intervention of counsel to remind the court of some matter of law which has escaped its notice and in regard of which it is in danger of going wrong.<sup>18</sup>

In the early common law, any person in court could apparently step forward as an *amicus curiae* to advise the court. The Year Book cases from 1353 show this to be an accepted practice.<sup>19</sup> In the abridgement of 1573, there are at least three known references to the *amicus* practice. These include a statement that in "an improper indictment any man, as *amicus curiae*, can inform the court of error in order to prevent the court from suffering the mistake"<sup>20</sup>.

<sup>13</sup> Rudolph Sohm, *Institutes of Roman Law*, 3d ed. (Oxford: Clarendon Press, 1907).

<sup>14</sup> As "it has been traced back as far as the 14<sup>th</sup> century and even to Roman law": Williams, *supra* note 12 at 367.

<sup>15</sup> See *supra* notes 5-8.

<sup>16</sup> Francis Rawle, *John Bouvier's Law Dictionary* (Boston: The Boston Book Company, 1897) at 138; William Edward Baldwin, *John Bouvier's Law Dictionary: Baldwin's Century Edition* (New York: Banks Law Publishing Company, 1928) at 69. Bouvier, who first compiled his dictionary in 1827, makes reference to Coke, *Commentary upon Littleton*, *supra* note 5 at 178 and Charles Viner, *A General Abridgement of Law and Equity*, vol. 2 (London: Stahan and Robinson, 1791) at 475.

<sup>17</sup> Krislov, *supra* note 2. See generally *Corpus Juris Secundum*, *supra* note 6 for American definitions of the term.

<sup>18</sup> *Supra* note 9 at 702.

<sup>19</sup> (1353), Y.B. Hil. 26 Edw. III. See Edmund Ruffin Beckwith & Rudolph Sobernheim, "Amicus Curiae—Minister of Justice" (1948) 17 Fordham L. Rev. 38; "Notes on Amicus Curiae" (1920 – 1921) 34 Harv. L. Rev. 773; "The Amicus Curiae", *supra* note 12. Collection of cases appearing in the Year Books will be found in Simon Theloall, *Le Digest Des Briefes Originals Et Des Choses Concernants Eux* (London: In ædibus Richardi Tottelli, Octobris decimo quarto., 1579) at 200 and in Viner, *supra* note 16 at 475-476.

<sup>20</sup> Brooke, *Le Garande Abridgement* (1573), cited in Covey, *supra* note 11 at 33.

There are cases of bystanders calling attention to irregularities in writs and inquisitions, to the death of a party in the proceedings and to relevant statutes governing the issues before the court.<sup>21</sup> In the rather strange 1686 case of *Horton and Ruesby*<sup>22</sup>, Sir George Treby informed the court that, as Member of Parliament, he had been present in Parliament when it passed the *Statute of Frauds and Perjuries* and appears to have been allowed to enlighten the court on what he perceived to be the true intention of Parliament in enacting that Act.

In earlier years, such intervention by third parties could only be by *amici* who were barristers, although according to Bouvier by the statute of 4 Hen.IV (1403), any stranger could move the court as *amicus curiae*. The custom included “instructing, warning, informing and moving the court”<sup>23</sup>. The *amicus curiae* continues to have been sustained over the centuries as an institution, not only to preserve the “honour of the court” to deliver proper judgment in individual cases, but also, in the public interest, to continue the rational development of the law “as a safeguard against judicial arbitrariness and for the preservation of free government”<sup>24</sup>.

Suggested reasons for the common law origins of the *amicus curiae* are as follows.

#### 1. *Inherent right of court to require assistance*

One of the reasons is that it was a “construct of the common law” based on the inherent jurisdiction of a court to require assistance from members of the legal profession to whom it had given special rights to practise their profession.<sup>25</sup>

#### 2. *The ‘bystander’ theory*

One writer has, however, suggested another possible source from which the *amicus* practice could have begun.<sup>26</sup> He concedes that his case, at best, rests on “some secondary confirmation” from early common law practice.<sup>27</sup> Until the middle common law, a defendant in a serious criminal charge was not allowed counsel to represent him. The reason for that rule was that the accused must answer a serious charge himself and not have a lawyer speak on his behalf.<sup>28</sup> In a study of the history of the English Bar, Herman Cohen explains that the resultant ritual of the accused being accompanied to court by his friends was partly to check on his accuser’s entourage or guard “against vengeance without law”<sup>29</sup>.

<sup>21</sup> Krislov, *supra* note 2; Covey, *ibid.* at 34-35. “The *Amicus Curiae*”, *supra* note 12. In South Africa the *amicus curiae* has also been judicially defined as “a member of the bar, or other bystander, who advises the court regarding a point of law or fact upon which information is required: *Grinshaw*, *supra* note 9.

<sup>22</sup> (1686), Com. 33, 90 E.R. 326.

<sup>23</sup> See Baldwin, *supra* note 16 at 69.

<sup>24</sup> Beckwith & Sobernheim, *supra* note 19.

<sup>25</sup> Williams, *supra* note 12 at 366; Johannes Chan, “*Amicus Curiae* and Non-Party Intervention” (1997) 27 Hong Kong L.J. 391 at 394.

<sup>26</sup> Covey, *supra* note 11. Covey accepts that there is no “direct confirmation or denial” for this theory from the historical data but “some secondary confirmation” from the early common law practice.

<sup>27</sup> *Ibid.*, at 35.

<sup>28</sup> Herman Cohen, *A History of the English Bar and Attornatus to 1450* (London: Sweet & Maxwell Ltd., 1929) at 4, 12-13, citing the works of Latin writings known as *Leges Henrici Primi* attributed to a scholar known as *Quadripartitus*.

<sup>29</sup> Cohen, *ibid.* at 12.

Gradually, bystanders, who were not necessarily lawyers, were allowed to provide assistance to the court. Some support for this appears in Coke's *Institutes*:

And after the plea of not guilty, the prisoner can have no counsel assigned to him. [A]ny learned man that is present may inform the court for the benefit of the prisoner of anything that may make the proceedings erroneous.<sup>30</sup>

The *amicus* practice, it is suggested, was therefore established to avoid judicial errors and to thus ensure justice to undefended defendants in criminal cases by permitting lawyers present in court to assist the judge.<sup>31</sup>

This 'bystander intervention' may have been a natural development of the *amicus* practice at common law, especially in criminal cases in early England. Some scholars question whether bystander participation truly represents the nature and purpose of the *amicus curiae*'s respectable beginnings. To them the intervention by 'bystanders' and other passers-by must have been rare indeed and not a principal feature of the manner in which the *amicus curiae* functioned even at common law. According to Bellhouse and Lavers, for example, the picture of unemployed or otherwise unengaged counsel and other bystanders eagerly awaiting opportunities to make themselves useful to the court, "is rich in comic possibilities, if not absolutely weird"<sup>32</sup>. Banner helpfully suggests that at best an intervening lawyer present in court was only "chiming in with a suggestion"<sup>33</sup> as he would have merely relied on his memory of a precedent and would have done no preparation by way of research or writing in the manner of one having conduct of the defence.

A judicial system based on inputs by bystanders, onlookers and other busy-bodies is hard to imagine. Historical evidence, however, seems to support such a practice in England before the development and growth of the legal profession and the change of laws to allow legal representation in all criminal cases. A study of the early presence of the *amicus curiae* in common law and at the English Bar indicates that intervention by legally trained bystanders was not infrequent.<sup>34</sup>

By about 1300, the serjeants-at-law (the early Barristers) were established but they were a "small wieldy body"<sup>35</sup> in active legal practice. They were easy to consult and even the Chancellor of the King's council was frequently ordered to consult them, surely an emulation of the practice the Roman Emperors had in place.<sup>36</sup> This explains the number of cases in the Year Books where lawyers were "jumping up, as it were, and arguing without being told for whom they appear"<sup>37</sup>. As Cohen explains,

<sup>30</sup> Edward Coke, *The Third Part of the Institutes of the Laws of England; Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (London: Brooke ed., 1797) at 29. See also Chitty's description: Joseph Chitty, *A Practical Treatise on the Criminal Law*, 2d ed. (Philadelphia: Edward Earle, 1819) at 308, cited in Covey, *supra* note 11.

<sup>31</sup> See e.g., the *Tilburne's Case* (1649) 4 State Trials 1270; *Ratcliffe's Case* (1746) 18 State Trials 429 referred to in Beckwith & Sobernheim, *supra* note 19.

<sup>32</sup> Bellhouse & Lavers, *supra* note 3. The "bystander" explanation for the institution no doubt contained in a number of dictionaries appears in many writings. See e.g., Murray, *supra* note 1; Stuart Banner, "The Myth of the Neutral Amicus: American Courts and their Friends, 1790-1890" (2003) 20 Const. Commentary 111.

<sup>33</sup> Banner, *ibid.* at 121.

<sup>34</sup> Cohen, *supra* note 28; Lowman, *supra* note 10.

<sup>35</sup> Cohen, *ibid.* at 218-219.

<sup>36</sup> *Ibid.* at 220, n. (z) refers to the "many references in Index to Rot.Parl.seargeant-at law, e.g. in 1330, 1347, etc., normally to assist the Triers".

<sup>37</sup> *Ibid.* at 220.

sergeants-at law were glad to offer legal solutions to the court, being “a small happy family, *amici inter se* and *amici curiae*”. There is a case as early as 1293 where, during an argument in the Common Bench on a writ by Gossefeld Sgt, an *amicus* is reported to have intervened to say that “he has seen a case where the assign had brought this writ”<sup>38</sup>. The frequency of the *amicus curiae* appearing in the early days “seems to have been over looked”<sup>39</sup>.

It is safe to assume that with the gradual increase in the number of trained lawyers and the availability of legal representation in all criminal cases, the need for bystander intervention ceased. Commenting on the *amicus* practice in the 1980s, J. M. L. Evans, Official Solicitor in England, observed:

It is ... usually invoked where it is considered by the court that an important point of law is involved which the court wishes fully argued, and which is unlikely to be dealt with by the parties before it. I think it is practically unknown in my experience for such procedure to be initiated by a bystander as indicated in these works.<sup>40</sup>

### 3. *Preserving the honour of the court*

In the celebrated case of *Protector v. Geering*, decided in 1656, the purpose of the *amicus* was discussed in the following terms:

It is for the honour of the court to avoid error in their judgments. The Court ex-officio ought to examine...into errors, though not moved. Barbarism will be introduced, if it be not admitted to inform the court of such gross and apparent errors in offices.<sup>41</sup>

In the result the *amicus curiae* was permitted to move the court to quash a previous order made in error.<sup>42</sup>

### 4. *Oral “shepardizing”*

Yet another theory as to how the *amicus curiae* came to be relates to its function at common law as a form of oral “shepardizing”<sup>43</sup>, the drawing of the attention of the judge to previously decided cases. With the lack of proper reporting of cases at that time, the need for assistance for the courts could have become greater and more pronounced. It is suggested that the *amicus* submissions were therefore “originally intended to provide the court with impartial information that was beyond its notice or expertise, which is where the name *amicus curiae*, or ‘friend of the court’ is derived”<sup>44</sup>.

<sup>38</sup> Reported in Y.B. 21 Edw. I, 149; Rolls. See *ibid.* at 314.

<sup>39</sup> Cohen, *ibid.* at 220, n. (z).

<sup>40</sup> In a communication dated November 12, 1969, cited in Levy, *supra* note 11 at 95, n. 12.

<sup>41</sup> (1656), Hardres 85, 145 E.R. 394.

<sup>42</sup> The court made reference to a case reported in 7 Edw. 4 (1449) to support the decision.

<sup>43</sup> Krislov, *supra* note 2 at 695.

<sup>44</sup> Allison Lucas, “The Ethics of *Amicus* Brief Writing in First Amendment Litigation” (1998 – 1999) 26 Fordham Urb. L.J. 1605 at 1607, cited in Jared B. Cawley, “Friend of the Court: How the WTO Justifies the Acceptance of the *Amicus Curiae* Brief from Non-Governmental Organisations” (2004) 23 Penn State International Law Review 47, n. 1.

### 5. Overcoming the shortcomings of the adversarial system

The most frequently cited explanation for its presence in the common law and a consequent deduction that it has obvious common law beginnings, is that it served as a useful and convenient tool to overcome the shortcomings of the adversarial system which is essentially “partisan” or “bi-polar”.<sup>45</sup>

The essence of the quest for justice in an adversarial system is that it is restricted to the resolution of the dispute between the parties to the dispute and confined to the issues that have been raised in the course of this dispute. There is no wider third party or public interest involvement beyond the outcome. The interests of parties not “formally represented” are generally irrelevant in a traditional judicial setting.<sup>46</sup> The very nature of legal proceedings in a common law adversarial system, the argument goes, compelled the accommodation of an independent adviser who could give the court assistance on behalf of a third party. Such an increased use of third-party interventions in some jurisdictions in recent years has been explained on the additional but tenuous ground of “public interest”.<sup>47</sup>

On the other hand, because common law trials were but a “judicial parody of the medieval tournament”<sup>48</sup>, it is equally improbable that an institution like the *amicus curiae*, which also permits third-party participation, could have had its origins within such a trial system known more as a contest between two warring factions. The more persuasive argument is that the *amicus curiae* practice is an integral part of a civil law tradition rooted in Roman law with more flexible rules of court appearance and representation. It is not, therefore, surprising that the institution has existed in many civil law jurisdictions including France for a long time<sup>49</sup> and has found its way naturally into international tribunals<sup>50</sup> which have a substantial civil law tradition and influence. Like many other legal institutions, this Roman practice became incorporated in the English common law.<sup>51</sup>

It seems more logical to think that, having found its way into the common law system, the *amicus curiae* later developed and has remained in some jurisdictions such as the United States as more of an adversarial weapon.<sup>52</sup> In others, it largely retained the purity of its ancient Roman form. The institution has survived remarkably in some form or other simply because of its adaptability. It has meant, since leaving Roman hands, different things to different people but the title has, rather remarkably, endured except, until recently, in the United Kingdom.<sup>53</sup>

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<sup>45</sup> Williams, *supra* note 12 at 367.

<sup>46</sup> “The *Amicus Curiae*”, *supra* note 12.

<sup>47</sup> See Sarah Hannet, “Third Party Intervention: In the Public Interest?” [2003] P.L. 128.

<sup>48</sup> Charles Maechling Jr., “Borrowing from Europe’s Civil Law Tradition” (1991) 77 A.B.A. J. 59 at 59.

<sup>49</sup> Angell, *supra* note 12.

<sup>50</sup> Isabel Davies *et al.*, “INTA Experience Shows Value of *Amicus* Briefs” (2005) 154 *Managing Intellectual Property* 19; Daryl A. Mundis & Fergal Gaynor, “Current Developments at the Ad hoc International Tribunals” (2004) 2 *Journal of International Criminal Justice* 879; Cawley, *supra* note 44.

<sup>51</sup> Rawle, *supra* note 16 at 138.

<sup>52</sup> Krislov, *supra* note 2.

<sup>53</sup> See note 138 and the accompanying text.

### B. *The Amicus Curiae from Roman Times*

That the *amicus curiae* originated from Roman law practices has been suggested by a number of writers.<sup>54</sup> The most commonly cited works in support of the Roman roots theory are the seminal article by Samuel Krislov in the Yale Law Journal in 1963<sup>55</sup>, Ernest Angell's<sup>56</sup> 1967 article in the International and Comparative Law Quarterly and more recently that of Michael K. Lowman in 1992<sup>57</sup>.

Angell puts his view in a single line that the "device was known in Roman law" without any references to Roman law sources for this proposition. Lowman in turn cites Angell, Harper and Etherington, and Covey,<sup>58</sup> none of whom makes any reference to Roman law texts or writings of Roman scholars to support his view. Harper and Etherington say no more than that the *amicus curiae* has had a long and respected role in the U.S. legal system and "before that in the Roman law"<sup>59</sup>.

Covey refers to the third edition of *Bouvier's Law Dictionary* (1914) for what he considers to be a doubtful suggestion that the *amicus* practice is based on the "Roman *consilium*, an officer of the Roman Court appointed by the judge to advise him on points on which he was in doubt"<sup>60</sup>. Unfortunately, the difficulty with these views has always been the lack of supporting references to Roman scripts or sources or to the writings of Roman law scholars.

According to Covey, there are two "significant differences" between the *amicus* practice and the *consilium* practice which raise a "serious doubt" that the *amicus* practice originated from the Roman *consilium* practice. It is interesting to note what Covey regards as the two key differences between the *amicus* and *consilium* practices to doubt the *amicus curiae*'s Roman roots<sup>61</sup>: First, the *consilium* could not advise the court on his own initiative, as the *amicus curiae* may, but could only act at the request of the court. Second, the *consilium* when requested by the court could act against a criminal defendant, while an *amicus curiae* may never appear against a criminal defendant.

With respect, as will be discussed elsewhere in this article, it is these two features that support the *amicus curiae*'s Roman origins. The *amicus curiae* was traditionally an independent advisor to the court, appointed by the court to provide assistance to the court and this is the *amicus* practice that still exists in some parts of the world. Covey appears to have been influenced by the *amicus* practice that presently exists in the United States which represents a stark departure from its original practices in ancient Rome.

<sup>54</sup> See e.g., "The Amicus Curiae", *supra* note 12; Harper & Etherington, *supra* note 12; Lowman, *supra* note 10 at 1244; Angell, *supra* note 12; Harris, *supra* note 12; Schmidt, *supra* note 12; Williams, *supra* note 12 at 367; Doron & Totry-Jubran, *supra* note 10.

<sup>55</sup> Krislov, *supra* note 2.

<sup>56</sup> Angell, *supra* note 12.

<sup>57</sup> Lowman, *supra* note 10 at 1244, n. 4.

<sup>58</sup> Covey, *supra* note 11; Harper & Etherington, *supra* note 12.

<sup>59</sup> Harper & Etherington, *ibid.* at 1176. They make no references to any sources for this attribution to Roman law.

<sup>60</sup> Bouvier's comment was that "There was in that day also the '*amicus consiliari*' who was ready to make suggestions to the advocate and this *amicus* was called a '*ministrator*'", citing *Cic. de Orat.* II.75.

<sup>61</sup> Covey, *supra* note 11 at 34-35. His only concession appears to be that the *consilium* practice was the "source of those facets of the *amicus* practice that are similar to it" without stating what these similarities are.

Is there then any substance in the theory that the *amicus curiae* is of Roman origin?

Roman records and the writings of Roman law scholars sufficiently indicate that the *amicus curiae* has its roots in Roman traditions and legal systems. The evidence for the Roman origins of the *amicus curiae* is strong. It can be traced to the early third century when the *consilium* and the jurists played an important part in all aspects of Roman life.<sup>62</sup> It certainly pre-dates the English common law *amicus* practice and like many other legal institutions was incorporated in the English legal system with subsequent changes in various forms in many common law countries.

Rather significantly, the *amicus* practice is also found in the French courts<sup>63</sup> and in the civil law systems which have their roots in Roman law.<sup>64</sup> This is hardly surprising given the extensive influence the Roman traditions have had upon the legal systems of Western Europe and, through colonialism, its spread “from Holland to South Africa, Sri Lanka and Indonesia; from France to Quebec, Louisiana and francophone Africa; and from Spain to Texas, South America and the Philippines”<sup>65</sup>. The Roman tradition has also been seen in Japan, Turkey and to some extent in China.<sup>66</sup> It is also prevalent in international tribunals which have adopted the *amicus* practice without much difficulty,<sup>67</sup> international law itself being the “most substantial flowering of the Roman legal tradition”<sup>68</sup>.

It is when one has regard to Roman traditions that the Roman origins of the *amicus curiae* practice become uncontroversial. The Romans had what Roman law scholar John Crook describes as “an immemorial tradition that men in positions of responsibility should not take decisions alone”<sup>69</sup>. The opinions of the *consilium* were of an advisory character only and were not binding on the Emperor. The *consilium*

<sup>62</sup> In John Crook, *Consilium Principis: Imperial Councils and Counsellors from Augustus to Diocletian*, (Cambridge: Cambridge University Press, 1955), the author, who is an eminent Roman law scholar, cites Dio, Herodian and the *Scriptores Historiae Augustae* as providing interesting material for the *amici* in the late second and early third centuries.

<sup>63</sup> Angell, *supra* note 12. See also David W. Duncan, “A Little Tour in France: Surrogate Motherhood and *Amici Curiae* in the French Legal System” (1993 – 1994) 21 W. St. U. L. Rev. 447; Dinah Shelton, “The Participation of Non-governmental Organisations in International Judicial Proceedings” (1994) 88 Am. J. Int’l L. 611. The writer owes a debt of gratitude to the late Mr. Debouzy and his colleagues in the Paris law firm of August & Debouzy who furnished the writer with information on the role of the *amicus curiae* in French law. The French Code of Civil Procedure distinguishes an *amicus* from an intervenor, expert witness and consultant. There is now specific provision under French law for an *amicus curiae*’s appointment in respect of competition law, labour law and discrimination cases.

<sup>64</sup> A.D.E. Lewis & D.J. Ibbertson, eds., *The Roman Law Tradition* (Cambridge: Cambridge University Press, 1994) at 7; George Mousourakis, *The Historical and Institutional Context of Roman Law* (England: Ashgate Publishing Ltd., 2003) at 438.

<sup>65</sup> Lewis & Ibbertson, *ibid.* at 14.

<sup>66</sup> *Ibid.*

<sup>67</sup> For information on the acceptance of the *amicus curiae* in international tribunals see e.g., Arndt Kaubisch, “Letters from Friends: The Admissibility of *Amicus Curiae* Briefs in WTO Dispute Settlement” (2004) European Law Students’ Association Selected Papers on European Law, online: European Law Students’ Association <[http://www.elsa.org/fileadmin/user\\_upload/elsa\\_international/PDF/SP/EL/SP/EL04\\_1\\_KAUBISCH.pdf](http://www.elsa.org/fileadmin/user_upload/elsa_international/PDF/SP/EL/SP/EL04_1_KAUBISCH.pdf)>; Cawley, *supra* note 44; Shelton, *supra* note 63; Duncan B. Hollis, “Private Actors in Public International Law: *Amicus Curiae* and the Case for the Retention of State Sovereignty” (2002) 25 B.C. Int’l. & Comp. L. Rev. 235, online: Boston College <[http://www.bc.edu/bc\\_org/avp/law/lwsch/journals/bciclr/25\\_2/04\\_FMS.htm](http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_2/04_FMS.htm)>.

<sup>68</sup> Lewis & Ibbertson, *supra* note 64 at 13.

<sup>69</sup> Crook, *supra* note 62 at 4; E.T. Salmon, “Book Review of *Consilium Principis: Imperial Councils and Counsellors from Augustus to Diocletian* by John Crook” (1957) 11:1 The Phoenix 39.

assisted the Emperor by providing advice in preparing legislative proposals and administrative orders and in carrying out judicial inquiries.<sup>70</sup> According to Crook, Roman literary sources dwell at length about *amici* and their advice, “enough to show that we are dealing with a subject of the first importance”<sup>71</sup>. In the Roman Republic, all policies and decisions were the result of conciliar discussion. Roman custom simply imposed a moral obligation to consult.

In carrying out his duties, even the Emperor was assisted by a council of advisers referred to as the *consilium principis*. This was initially composed of close friends or *amici* of the Emperor.<sup>72</sup> Thus the term ‘*amicus curiae*’ which in Latin, the language of the Romans, means a ‘friend of the court’, seems to make perfect sense when seen in a purely Roman context. One can, therefore, more readily accept where the strange terms *amicus curiae* or ‘friend of the court’ or ‘my learned friend’, a term not always used with a great degree of comfort in the present day legal world, must have originated from.

It was also in ancient Rome that academic lawyers or jurists began the practice of giving *consilia* or opinions to courts on disputed points of law.<sup>73</sup> In the later Republican period (367 B.C. – 27 B.C.), a group of Roman jurists practised in private law. The activities of these jurists were in general similar to the pontiffs’. They consisted of “giving legal advice to citizens, magistrates and judges (*respondere*); providing assistance to litigants on matters of legal procedure, drafting legal documents such as wills and contracts”<sup>74</sup>.

Roman practice, however, demanded that the *consilium* be consulted and it was the “regular practice”<sup>75</sup> of lay magistrates to follow such advice. The magistrates were dependent on the *consilium*’s advice because of the *amici*’s “distinguished descent, their prestige or their connections and indeed partly through the arbitrary drawing of lots”<sup>76</sup>. The Roman *amici* were highly regarded for their legal knowledge and expertise. These were the wise men of the law whose opinions were respected and invariably followed.<sup>77</sup> Roman Emperor Hadrian (A.D. 117 – 138) started the practice of employing leading jurists as members of his *consilium*.<sup>78</sup> The giving of such legal advice is said to have remained the main feature of these jurists’ work for more than four centuries.<sup>79</sup>

<sup>70</sup> *Ibid.* Every Emperor had a *consilium* of his *amici* which helped him make all purposes be it administrative, political, legal or judicial: Salmon, *ibid.* at 40.

<sup>71</sup> Crook, *supra* note 62 at 26, citing Dio, Herodian and the *Scriptores Historiae Augustae* as providing interesting material for the *amici* in the late second and early third centuries.

<sup>72</sup> *Cassius Dio* 53.21; *Suetonius, div. Aug.* 35, cited in Mousourakis, *supra* note 64 at 247-248. For a detailed study of the *consilium principis*, see Crook, *ibid.*

<sup>73</sup> Lewis & Ibbertson, *supra* note 64 at 4.

<sup>74</sup> Cicero, *de orat.* 1.48.212; *Topica* 17.65-66; Varro, *de r.r.*2.3.5; D.4.4.3.1. (Ulpianus), *etc.*, cited in Mousourakis, *supra* note 64 at 190.

<sup>75</sup> Fritz Schulz, *Principles of Roman Law* (Oxford: Clarendon Press, 1936) at 207. The advice was “probably seldom absent and may frequently have been decisive”: Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History* (Oxford: Clarendon Press, 1973) at 97.

<sup>76</sup> Kunkel, *ibid.*

<sup>77</sup> Alan Watson, *The Spirit of the Roman Law* (Athens: University of Georgia Press, 1995) at 206. This was a task held in great prestige: Watson at 1123.

<sup>78</sup> Fritz Schulz, *History of Roman Legal Sciences* (Oxford: Clarendon Press, 1946) at 101; Mousourakis, *supra* note 64 at 247. See also Crook, *supra* note 62 at 58-59.

<sup>79</sup> Kunkel, *supra* note 75.

Emperor Augustus (63 B.C. – A.D. 14), the first emperor to rule the Roman empire, had issued an ordinance by which he conferred upon the most distinguished jurists the right to publicly give opinions in the name of the emperor (*ius publice respondendi*). The important role of consultant on legal matters was thus confined to a relatively small circle of specially qualified experts of high social standing.<sup>80</sup> These jurists were referred to as *iurisconsulti* or *iurisprudentes*. They were chosen from the senatorial order partly because of the high reputation commanded by the senatorial class and its peculiar practice of gratuitously safeguarding the public interest. The giving of the legal opinions remained the central feature of the jurists' work until the latest period of classical jurisprudence, that is, for more than four centuries.<sup>81</sup>

The central difficulty in pointing to the Roman law as the source of the *amicus curiae* is that that term does not appear in Roman scripts or writings in reference to jurists who had performed that function since the third or fourth century. There are constant references to offices of the *amici*, *consillari*, *iurisconsulti* or *iurisprudentes*, *ius publice respondendi* and *ministrator* but not to an *amicus curiae*. This does not necessarily indicate that the institution did not exist in Roman times, as explicit evidence of even renowned Roman institutions is often unavailable in Roman scripts.

According to the late Professor E. T. Salmon, an eminent Roman law scholar, it has always proved “uncommonly difficult” to discover exactly what the machinery of consultation in Rome was.<sup>82</sup> Scholars are aware of the “evanescent and casual”<sup>83</sup> nature of the ancillary evidence. For example, the ancient Roman writers were not explicit about the way an Emperor reached a policy decision and not one uses the expression ‘*consilium principis*’, or the imperial council, even though every Roman ruler had a council of his friends, “for all manner of purpose, administrative, political, legal”<sup>84</sup>. Not even Cassius Dio, who was himself a member of the *consilium*, used the term “*consilium principis*”, although it obviously existed.<sup>85</sup>

#### IV. THE TYPES OF *AMICI CURIAE*

Having examined the origins of the *amicus curiae*, one can, borrowing partly from Doron and Jubran<sup>86</sup> classify the *amicus curiae* into four categories to better understand its historical development.

##### A. *The Classic or Traditional Amicus*

Traditionally, when a court is of the view that it needs more assistance than can be adequately or appropriately provided by the parties before it, it may appoint

<sup>80</sup> Bruns, *Fontes* 1, no.119, cited in Mousourakis, *supra* note 64 at 291, n. 41. See also Watson, *supra* note 77 at 1123; *ibid.* at 108-109.

<sup>81</sup> Kunkel, *ibid.* at 97, 108; Watson, *ibid.* at 123.

<sup>82</sup> Salmon, *supra* note 69. Professor Salmon was a world-renowned Roman historian and scholar who taught at McMaster University in Canada for more than 43 years.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* at 40.

<sup>85</sup> Dio 75.16.4; 76.17.1; *ibid.*

<sup>86</sup> Doron & Totry-Jubran, *supra* note 10, who use the three classifications of the Classic *Amicus*, the Supportive *Amicus* and the Political *Amicus*. For another discussion on the “principal categories of amici”, see Angell, *supra* note 12 at 1019-1020.

another lawyer whom it considers has sufficient expertise and competency to give independent or neutral advice to it. The purpose of the *amicus* then is to advise or assist the court in arriving at its decision and not to represent the interests of any party or cause.

In a number of countries, an *amicus* is normally appointed if the court is of the view that a case involves important questions of law of public interest; if a party that is unrepresented would not be able to assist the court; or if the points of law do not concern the parties involved but is nevertheless a matter of concern to the court.

The *amicus* is thus not an advocate, or intervenor or a party to the proceedings. In the Commonwealth countries, courts developed other institutions if they required third party interests to be represented or watched over. For instance, *pro bono* lawyers may represent an unrepresented defendant and in Malaysia, Singapore and Australia, counsel may be present to hold a watching brief<sup>87</sup> at the discretion of the court to watch over the interests of a witness or victim in a trial or the estate of a deceased or a potential defendant in a Coroner's inquiry.<sup>88</sup>

Four further characteristics of the *amicus curiae*, at least as practised previously in the United Kingdom and even today in many of the former British colonies, demonstrate a remarkable closeness to the original Roman or classic *amicus* practices.

### 1. *Legal training*

First, like the Roman jurists who formed the *consilium*, the *amici* are legally trained persons.<sup>89</sup>

### 2. *Appointment by the court*

Second, both could act only at the request or upon the appointment of the court. This may only be done at the court's invitation or with its permission and that too if the public interest requires it. Consistent with its Roman roots, the *amicus* practice is invoked if the court decides it needs the help of an impartial and wise friend, in addition to what the parties can offer to the court.

In *David Ma Wai-kwan*, Mortimer V.P. in the Hong Kong Court of Appeal, in rejecting a Senior Counsel's offer of assistance to the court, explained that this was against the concept of the *amicus curiae*:

Ms Gladys Li, SC appeared to offer her services to the Court—it would seem as *amicus*. For my part, there were serious problems about her locus standi. For

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<sup>87</sup> For an examination of the use of watching briefs in Australia and Malaysia, see Patmalar Ambikapathy, "The Use of A Watching Brief as a Legal Tool for the Protection of Child Victims in the Criminal Justice Process", online: Australian Institute of Criminology <[http://www.aic.gov.au/events/aic%20upcoming%20events/1988/~/\\_media/publications/proceedings/08/patmalar.ashx](http://www.aic.gov.au/events/aic%20upcoming%20events/1988/~/_media/publications/proceedings/08/patmalar.ashx)>.

<sup>88</sup> The watching brief was developed early in England in the Coroners Courts in the interests of potential defendants and the estate of the deceased or victims who had an interest in the outcome of the inquiry: *Halsbury's Laws of England*, 3d ed., vol. 3 (United Kingdom: Butterworth & Co, 1953) at 621.

<sup>89</sup> A friend of the court is a person, usually a barrister who, with the court's permission, may advise the court on a point of law or on a matter of practice: *United States Tobacco Co. v. Minister for Consumer Affairs* [1988] 83 A.L.R. 79 (F.C.A.) [*US Tobacco*].

obvious reasons it would be difficult for the court to accept as its amicus counsel who appears without invitation.<sup>90</sup>

Similarly, in the Malaysian case of *Tai Choi Yu*, the High Court ruled that an *amicus curiae* must be appointed by the court on its own initiative and not be a volunteer:

Who is an *amicus curiae*? In P Ramanatha Aiyar's *The Law Lexicon* (2nd Ed, 1997), *amicus curiae* is defined as a friend of the court, being a person who voluntarily or on invitation of the court, and not on the instruction of any party helps the court in any judicial proceedings. In the instant case notwithstanding that the senior Federal Counsel has volunteered to help the court in her capacity as *amicus curiae*, however, in my view she can only be heard if invited by the court to do so.<sup>91</sup>

The point of course is that a third party, unless allowed to appear as an intervenor under specific rules of the court, has no *locus standi* to address a court of law unless so permitted by the court. It is the appointment of the third party as *amicus curiae* that confers upon him the *locus standi*.<sup>92</sup>

### 3. *Non-partisan advisor*

Third, an *amicus curiae* is not a party to the proceedings and is an independent, non-partisan advisor to the court. Thus, in the Australian case of *US Tobacco*, the court emphasised:

An *amicus curiae* (as opposed to an intervenor) has no personal interest in the case as a party and does not advocate a point of view in support of one party or another.<sup>93</sup>

A similar view was expressed very early by a South African court:

But the point is also made that it is not the function of an *amicus* to seek to undertake the management of a cause...I think we should be laying down a dangerous precedent if we were to allow intervention of this kind.<sup>94</sup>

<sup>90</sup> *David Ma Wai-kwan*, *supra* note 9 at 359.

<sup>91</sup> *Tai Choi Yu*, *supra* note 5, approved by the Court of Appeal in *Nadarajan s/o Verayan*, *supra* note 9. The court, however, permitted counsel to appear as the *amicus curiae* as the case concerned a suit against a judge for an alleged libel contained in a written judgment and this was considered as a matter of public interest. See also *Re Application by Hamid bin Hassan*, *supra* note 9; *TSC Education Sdn. Bhd. v. Kolej Yayasan Pelajaran Mara* [2002] 5 M.L.J. 577 at 584-585 (H.C.) [*TSC Education*].

<sup>92</sup> See *Tai Choi Yu*, *supra* note 5; *Re Application by Hamid bin Hassan*, *ibid.*; *TSC Education*, *ibid.*; *David Ma Wai-kwan*, *supra* note 9. For a different view, see Chan, *supra* note 25 at 402 (commenting on the Hong Kong decision in *David Ma Wai-kwan*, *supra* note 9). The writer argues that an *amicus* necessarily lacks *locus* and that the question of *locus* and *amicus* intervention in that case should have been considered separately in view of the "current liberal tide on locus" in Hong Kong. Professor Chan does not appear to have accepted that it is the granting of a right to appear in court and participate in the proceedings that gives the *amicus curiae* the *locus standi* in that court.

<sup>93</sup> *US Tobacco*, *supra* note 89.

<sup>94</sup> *Connock's Motor Co. Ltd. (SA)*, *supra* note 9 at 356.

In *Allen*, Lord Salmon, in pointing out that an *amicus curiae* was not an intervenor, explained the *amicus*'s role thus:

Apparently, however, for fear lest we might be in need of still further help from the Bar in doing justice between the parties, the Law Society has thoughtfully provided us with the services of an *amicus curiae*. *I had always understood that the role of an amicus curiae was to help the court by expounding the law impartially, or if one of the parties were unrepresented, by advancing the legal arguments on his behalf.* As I listened to Mr. Wilmer's cogent and forceful argument, I gained the impression—although no doubt it was an illusion—that in reality he held a watching or indeed a speaking brief on behalf of hardly impartial third parties who feared that their interests or rather those of their members might be prejudiced should these appeals be dismissed.<sup>95</sup>

For this reason, an *amicus* opinion to the court, like the *consillari*'s advice to the Roman judges, could be against the interests of a criminal defendant if that was the view honestly held by the *amicus curiae* and considered the best assistance that could be provided to the appointing court in arriving at a just decision. Indeed, in keeping with these historical traditions of an independent advisor to the court, in *Public Prosecutor v. Mazlan bin Maidun*<sup>96</sup>, the Singapore Court of Appeal heard and accepted the submissions of the *amicus* that the court should decide the questions of law before the court in favour of the prosecution and against the interests of the defendant, despite the fact that he was unrepresented.<sup>97</sup>

In that controversial decision, the Court of Appeal accepted the submission of the prosecution that the High Court had been wrong in rejecting the police statements made by the accused and in concluding that the accused had a constitutional right against self-incrimination and to be informed by the police of his right to silence, as provided by the *Criminal Procedure Code*, before being questioned by the police. It is the invitation or appointment by the court rather than the intervention by an interested party that best ensures neutrality so essential to the perceived integrity of the *amicus curiae* process.

Courts have had occasion to emphasise the essential differences between a traditional *amicus curiae* and an intervenor. In *Re Northern Ireland Rights Commission*<sup>98</sup>, the House of Lords had to consider whether the Northern Ireland Human Rights Commission could intervene in proceedings before the Northern Ireland courts and tribunals on points of human rights law. Lord Slynn acknowledged the difference between an *amicus curiae* who keeps within “the limits of a non-partisan view of a particular case”<sup>99</sup>, and an intervenor and one who advocates a cause. Lord Hobhouse dismissed the Commission's claim to act as an *amicus curiae*, on the ground that the Commission's objective was to argue “strenuously for its view of human rights and

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<sup>95</sup> *Allen*, supra note 9 at 266 [emphasis added].

<sup>96</sup> [1992] 3 S.L.R.(R.) 968 (C.A.).

<sup>97</sup> See “Accused has no constitutional right to remain silent—lawyer” *The Straits Times* (13 October 1972); “No Constitutional Right to Silence for Suspects” *The Straits Times* (14 October 1972). It is not within the scope of this paper to discuss the development of the *amicus curiae* in Singapore which has had a chequered history but presently has a substantial presence in the legal system.

<sup>98</sup> [2002] UKHL 25.

<sup>99</sup> *Ibid.* at para. 29.

their protection”<sup>100</sup> and not to fulfil the role of the *amicus* which was to assist the court. In effect, the judges refused to permit the ancient institution of the *amicus curiae* to provide a cover for what really is a “more radical innovation to the judicial process”<sup>101</sup>.

Even in the United States there have been cases where the courts have refused a third party to participate as an *amicus* where he has “a special pecuniary interest in the defendant’s perspective” or where he “makes no attempt to present himself as a neutral party”<sup>102</sup>.

#### 4. *Position of prestige*

Fourth, as in the case of the Roman jurists who gave advice to the *consilium* or the judges, an *amicus curiae* is an unpaid honorary position of prestige. There is an inherent conflict in loyalties between a hired hand espousing a cause on behalf of his client and an independent advisor whose only aim is to ensure that the court arrives at a correct decision. A court’s invitation to be an *amicus* in Singapore and Malaysia, for example, is highly regarded and is a recognition of the standing, expertise and intellect of the lawyer so appointed by the court. Such a recognition by the Supreme Court is considered as a reward in itself.

#### B. *The Bystander or Intervening Good-Samaritan Amicus*

It was in the common law of the Middle Ages that the *amicus* apparently took on a new role he did not have in Roman law.<sup>103</sup> That is, as a bystander-intervenor, to offer factual or legal information to the court as noted earlier in this article. A bystander’s intervention or contribution may have been principally due to three reasons which have been considered earlier in this article.

First, the typical trial in the 14<sup>th</sup> century was conducted in the public city square and was open to intervention from the spectators. Although there are some recorded examples of such intervention, the extent to which this was done and the acceptance of such information or knowledge from spectators and onlookers by the court remains unclear. Second, the defendant in a criminal case was not entitled to be defended by counsel and because of this and the harshness of the punishment for convicted criminals in those times, parties present at the trial could have intervened to assist the accused by providing information to the court. Third, by the 13<sup>th</sup> century the small but active body of early English barristers known as serjeants-at-law were regularly consulted and were frequently present in court to offer their services as shown by the number of cases reported in the Year Books.<sup>104</sup>

Even in the United States before the 1870s, *amici* were known to offer their advice to the court orally and spontaneously if they happened to be present in court during the hearing.<sup>105</sup> In present times there have been occasions when courts have permitted

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<sup>100</sup> *Ibid.* at para. 72.

<sup>101</sup> A. Loux, “Hearing a ‘Different Voice’: Third Party Intervention in Criminal Appeals” (2000) 53 *Curr. Legal Probs.* 449 at 545. See also Hannett, *supra* note 47.

<sup>102</sup> Banner, *supra* note 32 at 112, n. 2.

<sup>103</sup> Krislov, *supra* note 2 at 696; Lowman, *supra* note 10.

<sup>104</sup> *Supra* note 38.

<sup>105</sup> Banner, *supra* note 32 at 113.

or requested lawyers present in court to assist the court as *amicus curiae* or when they have been involved in the proceedings at an earlier stage.<sup>106</sup>

### C. The Supportive Amicus

There are three categories of ‘supportive *amici*’ that have developed in later years. One is the *amicus* appointed by the court to present the case on behalf of an undefended party. This is out of a sense of fairness to ensure equal representation especially where legal aid is unavailable.<sup>107</sup>

The second is a third party with a “personal and direct interest in one of the parties in the case”. Prior to the introduction of the procedural rules for intervenors, there have been cases where the *amicus* was permitted in certain circumstances to perform that function. Thus in the 1736 case of *Coxe v. Phillips*, a case which involved a collusive dispute over a promissory note, the defendant had used the suit to embarrass a third party named Muilman by claiming that she was unable to enter into a contract as she was married to Muilman. Muilman was able to obtain the services of an *amicus curiae* to show that the marriage had been void as she had then had another husband. This case has been viewed as an example that even in England “a step had been taken towards change from neutral friendship to positive advocacy and partisanship”<sup>108</sup>, although it could as easily be seen as a typical case of an *amicus* providing information to the court to avoid an error.

The third group are the government officers who have been permitted to appear as *amici* in the wider public interest to inform the court of public policy issues. The Official Solicitor in England appeared in *Rondell v. Worsley*<sup>109</sup> to argue whether a member of the Bar was liable for negligence in the conduct of a case in court. In *Morelle Ltd. v. Wakeling*<sup>110</sup>, the Court of Appeal invited the Attorney-General to present the Crown’s position regarding the claim of a foreign company that although the Crown had failed to intervene. Though not a party in what was in fact a rent dispute between two other parties, the Crown’s interest as the owner would be affected by the outcome of the case.

Similarly in *Times Publishing Bhd. v. S. Sivadas*<sup>111</sup> the Singapore Attorney-General was appointed as *amicus curiae* to assist the court in a suit which concerned Parliamentary privilege. In another case the Solicitor-General was similarly appointed by the High Court to assist in deciding whether a suit commenced against the Government of Malaysia in Singapore, when Singapore was a part of Malaysia, could be continued after 1965 when Singapore was no longer a part of Malaysia.<sup>112</sup>

In the United States third party participation began when the U.S. courts allowed the Attorney-General of the various states to present their views as *amici curiae*.

<sup>106</sup> See e.g., *Faulkner v. Rex* [1905] 2 K.B. 76; *Mohan v. Public Prosecutor* [2002] 1 M.L.J. 438 (H.C.); *Deputy Public Prosecutor v. Toh Han Uh* [1959] M.L.J. 46 [*Toh Han Uh*]; *Suci Mathews v. Thomas Mathews* [1985] 2 M.L.J. 228; *Re Chan Eow Beng* [1961] M.L.J. 181.

<sup>107</sup> *Toh Han Uh, ibid.*

<sup>108</sup> Krislov, *supra* note 2 at 697.

<sup>109</sup> [1967] 2 W.L.R. 571 (Q.B.D.).

<sup>110</sup> [1955] 2 Q.B. 379 (C.A.).

<sup>111</sup> [1988] S.L.R. 599 (H.C.).

<sup>112</sup> *Olofsen v. Government of Malaysia* [1965-68] S.L.R. 488 (H.C.).

Major constitutional cases have involved the U.S. government's participation as *amicus curiae* even when it was not a party to the proceedings.<sup>113</sup> Government representatives are identified more easily with upholding the public interest and, according to one observer, "like their fourteenth century Roman predecessors government *amici* educate the court and help it to avoid error"<sup>114</sup>.

#### D. *The Political or Modern Amicus*

On the other side of the pendulum holding the traditional *amicus*, concerned only with independently assisting the court in its determination of the dispute between the parties, lies the modern *amicus curiae*. Although not a party to the case, the modern *amicus* often has a strong interest in its outcome. In a study of *amicus* participation in the United States between 1790 and 1890, Stuart Banner surprisingly found that the neutral *amicus* or the traditional friend of the court, offering gratuitous legal advice to assist the courts, had ceased to exist in the United States since the 1820s.<sup>115</sup>

The political or modern *amicus* that has emerged in its place, is an *amicus* representing an interest group or organisation with a social or political agenda. This development in the United States has resulted in a proliferation of the *amicus* briefs. Eighty-five percent of the cases argued before the U.S. Supreme Court, by the end of the 20<sup>th</sup> century, involved at least one written *amicus* brief.<sup>116</sup> Between the 1946–2001 Supreme Court terms, 15,214 briefs were filed in 3,865 cases.<sup>117</sup>

In 1990, after being overwhelmed with 78 *amicus* briefs in one abortion rights case,<sup>118</sup> the U.S. Supreme Court revised its Rule 37 to remind parties that new and relevant matters only were helpful to the court and that an *amicus* brief which did not do this "simply burdens the staff and is not favoured". Concerned with ethical issues in 1997, the court further required the *amicus* to indicate whether counsel for a party had assisted in writing the brief and to identify every person who had made a monetary contribution to the brief.<sup>119</sup>

In his study of the *amicus curiae* briefs filed in the U.S. Supreme Court during the 1950, 1968, 1982 and 1995 Supreme Court terms, Paul Collins found that the most common *amici* are trade associations (63%), state governments (41.5%), public advocacy groups (38.7%), public interest law firms (37.2%) and the U.S.

<sup>113</sup> Krislov, *supra* note 2 at 698.

<sup>114</sup> Harris, *supra* note 12 at 3.

<sup>115</sup> Banner, *supra* note 32. The *amicus curiae* made his first appearance in the U.S. as early as 1823 in *Green v. Biddle*, 21 Wheaton's Supreme Court Reports 1 (1823). He was able to point out to the court that the lawsuit was collusive.

<sup>116</sup> Joseph D. Kearney & Thomas W. Merrill, "The Influence of *Amicus Curiae* Briefs on the Supreme Court" (2000) 148 U. Pa. L. Rev. 743.

<sup>117</sup> Paul M. Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008) at 48.

<sup>118</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

<sup>119</sup> New Supreme Court Rule 37.6. For a consideration of similar ethical questions for Texas *amici*, see Nancy Bage Sorenson, "Comment, The Ethical Implications of *Amicus* Briefs: A Proposal for the Reform of the Texas Rules of Appellate Procedure" (1998 – 1999) 30 St. Mary's L.J. 1219 at 1249–1251. On "ghost writers" attempting to beat the page limitations for parties' briefs in Missouri, see Jesse Welisshaar, "Unhelpful Friends" (2007) 63 Journal of the Missouri Bar 22.

Government (36.4%).<sup>120</sup> Civil rights issues were raised in 60.2% of these briefs.<sup>121</sup> The *amicus* briefs contained, in addition to legal arguments (73%), policy (19%), separation of powers (6.9%), jurisdictional and non-traditional arguments.<sup>122</sup> An earlier study of briefs filed between 1954 and 1980 concluded that business groups, trade associations, corporations and professional associations filed 58% of all briefs. The remaining 42% were filed by public interest organisations, consumer groups, religious societies or labour organisations.<sup>123</sup>

Present-day judicial decision-making involves both a legal model consistent with a judge's legal training which requires the interpretation of the law in accordance with perceived legislative intent and precedents and an attitudinal model that recognises the role of ideology and policy goals.<sup>124</sup> There is a need to look at broader social issues and policy implications beyond the expertise of a lawyer-*amicus*.<sup>125</sup> In addition, one must be conscious of 20<sup>th</sup> century changes in the U.S. judiciary, in particular, where important decisions of the courts have taken on a greater political character.<sup>126</sup> The *amicus curiae* in such an environment serves as a flexible judicial tool to cater to the needs of a particular legal environment.

Clearly, both the character and the role of the *amicus curiae* have undergone radical changes in the United States and in other developed countries. In most cases the American *amicus* has long gone past the traditional boundaries of his Roman ancestors. This has been attributed to the creative use of a flexible judicial tool such as the *amicus* to meet 20<sup>th</sup> century changes in the legal environment and the changing nature of litigation, rather than in the partisanship of lawyers.<sup>127</sup> In choosing to push the agendas of business, corporate and civil society clients, the modern *amici* have no doubt parted ways from their revered Roman cousins of the same name. That has inevitably led to a further blurring of the lines between an *amicus* and an intervenor or advocate. In some federal district courts, the *amicus* has even been permitted

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<sup>120</sup> Collins, *supra* note 117 at 60.

<sup>121</sup> *Ibid.* at 48.

<sup>122</sup> *Ibid.* at 71, 60, 48.

<sup>123</sup> Bradley & Gardner, "Underdogs, Uppercuts and the Use of the *Amicus* Brief: Trends and Explanations" (1985) 10 *The Justice System Journal* 78 at 91.

<sup>124</sup> This is especially so for U.S. Supreme Court judges: David W. Rohde & Harold J. Spaeth, *Supreme Court Decision Making* (San Francisco: W. H. Freeman & Co., 1976) at 72; Collins, *supra* note 117 c. 4.

<sup>125</sup> Lawyers may become overly concerned with the facts of a case without being concerned with the broader legal and policy issues. For example, the case of *California v. Ciraolo*, 106 U.S. 1809 (1968) concerned the right of law enforcement officers to fly over and make aerial photographs of land use for the cultivation of marijuana. Arguments focused on the grower's expectations of privacy. It was the *amicus* briefs of Americans for Effective Law Enforcement which cited the statistical importance of aerial surveys in other states resulting in massive amounts of marijuana being discovered and the total of 257,000 private aircraft flying over the U.S. which made the privacy argument redundant. The technique of using economic or social evidence rather than legal precedents was pioneered by Louis Brandeis (*Muller v. Oregon*, 208 U.S. 412 (1908)) and used by Thurgood Marshall (the Brandeis briefs), resulting in the U.S. Supreme Court reversing itself and ordering public schools not to have racial segregation: *Brown v. Board of Education*, 347 U.S. 483 (1954). More recently in *Edwards v. Aguillard*, 482 U.S. 578 (1986), the U.S. Supreme Court received *amicus* briefs from 72 Nobel Laureates, 17 State Academies of Science and 7 other scientific organisations.

<sup>126</sup> Lowman, *supra* note 10, n. 9.

<sup>127</sup> Banner, *supra* note 32 at 122.

to present oral arguments, to examine witnesses, to introduce evidence and even to enforce previous court orders.<sup>128</sup>

Those who support the American-style modern *amici* and their briefs point out the effect these have on judicial decisions and hence the assistance to the court provided by these *amici*. There is sufficient evidence to show that judges consider and are influenced by these briefs.<sup>129</sup> Kearney and Merrill in a study of 6000 Supreme Court judgments over 50 years found that briefs on behalf of institutions such as the American Civil Liberties Union and the American Federation of Labour-Congress of Industrial Organisations enjoy “above average success”. Despite its hesitation to acknowledge the influence of *amicus* briefs, the U.S. Supreme Court has occasionally cited an *amicus* brief in its judgments.<sup>130</sup>

Issues now coming before the courts are a lot more complex and varied than the combined experience and expertise of any particular bench which may have limited resources to be informed of all relevant issues and interests. Courts can no longer operate in an “Olympic remoteness from the social scene”<sup>131</sup>. In the last few decades, particularly in Canada, Australia and the United Kingdom, as in the United States, there has been an increase in litigation involving fundamental freedoms and constitutional interpretation. Judges seek information and informed opinion and have invariably welcomed those able to render such assistance from both the public and private sectors. The question is whether those who elect to appear or file briefs as *amici* should have a partisan view; and if they do, would that kind of assistance be unbecoming of a true ‘friend of the court’?

Those who are critical of the modern development of the ancient institution in some jurisdictions may well be entitled to say that, apart from not keeping with the original purpose of the *amicus curiae*, his modern counterpart has turned the courts into a political arena for advancing the private interests of social, political and commercial groups. The *amicus* has become the friend of the party or of those who have the budget to file such briefs.<sup>132</sup> These reasons alone may well not support the modern development of the *amicus* practice in a number of jurisdictions which frown upon the use of the courts and the litigation process to put pressure on the political process.

As *amicus curiae* participation allows groups to influence public policy, this method has become the main lobbying technique used by interest groups. It is a cost-effective way to have access to the highest court in the country. This has also contributed to the abuse of the *amicus* briefs by lawyers known to file briefs to advertise their special expertise in the hope that the brief will attract work.<sup>133</sup> As is to be expected, there has also been criticism that many *amicus* briefs are not helpful to

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<sup>128</sup> Lowman, *supra* note 10 at 1246; *TSC Education*, *supra* note 91 at 585.

<sup>129</sup> See e.g., Kelly J. Lynch, “Best Friends? Supreme Court Law Clerks on Effective *Amicus Curiae* Briefs” (2004) 20:1 J.L. & Pol. 33; Suzanne U. Samuels, *First among Friends: Interest Groups, the US Supreme Court, and the Right to Privacy* (Westport, CT: Praeger Publishers, 2004); Kearney & Merrill, *supra* note 116.

<sup>130</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961); *Teague v. Lane*, 489 U.S. 288 (1989); *Tehan v. US ex rel. Shott*, 382 U.S. 406 (1966).

<sup>131</sup> Angell, *supra* note 12 at 1023.

<sup>132</sup> Alexander Wohl, “Friends with Agendas” (1996) 82:11 A.B.A. J. 46; Stephanie Francis Ward, “Friends of the Court are Friends of Mine” (2007) 93:11 A.B.A. J. 24.

<sup>133</sup> Wohl, *ibid.*

judges as they frequently include duplicative arguments. As observed by an American judge, these constitute a waste of judicial resources “in an era of heavy caseloads and public impatience with delays and expense of litigation”<sup>134</sup>.

The numerous and often conflicting *amicus* briefs filed by numerous parties have not always helped courts make informed decisions. They have at times resulted in a confusing overload of information and data. Rather significantly, there has been a marked rise in non-unanimous decisions in post-war U.S. Supreme Courts as a result. Paul Collins’s findings illustrate that the rise in dissenting judgments in the court can be partially attributed to the surge of *amicus* filings.<sup>135</sup> This is because, as Collins argues:

*amicus* briefs are able to light the fires of dissensus, motivating justices to express their displeasure with the majority’s interpretation of the law. Moreover, by providing the justices with a well researched basis on which they can cultivate a separate opinion, *amicus* briefs reduce the resource-costs implicated by the decision to author or join a separate opinion.<sup>136</sup>

The frequency of dissenting judgments in the U.S. Supreme Court may cause uncertainty in the law and may not always be in the public interest.

## V. CONCLUSION

The *amicus curiae* has certainly come a long way from his noble Roman beginnings as a learned, respected, independent appointee of the court. His role was, as a ‘friend of the court’, to gratuitously advise and assist the court in arriving at a just decision. In some jurisdictions, particularly in the Commonwealth, the *amicus* has largely retained that function. In others, as in the United States, he has assumed varied roles including that of a litigating *amicus curiae*, a lobbyist, an intervenor and an advocate.

There is thus, a perceived contradiction between the name *amicus curiae* and the role of the modern *amicus* now accentuated by U.S. Supreme Court rules which require him to identify the party he represents and “every person who had made a monetary contribution to the brief”<sup>137</sup>. But has he remained a friend of the court? Ought he to perhaps change his name to that of an advisor or intervenor or advocate? This was what was done in England in 2001. Following a re-appraisal of the function of the *amicus curiae*, it was decided to drop the name of the *amicus curiae* for that of an ‘Advocate to the Court.’ Interestingly, this was to address the problem that “the line between the role of an *amicus* and the intervenor has not always been drawn too clearly”<sup>138</sup>.

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<sup>134</sup> *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997), Posner J. He had occasion to remind lawyers that the term *amicus curiae* means “friend of the court and not friend of a party”.

<sup>135</sup> Collins, *supra* note 117 at 163.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Supra* note 119.

<sup>138</sup> Lord Goldsmith Attorney-General. The Advocate’s function is to give the court such assistance as he or she is able to at the request of the court, as stated in a joint memorandum dated 19 December 2001 signed by both Lord Goldsmith and Lord Woolf the Chief Justice. See Lord Goldsmith, “Advocate to the Court” (2002) 32 Family Law 228. For a discussion of this concept see also Bellhouse & Lavers, *supra* note 3.

If in his new role as counsel representing a trade association, public advocacy group or public interest law firm, an *amicus*' primary intent is to influence the outcome of a decision in his client's favour, does he disqualify himself from being a 'friend of the court'? But in all litigation cases, are lawyers, in assisting their clients, not also assisting the court? They are certainly officers of the court and are regarded as 'learned friends' even by their adversaries in court. Does the fact that modern *amici* in some jurisdictions are engaged and paid by their clients make a difference to the way the court ought to perceive them?

It may not be fair or reasonable to expect all *amici* to emulate their Roman brethren and work gratuitously and still be a source of much welcome information and research for an overburdened judiciary having to decide increasingly complex questions. The number of briefs filed and the diversity of the legal and social issues they represent which have been considered by the courts would not have been possible if only the classic *amicus curiae* had continued to operate in the U.S. And do the judges at present need the same sort of information and assistance as were once given to their Roman brethren who were not quite schooled in the law as the *amicus curiae* then was? They are new friends perhaps but it is difficult to deny that the modern or political *amici* are still friends of the court.