

# URGENCE AND CHALLENGES OF REGULATION OF AMICUS CURIAE IN THE JUDICIAL SYSTEM

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## **Abstract**

The judicial system in Indonesia is dynamic and adaptive to the development of science and law, not least within the scope of the Supreme Court of the Republic of Indonesia, one of which relates to the amicus curiae (friends of the judiciary). In practice, amicus curiae are generally presented in cases or trials that get public attention and the livelihoods of many people, such as the environment, land, labor, and so on. Nevertheless, there is no regulation or Supreme Court Regulation on the application of amicus curiae in the trial, but various practices have occurred within the court. This paper will discuss: (a) how the concept of amicus curiae is in the justice system in several countries, (b) the practice and application of amicus curiae in the judiciary in Indonesia, and (c) the opportunity for the Supreme Court to issue regulations or circulars that seek to regulate the implementation of the amicus curiae as part of legal developments in Indonesia. This writing uses a qualitative method with a normative juridical approach. The results of this paper conclude that amicus curiae have become a good practice in the judicial system in Indonesia, especially in public cases, and the Supreme Court has the authority to make arrangements through PERMA as a foundation and procedure guide for all judicial personnel and society in Indonesia.

Keywords: *amicus curiae, Supreme Court Regulations, and judicial system*

## Introduction

Amicus curiae were recognized in the Indonesian justice system for the first time in 1998 during the Times Magazine trial with President Suharto.<sup>1</sup> The lawsuit is related to The case relates to a magazine editorial about "Suharto Inc" at the Central Jakarta District Court. How Indonesia's old boss built family wealth". In particular, various elements or institutions from abroad and within the country expressed their concerns and sent amicus curiae to the Central Jakarta District Court. Then the case reached the cassation stage in the Supreme Court.<sup>2</sup> The purpose of delivering amicus curiae is to encourage civil liberties and democracy that have been enjoyed to be defended from severe threats.

Based on the directory of decisions at the Supreme Court, there are thirty-two decisions related to amicus curiae submitted by civil society, academics, and auxiliary bodies.<sup>3</sup> Amicus curiae are intended as a mechanism or input for judges to understand the context and substance of legal issues, which are expected to be the basis for consideration in decisions.<sup>4</sup> The Legal and Public Relations Bureau of the Supreme Court considers that the inclusion of amicus curiae will increase the litigation parties and public suspicion of the judiciary. The basis of this argument is that other parties who enter can be suspected of having an interest in a case.<sup>5</sup> Some variants of acceptance of amicus curiae, for example, progressive judges openly accept amicus curiae as a friend of the court. On the other hand, cautiously or passively placing the amicus curiae is just an expert opinion.

The Supreme Court acknowledged that the amicus curiae in various countries had become part of the legal system. Thus, the opportunity to adapt to Indonesia's justice system is very open to benefit justice seekers. Therefore, it becomes a certainty and a chance to adjust to Indonesia's

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<sup>1</sup> Time Magazine, published in the Asian Edition of May 24, 1999, Vol. 153 No. 20.

<sup>2</sup> Supreme Court Decision No. 3215 K/PDT/2001 dated 30 August 2007

<sup>3</sup> Supreme Court, *Directory of Decisions of the Republic of Indonesia Regarding Amicus Curiae* (Jakarta, 2021), <https://putusan3.mahkamahagung.go.id/search.html?q=amicus>.

<sup>4</sup> Linda Ayu Pralampita, "The Position of Amicus Curiae in the Justice System in Indonesia," *Jurnal Lex Renaissance* 5, no. 3 (2020), pp.558–572.

<sup>5</sup> Petrus Riski, "Measuring the Need for Amicus Curiae in the Indonesian Legal System," *VOAI*, last modified 2020, accessed November 28, 2022, <https://www.voaindonesia.com/a/mengukur-perlu-tidaknya-amicus-curiae-dalam-sistem-hukum-indonesia/5367007.html>.

justice system. Formally, there has never been a discussion by the leadership of the Supreme Court in the plenary chamber system. The Supreme Court based on the provisions of Article 5 paragraph (1) Law Number 48 of 2009 on the Judicial Law, which emphasizes the obligation of "*Constitutional judges and judges are required to explore, follow, and understand legal values and a sense of justice that lives in society.*" In this context, recognizing that the amicus curiae is a new legal development in domestic and international law.<sup>6</sup> By adopting the values and mechanisms of legal development produced under the ideals of law and community justice, the amicus curiae can become an instrument or tool that will be arranged without affecting the independence of judges in deciding cases. Applying the precautionary principle, setting prerequisites, limits, and procedures is essential to formulate because the amicus curiae have the intersection of judicial independence.

Amicus curiae have several reasons or urgency for the legal procedure to be regulated by the Supreme Court. The first problem is that amicus curiae have been applied in several courts, both in general, State administrative, and military courts. The second problem is the absence of rules, regulations, or internal guidelines at the Supreme Court, causing disparities in the procedures for submission, assessment, and use in court. In the absence of procedural law, the amicus curiae ultimately depend on the subjectivity of the Judge.

Based on these considerations, as in the United States and Indonesia then, this paper will focus on several discussions: (a) exploring the concept of amicus curiae in several countries, (b) descriptions of the practices and experiences of amicus curiae in the Indonesian justice system, and (c) the urgency of regulation regarding the mechanism and implementation of amicus curiae in the justice system in Indonesia. In this paper, the research method chosen is normative juridical. The direction of normative research is focused on the inventory of cheerful legal instruments, principles and doctrines, systematics, and comparative law.<sup>7</sup>

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<sup>6</sup> Aida Mardatillah, "Encouraging the Institutionalization of Amicus Curiae in the Indonesian Legal System," *Hukum Online*, last modified 2020, accessed November 28, 2022, <https://www.hukumonline.com/berita/a/mendorong-pelembagaan-amicus-curiae-dalam-sistem-hukum-indonesia-lt5e943879e2606/?page=2>.

<sup>7</sup> S Chandra Mohan, "The Amicus Curiae: Friends No More," *Singapore Journal of Legal Studies* 2, no. I (2010), pp. 352–374.

## The Concept of Amicus Curiae

Based on the literature, the amicus curiae was initially born in the Roman legal system in the 9th century.<sup>8</sup> The amicus curiae became increasingly popular in the 18th century in countries that adopted the standard law system, such as the United States. In particular, the discussion in this chapter is to look at the development and regulation of amicus curiae in the United States. Some of the laws governing the amicus curiae include: (a) Rule 37 of the Rules of the Supreme Court of the United States dictates the content, format, and circumstances of amicus briefs before the U.S. Supreme Court; and (b) in general, Rule 29 of the Federal Rules of Appellate Procedure governs amici curiae in federal courts.<sup>9</sup> Court cases that get amicus curiae are usually in the appellate court and are limited to matters that get public attention.<sup>10</sup> The mechanism regulated in the amicus curiae is that the Judge allows third parties to provide information or legal facts on unfamiliar issues. Later, selectively and gradually, countries that adhere to civil law also implement amicus curiae.<sup>11</sup>

The concept of amicus curiae can be seen from the definition by an American Jurist: *amicus curiae have been defined as one who, as a bystander, may inform the court when the Judge is doubtful or mistaken in a matter of law*".<sup>12</sup> Whereas the Corpus Juris Secundum defines "*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 regarding which the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts.*".<sup>13</sup> While the Law Lexicon, which is influenced by the interpretation of English law, defines "*amicus curiae as one, who volunteers or on the invitation of the Court, instructs the Court*

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<sup>8</sup> Frédérique AST, *Equality Bodies as Amicus Curiae* (Chisinau, 2018), pp. 17, <https://rm.coe.int/equality-bodies-as-amicus-curiae/1680932030>.

<sup>9</sup> Legal Information Institute, "Amicus Curiae," *Cornel.edu*, last modified 2022, accessed November 28, 2022, [https://www.law.cornell.edu/wex/amicus\\_curiae](https://www.law.cornell.edu/wex/amicus_curiae).

<sup>10</sup> Inter-American Court of Human Rights, "Amicus Curiae," *Inter-American Court of Human Rights*, last modified 2022, accessed November 28, 2022, [https://www.corteidh.or.cr/amicus\\_curiae.cfm?lang=en](https://www.corteidh.or.cr/amicus_curiae.cfm?lang=en).

<sup>11</sup> Article 44 of the American Convention on Human Rights states that any person or institution can present *amicus curiae*. They must be submitted by email to [tramite@corteidh.or.cr](mailto:tramite@corteidh.or.cr), indicating who offers it and their respective signature.

<sup>12</sup> Duncan B Hollis, "Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty," *Boston College International and Comparative Law Review* 25, no. 2 (2002), pp.235–255.

<sup>13</sup> Robert C. Berring Ba, *Corpus Juris Secundum* (Semantic Scholar, 1981), <https://www.semanticscholar.org/author/Robert-C.-Berring-Ba/70012776>.

*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>14</sup>

Amicus curiae are briefly referred to as a court friend from these definitions. They are individuals or groups who are not parties to the litigation but are permitted by the Judge to convey their analysis or knowledge of specific issues. Amicus curiae are filed by people who typically take the position of one side in a case, supporting a cause that has some bearing on the problems in the case. The groups most likely to file amicus briefs are businesses, academics, government entities, non-profits, and trade associations. Amicus curiae in court may be delivered in writing or oral presentation. In general, amicus curiae can be filed at all levels of justice, either in the first instance, in appeals, or at the Supreme Court.<sup>15</sup>

Based on the formulations and definitions presented by the experts as discussed earlier, there are three elements related to the amicus curiae, namely:<sup>16</sup>

1. There is a submission party referred to as amici(s), namely individuals, organizations, or institutions that are not parties to the case or dispute. Thus, the amicus curiae are not part of the litigation party or the intervening third party but pay attention to a particular topic that generally has a public dimension.
2. Amicus curiae submission to courts or judges can be carried out on the independent initiative of individuals, institutions, or organizations or specifically requested by the Judge to provide knowledge or legal opinions.
3. The delivery of amicus curia is possible directly in court or writing (text). The purpose of submitting amicus curiae is to provide information or assistance to Judges regarding some legal issues that may be doubtful or erroneous, social issues, or civil liberties being debated. The accuracy of

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<sup>14</sup> Mohan, "The Amicus Curiae: Friends No More." *Singapore Journal of Legal Studies*, 2 No. 1 (2010), pp. 352-374.

<sup>15</sup> Leah Ward Sears, "Why and When to File an Amicus Brief," *SGRLAW* 4, no. 2 (2020): 1-5.

<sup>16</sup> Siti Aminah, *Becoming a Friend of Justice A Guide to Compiling an Amicus Brief* (Jakarta: The Indonesian Legal Resource Center (ILRC), 2014), <http://www.mitrahukum.org/wp-content/uploads/2015/02/Amicus-Brief.pdf>.

the Panel of Judges in deciding cases will benefit the fulfillment of the rights of justice seekers and impact the community's rights.

Thus, the existence of amicus curiae becomes a legal breakthrough for the search for additional material or information for judges in their legal considerations. Amicus curiae can be used as new material for judges in forming their beliefs and helping to explore the value of justice in society. The cases in which the government had a direct interest usually concern the administration of federal acts, e.g., the National Labor Relations Act. There are many cases like that. In issues concerning a federal statute administered by an agency or the Department of Justice, the United States needs to present to the Supreme Court what the act meant or meant. (quoted in Puro, 1971).<sup>17</sup> An amicus curiae usually present arguments or information to the court as a brief. Amicus briefs are typically filed at the appellate level, although they also may be filed in lawsuits pending at the trial court level. Generally, an amicus curiae must obtain the court's permission before filing its brief unless all of the parties consent to the amicus filing.<sup>18</sup>

## Comparison of United States

In the modern legal and judicial system, the United States is one of the references, including implementing the amicus curiae in court. Amicus curiae became popular in America in 1821, related to the case of *Green vs. Biddle*. This case occurred because of the implementation of the Kentucky State Act of February 27, 1797, concerning the occupation and claiming of land rights.<sup>19</sup> This case relates to was a writ of right, brought in the Circuit Court of Kentucky, by the demandants, Green and others, who were the heirs of John Green, deceased, against the tenant, Richard Biddle, to recover certain lands in the State of Kentucky, in his possession. he cause was brought before this court upon a division of opinion of the judges of the court below, on the following questions: (1) Whether the acts of the legislature of the State of Kentucky, of February 27, 1797, and of January 31, 1812, concerning occupying claimants of land, are constitutional or not;

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<sup>17</sup> Paul M. Collins Chris Nicholson, "The Solicitor General's Amicus Curiae Strategies in the Supreme Court," *American Politics Research* 36, no. 3 (2005): 382–414.

<sup>18</sup> Thomson Reuters, *Amicus Curiae*, 2020, [https://uk.practicallaw.thomsonreuters.com/4-502-7653?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-502-7653?transitionType=Default&contextData=(sc.Default)&firstPage=true).

<sup>19</sup> U S Supreme Court, *Green v. Biddle*, 21 U.S.1 1–35 (1821).

the demandants and the tenant both claiming title to the land in controversy under patents from the State of Virginia, prior to the erection of the district of Kentucky into a State?; and (2) Whether the question of improvements ought to be settled under the above act of 1797, the suit having been brought before the passage of the act of 1812, although judgment for the demandant was not rendered until after the passage of the last mentioned act.<sup>20</sup>

Before *Green v. Biddle*, *amicus curiae* in American courts is also tricky. The development of the social situation and legal values brought changes in the early 20th century, so *amicus curiae* have an essential role in the justice system in America, especially in civil liberties and abortion cases. In a 1998 study by the judiciary, the *amicus curiae* participated in about fifty percent of cases the US Supreme Court tried.<sup>21</sup> *Amicus curiae* were rare in the first 100 years of American high-court cases. From 1900 to 1950, *amicus* briefs were filed in only about 10% of the issues on appeal, according to a review of *amicus* advocacy published by the University of Pennsylvania Law Review. However, the landscape has completely changed — so much so that today more *amicus* briefs are being filed in the state and federal appellate courts than ever before.<sup>22</sup>

The results of studies related to the importance of *amicus curiae* in influencing judges' decisions in American courts align with the research of Merrill and Kearny.<sup>23</sup> From 1946-1995 the US Supreme Court used the *amicus curiae* method in as many as 3,389 cases out of 6,151 petitions received. The trend of increasing the use of the most progressive *amicus curiae* occurred from 1986-1995. Of the 1,154 cases, almost 85.10%, or 982 instances, used the *amicus curiae* concept.

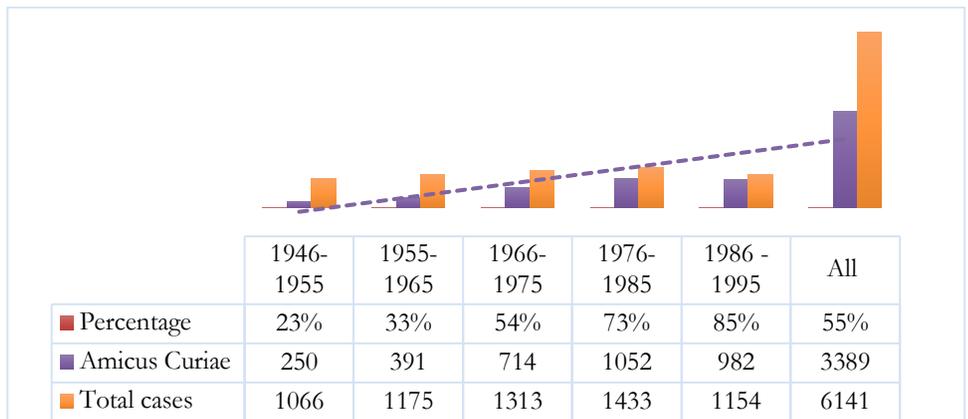
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<sup>20</sup> Legal Information Institute, *GREEN and Others v. BIDDLE*. 1–6 (2020).

<sup>21</sup> ELSAM, *Amicus Curiae (Friend of the Court) in the Case of Heri Budiaman Alias Budi Pego* (Jakarta, 2018), <https://referensi.elsam.or.id/wp-content/uploads/2018/01/REVISI-OKE-elsam-amicus-budi-pego-1801181.pdf>.

<sup>22</sup> Leah Ward Sears, “Why and When to File an Amicus Brief,” *SGRLAW* 4, no. 2 (2020): 1–5.

<sup>23</sup> Joseph D Kearney; Thomas W Merrill, “The Influence of Amicus Curiae Briefs on U.S. Supreme Court,” *University of Pennsylvania Law Review* 148, no. 854 (2000): 744–855.



Source: Merrill dan Kearny, 2000 (Edited)

**Figure 1. Percentage of Cases with Amicus Curiae in the US Supreme Court**

A reflection on Franze and Anderson's use of amicus curiae in *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review* confirms the study of Merrill and Kearny. Based on statistical figures for cases with amicus curiae from 2010 - 2020, 2019 was the highest average, with 900 cases involving amicus. About 65% of Judges cite amicus curiae which generally relates to government policy, history, religion, medicine, psychology, and even the financial implications of court decisions. Judge Ruth Bader Ginsburg is the Judge who has the most social justice during the trial.<sup>24</sup>

Based on the data and facts, the amicus curiae cannot be separated from the embodiment of participation. This participation appears to be related to cases with public and government dimensions. The implication is that civil society institutions, academics, experts, and activists dominate the amici(s). Amicus curiae in the justice context is an attempt to develop procedural rules. These procedural rules will provide transparency and opportunities for participation, especially regarding controversial cases.

<sup>24</sup> Anthony Franze and Reeves Anderson, "Amicus Curiae at the Supreme Court: Last Term and the Decade in Review," *The National Law Journal* (2020), pp.1-5.

Almeida stated that the participation of non-state actors as amici(s) is a strength in finding facts and evidence and the natural path for the State. Amicus curiae, in this case, is an "intervention" for the public interest.<sup>25</sup> Based on data from the amicus curiae in 2019-2020 in America, the subjects with the most participation were the public through civil society organizations (including academics) as many as 768, the American government 27 times, and the federal government 54 times.<sup>26</sup> Steffensmeier and Christenson's research in 'The evolution and formation of amicus curiae networks confirmed the role of interest group networks in the provision of amicus curiae. As an illustration, from 2000–2009, the characters who went to court were closely related to the industry, so the participation of the amicus curiae from industry and workers dominated. Thus, the interest group becomes an essential and approachable actor in forming a coalition.'<sup>27</sup>

### **Amicus Curiae in Indonesian Judicial Practice**

The practice of amicus curiae in the judicial system generally develops in countries that adhere to common law. Still, countries with civil law systems, such as Indonesia, have also adopted it. Based on observations from the Supreme Court's decision directory until 2022, 32 cases received the submission of amicus curiae. However, not all amicus curiae are the basis for the Judge's consideration in his decision.<sup>28</sup> Of these, the author sees many amicus curiae receiving sufficient attention from the public. This amicus is usually related to injustice, discrimination, religion, vulnerable groups, state violence, and corporate actions.

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<sup>25</sup> Paula Wojcikiewicz Almeida, "International Procedural Regulation in the Common Interest: The Role of Third-Party Intervention and Amicus Curiae before the ICJ," *Law and Practice of International Courts and Tribunals* 18, no. 2 (2019): 163–188.

<sup>26</sup> Anthony Franze and Reeves Anderson, "Amicus Curiae at the Supreme Court: Last Term and the Decade in Review," *The National Law Journal* (2020), pp.1-5.

<sup>27</sup> Janet M. Box-Steffensmeier and Dino P. Christenson, "The Evolution and Formation of Amicus Curiae Networks," *Social Networks* 36, no. 1 (2014), pp. 82–96.

<sup>28</sup> *micus Curiae* (Jakarta, 2021), <https://putusan3.mahkamahagung.go.id/search.html/?q=amicus>.

**Tabel. 1. Several Amicus Curiae in Cases of National Concern**

Case	Substance	Amicis	Cluster
President Suharto with Time Magazine	This lawsuit began with the issue of Time Asia Edition dated May 24, 1999, Vol. 153 No. 20, which contains news and pictures of Suharto with the cover title "SUHARTO INC. How Indonesia's longtime boss built a family fortune."	Aliansi Jurnalis Independen, ARTICLE 19, The Associated Press, Cable News Network LLP, Dow Jones & Company, Inc, etc.	Democracy and press freedom
Heri Budiawan nickname Budi Pego in case Number: 559/Pid.B/2017/PN.Byw at the Banyuwangi District Court	The defendant is an environmental activist who opposes mining in Banyuwangi, East Java, accused by the government of spreading the teachings of communism or Marxism-Leninism.	ELSAM	Environment and Human Rights Defender
Saiful Mahdi in case Number 432/Pid.Sus/2019/PN.Bna	The defendant is a lecturer at Syiah Kuala University, Banda Aceh. The case occurred because the defendant asked for irregularities in	Safenet	Freedom of speech

	accepting Civil Servant Candidates (CPNS) at the Faculty of Engineering, Syiah Kuala University, in the WhatsApp group.		
Basuki Tjahaja Purnama or Ahok in case Number 1537/Pid.B/2016/PN.Jkt.U.	The defendant is a candidate for Governor of DKI Jakarta. The latter is accused of insulting and blaspheming Islam as regulated in Article 156a of the Criminal Code and Law No. 11 of 2008 concerning Electronic Transaction Information.	Jakarta Legal Aid Institute	Religion
Prita Mulyasari vs Omni International Hospital in case Number 683/Pdt.P/2016/PN.Tng.	Prieta was made a defendant only because she conveyed her complaints about the Omni hospital service. To this problem, the hospital did not respond by improving services but reported it with accusations of defamation.	ICJR, Elsam, PBHI, dan IMDLN	Public health service

*Source: Author, 2022 (Edited)*

These various examples show that the *amicus curiae* in the judiciary in Indonesia has been initiated by civil society, the National Human Rights

Commission, and academics, especially in the post-1998 reform era. The indicator started in 1998 because the amicus case occurred during the conflict between Times Magazine and President Soeharto's family in 1997. After that, the era of democracy, the rule of law, and human rights grew in Indonesia. Amicus curiae are usually in cases with dimensions of public interest, such as civil liberties, democracy, religion, public services, the environment, and human rights defenders.

For some cases of amicus curiae involving foreign parties, the mechanism adopted is by letter to the Judge who examines the issue. Bret Thiele, an activist from The Center on Housing Rights and Eviction (COHRE), Switzerland, in amicus curiae at the North Jakarta District Court. Amicus curiae, regarding a lawsuit against the eviction of the urban poor by the DKI Jakarta Government, gave a letter emphasizing guarantees and the importance of housing rights for urban communities.<sup>29</sup> The considerations for granting amicus curiae in writing or letters are:<sup>30</sup> (a) there is a considerable difference between a court friend and an expert. In amicus curiae, it is more holistic to convey valid legal arguments and references for the Panel of Judges related to a problem or topic. The weakness of an expert witness is the limited information given only in certain areas of expertise; and (b) concerning efficiency, it requires financing from other countries to the courts in Indonesia. The risk is that the information or explanation submitted is not used as a basis for consideration in the decision.

**Table. 2. Typology of Amicus Curiae in Indonesian Courts**

<i>Amicus Curiae</i>	<b>State Institutions (such as the National Human Rights Commission)</b>	<b>Public (Academics, Activists, Civil Society Organizations)</b>
Case	Public Case	Public Case

<sup>29</sup> Ali, "Foreign NGOs Become Amicus Curiae for Eviction Cases," *Hukumonline.com*, last modified 2009, <https://www.hukumonline.com/berita/a/lsm-asing-menjadi-iamicus-curiaei-kasus-penggusuran-lt4b17bd086a025>.

<sup>30</sup> Frédérique AST, *Equality Bodies as Amicus Curiae* (Chisinau, 2018), pp. 17, <https://rm.coe.int/equality-bodies-as-amicus-curiae/1680932030>.

Court	Courts or Judges often refuse to submit amicus curiae	The court often rejects oral submissions
Method	Oral and Letter (Written)	Written Submission (Letter)
Alternate Admission	Constructed as Expert Description	Constructed as Expert Description
Judge's Consideration	Amicus curiae are not explicitly mentioned in consideration of the decision. Some of the substance of the decision reflects the amici's view related to the relationship with the fulfillment, protection, and enforcement of human rights.	They are not explicitly mentioned in consideration of the Judge's decision.
Decision	1. Several cases, such as mining on the island of Bangka, North Sulawesi in case Number: 211/G/2014/ PTUN-JKT; claim for water rights in DKI Jakarta in case Number 527/Pdt.G/2012/ PN.Jkt.Pst; air pollution lawsuit in case it for DKI Jakarta and other big cities case number Nomor 374/Pdt.G/LH/2019/ PN.Jkt.Pst; as well as	From several examples of amicus curiae presented in table 1 and the directory data of Supreme Court decisions, amicus curiae accepted by judges in decisions is scarce. Some only happened after the Tangerang District Court 683/Pdt.P/2016/ PN.Tag. they were related to the Omni Hospital case with Prieta Mulyasari. Another decision that the Judge also accepted amicus curiae was in decision No.

	<p>suits for the right to clean air related to forest fires, most of the judges' decisions are in line with public expectations.</p> <p>2. Allows Judges to do judicial activism</p>	<p>45/PID.B/2012/PN.MR regarding the issue of religious blasphemy, claiming to be an atheist in West Sumatra.</p>
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Referring to the typology mentioned above, in the context of trial practice in Indonesia, it is related to the amicus curiae mechanism. It is pretty diverse: (a) some are in the form of letters, (b) the Judge determines it as expert testimony, and (c) his testimony is presented in court. The amicus curiae vary depending on the Judge handling the case. For example, at the Central Jakarta District Court, in the case of a citizen's lawsuit over the water of a DKI Jakarta resident in 2015 and a lawsuit against the law related to air pollution in the Jakarta area in 2020, amicus curiae directly submitted in court. The Judge publicly accepted the readings and files as part of the trial. Disparate with the Jakarta Administrative Court Number: 211/G/2014/PTUN-JKT. This case is related to the issuance of a Decision Letter Minister of Energy and Mineral Resources of the Republic of Indonesia Number 1361 K/30/MEM/2017 and North Minahasa Regent Letter Number 152/2012 dated July 20, 2012, concerning the Extension of Exploration Mining Business License (IUP) to PT Mikgro Metal Perdana on Bangka Island, East Likupang District, North Minahasa Regency, North Sulawesi. The amicus curiae may only be submitted to the clerk as input from outsiders, even after intensive discussions with the Panel of Judges. Furthermore, the information is considered as information from expert witnesses.

### Arrangement of Amicus Curiae in the Rules of the Supreme Court

Based on the provisions of Article 1 paragraph (3) of the 1945 constitution, Indonesia declares itself as a state of law or *rechtstaat*. With this concept, ideally, all arrangements in State or public affairs are based on law, not merely economic or political interests.<sup>31</sup> The idea of the rule of law

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<sup>31</sup> Jimmy Asshiddiqie, "The Idea of the Indonesian Rule of Law," *BPHN* 25 (2011), pp. 1–17.

was developed to realize a functional and fair system. As a state that claims to be based on law, all policies, arrangements, and implementation of state activities are based on legal principles and formal rules. The thoughts of experts influence the development of a modern legal state. The first is Immanuel Kant, Paul Laband, Julius Stahl, and Fichte, who developed the term the rule of law with *rechtstaat*.<sup>32</sup> There are four unique characters regulated in the *rechtstaat*, namely: (a) protection of human rights, (b) sharing of power, (c) government based on law, and (d) the existence of a state administrative court.<sup>33</sup> Second is the thought of A.V. Dicey called the rule of law,<sup>34</sup> there are three characteristics of the rule of law, namely (a) supremacy of law, (b) equality before the law, and (c) due process of law. To complement the principles and characteristics of the modern rule of law, the International Commission of Jurists affirms one fundamental principle, namely the independence and impartiality of the judiciary.<sup>35</sup>

Bagir Manan, former Chief Justice of the Supreme Court of the Republic of Indonesia, considers that the independence and impartiality of the judiciary are related to the essence of ensuring fairness in deciding cases. Courts or judges must be independent not only of other institutions but also of litigants.<sup>36</sup> However, judges in the Indonesian context are not merely "mouthpieces" of the law. Article 5, paragraph (1) Law Number 48/2009 of the Judicial Law stipulates that judges are obliged to find, follow and show an understanding of the values that live in society; in this case, it is the application of *amicus curiae* in court. Therefore, judges must explore social values and legal developments that will affect the ideals of justice seen in

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<sup>32</sup> Kadek Agus Sudiarawan and Bagus Hermanto, "Reconstruction of Paradigm Shifts in Administrative Efforts in Resolving Pre-Election Regional Head Disputes," *Legislasi Indonesia* 16, no. 3 (2019), pp. 325–343, file:///C:/Users/admin/Downloads/505-1689-1-PB.pdf.

<sup>33</sup> Muhamad Rakhmat, *Constitution & State Institutions* (Bandung: Logoz Publishing, 2014), pp.13-14.

<sup>34</sup> Muhammad Bahrul Ulum, "Implications and Implementation of the Constitutional Court Decision on the Constitutional Rights of Indonesian Citizens," *Jurnal Konstitusi* 6, no. 3 (2009), pp. 83–102.

<sup>35</sup> Kusniati Retno, "History of the Protection of Human Rights concerning the Concept of the Rule of Law," *Inovatif Jurnal Hukum* 4, no. 5 (2011), pp. 79–91, <https://online-journal.unja.ac.id/index.php/jimih/article/view/536>.

<sup>36</sup> Bagir Manan, *Law Enforcement A Quest*, Pertama. (Jakarta: Asosiasi Advokat Indonesia, 2009), p. 13, [https://perpustakaan.mahkamahagung.go.id/slims/pusat/index.php?p=show\\_detail&id=7546](https://perpustakaan.mahkamahagung.go.id/slims/pusat/index.php?p=show_detail&id=7546).

consideration of their decisions.<sup>37</sup> Although it has not been discussed in the Plenary Meeting of the Supreme Court Chamber, the Head of the Legal and Public Relations Bureau is aware of the urgency of the amicus curiae in the aspect of legal development in Indonesia. With the adjustment of legal consequences, it is intended that the resulting decisions are more credible, of high quality, and under the community's sense of justice.<sup>38</sup>

Referring to several typologies in the amicus curiae and the characteristics of the decisions described in the previous section, the author assesses the urgency of regulation by the Supreme Court for various reasons. *First*, the absence of formal rules or instructions relating to the application for amicus curiae results in disparity in procedures between courts. There are two characteristics of the application for amicus curiae, namely (a) based on the Judge's initiative, who requires information to help clarify a problem and (b) a request for submission from the public or a third party. It is intended that the Judge understands a problem comprehensively as a basis for deciding the case. *Second*, the procedure for delivering the amicus curiae in court. The Chief Justice or the Chief Judge has a crucial role in applying amicus curiae depending on experience and knowledge related to legal progress. Conventional judges view the amicus curiae as an instrument to intervene in court decisions and interfere with the independence of judges. Meanwhile, progressive judges view the amicus curiae as part of progress and an instrument to provide input to judges in understanding complex issues. The resulting decision is hoped to be accurate, fair, and under noble values.

*Third*, the absence of guidelines or regulations regarding procedures and delivery of amicus curiae implies differentiation in implementation. These variations include (a) some courts allow the submission of amicus curiae in court by third parties or public representatives, (b) there are still many courts in the regions that refuse because there is no procedural law, (c) received only in written form for submission to the clerk of the court,

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<sup>37</sup> Muhammad Yasin, "The Problem of Judge Independence and the Sense of Justice of the People," *Hukumonline.com*, last modified 2013, accessed October 17, 2022, <https://www.hukumonline.com/authors/lt5eb447013693a/MuhammadYasin/?type=stories>.

<sup>38</sup> Dyah Dwi Astuti, "Supreme Court Is Wary of Implementing 'amicus Curiae,'" *Antara.com*, last modified 2020, accessed October 19, 2021, <https://www.antaraneews.com/berita/1414558/ma-berhati-hati-soal-penerapan-amicus-curiae>.

(d) the change from the concept of *amicus curiae* to a model of expert witness examination which resulted in the limitation of the information submitted. *Fourth*, the next challenge is the adoption of *amicus curiae* in the Judge's consideration in understanding the problem wholly and comprehensively, as well as the basis for deciding cases. Even though the *amicus curiae* have submitted their decisions, several instances with a public interest dimension have not explicitly adopted the values conveyed. The decision is reflected in several choices, such as the privatization of clean water in DKI Jakarta, forest fires in Central Kalimantan, and claims for air pollution in the State Capital area. Judges prefer conventional considerations with civil and State administrative norms rather than references to international legal instruments in the field of human rights and new standards decided by the Constitutional Court.

Based on this argument, the formation of procedural law related to the *amicus curiae* has a critical urgency. Emphasizes the importance of judges in their decisions to be active in the trial and in their choices to reflect the context of social, political, economic, and moral situations. Applying this *amicus curiae* is a form of expression from the Judge and is the antithesis that judges are only robots and mouthpieces of the law.<sup>39</sup> Several legal grounds can be used as a juridical basis in the regulation of *amicus curiae* by the Supreme Court. Article 27 of Law No. 14 of 1970 and Article 79 of Law No. 14 of 1985 concerning the Supreme Court regulate the authority of delegates to form and formulate regulations aimed at filling in the absence of rules and facilitating trials. Further arrangements can be in the form of a Supreme Court regulation or a Circular. This rule will apply and be addressed to all courts, judges, clerks, the public, and third parties who will submit or file *amicus curiae*.<sup>40</sup> The validity of legal products established by the Supreme Court is based on the authority mandated in Article 8 paragraph (1) of Law Number 12 of 2011, which was revised by Law Number 15 of 2009 and Law Number 13 of 2022 concerning the Establishment of Legislation. The provisions of Article 8 paragraph (1)

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<sup>39</sup> Li-ann Thio, "Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to Go Before I Sleep,'" *Yale Human Rights and Development Journal* 2, no. 1 (1999): 1.

<sup>40</sup> Nelly Mulia Husma, Faisal A.Rani, and Syarifuddin Hasyim, "Regulatory Authority of the Supreme Court (Juridical Review of Supreme Court Regulation Number 4 of 2016 Concerning the Prohibition of Reviewing Pretrial Decisions)," *Syah Kuala Law Journal* 1, no. 1 (2018): 1–16.

confirm that the types of laws and regulations ranging from constitutions to regional regulations, as well as rules stipulated by institutions or commissions established by law, have legal and binding force as law.

## **Conclusion**

Based on all the discussion and arguments that have been put forward from the introduction and substance, it is concluded that: (a) the concept of amicus curiae is a form or participation in a trial which is not a party to a case to convey its analysis or knowledge of a problem to assist the Judge in deciding a case. Amicus curiae in the United States also initially received a rejection from courts or judges before 1821; after that, there was a tendency for judges to accept amicus curiae for up to fifty percent of cases in the Supreme Court; (b) amicus curiae in courts in Indonesia have different typologies and forms of acceptance. One reason is the absence of procedural law or formal regulations so that the amicus curiae has not become the basis or reference for judges in explaining a case and a court decision; (c) with various problems in the practice of amicus curiae and the absence of regulations that serve as a basis for referrals for Judges in court, it is necessary to establish a Supreme Court Regulation as a guideline to fill the legal vacuum and expedite trials.

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