AMICUS CURIAE

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Abstract:
This study represents a comprehensive analysis based on documentary research, case-law analysis, and practical observation. The issue of the existence of amicus curiae *oscillates between doctrinal and jurisprudential support and the need for legal regulation within a statutory legal text. The study makes a clear distinction between intervention as a procedural mechanism regulated by codes and* amicus curiae*, arguing for the usefulness of such briefs at the level of all courts in Romania. For the moment, this mechanism is frequently encountered at higher courts, including and especially before the Constitutional Court, but it is not encountered to the same extent at the level of tribunals and courts of first instance, so that the need for legislative support for an* amicus curiae *brief appears as an objective necessity at the level of the practice of all courts in Romania.*
Keywords: amicus curiae*, doctrinal approaches, jurisprudential approaches, advantages, support.*

1. Origins and historical evolution

The concept has its roots in Anglo-Saxon law (common law), where it appeared in the 15th century, being less frequently used in classical legal systems. It was later adopted and adapted over time by international courts, such as the CJEU, the ECHR, and the International Criminal Court, and in Romania it penetrated mainly into Romanian judicial practice through the influence of European law (after 2007), the need to resolve complex technical cases, and the pressure exerted by civil society organizations for greater transparency.

2. Definitions

In Romanian legal doctrine, three levels of definition are distinguished:

- **Restricted definition:** A person who submits a brief in order to inform the court;
- **Intermediate definition:** A third party with specific expertise, admitted to contribute to the resolution of the case;
- **Broad definition:** Any intervention by a third party that does not pursue the acquisition of party status.

An *amicus curiae* (literally: friend of the court; plural: *amici curiae*) is someone who is not a party to a case pending before a court, but who provides information related to that case, without having been requested by any of the parties to provide assistance before the court [1]. More precisely, an amicus curiae is a natural or legal person, who is not a party to a trial, but who requests the court to allow the submission of a brief (letter, report, opinion) with the purpose of assisting it in making a correct and informed decision. In this context, such an "interlocutor" does not have the status of a party and, as a rule, cannot formulate its own procedural claims (e.g. annulment of the act); it is a "counsel" who brings an external, complementary perspective, and the purpose is the improvement of the quality of justice, not the representation of a direct private interest.

From a "procedural" point of view, there are two variants through which an amicus curiae may be submitted:

A] By invitation ("by invitation") the court, recognizing the complexity of an issue, officially **invites** an authority (e.g. the National Bank in currency-related cases, the National Authority for Consumer Protection in consumer cases, etc.) or an expert to submit a brief, this being the case where the initiative of this approach belongs to the court, which resorts to this method in order to ascertain the truth and clarify the complex aspects of the case brought before it.

B] By permission ("by leave of the court"): The interested person submits an **application for the admission** of the amicus curiae brief. The court approves or rejects it, assessing whether the contribution is useful and does not delay the proceedings. This is the most frequent route in practice.

3. Regulation and recognition

It is noted that there is **a formal legislative gap** in the civil and criminal procedure codes. Instead, practice has been important and adapted from the following sources:

- **International and European law** (the practice of the ECHR and the CJEU is rich in amici curiae);
- **Doctrine**;
- **Case law;**

Even though in Romanian legislation we do not find an “expressis verbis” text to support the existence of this means of legal expression, by analogy, reference may be made to several internal and international normative acts that may be invoked in this matter, as follows:

- Code of Civil Procedure (New CPC);

Does not expressly mention "amicus curiae", but provides openings through:

Art. 5. – *(1) Judges have the duty to receive and resolve any claim falling within the jurisdiction of the courts, in accordance with the law.*

Art. 254 (5). *Likewise, the judge may, ex officio, raise for discussion with the parties the need to administer other evidence, which he or she may order even if the parties oppose it.*

- Code of Criminal Procedure;

Nor does this one expressly mention *amicus curiae*; however, there are several articles that lead to the permissibility of accepting it, as follows:

Art. 97 (2) *Evidence is obtained in the criminal proceedings through the following means:*

e)*documents, expert reports, minutes, photographs, material means of evidence;*

f) *any other means of evidence that is not prohibited by law.*

– Constitutional and Conventional Bases.

– **Art. 21 of the Constitution:** Free access to justice

– **Art. 6 ECHR:** *European Convention on Human Rights* – Right to a fair trial, interpreted as including the court’s right to be properly informed.

– **Art. 47 of the Charter of Fundamental Rights of the EU:** Right to an effective remedy and to a fair trial

Considering that such approaches are not studied at the level of higher education and that cases where they are included in university curricula are rare, we consider that

a short guide for drafting an *amicus curiae* would be welcome. In our opinion, the request addressed to the court should include the following elements:

– To present itself and indicate its expertise or legitimate interest;

– To briefly describe its position and the relevance of its arguments for the case;

– To attach the *amicus curiae* **memorandum** itself.

Content of the *amicus curiae* memorandum:

- A concise presentation of the case (from the third party's perspective);
- Legal, economic, social, or technical arguments;
- References to relevant legislation, doctrine, and case law (including international sources).
- **Clear conclusions and suggestions for the court.**

Important: It must not overtly support one side, but rather shed light on a particular issue.

The court, upon receiving such a memorandum, may either **admit** it and make it available to the parties so that they may express their point of view, **or reject** it if it considers it unnecessary, dilatory, or if the third party is in fact promoting a private interest "as a party."

4. Doctrinal approaches

In doctrinal understanding, ***amicus curiae*** is a sophisticated mechanism that transforms judicial proceedings from a simple dispute between parties into a broader forum for social and technical debate. It encourages **transparency, quality, and the legitimacy** of judicial decisions by allowing civil society and experts to contribute to the administration of justice. Although in Romania it is less regulated than in common law systems, its practice is continuously developing and consolidating, aligning itself with European standards. In the Romanian legal system, ***amicus curiae*** is more a **jurisprudential and doctrinal** practice than one exhaustively regulated by codes.

Also from a doctrinal perspective, at the level of approaches in Romania, *amicus curiae* is defined as a modern instrument, necessary for quality justice.

Thus, it is seen as **a consequence of the principle of judicial cooperation and of the right to a fair trial**, which requires the court to have access to all relevant information. At the same time, it is argued that it is a means of "democratizing justice,"

allowing civil society to participate in the shaping of case law in matters of public interest. On the other hand, doctrine clearly distinguishes between a party, an intervening **party, and an *amicus curiae***. The *amicus* does not have a direct material interest in the outcome of the dispute, but rather an interest of a general nature (professional, social, or principled).

At the doctrinal level, there are quite few approaches to this subject, which is why, when such opinions appear, they deserve to be highlighted. I find the approach particularly well grounded by Prof. Tudor Dumitru in the article **"Amicus curiae – between necessity and abuse" [2]**, who argues that *"although the presence of this institution in the Romanian system is beneficial (allowing the contribution of experts or organizations in cases with general impact), the lack of a detailed procedural framework in the codes or in special laws leads to:*

Uncertainty and lack of uniformity in judicial practice (some judges accept amicus briefs, others reject them arbitrarily).

The risk of abuse, through the submission of subjective opinions disguised as neutral experts, capable of influencing the court.

The need for a clear regulation of: the conditions for admissibility, time limits, form, the parties' rights to challenge the amicus brief, etc."

The same position is also maintained in his/her civil procedure manual (*"Civil Procedural Law. The General Part"*, recent editions), where a specific paragraph is devoted to the institution of *amicus curiae*. This is one of the few studies dedicated to this subject in the Romanian specialized literature, which is why we also seek to contribute additional aspects intended to clarify this "legal institution," which tends to take shape and which, in our view, should find support in our legislation, moving beyond the doctrinal and jurisprudential sphere.

Also from a doctrinal perspective, he/she considers essential for the admission of an *amicus curiae* brief the following conditions:

The existence of expertise or a unique perspective, more precisely, the third party must provide knowledge or a point of view that the court or the parties do not possess.

To be useful for the resolution of the case, namely the information must be relevant and help clarify a factual or legal issue.

The opinion expressed must be impartial and objective, so that its purpose is to enlighten the court, not to militantly support one of the parties. (In practice, this condition is applied with flexibility).

The opinion expressed must not limit the rights of the parties, meaning that the intervention must not unjustifiably delay the proceedings or infringe the parties' right to a fair trial.

In Romanian doctrine, there are still sufficiently many elements of doctrinal controversy. Thus, we can distinguish a current that perceives a conflict between celerity and exhaustiveness. In this context, some authors [I. Leș] warn of the danger of "overloading" case files with such briefs. Other authors [M. Vidu] support the justification of these briefs from the perspective of the quality of the decision that is to be adopted.

5. Jurisprudential approaches

Romanian judicial practice progressively recognizes and uses *amicus curiae*, especially at the level of higher courts. In this context, we will attempt to structure the jurisprudential sources according to the following courts:

5.1. The Constitutional Court of Romania (CCR)

Analyzing at the jurisprudential level the use of *amicus curiae*, we find that the CCR **is the most receptive forum** in this matter. The CCR has developed a consistent practice, acknowledging the value of opinions and briefs submitted by entities with authority.

Notable examples: In numerous referrals concerning the unconstitutionality of laws, the CCR has expressly requested opinions from:

- **The Superior Council of Magistracy (CSM)**
- **The National Authority for the Protection of the Rights of the Child (ANPDC)**
- **The Ombudsman**
- **Relevant public institutions** (e.g. the National Bank of Romania – NBR – for financial legislation)
- **Professional associations** (e.g. the National Union of Romanian Bar Associations – UNBR)

These opinions ***are explicitly cited in the legal reasoning*** *of the CCR's decisions, becoming sources.*

5.2. The High Court of Cassation

In civil and commercial matters, the High Court of Cassation and Justice (HCCJ) has admitted and taken into consideration briefs submitted by third parties with expertise, as follows:

- **As an emblematic decision, we mention here Decision no. 3583/2015 of the HCCJ, Commercial Division [3]:** The court admitted a brief submitted by an association of electronic payment companies in a public procurement case. In the judgment, the judges made explicit reference to the **arguments contained in that brief** in order to reinforce their own reasoning.
- As a clarifying position, we refer here to other decisions of the High Court of Cassation and Justice, in which it emphasized that the submission of such a brief **does not confer party** status and does not allow the third party to challenge the judgment or to lodge an independent appeal.

5.3. The Bucharest Court of Appeal, Administrative and Fiscal Litigation Division

In cases with environmental or urban-planning impact, the courts have admitted and cited reports or opinions submitted by environmental associations or by the local urban planning commission.

In these cases, the court examined whether the brief brings new and useful elements, beyond those presented by the parties. If it is merely a repetition, the *amicus curiae* will be ignored.

5.4. National vs. international jurisprudence

Romanian courts are increasingly invited by the European Court of Human Rights (ECHR) to take into account *amicus curiae* opinions in cases pending in Strasbourg. This international exposure has contributed to the internalization of the practice.

In cases involving European law, Romanian courts refer to *amicus* briefs submitted in the case law of the Court of Justice of the European Union (CJEU) on similar issues.

At this jurisprudential level, the opinion expressed by ***Prof. Gheorghe Buța*** [4] who served as Romania's agent before the European Court of Human Rights and, as a careful observer of the practice of the Constitutional Court, made interesting references to *amicus curiae*. In this context, he commented on **Constitutional Court Decision no. 685/2018**, which represented a key moment in the recognition of *amicus curiae* in the Romanian system. His position (as inferred from the published analyses) is as follows:

- He supports the usefulness of *amicus curiae* intervention in constitutional proceedings, especially in cases with major social impact, where civil society organizations or independent experts can bring complementary perspectives, assisting the court in a collective effort to find the best possible solution.

In general terms, his perspective (in line with the majority doctrine) is that *amicus curiae*:

– Is essentially different from an expert appointed by the court, having a role closer to that of an "informal party" who brings legal and principled arguments, rather than factual findings.

– Its intervention should be regulated through a simple and discreet procedure, which should not turn the proceedings into a "polyadic" one (with too many interveners that make it cumbersome).

While Prof. Tudor Dumitru wrote a fundamental article calling for express regulation in order to prevent abuses, Prof. Gheorghe Buta is rather associated with the analysis and legitimation of the role of *amicus curiae* in constitutional jurisprudence, emphasizing its value in strengthening judicial deliberation in cases of principle.

As **a synthesis of the Romanian jurisprudential position, we note**:

– **It is admissible**, although it is not expressly regulated.

– **It is appreciated** especially at the level of higher courts (the Constitutional Court and the High Court of Cassation and Justice) in complex cases.

– **The safest course** is for the third party to **submit a request for the admission** of the brief, accompanied by a motivation highlighting its expertise and usefulness.

– **Its effect is not binding**. The court has **discretionary power** to take it into account or not. However, if it does take it into account, it must address the relevant arguments (even if only to reject them).

– **It does not create procedural** rights for the third party (the third party cannot lodge an appeal against the judgment).

Differences between ***amicus curiae*** and intervention

***Amicus curiae* is a neutral consultant** (or one with a public-interest agenda), whereas intervention involves an active interested party that enters into the conflict between the original parties.

***Amicus curiae* cannot be ordered to pay legal costs** (it is not a party), whereas the intervener may be required to bear legal costs.

Amicus curiae appears mainly **in cases with constitutional, social, or principled implications**, whereas intervention appears in **ordinary litigation** with direct implications for third parties.

6. Organizations/institutions that frequently submit *amicus curiae* briefs in Romania:

From the analysis of jurisprudence, we can exemplify a series of organizations and institutions that have resorted to this mechanism, as follows:

- The Ombudsman;
- The Superior Council of Magistracy (CSM);
- Associations of lawyers (UNBR);
- Specialized NGOs (in the fields of environment, human rights, consumer protection – e.g.: APADOR-CH, Society for Justice, the Prosumers Association, etc.);
- Professional and employers' associations (for economic regulations);
- Public institutions with authority in the field (ANPC, ANRE, etc.).

7. The roles that *amicus curiae* may fulfill

The *amicus curiae* brief may have several crucial roles, as follows:

– **Technical/scientific information:** It presents data, studies, and experts in complex fields (medical, IT, engineering).

– **Social or economic perspective:** It shows the potential impact of a ruling on the community, the market, or a social group.

– **Comparative legal analysis:** It presents how a similar issue has been regulated or adjudicated in other states or before international courts.
– **Protection of the interests of large groups:** NGOs may represent the interests of categories that are not physically present in the proceedings (e.g. consumers, minorities, persons with disabilities).
– **Highlighting constitutional implications or human rights issues:** Often used by the Ombudsman Institution, associations, or even by the courts themselves when referring matters to the Constitutional Court.

8. The manner of handling *amicus curiae* in different legislative systems

In the American system, considered to be the most permissive in this field, we note the following:
– *Amicus curiae* involves minimal standards of admissibility;
– The weight of this approach is increased in judicial decisions;
– The risk of "amicus overload" but on a permanent basis.

In the French system, considered the most restrictive in this field, we note the following:
– *Amicus curiae* may be introduced only mandatorily through a lawyer;
– It may be introduced almost exclusively in the field of administrative litigation;
– It may be submitted under the strict control of the court.

In our legislation, which may be considered a mixed system between the two mentioned above, *amicus curiae* has the following legal features:
– It is close to the German model, meaning that it is flexible and subject to judicial control;
– It is influenced by the practice of the ECHR, more precisely, human rights standards are observed;
– It has a rapid evolution, namely a tendency can be observed from systematic rejection (the 2000s) to selective acceptance (after 2010).

Conclusion

The present study seeks to support the usefulness of the legal regulation of *amicus curiae*, bringing as arguments both domestic and international doctrine, but especially

judicial precedents from Romania, which have been relied upon mainly by higher courts, as well as by the Constitutional Court, and less so by lower courts. The reluctance to accept this mechanism, which contributes to the grounding of judicial decisions, is also due to the quasi-nonexistence of an academic approach to this institution by Romanian law faculties, despite the fact that it is particularly effective and frequently encountered, especially in the Anglo-Saxon legal system. The adaptation of *amicus curiae* to Romanian legislation has already been achieved through the jurisprudence of the higher courts in our country.

References:

[1] https://ro.wikipedia.org/wiki/Amicus_curiae .
[2] Tudor Dumitru, Amicus curiae – între necesitate și abuz, Romanian Review of Constitutional Law, no. 4/2014, pp.167-185.
[3] Decision no. 3583/2015 rendered in case file no. 4959/3/2014 by the High Court of Cassation and Justice.
[4] Gheorghe Buta, Observații privind contradictoriul în fața Curții Constituționale. Comentariu pe marginea Deciziei Curții Constituționale nr. 685/2018, in Romanian Review of Constitutional Law, no. 1/2019.