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TOPICS FROM CIVIL SOCIETY

Amicus curiae: *the role and experience of NGO involvement as a third party in proceedings before the Russian Constitutional Court and the European Court of Human Rights*

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(1) INTRODUCTION

An *amicus curiae* (Latin for "friend of the court") is a formal role making it possible for a person or a group, such as an NGO or some other civil society actor, to participate in proceedings before a court while not being a party to the case; in Russian judicial procedure, they are defined as "a third party without an independent claim over the subject matter of the dispute." Besides assisting the court with decision-making, being an *amicus curiae* can enable an individual or organisation acting in this role to voice their opinion in a public interest case.

The role of *amicus curiae* exists in some but not all legal systems. It is widely and prominently used in the US and other Anglo-Saxon jurisdictions. For example, the US Supreme Court and the Supreme Court of India are known to receive hundreds of *amicus curiae* briefs from advocacy groups of various types and sizes in high-profile cases. By contrast, many European continental legal systems do not have procedural provisions in place for this role. In Russia, submitting full-fledged *amicus curiae* briefs is possible only as part of proceedings before the Constitutional Court. The Supreme Court and other domestic Russian courts normally reject them as "extra-procedural submissions." While there is a way to circumvent this by having a party to the dispute to motion for including such a brief as evidence, this go-around deprives "friends of the court" of their independence and impartiality; it is also highly unlikely that a party would submit evidence which does not fully agree with its own position.

There is no unity of approach in international justice either. The European Court of Human Rights accepts *amicus curiae* submissions from NGOs based in and outside Europe. The Rules of Procedure and Evidence of the International Criminal Court also allow such submissions. However, this procedural instrument is not available in proceedings before the International Tribunal for the Law of the Sea and the International Court of Justice, although the latter provides

for its procedural surrogate as part of the advisory opinion procedure where the Court does not consider a dispute between States but issues a non-binding advisory opinion at the request of the UN General Assembly or another authorised international body.[1]

The lack of procedural uniformity has raised controversy as to whether "friends of the court" should exist in the first place. Do courts need "friends" anyway? While each NGO and each court has to answer this question for themselves, it makes sense to examine current practices and learn about their pros and cons to inform the best possible choice.

(2) THE RUSSIAN CONSTITUTIONAL COURT

The Russian Constitutional Court's rules of procedure permit the judge-rapporteur in the case to add to the case file not only the parties' submissions but also documents received from other sources. Since the 1990s, this has led to a practice by judge-rapporteurs to invite third parties to participate in the proceedings by making a written submission and/or an oral statement, which can be considered a prototype of *amicus curiae*. In most cases, the judge-rapporteur invites representatives of relevant federal executive authorities or state-run academic institutions, but sometimes a specialist NGO can be called to testify as a third party. For example, in 2005, the Constitutional Court invited a representative of the Russian Union of Self-Regulating Organisations of Arbitration Managers to participate in a session which examined the constitutionality of certain provisions of the Federal Law on Insolvency (Bankruptcy) concerning eligibility requirements for arbitration managers.[2]

However, there was no clarity for some time as to how the Constitutional Court should treat any materials submitted by NGOs on their own initiative rather than in response to the judge-rapporteur's request. Perhaps the first such submission, which the judge-rapporteur Knyazev added to the case file, was initiated in 2012 by the Public Verdict Foundation (PVF), a Moscow-based human rights group, in connection with proceedings to review the constitutionality of a number of provisions of the Federal Law on Meetings, Rallies, Demonstrations, Marches and Pickets.[3]

[1] Practice Direction XII.
[2] See: Judgment of the Russian Constitutional Court no.12-P of 19 December 2005.
[3] See details in: Иванов М. Закону о митингах подготовили спорные заключения. Конституционному суду предстоит выбор между экспертной и ведомственной позицией // Коммерсантъ. 15 ноября 2012 года. № 216: https://www.kommersant.ru/doc/2067098?isSearch=True. The PVF's submission was prepared by the author of this article.

Over time, Russian constitutional judges have developed a practice whereby such unsolicited "proactive" submissions, provided they are of value to the court, are added to the relevant case file and sent out to the parties who can refer to them in the proceedings, while the judges can draw on such statements in making the final decision in the case.

In 2014, the Russian Constitutional Court examined a series of complaints from Russian NGOs and their leaders against the "foreign agents" law; independent non-profits such as the Institute of Law and Public Policy (Moscow) and the Human Rights Resource Centre (St. Petersburg) initiated *amicus curiae* submissions. Following the established practice, the judge-rapporteur added the materials to the case file and forwarded them to the parties. A representative of the Russian President motioned an objection to the use of these materials, but the motion was dismissed by the court.[4]

Eventually, the Russian Constitutional Court added a paragraph to its Rules of Procedure[5] which explicitly permitted "unsolicited scientific [evidence-based] submissions" but added that "the Constitutional Court is not required to make any case file materials available [to third parties] for the purpose of preparing such submissions."

An unsolicited scientific evidence-based submission must "meet the standards of objectivity" and "express a legal position free from political bias." As a general rule, once admitted, the unsolicited submission is added to the case file and made available to the parties. The judge-rapporteur or the court may reject a submission if they find it "lacking in informational and analytical value." In a few exceptional cases, *amicus curiae* briefs have been posted on the Constitutional Court's website. While the parties are free to refer to *amicus curiae* briefs – as well as to any other materials in the case file – in their statements and procedural documents, the Constitutional Court's decisions and rulings do not normally cite or even acknowledge such unsolicited submissions.

In certain landmark cases, concerned NGOs periodically initiate evidence-based submissions to the Constitutional Court which are often cited by the parties in their oral and written statements. A vast majority of such briefs provide a review of international legal standards in the pertinent

[4] See Голубок С.А. Конституционный Суд не отвернулся от «друзей» // Закон.ру. 9 марта 2014 года: https://zakon.ru/blog/2014/03/09/konstitucionnyj_sud_ne_otvernulsya_ot_druzej__v_dele_ob_inostrannyx_agentax. The author of this article contributed to the brief submitted by the Human Rights Resource Center.
[5] Rules of Procedure of the Russian Constitutional Court. § 34.1.

area or a comparative legal analysis of the matter decided by the constitutional judges, which is particularly important in human rights cases, since the Russian Constitution, in its Article 17(1), stipulates that individual rights and freedoms in Russia are recognised and guaranteed in accordance with the universally accepted principles and standards of international law.

(3) THE EUROPEAN COURT OF HUMAN RIGHTS

According to the Rules of the European Court of Human Rights, once a complaint is communicated to the respondent government, non-profit organisations may be granted leave by the President of the Chamber considering the case to submit written comments as a third party.[6] Requests for such leave must be duly reasoned and submitted in writing by the potential *amicus curiae* no later than twelve weeks after the application is communicated to the respondent government, unless another time limit is established for exceptional reasons.

Russian NGOs have made use of the possibility to submit *amicus curiae* comments in public interest cases considered by the European Court of Human Rights.

Lawyers for Constitutional Rights and Freedoms (JURIX) and Glasnost Defence Foundation were among the first Russian NGOs to submit written comments as *amici curiae* in 2005 in a case involving a violation of the right to freedom of expression.[7] Their observations referred to the free speech standards arising from defamation cases examined by the US Supreme Court and by the House of Lords in Britain.[8]

On many occasions, Russian NGOs have prepared and submitted third-party briefs to the Court jointly with international partners. Thus, in 2019, the Mass Media Defence Centre (Voronezh), together with the London-based Media Legal Defence Initiative, submitted an *amicus curiae* brief in two cases considered jointly, *Kalikh v. Russia* (no. 72058/17) and *Demyanenko v. Russia* (no. 77503/17).[9] To assist a comprehensive examination of the complaints by the Court, the brief provided essential information about international legal standards protecting journalists who cover

[6]Rules of the Court: Rule 44.
[7] See Judgment of the European Court of Human Rights of 31 July 2007 in *Dyuldin and Kislov v. Russia*, Application no. 25968/02
[8] Ibid, §§ 32-34.
[9]The author is one of Andrei Kalikh's representatives before the European Court of Human Rights.

protests, including freelance journalists as well as full-time employees of incorporated media outlets, and about interference with journalists' professional activities in Russia.

Russian NGOs have successfully submitted *amicus curiae* briefs in cases, including those brought before the Court's Grand Chamber, against the Council of Europe member states other than the Russian Federation. Such briefs were provided where the matter considered by the Court was of significance for the entire human rights movement and the Court's legal position in the case could determine the outcomes of numerous future cases, including those against Russia. Thus, Citizens' Watch, a human rights NGO based in St. Petersburg, was given leave by the President of the Grand Chamber to submit, within a very tight deadline, its *amicus curiae* observations in *Naït-Liman v. Switzerland* (application no. 51357/07). In the judgment delivered on 14 March 2018, the Grand Chamber devotes three paragraphs to summarising the Citizens' Watch brief to which the applicant's representatives made references in their statements during the Chamber hearings.

What are the main reasons why Russian NGOs prepare and submit, sometimes jointly with others, *amicus curiae* observations for the Court? Summaries of the legal positions stated in such *amicus curiae* briefs are often sent out to the parties for written comments and eventually included in the Court's judgment. In addition to this, nothing prevents NGOs from publishing such briefs independently, e.g. on their websites, or as a paper or part of a collection of papers. Regardless of whether the Court makes use of the *amicus curiae* observations in its judgment, the fact and the content of such submissions can be used by the organisation as an advocacy tool.

In certain cases, *amicus curiae* observations can influence the judgment when they contain information (often technical rather than legal) of which the Court and the parties may not be fully aware, not having the relevant expertise. An *amicus curiae* brief by the UK-based human rights NGO Interights – unfortunately, no longer existing – in *Kiyutin v. Russia* (application no. 2700/10) can serve as an example.[10] The case concerned a Russian law whereby residence permits could not be issued to HIV-positive foreign nationals. This restriction was based on public health concerns. In their *amicus curiae* submission, Interights pointed to the existing consensus among experts and international bodies working in the field of public health that measures such as those imposed by Russia were ineffective in preventing the spread of HIV. Interights further argued that

[10] See judgment of the European Court of Human Rights of 10 March 2011.

travel restrictions did not apply to leaving and returning Russian nationals or short-stay foreign tourists. Similarly, Interights referred to WHO and UNAIDS statements and the case-law of the Supreme Court of Canada to highlight the inconsistency and arbitrariness of the Russian authorities' argument that the restriction was designed to prevent excessive spending in the publicly funded health insurance system. As is well known from international public health practice, HIV-positive people who are unable to access appropriate information, treatment and prevention services are much more likely to transmit the infection to others than those who are officially registered with the healthcare system and receive adequate care and treatment.

Based on advanced medical expertise, the arguments presented in the *amicus curiae* submission informed the Court's judgment, which, in turn, led to systemic changes in the Russian law and practice implemented in compliance with the Court's judgment; this does not often take place in cases against Russia considered by the Court.

Success stories like this one exemplify, perhaps, the most effective use of *amicus curiae* briefs as a procedural tool.

(4) REFLECTIONS AND CONCLUSIONS

Initiating *amicus curiae* briefs can help NGOs advance their causes in many ways. First, such observations add weight to the legal discussion by reference to comparative law arguments, international legal standards and especially to technical data which the court may not have available to it (and the parties may have failed to provide). Such impartial advice can highlight certain new aspects of the matter and inform a judgment which is more weighted, balanced, substantiated and ultimately, more legitimate.

Secondly, the mere act of submitting *amicus curiae* comments offers an opportunity for NGOs to use the proceedings as an advocacy platform to promote their cause to a wider audience. This is especially true of observations filed with the European Court of Human Rights, because its proceedings and decisions are closely followed by European countries and because, unlike Russia's Constitutional Court, the ECtHR includes summaries of amicus curiae briefs in the published texts of its judgments.

Care must be taken, however, to distinguish expert observations provided in *amicus curiae* briefs from case presentations by parties hereto, e.g. by applicants to the Russian Constitutional Court or the European Court of Human Rights. An *amicus curiae* is a friend of the court – not a friend of a party to the case. No court will accept a third-party opinion which appears biased towards one side in a dispute. Therefore, the preparation and submission of *amicus curiae* briefs is no substitute for legal assistance provided by NGOs to individuals challenging their own or foreign governments in international courts. Admittedly, formal representatives of applicants in such proceedings have more opportunities to voice their position and defend their client – in the media and social networks, as well as in the courtroom – than *amici curiae* who need to remain impartial to avoid undermining the validity of their observations for the court, on the one hand, and who lack the procedural rights granted to parties and their representatives in the Russian Constitutional Court and in the European Court of Human Rights, on the other hand. In particular, these courts do not normally allow *amici curiae* to make oral statements or to answer questions during public hearings.

Suggestions have been made about using *amicus curiae* submissions for the so-called *strategic litigation*. Leaving aside the discussion of what "strategic litigation" is and how it is different from any other court proceedings, it should be noted that the subject matter of any complaint or question brought before the relevant court are always determined by the applicant. An *amicus curiae* has no possibility to raise any other issue in the proceedings unless it has already been raised by the applicant, but can only add a new argument or aspect to whatever subject matter is at stake. Therefore, one should not have excessive expectations of this tool or overestimate its weight in the proceedings.

That said, the *amicus curiae* approach certainly has potential. We would particularly recommend this tool to NGOs having the technical expertise or data which can help a court in deciding relevant cases. Such expertise and data may be either legal or non-legal. As part of relevant legal expertise, a third party may provide an overview of how a particular issue is treated in other legal systems, e.g. in advanced jurisdictions outside of Europe, such as Canada, India, New Zealand or South Africa, or in other international human rights systems, such as the United Nations, the Organization of American States or the African Union.

Other useful observations which *amici curiae* could contribute concern the context of the problem, such as the current law enforcement statistics which under Article 74 of the Federal Law on the

Constitutional Court of the Russian Federation must be taken into account by the court in its judgments.

In addition to legal arguments, pertinent technical information, e.g. medical, can be of particular value to the court. Professional lawyers working in court or representing parties in proceedings may or may not have sufficient technical expertise in other relevant areas. Thus *amici curiae* can play a valuable role by explaining any technical matters which the court must understand in resolving the legal dispute.

NGO cooperation in preparing *amicus curiae* briefs has great potential and can further evolve in at least two main areas. First, NGOs can share lessons learned and discuss issues among organisations working on similar problems, e.g. domestic violence, in different jurisdictions. Second, partnerships between human rights groups and NGOs working on non-legal but related issues can have enormous potential – e.g. between anti-torture organisations and mental health professionals with expertise in PTSD, or between groups monitoring places of detention and associations of criminologists.

Lawyers should never forget that they are expected to provide a service, and their expertise is not an end in itself. Taxpayers finance the legal mechanisms available, such as courts, not because they feature entertaining debates set in nice courtrooms – although in some cases such debates may have aesthetic and intellectual value – but because these mechanisms fill a social need and ultimately make people happier.

Legal arguments in and of themselves, disconnected from life's realities, tend to be overly formalistic, verbose and existing only to self-perpetuate, which can end up being a form of intellectual incest and an endless play of words moving round and round in a circle. In order to prevent a decline of the legal debate, it is important to enrich it with "voices from the ground" – *amicus curiae* observations from NGOs with first-hand knowledge of the actual situation with the problem brought before a high domestic or international court. Indeed, such courts often need "friends" to keep them from turning into "ivory towers" even more than NGOs need this advocacy platform to promote their cause by contributing *amicus curiae* observations.

That said, as noted above, this procedural tool has potential and can be effectively used by organisations to advance their goals and objectives.

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