

## IMPLEMENTATION OF THE JUDICIAL SYSTEM INVOLVING *AMICUS CURIAE* AS THE JUDGE'S CONSIDERATION IN PROVIDING DECISIONS IN EFFECTING THE PRINCIPLE OF PROPORTIONALITY

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### ABSTRACT

*Amicus curiae is a legal concept where a third party feels interested in a case by providing their legal opinion to the court. This interest is only in the form of providing an opinion in the realm of court and is only material for consideration by the Judge, thus allowing every citizen to provide their views and opinions on a case, however the practice of amicus curiae is not yet clearly regulated in Indonesian positive law. This type of research and approach is normative research using a normative juridical legal research approach. Based on the results of research that the position of the amicus curiae in the judicial system in Indonesia is a matter for consideration by the judge in determining a decision in the judiciary, until now, there is no clear legal regulation regarding the concrete involvement of the amicus curiae in the trial process of criminal cases in Indonesia . Legal regulations regarding amicus curiae are not merely to assist judges in obtaining information on factual truths, but can promote proportionality between the judicial system in enforcing law enforcement based on a balance between the interests of society, the interests of the state, the interests of the perpetrator and the interests of the victim.*

**Keywords :** *Judicial; Amicus Curiae; Judge's Considerations.*

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## INTRODUCTION

Indonesia is a country that adheres to the Continental European legal system or *Civil law* . Countries that adhere to *Civil Law* place the written Constitution at the highest level in the hierarchy of legislation and this is followed by other regulations that are below it.

*Civil law systems* are forms of legal sources in the formal sense in the *civil law legal system* in the form of statutory regulations, customs and jurisprudence. All *civil law* countries have a written constitution. The main characteristic that is the basis of the *Civil Law system* is that the law has binding force, because it is manifested in regulations in the form of laws and arranged systematically in codification.<sup>1</sup>

This basic characteristic is adopted considering that the main value which is the goal of law is legal certainty. Legal certainty can only be realized if human legal actions in social life are regulated by written legal regulations. With this legal aim and based on the legal system adopted, judges cannot freely create laws that have general binding force. Judges only function to establish and interpret regulations within the limits of its authority. A judge's decision in a case is only binding on the parties to the case (*Res Adjudicata Doctrine*).<sup>2</sup>

The second characteristic of the *Civil Law system* cannot be separated from the teaching of separation of powers which inspired the French Revolution. According to Paul Scolten, the real purpose of organizing the Dutch state organs is the separation between law-making power, judicial power and the cassation system, meaning that it is impossible for one power to interfere in the affairs of another power. Adherents of the *Civil Law system* provide great freedom for judges to decide cases without needing to follow the decisions of previous judges. What the judge relies on are the rules made by parliament, namely laws by parliament, namely laws.<sup>3</sup>

The third characteristic of the *Civil Law legal system* is what Lawrence Friedman calls the use of the Inquisitorial system in justice. In this system, judges have a large role in directing and deciding cases; The judge is active in finding facts and careful in assessing evidence. According to Friedman's observations, judges in the *Civil Law legal system* try to get a complete picture of the events he faced from the start. This system relies on the professionalism and honesty of judges.<sup>4</sup>

Criminal procedural law is a complement to criminal law or in other words criminal procedural law is often referred to as formal criminal law. According to Wirjono Prodjodikoro, procedural law is a series of regulations that contain how powerful government bodies or law enforcers, namely the police, prosecutors, judiciary and courts, must act to achieve state goals by enacting criminal law.<sup>5</sup>

Law enforcers include judges. When resolving a problem, the judiciary has independent authority, meaning that no other institution can interfere or influence Law

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<sup>1</sup>Fajar Nurhadianto. "Sistem Hukum dan Posisi Hukum Indonesia". *Dalam Jurnal Teropong Aspirasi Politik Islam*. Volume 11. Nomor . 2015. p. 4

<sup>2</sup> *Ibid.*, page 37

<sup>3</sup> *Ibid.*, page 37

<sup>4</sup> *Ibid.*, page 38

<sup>5</sup> H. Suyanto, 2018. *Hukum Acara Pidana*. Sidoarjo : Zivatama Jawara, pages 7-8.

Number 48 of 2009 concerning "Judicial Power is the power of an independent state to administer justice in order to upholding law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of implementing the rule of law of the Republic of Indonesia."

Mengenai penegakan hukum itu sendiri seyogyanya juga terdapat di dalam QS An-Nisa' Verse 135.

O you who have believed, be upholders of justice as witnesses to God, even against yourselves or the parents and the relatives. No, whether he is rich or if it is poor, God is more worthy of them both. So do not follow inclination lest you be just, even if you distort it or turn aside. Indeed, Allah is Aware of what you do  
Artinya :

*O people of faith, be true enforcers of justice, be witnesses for God even if it is against yourself or your parents and relatives. If he is rich or poor, then God knows best his benefits. So don't follow your lust because you want to deviate from the truth. And if you twist (words) or refuse to be a witness, then verily Allah is All-Knowing of all that you do."*

When a judge is faced with the situation of having to try a case that has no legal basis or the legal regulations are unclear, the judge may not refuse to try the case on the pretext that there is no law that regulates it, this is in accordance with Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, and in article 5 paragraph (1) it is stated that "judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society". When a case is unclear, it is the judge's obligation to clarify it by creating a new law that is as fair as possible. This is adjusted to the needs of the community through decisions. In the development of existing evidentiary mechanisms and evidence, *Amicus Curiae* is one of them.

In the last few years, the Indonesian judiciary has emerged called *Amicus Curiae*. *Amicus Curiae* is a legal concept that is not well known in Indonesia which adheres to the Civil Law legal system. Because the legal concept of *Amicus Curiae* is only practiced in the traditions of countries that adhere to the Common Law legal system. This concept originally came from the Roman legal tradition. *Amicus Curiae* or Friends of Court or known as friends of the court is an input from a person, group of people or organization which does not act as a party in the case but has an interest or interest in a case.<sup>6</sup>

*Amicus Curiae* is a Latin term which means "friends of the Court" or in Indonesia known as "Friends of the Court". *Amicus Curiae* is known as a third party

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<sup>6</sup>Dio Ashar Wicaksana, dkk. 2018, *Komentar Tertulis sebagai Amicus Curiae (Sahabat Pengadilan) Terhadap Perkara Nomor 1612/Pid.B/2018/PN.Mdn di pengadilan Negeri Medan, Bahan Pertimbangan Bagi Majelis Hakim*, Jakarta, Masyarakat Pemantau Peradilan Indonesia, page.5

who feels an interest in a case, by providing their legal opinion to the court. *Amicus Curiae* is only limited to providing opinions, and not fighting. The practice of *Amicus Curiae* is actually commonly used in countries that adhere to a *common law system* and not a *civil law system* as adopted by Indonesia, namely Article 5 paragraph (1) of Law Number 4 of 2009 concerning judicial power. This article is a reason for judges to know the strength of evidence. This article is a reason for judges to know the strength of evidence. And in article 14 paragraph (4) of Constitutional Court Regulation Number 06/PMK/2005 it is stated that the related parties with indirect interests are:<sup>7</sup>

- a. "Parties whose statements, due to their position, main duties and functions, need to be heard"
- b. "The party whose statement needs to be heard as *ad informandum* is the party whose rights and/or authority are not directly affected by the subject of the petition but because of their high concern for the petition in question."

Thus, the concept of *Amicus Curiae* has been intended by the Constitutional Court in its regulations.

*Amicus Curiae*, which is not well known in the legal system in Indonesia, especially in criminal procedural law, has recently been widely used in practice by institutions operating in the social and humanitarian sector to defend and provide explanations of the legal facts in a case. In practice, the explanation given by the *amicus curiae* is given in the form of a letter or in writing or usually called an Amicus Brief or it can also be done orally in court, however in practice what has happened so far is mostly given in the form of a letter/written (*Amicus Brief*).<sup>8</sup>

The practice of *Amicus Curiae* is starting to be discovered and applied in criminal justice in Indonesia. It is nothing new when a concept in the *common law system* enters the *civil law system* adopted in Indonesia. Because Indonesia has long adhered to several principles of the *common law system*, such as the principle of *presumption of innocence*, the practice of *Amicus Curiae* began to be used in various criminal cases, for example in the "Upi Asmaradana" case, the Time versus Soeharto magazine case and the Prita Mulyasari case. However, the practice of *Amicus Curiae* has not been clearly and definitely regulated in positive law in Indonesia, bearing in mind that Indonesia adheres to a *civil law legal system*.

*Amicus curiae* is one effort that can be used to restore victims' rights that have been violated and can provide and at the same time create a sense of justice in society. In this context, the judge can provide an opportunity for third parties who are

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<sup>7</sup> Nia Juniawati. 2018. "Kedudukan *Amicus Curiae* dalam penyelesaian tindak pidana pencemaran nama baik di pengadilan". *Skripsi*. Faculty of Law, Universitas Islam Indonesia.

<sup>8</sup>Siti Aminah. 2014. "*Menjadi Sahabat Pengadilan : Panduan Menyusun Amicus Brief*". Jakarta : ILRC-Hivos, page.11

not related to the parties involved in the case to provide opinions and obtain the widest possible information from the parties with an interest in a case being examined in court.<sup>9</sup>

Through this, it is hoped that by providing *Amicus Curiae* by other interested parties, judges can obtain new information of a scientific nature in looking at a case comprehensively. As in countries that adhere to the *common law legal system*, such as the United States and several other European countries. Article 37 paragraph 1 of the Law on Courts also regulates the importance of managing special and new information from independent third parties, which information is in accordance with the needs of the court to form a judge in deciding a case.<sup>10</sup>

## METHOD

This type of research and approach is normative research using a normative juridical legal research approach. Normative legal research is also called doctrinal legal research, where law is conceptualized as what is written in statutory regulations (*law in books*), and research on legal systematics can be carried out on statutory regulations or written law. The nature of the research used is descriptive analysis, which means, this research explains what is true about a legal event or legal condition. By using a normative juridical approach that describes systematically so that conclusions can be drawn from the overall research results. The data obtained in this research was from secondary data using data collection tools in the form of library research *which* was carried out through literature searches at the Muhammadiyah University of North Sumatra Library and other universities through literature searches. In this case, the writer will study and explore written objects such as legal books, documents, scientific journals, statutory regulations and so on.

## DISCUSSION

### History Amicus Curiae In The Judicial System In Indonesia

The emergence of *Amicus Curiae* in Indonesia in recent years, on the one hand, has had a positive impact on judges in court, where the participation of *Amicus Curiae* helps courts, especially judges, in examining and adjudicating and handing down decisions on cases. And on the other hand, the existence of *Amicus Curiae* also provides control over the judicial process. When the judge examining the case has deviated from the existing rules, *the Amicus Curiae* that is submitted is very helpful to set things straight again.

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<sup>9</sup>Ridha Wahyuni dkk. "Optimalisasi Kewenangan *Amicus Curiae* Komnas HAM Dalam Proses Pemeriksaan Perkara di Pengadilan Berdimensi Hak Asasi Manusia" *dalam Jurnal UNES LAW RIVIEW*. Volume 5. Nomor 1. Tahun 2022 page 6.

<sup>10</sup> *Ibid.*, page 6

However, on the other hand, the existence of *Amicus Curiae* also has a negative impact in the context of judges' freedom. In the world of justice, there is a principle known as "Judicial power is independent power". This means that no influence from outside the court is permitted. Even though in practice *the Amicus Curiae's* position is not as an outside party to the court, but rather entering into a case being examined by the court through the defendant's legal advisor, this can psychologically influence the judge. For this reason, the existence of *Amicus Curiae* is actually not good for judges' freedom in enforcing the law, because it could be misused by certain groups to influence judges.

Regarding when *the Amicus Curiae* gives his opinion in court, basically there are no rules governing this matter. However, when *the Amicus Curiae* gives its opinion in court, it can be during the examination of mitigating evidence from the defendant and it can also be during the plea, depending on the form of opinion given by the *Amicus Curiae*. When *the Amicus Curiae* gives his opinion orally, *the Amicus Curiae's* opinion can be conveyed when examining mitigating evidence from the defendant. However, when *Amicus Curiae* gives his opinion in writing ( letter ), the letter written by *Amicus Curiae* is submitted during the plea process through the defendant's legal advisor.

Participation in *the Amicus Curiae* is extensively recorded in *the All England Report*. From this report we know several descriptions related to *Amicus Curiae*:<sup>11</sup>

1. The main function of *amicus curiae* is to clarify factual issues, explain legal issues and represent certain groups;
2. *Amicus Curiae*, concerned with facts and legal issues and representing certain groups;
3. *Amicus Curiae*, not related to the plaintiff or defendant, but has an interest in a case;
4. Permission to participate as *amicus curiae*.

Since the beginning of the 20th century, in the United States, *Amicus Curiae* has played an important role in civil rights cases, in fact, in more than 90 percent of cases that go to the Supreme Court, the *amici(s)* have participated in the trial process. The same idea is then used in international legal proceedings, especially in cases relating to human rights. Recently, the institutionalization of the role of "friend of the court" has also been regulated by countries with *civil law systems* <sup>12</sup>.

Initially, people filed *Amicus Curiae* for:

- a. To support the arguments previously made by the parties involved in the case,
- b. Shows new arguments in cases that have not been introduced before,

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<sup>11</sup> Siti Aminah. 2014. *Menjadi Sahabat Pengadilan Panduan Menyusun Amicus Brief*. The Indonesian Legal Resource Center (ILRC) : South Jakarta

<sup>12</sup> *Ibid* ., page 12

- c. Showing the court the consequences of a particular decision. For example, court decisions can have social, political, legal or economic impacts.

In the State Administrative Court process, third parties in the form of individuals or civil legal entities who are outside the litigants can intervene in the case examination process. The entry of this third party (intervention) is regulated in article 83 of Law No. 5 of 1986 by means of.<sup>13</sup>

1. Own willingness to defend or defend his rights and interests so that he is not harmed by a court decision in an ongoing dispute;
2. Due to the request of one of the parties (plaintiff or defendant);
3. At the initiative of the judge who examined the case.

Likewise, in a law review trial at the Constitutional Court (MK) in its procedural law there is a provision that a third party who has a direct or indirect interest in the subject of the petition can register and provide an opinion in a review of a law submitted by another person. The "indirectly interested parties" involved in the Constitutional Court hearing are no different from *the Amicus Curiae* who was present and had their statements heard at the hearing.<sup>14</sup>

Article 14 of Constitutional Court regulation number 06/PMK/2005 defines related parties with indirect interests as *parties whose statements, because of their position, main duties and functions, need to be heard* or *parties whose statements need to be heard as ad informandum, namely parties who have the right and or his authority is not directly affected by the subject matter of the application but is due to his high concern for the application in question*<sup>15</sup>

Thus, it can be said that the concept of *Amicus Curiae* has been partially adopted in the procedural law of the State Administrative Court and the judicial review at the Constitutional Court. However, for *Amicus Curiae* in the form of providing written statements (*amicus brief*) independently, so far there are no regulations governing this. However, providing an *amicus brief* (written comments) for academics is very important, based on the following reasons<sup>16</sup>:

1. To participate in realizing a democratic rule of law,
2. Maintaining the law enforcement process and encouraging judges to continue to update their knowledge
3. Maintain academic freedom, by exploring knowledge and opinions as widely as possible, without interests and attachments to parties involved in the dispute;
4. Efficiency, because someone does not need to set aside a special time to come to court.

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<sup>13</sup> *Ibid.*, page 14

<sup>14</sup> *Ibid.*, page 15

<sup>15</sup> *Ibid.*, page 15

<sup>16</sup> *Ibid.*, page 19

Basically, an *amicus brief* can be in the form of a short statement about one argument or discussion about a certain point, which can be stated in the form of a paper, article or freelance writing, but can be justified academically. So there is no standard standard for writing an *amicus brief*.<sup>17</sup>

### **The Position of *Amicus Curiae* in the Judicial System in Indonesia**

Indonesia is a country that adheres to a legal state system, every life of society in the nation and state is bound by the existence of law, based on the norms and values of justice. The purpose of law is to bind and provide boundaries and prosperity for its citizens through its legal products. The Criminal Code is an extension of the Criminal Code, which is one part of the legal products that apply in Indonesia, which is then enforced by criminal justice and is also regulated in the Criminal Procedure Code (KUHAP).<sup>18</sup>

In criminal justice in Indonesia, evidence in a practical setting is very important to test the truth or legal facts which are essential in determining the criminal responsibility of a defendant. The fate of a defendant in a court trial is determined by the evidence which is used as a guide in the trial.

Equipment in a legal country that is assigned to establish the actual legal relationship between the two parties involved in the dispute or conflict earlier. The duty of a judge or court is to determine the law or law in a special way or to apply the law or law, to determine what is "law" between the two parties concerned. In the dispute that took place in front of the judge, each side put forward arguments (Latin "posita") that contradict each other. The judge should examine and determine which arguments are true and which arguments are not true.<sup>19</sup>

Based on the position of the case which is determined to be the real one, the judge in his ruling or "diktun" decides who wins and who loses. In carrying out the examination, the judge must pay attention to the rules regarding evidence which constitute the law of evidence. Legal uncertainty "*recutsonzakerheid*" and arbitrariness "willekkeur" will arise if judges, in carrying out their duties, are allowed to rely their decisions on their beliefs, even if they are very strong and very pure. The judge's belief must be based on something that the law calls "evidence".<sup>20</sup>

The provisions for valid evidence contained in article 184 of the Criminal Procedure Code paragraph 1 state that: valid evidence is

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<sup>17</sup> *Ibid* ., pages 22-26

<sup>18</sup> Dewa Gede Edi Praditha "Posisi *Amicus Cureae* Dalam Tata Peradilan Indonesia" dalam *Jurnal Ilmiah Multidisipline* Vol.1 No.5 Juni 2023.

<sup>19</sup> Mhd. Teguh Syuhada Lubus. 2021. *Hukum Pembuktian dalam Peradilan Di Indonesia*. Medan : Pustaka Prima.

<sup>20</sup> *Ibid* ., page 26



1. Witness Statement
2. Expert Statement
3. Letter
4. Instruction
5. Defendant's statement

These provisions then become the basis for the judge's consideration in determining the decisions that will become the judge's arguments for determining the sentence for the defendant. The judge's belief is bound by the existence of evidence and the results of the evidence that appear in court, because evidence is everything related to an act. The judge's belief is presumably equivalent to the evidence.<sup>21</sup>

*common law* legal system, such as the principle of *presumption of innocence*, so it is natural for the practice of *Amicus Curiae* to be used in existing criminal cases. *Amicus Curiae* is a legal consequence of the democracy adopted by Indonesia. The participation of every citizen in law enforcement is realized in the form of *Amicus Curiae*.<sup>22</sup>

*Amicus Curiae* or commonly known as *Friends of court* is input from individuals or organizations who do not act as parties to the case but have special interests or concerns regarding a legal event. Judges in Indonesia position *Amicus Curiae* only as another point of view to be used as material for consideration but cannot intervene in anything, because *Amicus Curiae* does not act as a litigant. Several countries that have recognized and provided clear portions to *the Amicus Curiae*, especially those related to human rights crimes, always consider and pay attention to the opinions of *the Amicus Curiae* and always relate to social interests. There are 3 categories of *Amicus Curiae*<sup>23</sup>:

1. Apply for permission to become an interested party in the judicial process.
2. Provide opinions on the Judge's orders
3. Providing information or opinions on their own matters.

In the judicial process, the judge's decision cannot be based on emotions, but must always be related to the existence of evidence, because it will influence the decision whether the charges are appropriate or not for the crime committed, these decisions will put a person's human rights at risk. So there are legal sources of evidence, including legislation, doctrine, jurisprudence.<sup>24</sup>

Based on the provisions of valid evidence stated in article 184 paragraph 1 of the Criminal Procedure Code, it includes witness statements, expert statements,

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<sup>21</sup>Dewa Gede Edi Praditha, *Op. Cit.*, page 2

<sup>22</sup> Sukinta "Konsep dan Praktik Pelaksanaan *Amicus Curiae* dalam Sistem Peradilan Pidana Indonesia" dalam *Jurnal Administrative Law & Governance* Vol.4 No.1 Maret 2021.

<sup>23</sup>Dewa Gede Edi Praditha, *Op. Cit.*, page 3

<sup>24</sup> *Ibid.*, page 3

letters, instructions and statements from the defendant. We can conclude that *Amicus Curiae* is not included in the legally regulated evidence. However, in practice, *Amicus Curiae* has been carried out several times in several cases.

When carrying out his considerations, the judge exercises his authority by providing considerations that are carried out wisely. Judges are assumed to always know everything about the law, when the judge doesn't know it is the judge's job to find out first. *Amicus Curiae's* interest is limited to providing opinions or legal opinions. *Amicus Curiae* is not mentioned in the evidence in the Criminal Procedure Code. Because the power of proof lies in Article 183 of the Criminal Procedure Code. According to this article, a judge who decides on a case is prohibited from imposing a crime without a basis based on a minimum of two valid pieces of evidence plus a belief based on that evidence. 13 Legal pieces of evidence are regulated in Article 184 paragraph (1) of the Criminal Procedure Code, namely<sup>25</sup>:

#### 1. Witness Statement

Witness testimony is the most important piece of evidence in the examination of criminal cases. Almost all evidence in criminal cases is always based on the examination of witnesses. 14 Article 1 point 27 of the Criminal Procedure Code, explains that witness testimony is one of the pieces of evidence in a criminal case in the form of a witness's statement regarding a criminal event that he heard, saw, experienced himself by stating the reasons for his knowledge ( *testimonium de auditu*). Regarding who is referred to as a witness, Article 1 point 26 of the Criminal Procedure Code states that a person can provide information for the purposes of investigation, prosecution and trial regarding a criminal case that he has heard, seen and personally experienced. In order for witness testimony to be considered as evidence, the statement must be stated in court. This is in accordance with Article 185 paragraph (1). Information stated outside the court is not evidence, and is not used to prove the defendant's guilt. Article 185 paragraph (2) the testimony of a witness alone is not enough to prove the defendant's guilt (*unus testis nullus testis*).<sup>26</sup>

#### 2. Member Statement

According to Article 1 point 28 of the Criminal Procedure Code, expert testimony is information given by a person who has special expertise regarding matters needed to shed light on a criminal case, for the purposes of examination. According to Karim A. Nasution, the definition of expert does not necessarily refer to someone who has received special education or someone who has a certain

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<sup>25</sup>Linda Ayu Pralampita. "Kedudukan Amicus Curiae Dalam Sistem Peradilan Di Indonesia" dalam jurnal *Lex Renaissance* Vol.5 No.3 Juli 2020.

<sup>26</sup> *Ibid.*, page 10

diploma, but every person who according to criminal procedural law can be appointed as an expert, as long as they are considered to have special knowledge and experience regarding a matter, or has a lot of knowledge and experience regarding this matter. 16 Expert testimony is general in nature in the form of an opinion on the subject matter of the case being heard or related to the subject matter of the case. Experts are not permitted to provide assessments on concrete cases that are being tried. Therefore, questions to experts are usually in the nature of hypotheses or general statements, and experts are not permitted to provide an assessment of whether the defendant is guilty or not based on the trial facts presented to him.<sup>27</sup>

3. Letter

As stipulated in Article 186 of the Criminal Procedure Code, namely a letter made on an oath of office, or a letter made with an oath. It is considered a valuable document as evidence, namely, an official report which provides information about events or conditions heard, seen or experienced, accompanied by clear and unequivocal reasons for the statement. A letter in the form of statutory provisions made by an authorized official. Expert certificate, and/or other letters of an official nature. From a formal perspective, the evidentiary value of a letter is perfect evidence, from a material aspect it has binding force and the judge is free to make an assessment of the substance of the letter, with the principle of the judge's belief and the principle of the minimum limit<sup>28</sup> of proof .

4. Instruction

Indicative evidence is evidence that is different from other evidence. The indicative evidence is not examined in court, because the indicative evidence does not have a concrete form or it could be said that the indicative evidence is in an abstract form. As intended in Article 188 paragraph (1) of the Criminal Procedure Code, indicative evidence is an act, event or situation which, because of their correspondence, either with one another or with the criminal act itself, indicates that a criminal act has occurred and who the perpetrator is.<sup>29</sup>

5. The Defendant's Statement The defendant's statement of evidence is the last item in Article 184 paragraph (1). This last placement is the reason used to place the process of examining the defendant's statement to be carried out later after examining the witness' statement. The defendant's statement is what the defendant

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<sup>27</sup> *Ibid.*, page 11

<sup>28</sup> *Ibid.*, page 12

<sup>29</sup> *Ibid.*, page 12

stated in the trial about the actions he committed or that he personally knew about or experienced.<sup>30</sup>

*Amicus Curiae* also cannot be said to be a witness or expert witness, because *Amicus Curiae* is something new in criminal justice, but in practice it has been applied in several cases in Indonesian justice. *Amicus Curiae* cannot be said to be a witness because in Article 1 point 26 of the Criminal Procedure Code, a witness is a person who can provide information for the purposes of investigation, prosecution and justice regarding a criminal case that he himself heard, saw for himself and experienced for himself. while *the Amicus Curiae* is a person who feels an interest because it is to clarify factual issues, explain existing legal issues and represent certain groups, it is not explained that the *Amicus Curiae* must be a person who sees, hears or experiences it himself.<sup>31</sup>

*Amicus Curiae* can be carried out by anyone who has permission from the panel of judges and is allowed to express their opinion, if the aim of the *Amicus Curiae* is to help the court in the form of thoughts, presentation of facts, or opinions and analogies in law and other scientific fields. Indonesia has not used too much proportionality for the existence of *Amicus Curiae*. The judiciary under the Supreme Court also does not yet have regulations regarding *Amicus Curiae*, but it is stated in the Judiciary Law number 48 of 2009, in article 5 paragraph (1) that it reads, "Constitutional Judges and Justices are obliged to follow and understand legal values and a living sense of justice in society" this is reinforced by the existence of article 14 of the Constitutional Court regulation number 06/PMK/2005 which states that parties who are indirectly related are "Parties whose statements, main duties and functions need to be heard" or "parties whose statements are heard as *ad informandum* , namely a party whose rights and/authorities are not directly affected by the subject of the petition but because of their concern for the petition in question." From this regulation, the concept of *Amicus Curiae* appears to be adopted in this regulation, however, the existence of *Amicus Curiae* is not explained in depth in this regulation.<sup>32</sup>

The Indonesian judiciary under the Supreme Court does not have regulations regarding *Amicus Curiae*, however the legal basis for the crime of *Amicus Curiae* is based on article 180 of the Criminal Code, consisting of 4 paragraphs which read;<sup>33</sup>

- 1) In the event that it is necessary to clarify a problem that has arisen in court, the presiding judge at the trial can ask for expert information and can also ask for new material to be submitted by interested parties;

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<sup>30</sup> *Ibid.*, page 12

<sup>31</sup> *Ibid.*, page 12

<sup>32</sup> *Ibid.*., page 4

<sup>33</sup>Sukinta, Op.cit., page 91

- 2) In the event that a reasonable objection arises from the defendant or legal advisor to the results of the expert testimony as intended in paragraph (1), the judge orders that the matter be re-examined;
- 3) The judge, because of his position, can order a re-examination as stated in paragraph (2).
- 4) The re-examination as mentioned in paragraph (2) and paragraph (3) is carried out by the original agency with a different personnel composition and another agency that has the authority to do so.

In paragraph (1) it is stated "the presiding judge at the trial can ask for expert information and can also ask for new material to be submitted by interested parties." This sentence indirectly refers to the concept of *Amicus Curiae*. Therefore, it can be said that the concept of *Amicus Curiae* has been used in the criminal justice system in Indonesia even though it is not specifically institutionalized. Currently, there are no regulations regarding *Amicus Curiae* specifically in Indonesia.<sup>34</sup>

Referring to the above, it can be seen that *Amicus Curiae* is accepted by judges as a form of community participation in a case which is part of a form of supervision by the community regarding ongoing law enforcement so that it can be said that *Amicus Curiae* is accepted by judges as a form of community participation in a case. Even though the existence of *Amicus Curiae* is not institutionalized and clearly stated that it exists, functionally *Amicus Curiae* has been implemented by Indonesian courts.<sup>35</sup>

Based on the explanation above, it can be concluded that the existence of the position of *Amicus Curiae in the judiciary* in Indonesia is taken into consideration by judges in determining a decision in the judiciary . a basic element that is institutionalized as the main part of the criminal court, and is only used as material for the judge's consideration, *Amicus Curiae* is only a form of public participation as another party who feels an interest in providing an opinion, not providing resistance or legal intervention.

Therefore, the author feels that it is important to provide legal certainty and the existence of law in the application of *Amicus Curiae* in the Indonesian judicial system , this will guarantee and legal certainty in enforcement and providing opinions in positioning and providing criteria for the use of *Amicus Curiae* in the system. Indonesian judiciary.

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<sup>34</sup> *Ibid.*, page 4

<sup>35</sup> *Ibid.*, page 4

**a. WRITING STRUCTURE**

The following writing structure, which developed in Indonesia, is as follows:

**I. Title Page “[Title]”****WRITTEN STATEMENT**

[Name]

As a Friend of the Court/ *Amicus Curiae*

or Related Parties with Indirect Interest

In Case [Case Number and Title]

[ one paragraph summary of information or quotation from  
conclusion ]

[ City name , date and year]

**II. IDENTITY AND INTERESTS OF RELATED PARTIES**

- Name, brief personal history and/or organizational background.
- Interest or concern for the case.
- Reasons for information need to be accepted and considered.
- Mailing address or contact number.

**III. SUMMARY OF OPINIONS/INFORMATION**

- One page summary of all opinions/information  
Given

**IV. OPINION/REMARKS**

- A. Introduction]
- B. [Discussion]
- C. [Conclusion]

**V. BIBLIOGRAPHY****VI. ATTACHMENT**

- Statistics.
- Letters, Documents.
- Scrapbook.
- And others

## b. EXAMPLE OF A COVER LETTER

b. CONTOH SURAT PENGANTAR

Kepada Yang Terhormat,  
Majelis Hakim  
Pemeriksa Perkara  
[Nomor dan Judul]  
[Nama Pengadilan tempat perkara diperiksa]

Dengan hormat,  
Saya yang bertandatangan di bawah ini, [nama], dengan ini memohon perkenanan Majelis hakim untuk menerima keterangan yang saya ajukan secara tertulis, serta mempertimbangkannya dalam memeriksa dan memutus perkara [Nomor dan Judul Perkara]. Keterangan ini saya ajukan sebagai "Sahabat Pengadilan" ("*Amicus Curiae*"/"Friend of the Court") atau Pihak Terkait Yang Berkepentingan Tidak Langsung.

Tulisan ini saya persiapkan untuk memberikan informasi dan hasil kajian akademis terhadap pokok permasalahan dalam kasus yang sedang diperiksa. Melalui tulisan terlampir, saya berpendapat bahwa:

1. [alasan]
2. [alasan]
3. [alasan]

Berdasarkan alasan-alasan tersebut diatas, saya berharap keterangan tertulis ini dapat diterima dan dipertimbangkan Majelis dalam mempertimbang dan memutus perkara dimaksud.

[Nama Kota], [tanggal] [Bulan dan Tahun]  
Hormat kami,

[tanda tangan]  
[nama]

## c. Delivery

The amicus brief is printed on letterhead paper (if organization), and sent with a signed Cover Letter to the address of the court in question. For example, for an amicus brief to the Constitutional Court, send it to:

Dear,

**Panel of Constitutional Judges Examining Judicial Cases [Case Number and Title].**

Constitutional Court of the Republic of Indonesia

Jalan Medan Merdeka Barat Number 6

Central Jakarta 10110

*Amicus Briefs* can be sent directly to the Constitutional Court or via registered delivery service. Amici(s) can provide their amicus brief to the parties or the general public.

Any legal profession ultimately culminates in court through the hands of judges as God's representatives in the world who judge, examine and decide cases that concern the future fate of humans (litigants). In relation to law enforcement, it is strongly influenced by the paradigm and/or approach to law, whether positivistic, post-positivistic or a religiosity-based legal approach. Legal science which is carried

out through law enforcement in practice is dominated by the application of positive laws, namely a series of text norms that are wrapped in in a regulation or concrete law.<sup>36</sup>

*Amicus Curiae* , which provides its legal opinion in the form of *an amicus brief* , is a form of legal argumentation in the form of writing which will later be presented at trial. Therefore, *Amicus Curiae* can be used as new material for consideration by judges when giving court decisions.

Court decisions are likened to the work of a judge's science. Because it can be said to be a scientific work, the legal arguments put forward by the judge are very important. From legal arguments, the quality of a judge can be assessed for professionalism, accountability and integrity as a judge. Legal argumentation is also a reflection of a judge ( juris ) to what extent he knows or masters the law of the 24 Transcendental Laws; Legal Argumentation Using Religious Norms themselves. So jurists must have a legal argument that makes sense or is in accordance with the rules and is rational. The reality in the field is that there are times when jurists who are experts in arguments take their arguments in confusing directions for their personal or group interests. In several recent cases, the weak legal arguments of the judges were not due to weak intellect, but were more often influenced by external factors which damaged the independence and independence of the judges.<sup>37</sup>

It is not easy to find justice, because everyone's perception of justice is different. A decision that the judge considers to be fair will not necessarily be fair to the parties involved in the case or to the community. In addition, there is no single agreed definition of justice. Lord Denning, a British Supreme Court judge, once said that "*Justice is not something you can see. It is not temporal but eternal. How does a man know what is justice. It is not the product of his intellect but of his spirit .*"

Recently, due to the development of democratic law in Indonesia, many individuals or independent legal institutions want *Amicus Curiae* to be implemented according to legal regulations, because recently the practice of *Amicus Curiae* or Friends of the Court has been implemented in several cases.

Criminal Law Lecturer at the Jentera Indonesian Law College (STHI Jentera) Miko Susanto Ginting said that *Amicus Curiae* initially developed in common law countries . Over time, *Amicus Curiae* has also begun to be adopted in civil law countries and international courts or tribunals, such as dispute settlement at the WTO, international arbitration and the International Criminal Court (ICC). "*Amicus Curiae* is not a formal mechanism within the Indonesian judiciary, but it encourages the

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<sup>36</sup>Nasrullah Ompu Bana. 2018. *HUKUM TRANSDENTAL Pengembangan dan Penegakan Hukum di Indonesia*. Bantul-Yogyakarta: GENTA Publishing

<sup>37</sup>Badwan dan Farkhani, 2017. *HUKUM TRANSENDENTAL; ARGUMENTASI HUKUM MENGGUNAKAN NORMANORMA AGAMA DI PENGADILAN NEGERI PURWOREJO*. Salatiga : LP2M-Press. page 24



judiciary to address social needs and these social needs need to be owned by the judiciary," said Miko in an online Legal Webinar Discussion entitled "The Future of Amicus Curiae in the Legal System in Indonesia ", Thursday (9/4/2020).<sup>38</sup>

He quoted Collins' opinion, the aim of *Amicus Curiae* is to provide an alternative legal position on a case, factual information and knowledge of an issue, as well as a perspective on the policy implications of the judge's decision. Because, he said, the court's *Amicus Curiae* not only examines and decides cases , but is expected to be able to resolve social problems.

"In the judicial context, *Amicus Curiae* can balance the positions of the parties (*equality of arms*) including the public interest and encourage the quality of court decisions, especially the support of empirical information. "This needs to be supported by a strong jurisprudential system so that it becomes a precedent, but unfortunately there is currently no jurisprudence where the judge's considerations use input from the *Amicus Curiae* ," he explained.<sup>39</sup>

In fact, he saw that in several countries or international courts, *Amicus Curiae* could not only be submitted by individuals or groups, but also countries (Koichi Mera and GAHT-US Corporation vs City of Glendale (2017). Miko admitted that the rules regarding *Amicus Curiae* were not regulated implicitly. However, if we look at the Law on Judicial Power, "judges are obliged to explore, follow and understand legal values and the sense of justice that lives in society."<sup>40</sup>

Even so, it doesn't matter if *Amicus Curiae* is not specifically regulated in statutory regulations. However, he asked that this *Amicus Curiae* not be prohibited. "Because the legal issues in court are not purely matters of the case itself, but also involve social issues, that is where the position of *Amicus Curiae* is present. Therefore, don't prohibit it," he asked. "So, to regulate *Amicus Curiae*, you must first look at the results of studies and research conducted on *Amicus Curiae* . If it is possible to regulate the regulations, you need to improve the regulations, so you need to look again at the conception in the formation of statutory regulations, namely what is the background, objectives, targets and impacts," he said. Tongam<sup>41</sup>.

"Will it be institutionalized, but of course it requires more mechanisms and procedures, or will it only be shown to support trials or later bind judges. It needs to be studied further, by looking at the relationship between *Amicus Curiae* and other

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<sup>38</sup>Aida Mardatillah. "Mendorong Pelembagaan Amicus Curiae dalam Sistem Hukum Indonesia" <https://www.hukumonline.com/berita/a/mendorong-pelembagaan-amicus-curiae-dalam-sistem-hukum-indonesia-lt5e943879e2606/?page=1>. 2020. (accessed 24 August 2023)

<sup>39</sup> *Ibid*

<sup>40</sup> *Ibid*

<sup>41</sup> *Ibid*

laws. "So, it's not only seen from desire, but also the need for urgency whether or not it is included in the regulations," he said.<sup>42</sup>

*Amicus Curiae* was adopted from the *common law legal system*, and is currently being practiced in Indonesia. In Indonesia, the judicial system does not or does not have specific regulations regarding *Amicus Curiae*, but it still adheres to the provisions of Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power. The KUHAP is narrowly interpreted and also gives limited recognition to community involvement, namely in Article 180 paragraph (1). Because *the Amicus Curiae* cannot be said to be valid evidence, *the Amicus Curiae* can be used as a consideration by the judge, so *the Amicus Curiae* is a rock in the judiciary in Indonesia which does not yet have a standard form, because there are no clear and specific regulations, the position of *the Amicus Curiae* is also not as a witness statement or expert witness, because *Amicus Curiae* is more about public participation whose opinions are accepted and can be considered by the judge.<sup>43</sup>

Therefore, there must be rules both materially and formally in a statutory regulation to regulate *Amicus Curiae*. It is also hoped that the government will play a greater role in dealing with current developments, because *Amicus Curiae* can be a mechanism used for strategies in clarifying the principles of a Democratic State.<sup>44</sup>

## CONCLUSION

The position of the *Amicus Curiae* in the judicial system in Indonesia is as material for consideration by the judge in determining a decision in the judiciary. In the statutory regulations relating to judicial power and the Criminal Procedure Code, the existence of the *Amicus Curiae* is mentioned *but* it is not recorded as a basic element that is institutionalized as the main part. criminal court, *Amicus curiae* is only a form of community participation as other parties who feel an interest in providing opinions, not providing resistance or legal intervention.

In the judicial context, *Amicus Curiae* can balance the positions of the parties (*equality of arms*) including the public interest and encourage the quality of court decisions, especially the support of empirical information. This needs to be supported by a strong jurisprudential system in order to become a precedent, but unfortunately there is currently no jurisprudence whose judge's considerations use input from *amicus curiae*.

The position of *Amicus Curiae* in the judicial system in Indonesia, the author feels that it is important to provide legal certainty and the existence of law in the application of *amicus curiae* in the Indonesian judicial system, this will guarantee and legal

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<sup>42</sup> *Ibid*

<sup>43</sup> Linda Ayu Pralampita, Op.Cit., page 13

<sup>44</sup> *Ibid.*, page 13

certainty in enforcing and providing opinions in positioning and provides criteria for the use of *amicus curiae* in the Indonesian judiciary.

The importance of implementing *Amicus Curiae* as a judge's consideration in making decisions in the judicial system in Indonesia in upholding the principle of proportionality. The author sees that the aim of *Amicus Curiae* is to assist the court in the form of thoughts, presentation of facts, or opinions and analogies in law and other scientific fields. Indonesia has not used too much proportion for the existence of this *Amicus Curiae*. Therefore, to obtain the truth about an event that occurred requires a systematic activity process using appropriate and rational measures and thinking. The legal regulation of *Amicus Curiae* is not merely to assist judges in obtaining information on factual truths, but can promote proportionality between the judicial system in law enforcement based on a balance between the interests of society, the interests of the state, the interests of the perpetrator and the interests of the victim.

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