A Discourse on Amicus Curiae Participation in the Jurisprudence of the Supreme Court of Nigeria

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Abstract

Amicus curiae participation is an established practice in the Nigerian legal system yet there is a paucity of research on its influence in judicial decision making within Nigeria. This paper explores the legal provisions that provide a basis for amicus curiae participation at the Supreme Court of Nigeria; the practice at the Court and the influence of amicus curiae briefs on the jurisprudence of the Court. The article adopts the doctrinal method of research. Proceeding from a review of relevant literature it utilises keyword searches in law reports and other legal repositories to identify Supreme Court cases in which amicus curiae participated. The cases are analysed for the contributions of amici. Over a period of fifty years (1971 - 2021) we identified ten cases in which amici curiae filed briefs and participated. This suggests a low incidence of amicus curiae participation at the Supreme Court. Findings from the research are that the Supreme Court adopts the traditional mode of amicus curiae; participation of amici has influenced the jurisprudence of the Court and has contributed to the Supreme Court overruling itself. The practice of the Supreme Court is to invite eminent senior legal practitioners when it considers itself to be in need of assistance. Only rarely have amici appeared on their own application. The Attorney General of the Federation (representing the Executive Branch) is the most frequent amicus curiae. The paper concludes with suggestions for further research.

Key words: Amicus curiae, Supreme Court, Jurisprudence, Judiciary

1. Introduction

The influence of *amicus curiae* participation in judicial decision-making has been the subject of study in a number of texts.[1] *Amicus*

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curiae briefs have played a role in developing the jurisprudence of appellate courts in the USA and South Africa.[2] *Amicus curiae* participation in judicial proceedings in Nigeria is established and the filing of *amicus curiae* briefs in proceedings before the Supreme Court of Nigeria has been a recognised practice for over five decades; yet there is paucity of research on its usage within Nigeria and its influence on judicial decision-making. Its incidence at the Supreme Court remains relatively low and the device underutilized.

It is apparent that the courts recognize the utility of *amicus curiae* participation; in some cases the courts invite *amicus curiae* to assist it. There are Rules of Court that permit and/or encourage the filing of *amicus* briefs. In Nigeria the Fundamental Rights (Enforcement Procedure) Rules 2009, made by the Chief Justice of Nigeria, endorses *amicus curiae* participation.[3] This, and the fact that no such provisions existed in its predecessor rules, the 1979 FREP Rules, suggest that recognition of the utility of the amicus curiae device has increased and its usage in judicial proceedings in Nigeria is on the rise particularly in the realm of fundamental rights.

While this may be the case at the lower courts, there is the need to examine how *amicus curiae* participation has fared at the Supreme Court, the form it has taken and what role, if any, it has played in developing the jurisprudence of the Court. Thus the aim of this paper is to examine *amicus curiae* participation at the Supreme Court and how it has influenced judicial decision making at the Court.

This paper adopts the doctrinal method in answering these questions raised herein. Proceeding from a review of the literature, it examines *amicus curiae* participation before the Supreme Court of Nigeria in the last five decades. Key word searches in digital law reports yield decisions of the Supreme Court in which *amicus curiae* briefs were filed. It highlights the role played by *amici*, including the manner in which they influenced the decisions of the Court; the

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1 J.D. Kearney and T.W. Merill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' 148 *University of Pennsylvania Law Review* (2000) Rev. 743, 744-847; Samuel Krislov, 'The Amicus Curiae Brief. From Friendship to Advocacy', (1963) 72 *Yale Law Journal*, 697-704.

2 J.C. Mubangizi and C. Mbazira, Constructing the Amicus Curiae procedure in human rights litigation: What can Uganda learn from South Africa? *Law, Democracy and Development*, vol. 16 (2012), 199 – 218; J.D. Kearney and T.W. Merill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' 148 University of Pennsylvania Law Review Rev. 743 (2000) 744-847.

3 Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP Rules 2009). Order XIII Rule 2 provides that "*amici curiae* may be encouraged in human rights applications and may be heard at any time if the Court's business allows it".

disposition of the Court towards *amicus curiae* participation and other lessons that may be learnt. The paper concludes with findings and suggestions for further research.

2. The Meaning of Amicus Curiae

Amicus curiae, (which literally means "friend of the court") is used to refer to a group or person that interposes in a judicial proceeding, upon judicial request or permission, for the purpose of providing the court advice or information on matters of law or public interest.[4] He is one who, although not a party to litigation, participates by making suggestions and ensuring complete presentation of fact and issues.[5] This is normally done by means of filing a written brief or, less commonly, through oral arguments and representations. *Osborn's Concise Law Dictionary*[6] defined *amicus curiae* as, "A friend of the Court. One who calls the attention of the Court to some point of law or fact, which would appear to have been overlooked; usually a member of the Bar."

Ferguson, J. in *Grice v. Queen*[7] defined *amicus curiae* as:

> … [A] bystander, usually a lawyer, who interposes and volunteers information upon some matter of law in regard to which the Judge is doubtful or mistaken, or upon a matter of which the court may take judicial cognisance. He is one whom as a stander by, where a Judge is doubtful or mistaken in a matter of law, may inform the Court. In its ordinary use the term implies a friendly intervention of counsel to remind the Court of some matter of law which has escaped its notice and in regard to which it is in danger of going wrong.[8]

The varying academic and judicial definitions of *amicus curiae* is due, in part, to the fact that the device has developed historically in different ways from country to country and is understood and employed in different ways depending on the jurisdiction. Some countries retain the traditional concept where *amicus* is expected to

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4 M.K. Lowman, The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave? 41 *The American University Law Review*, 1243.

5 Ibid.

6 R. Bird (ed.) *Osborn's Concise Law Dictionary* 7th ed. (Sweet and Maxwell 1983). P.25

7 (1957) 11 DLR (2d) 699.

8 Ibid., 702. This definition was adopted by Ogundare JSC in *Atake v. Afejuku* (1994) 9 NWLR (Pt. 368) 379 at 411, para. D.

be disinterested and merely there to assist the court; while in other countries the *amicus* may have a strong interest in the subject matter of the suit. In some jurisdictions *amicus curiae* participation is largely by the invitation of the court while in some jurisdictions no such invitation is needed and the vast majority of *amicus* briefs are unsolicited.

The origin of the concept is steeped in antiquity and has been traced to Roman law and Medieval England.[9] The *amici curiae* under Roman law were judicially appointed attorneys or jurists, who advise and assisted the court in the disposition of cases and they performed these duties by providing nonbinding opinions on points of law with which the court was unfamiliar. This practice was accepted in the English Common Law Courts where the *amicus curiae*, additionally, encompassed disinterested bystanders who, at the courts' request or permission, informed the court on points of law.[10] A traditional function of an *amicus* was preserving the courts' honour by avoiding error.[11] In addition to this role, the *amicus curiae* is now utilised as a device for representing inadequately recognized interests under the adversarial system.[12]

The practice of *amicus curiae* is common in Common Law jurisdictions and is increasingly accepted in International Law, particularly in the area of international human rights adjudication.[13] *Amicus curiae* participation was widespread in England by the seventeenth and eighteenth century and utilized in the United States

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9 For studies of the history of amicus curiae, see: S.C. Mohan, The Amicus Curiae: Friends No More? *Singapore Journal of Legal Studies* (2010), (2), 352-374. Research Collection School of Law. Accessed 13 March 2021 at https://ink.library.smu.edu.sg/sol/research/975; Ernest Angell, The Amicus Curiae: American Development of English Institutions, (1967) 16 *International & Comparative Law Quarterly* 1017, 1017; F.M. Covey, Amicus Curiae: Friend of the Court, (1959) 9 *DePaul L. Rev.* 30.

10 M.K. Lowman, n.4 1248

11 Ibid.

12 M.K. Lowman, n.4 pp. 1249 -1250; Samuel Krislov, 'The Amicus Curiae Brief. From Friendship to Advocacy', (1963) 72 *Yale Law Journal*, 697-704, p. 696.

13 The ECOWAS Community Court recently admitted two groups of Nongovernmental Organisations as *amici curiae* in a suit instituted before it challenging the decision of the Nigerian government to ban Twitter. Lesi Nwisagbo, 'Twitter Ban: ECOWAS Court merges four suits against FG', *The Punch* (Lagos, 9 July 2021) <https://punchng.com/ twitter-ban-ecowas-court-merges-four-suits-against-fg/%3famp> accessed 12 August 2021. See also Dinah Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, [1994] 88 *AJIL* 611, 614; S. Charnovitz, 'Nongovernmental Organizations and International Law', [2006]100 *AJIL* 348.

of America as early as 1790.[14] In the United Kingdom, the intervention of *amicus curiae*, in most cases required an invitation from the Court. In the United States, *amicus curiae* participation has witnessed a shift from the late eighteenth century and early nineteenth century where most cases of participation were by the invitation of the court to the present situation where the vast majority of *amicus* briefs are by application of interested persons or groups. USA, Canada and South Africa have rules governing the filing of *amicus curiae* briefs.[15]

The traditional characterization of *amici* as impartial and detached from litigation is no longer universally valid as it is now recognized in several jurisdictions that *amici curiae* may have an interest in ongoing litigation and may, in fact, be supportive of one of the parties. In the US, for example, the concept is now utilised as an alternative platform for partisan advocacy by interest groups who are barred from litigation by traditional rules of standing.[16] In Canada, *amici* are required to have an interest in the litigation and to have useful and novel submissions.[17] *Amicus curiae* practice has evolved into a tool for protecting the interest of the public as well as means of representing third-party interests potentially affected by ongoing litigation.[18] This shift is reflected in the *Black's Law Dictionary*[19] definition of *amicus curiae* as "someone who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the

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14 Stuart Banner, 'The Myth of the Neutral Amicus: American Courts and Their Friends, 1790-1890', (2003) 20 *Const. Commentary* 111, 119. Cited in L. Johnson and N. Amerasinghe, *Protecting the Public Interest in International Dispute Settlement: The Amicus Curiae Phenomenon* (Centre for International Environmental Law 2009).

15 See US Supreme Court Rules 2019, Rule 37 <https://www.supremecourt.gov/ctrules/2019RulesoftheCourt.pdf> (Accessed 21 July 2021); Rules of the Supreme Court of Canada, SOR/2002-156, Rule 92. https://canlii.ca/t/54wjn (Accessed 21 July 2021); Constitutional Court of South Africa, Court Rules, Rule 10. <concourt.org.za/index.php/about-us/rules-of-the-court (Accessed 21 July 2021).

16 L. Johnson and N. Amerasinghe, Protecting the Public Interest in International Dispute Settlement: The Amicus Curiae Phenomenon (Centre for International Environmental Law 2009). M.K. Lowman, 'The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?' *The American University Law Review* [Vol. 41:1243; Samuel Krislov, 'The Amicus Curiae Brief. From Friendship to Advocacy', (1963)72 *Yale Law Journal* 694, 697-704.

17 L. Johnson and N. Amerasinghe, op. cit. 11.

18 Samuel Krislov, n.13 at 720

19 B.A. Garner *et al* (eds.) *Black's Law Dictionary*, 11th edition (Thomson Reuters 2019).

subject matter."[20] The role of an *amicus curiae* and the scope of his participation will normally depend on the rules of court applicable in the particular jurisdiction or the Court in which the filing of an *amicus* brief has been allowed. Where there are no specific rules, the practice of the court and judicial discretion will come into play.

3. Amicus Curiae in Nigerian Courts

It is not certain when the practice of *amicus curiae* began in the English styled law courts of Nigeria. Considering the overwhelming influence of the English legal system and the dominance of UK-trained legal practitioners in colonial Nigeria,[21] it can be argued that the *amicus curiae* practice, like many other Common Law practices and procedure, was imported into Nigeria in the colonial era. The recognition and acceptance of the practice in Nigeria was highlighted by the Supreme Court in *Atake v. Afejuku*[22] where Ogundare JSC stated (in relation to *amicus curiae*):

> Every court has an inherent power to invite barristers and/or solicitors of considerable experience to appear before it to assist in the proper administration of justice when important issues of law or fact are being considered. A legal practitioner so invited, gives his views of law in a dispassionate manner. He does not act for any of the parties but is in court to assist the Bench in unravelling intricate questions of law it is faced with. The invitation to legal practitioners is understandable for after all, they are equally officers of the Court and owe a duty not to mislead the court but to assist it in ensuring that justice is done.[23]

He further stated:

> In practice, the Court allows a person whether a member of the Bar not engaged in the case or any other bystander, who calls the attention of the court to some

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20 The Black Law Dictionary's characterisation of the amici as someone who has a strong interest in the subject matter of the case is not surprising as it is mostly edited by Americans and published in the USA where the amicus device has assumed broad dimensions and has been compared to lobbying.

21 J.O. Fabunmi and A.O. Popoola, 'Legal Education in Nigeria: Problems and Prospects,' [1990] 23(1) *Law and Politics in Africa, Asia and Latin America*, 34-55.

22 (1994) 9 NWLR (Pt. 368) 379.

23 Ibid., at 411.

> decision, whether reported or unreported. A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae brief are commonly filed in appeals concerning matters of a broad public interest; e.g. civil rights case. Such may be filed by private persons or the government.[24] (emphasis supplied)

Ogundare's dictum captures both the *amicus curiae* who appears by the invitation of the court and *amicus* who intervenes and is granted leave by the court to appear. It also captures the *amicus* who is disinterested and impartial as well as one who has a strong interest in the subject matter of an action.

In Nigeria, *amici* commonly appear at all levels of the federal and state judicial system, from Magistrate and District Courts to the Supreme Court. Participation of *amicus curiae* is encouraged in actions for the enforcement of fundamental rights.[25] The practice, although not expressly mentioned, is recognised by implication in the Rules of Court.[26] The focus of this paper is *amicus curiae* practice at the Supreme Court.

In spite of their appearance at the Supreme Court, the court is yet to make detailed rules relating to *amicus curiae* participation or the means by which *amici* can apply for permission to file an *amicus* brief. The only clear instance where *amicus curiae* participation can be implied is in Order 5 Rule 4 Sub-Rule (1) of the Supreme Court Rules which provides for cases involving the validity or constitutionality of federal or state laws. The Attorney General of the Federation (AGF) is entitled to appear as of right in cases involving the validity or constitutionality of a law within the competence of the Federal Government; and the Attorney General of the State (in which the law in question is in force) is entitled to appear as of right where the case involves the validity or constitutionality of a law within the competence of a State.[27]

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24 Ibid., at 410 -411.

25 Fundamental Rights (Enforcement Procedure) Rules 2009, Order 13 Rule 2. See Introduction

26 Supreme Court Rules Order 5 Rule 4, Court of Appeal Rules Order 5 Rule 4. *Amicus curiae* participation in the context stated in the Rules is with specific reference to the Attorneys General.

27 Supreme Court Rules Order 5 Rule 4.

Order 5 Rule 4 Sub-Rule (2) provides that where the AGF or the Attorney-General of a state is not entitled to appear as of right under Order 5 rule 4 sub-rule (1), the Court may of its own motion or otherwise, grant leave to either of them to appear personally or by a legal practitioner for the purpose of presenting arguments to the Court on the case. Thus, *amicus curiae* participation by the AGF and Attorneys-General of states is recognized and encouraged in cases involving questions on the constitutionality of federal and/or state laws as well as in other important constitutional issues.[28]

4. Instances of Amicus Participation before the Nigerian Supreme Court

The Supreme Court is the highest court in the hierarchy of the judicature in Nigeria and its decisions, which are final, are binding on all other courts in Nigeria.[29] It possesses, in addition to the general powers of a court conferred on it under Section 6 of the Constitution[30], original and appellate jurisdiction. Its original jurisdiction, which is to the exclusion of all other courts, is in disputes between the Federation and a State or between States where the dispute involves any questions (whether of law or fact) on which the existence or extent of a legal right depends.[31] It exercises appellate jurisdiction over decisions of the Court of Appeal.[32] In the exercise of its original and appellate jurisdiction, the Supreme Court often has to embark on interpretation of the Constitution and statutes. By the operation of the doctrine of *stare decisis*, its decisions constitute Case Law. Its jurisprudence also influences the growth and development of the law in Nigeria.[33]

From the foregoing it is apparent that *amicus curiae* submissions that influence the decisions of the court contribute indirectly to the growth and development of the law. *Amicus curiae* participation has been viewed positively and negatively. On the positive side, it aids

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28 The Court of Appeal Rules, Order 5 Rule 4 are *in pari materia* to Order 5 Rule 4 of the Supreme Court Rules.

29 Constitution of the Federal Republic of Nigeria 1999 (CFRN 1999) (as amended), ss 230 and 235.

30 CFRN 1999 (as amended).

31 Ibid., s 232 (1).

32 Ibid., s 233

33 For instance, the constitutional amendment of 2011 to include the National Industrial Court in the list of Superior Courts of record in section 6(5) of the CFRN 1999 (as amended) was a product of the decision of the Supreme Court in *Nigerian Union of Electricity Employees v. Bureau of Public Enterprises* (2010) 7 NWLR (Pt.1194) 538.

the court in producing higher quality and more thorough decisions based on the particular expertise and perspectives of *amici*. This is evidenced by the court appreciating the submissions of learned *amici*; and referring to their submissions in the reasons for its decision. It helps in some cases to protect the interest of the public; aids parties in the presentation of their cases; and affords interested parties the opportunity to be heard (albeit to a limited degree) when concepts such as *locus standi* would have prevented them from participating in the case.[34] On the other hand *amicus curiae* participation may be a means of circumventing procedural rules to include non-parties;[35] it increases the workload of the courts who may want to take such briefs into consideration.[36] It may also increase the workload of the parties who may want to respond to such briefs.

Amicus briefs can have an impact on the Court's decision-making by influencing the outcomes reached by the Court or by influencing the rationales used by the Court in justifying its decisions.[37] An indicator of the influence an *amicus* brief has on the court can be seen in the manner in which the court cites it in arriving at its decision; where, for example, the lead judgment draws extensively from the argument(s) and authorities set forth in the brief. This section examines Supreme Court cases in which *amici curiae* appeared in order to provide a picture of the role they played, the trend at the court and lessons that may be learnt.[38]

Jamal Steel Structures v. African Continental Bank[39] dealt with the jurisdiction of the Federal Revenue Court (now Federal High Court) to hear cases on banking operations. The case that gave rise to the appeal involved ordinary banker-customer relationship. The Attorney General of the Federation applied and was granted leave to address the court as *amicus curiae*. His construction of the Federal

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34 L. Johnson and N. Amerasinghe, Protecting the Public Interest in International Dispute Settlement: The Amicus Curiae Phenomenon, op cit., 6.

35 See the USA case of *Florida v. Georgia* 58 US (17 How.) 478 (1954) where the Attorney General of the USA, who by rules of procedure was precluded from appearing, was admitted as amicus curiae. The case is discussed in S. Krislov, 'The Amicus Curiae Brief. From Friendship to Advocacy', (1963) 72 *Yale Law Journal*, 697-704 at 702.

36 J.D. Kearney and T.W. Merill, op. cit. 746

37 J.D. Kearney and T.W. Merill, op. cit. 744-847

38 The cases discussed are not intended to be a comprehensive analysis of the judicial decisions highlighted but simply focus on the role played by amicus curiae in all of them.

39 (1973) 1 NSCC 619.

Revenue Court Decree in his submissions was that all disputes of whatever nature relating to banking are within the exclusive jurisdiction of the Federal Revenue Court and therefore the High Court of the State lacked jurisdiction. The Supreme Court rejected this construction and held that where any dispute relates to breach of or non-compliance with certain formalities required by law for the lawful operations of banking business, it is a matter for the Federal Revenue Court because it involves a Government measure and the Government is a necessary party. However, where it is a dispute between a bank and one or more of its customers in the ordinary course of banking business or transactions, as in the instant case, the State High Court is competent to entertain the case.[40]

Ifezue v. Mbadugha,[41] dealt with the interpretation of *Section 258 (1) of the 1979 Constitution* on delivery of judgment, specifically the constitutionally required timeframe within which the judgment of a court is to be delivered and the effect of delay in delivering the judgment. Chief FRA Williams SAN appeared by leave of the court as *amicus curiae*. His submissions, although forceful, failed to sway the majority of justices as they rejected his liberal interpretation of the Constitutional provision in issue and instead adopted a strict literal interpretation holding *inter alia* that the provisions of section 258(1) are mandatory rather than directory and that a judgment delivered outside of the constitutionally stipulated time is a nullity. The apex court also based its decision on the rule of interpretation in *Heydon's case* (the Mischief Rule).[42] It is instructive to note that the dissenting judgment of Bello JSC (as he then was)[43] was obviously influenced by the submissions put forth by the learned *amicus*. This illustrates how arguments by *amicus* could provide material for a dissenting judgment.[44]

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40 Ibid, p. 628 paras 10 - 15.

41 (1984) 1 NSCC 314.

42 The Court alluded to the historical antecedents of s 258 (1) of the 1979 Constitution including the inordinate delay by some judges in delivering judgments, a matter of public concern, which was addressed by the Constitution Drafting Committee in section 258 (1). "The 'mischief' aimed at was clearly against delays in the delivery of judgments after the conclusion of hearing of cases, by the courts." Per Aniagolu JSC, p. 326 para 20.

43 (supra) p. 332 – 339.

44 This precedent was upheld in the case of *Odi v Osafile* (1985. 1 NWLR (Pt. 1) 17. The hardship this strict literal interpretation worked occasioned a moderation of the said provision by way of legislation: the Constitution (Suspension and Modification) Decree). The legal effect of non-compliance with the stipulated time frame in s 294 (1) of the 1999 Constitution, *in pari materia* with s 258 (1) of the 1979 Constitution, is now moderated by the insertion of sub section 5 of

Attorney General Ogun State v. Aberuagba,[45] examined the taxing powers of the Federation and of the states under the 1979 Constitution. In recognition of the law and practice of inviting the Attorney General of the Federation and the Attorneys-General of states as *amici curiae* in cases involving questions on the constitutional validity of a federal or state legislation, Bello JSC (as he then was) stated:

> As the appeal raised very important constitutional issues concerning the Federal and State's taxing powers, we invited all the Attorneys-General in the Federation as amici curiae to file briefs of argument on the issues and to appear for oral argument at the hearing. The Attorney-General of the Federation and the Attorneys- General of ten States responded to the invitation … In parenthesis, I should like to express my appreciation for the assistance given to the Court by learned counsel for the parties and learned amici curiae.[46]

This comment demonstrates the use of the *amicus* device in a suit whose outcome would have far reaching implications on public revenue and the practice of federalism. Nine of the *amici curiae* associated themselves with the appellant's brief (on the legislative competence of the state government to enact laws imposing sales taxes contending that it was a residuary matter) and two *amici* briefs were on the side of the respondents. While the briefs in the main were repetitions of the submissions of both parties, some amplified the arguments and advanced additional arguments and perspectives not contained in the appellant's and respondent's briefs.[47] Allowing the appeal in part, the court held *inter alia* that every state in Nigeria has legislative competence to impose tax on all matters in the Concurrent List and Residuary matters including sales tax but such laws must avoid the exclusive competence or inconsistency rules. That since the sales tax imposed by s 3(1) of the Ogun state Sales

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section 294 which reads: "The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof".

45 (1985)1 NSCC 487.

46 Ibid, 495.

47 Supra p. 496 - 498. Item 61(e) is *in pari materia* with Item 62 (e) in the 1999 Constitution (as amended).

Tax Law is on taxable goods brought into the state and payable by a retailer to the wholesaler at the time of purchasing from him, it is not an excise duty within the meaning of item 15 of the Exclusive List and therefore not invalid for breaching that item. However subsection (1) and (4)(ii) of section 3 of the law are unconstitutional and invalid in so far as they discriminate against goods from another state or from abroad and thus relate to interstate or international trade and commerce; and also for infringement of item 61(e) to the extent that they imposed tax on goods already price controlled by the Federal Government.[48]

In *Bello and others v. Attorney General of Oyo State*,[49] one Nasiru Bello had been convicted of the offence of armed robbery and was sentenced to death by the High Court. He appealed to the Federal Court of Appeal and a copy of the Notice of Appeal was served on the Attorney-General of Oyo State. While the appeal was pending, the Attorney-General recommended the execution of Bello to the Governor. Following Bello's premature execution, his dependents instituted a suit at the High Court of Oyo State. The case went on appeal to the Supreme Court. Bello JSC (as he then was), in delivering the lead judgment, provided the rationale for the invitation of *amici curiae*:

> "Because of the constitutional issue involved in the appeal and its great public importance, the Court invited all the Attorneys-General in the Federation to file briefs and appear before the court and address it as amici curiae. In all the Attorney-General of the Federation and 12 States Attorneys-General responded to the invitation."[50]

Even though the *amici* agreed on the unconstitutionality of the execution of the deceased while his appeal was still pending, they were however divided on whether or not the claim was actionable under the Torts Law. Seven out of thirteen *amici*, submitted that the Court of Appeal had erred in law in holding that the Appellant's claim did not disclose any cause of action and also in holding that the pleadings were incurably defective as they did not comply with many provisions of the Torts Law. They argued that the pleadings, in spite of its shortcomings, disclosed sufficient facts to bring the claim

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48 Supra p. 498, 511 – 512.
49 (1986) 2 NSCC 1257.
50 Ibid, p. 1264 para. 25.

within the provisions of the Torts Law. Referring to the definition of "fault" under section 2 of the Torts Law, they further submitted that whether the unconstitutional execution of the deceased may be regarded as "illegal", "unlawful" or "wrongful" is a distinction without a difference as the pleadings and the evidence show clearly the death was caused by the Respondent's "fault" within the meaning of section 2. Furthermore, they drew the attention of the Court to the provisions of Sections 3 and 4 of the Torts Law which set out the elements required to be pleaded and proved in a claim under the Law. Learned *amici* contended that by their pleadings and evidence the Appellants had substantially complied with the essential elements of the Law and they urged the court to allow the appeal by doing substantial justice devoid of legal technicalities.[51]

Six of the learned *amici* aligned themselves with the respondent in arguing that the appeal should fail, although for divergent reasons ranging from: inapplicability of the Torts Law due to purported non-compliance with the provisions of the law and inadequacy of pleadings, among others; failure to prove negligence; failure to bring the claim in the name of the executor or administrator of the deceased and non-justiciability of the matter.[52]

The court held *inter alia* that the execution was an infringement of the deceased's constitutional right to life and the right to prosecute his appeal and accordingly, was wrongful as well as illegal. It agreed that the apparent distinction in the meanings of the words "illegal" and "wrongful" is not significant in so far as the Torts Law is concerned. This is because by virtue of the express provisions of section 3 of the Law any death caused is actionable under the Law.

In holding that the pleadings and evidence of the Plaintiffs/Appellants satisfied the requirements for a claim under the Torts Law, Bello JSC (as he then was) cited with approval Eso, JSC in *State v. Gwonto & 4 Others* (1983) 1 SCNLR 142 at 160 wherein he stated: "The Court has for some time now laid down as a guiding principle that it is more interested in substance than in mere form. Justice can only be done if the substance at the matter is examined. Reliance on technicalities leads to injustice." He went on to hold that a right of stay of execution must be inferred from the provisions of the constitutional rights of appeal of the convict and the appellate jurisdictions of the Court of Appeal and of the Supreme Court under sections 219, 220 and 213 of the Constitution.

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51 Ibid, pp. 1268 – 1269.
52 Ibid, p. 1269.

The role that *amici* played is reflected in the reasons for the decision (which aligned with the submissions of *amici* highlighted above) and further acknowledged in the lead judgment thus:

> I would only express my appreciation for the commendable effort made by the learned amici in research and industry to assist the Court for the determination of this very important question of law. The effort of the learned amici was not in vain. The Court has been immensely benefited by it.[53]

Savannah Bank v. Ajilo[54] examined the status and legal effect of a deemed Right of Occupancy under the Land Use Act, 1978[55] and whether or not the Governor's consent is mandatory for its alienation. Prof. A. B. Kasunmu SAN appeared as *amicus curiae* on his own application.[56] His brief was unique for delving into the historical background of the Land Use Act and the different land tenure systems in the northern and southern parts of Nigeria prior to the enactment of the Land Use Act, including how the Act had changed that position and unified the land law of the north and south.[57] The reference to this important background information in the lead judgment illustrates how an *amicus* brief can enrich the discourse of the apex court as well as supply facts that a party may have left out.

Stanley Egboghonome v. The State[58] was an appeal that raised a very important question of law in the administration of criminal justice and so the apex court extended an invitation to amici curiae, namely all the Attorneys-General and some eminent Senior Advocates of Nigeria, to address the court on the question. The question was whether or not a principle of law known as the inconsistency rule was to be applied to extra-judicial confessions of an accused person which were inconsistent with his testimony. In *R. v. Golder*,[59] Lord Parker C.J. restated the Common Law inconsistency rule thus:

> In the judgment of this court, when a witness is shown to have made previous statements inconsistent with that

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53 Ibid, p. 1275, per Mohammmed Bello JSC (as he then was).
54 (1989) 1 NSCC 135
55 Cap L5 LFN 2004.
56 Ibid., p. 145, para. 30.
57 Ibid, p. 147.
58 (1993) 7 NWLR (Pt. 306) 383.
59 (1960) 3 All ER at p.459

> given by that witness at the trial, the Jury should not merely he directed that the evidence given at the trial should be regarded as unreliable: they should also be directed that the previous statements whether sworn or unsworn, do not constitute evidence upon which they can act.[60]

The Supreme Court adopted the rule in Nigeria and, in some cases, applied the inconsistency rule to extra-judicial statements and confessions of an accused person. In *Oladejo v. State*,[61] Nnamani, J.S.C. (applying the principle) stated it as follows: "Where a witness (here an accused person) makes a statement which is inconsistent with his testimony, such testimony is to be treated as unreliable while the statement is not regarded as evidence upon which the court can act."[62] In *Asanya v. State*[63] the apex court adopted and applied the same principle and declined an invitation of counsel to depart from the decision in *Oladejo v. State*[64] and to overrule the cases in which the principle had been applied to the extra judicial confession of an accused person, where inconsistent with his testimony at his trial.

The issue of whether the decision in *Oladejo* and *Asanya* was good law and should be followed or overruled again surfaced in *Egboghonome v The State*, thus the invitation to *amici*. The *amici curiae* (unanimously) made forceful submissions to the effect that the inconsistency rule should not be extended to cover extra-judicial statements (including confessions) of accused persons and that the apex court should overrule its decisions in *Oladejo's case* and *Asanya's case*.

The Supreme Court agreed with the amici and noted, *inter alia*,

> Learned counsel for the appellant in Asanya's case had contended that the decision in Oladejo's case was per incuriam and invited the full court to overrule it. The court did not accede to his invitation but it approved the decision and followed it. *We did not have then the advantage of the forceful submissions of the learned amici. Having regard to the plethora of the authorities on the matter, I am now convinced that the decision of*

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60 Ibid.
61 (1987) 3 NWLR (Pt.61) 419.
62 Ibid. at 427.
63 (1991) 3 NWLR (Pt.180) 422 at 451.
64 (Supra)

> *the court in Oladejo's case was made per incuriam and the court erred in law in adopting it in Asanya's case*.[65] (italics supplied for emphasis)

The court went on to hold:

> It is trite law that this court will depart from or overrule its previous decision if the decision was made per incuriam or its application to future cases will perpetuate injustice….. The application of the rule in R. v. Golder to retracted confessions will *(sic)* tantamount to overruling by implication all the relevant decisions of this court from *Udo v. State in 1964* to *Kim v. State in 1992*. In my considered view, grave miscarriage of justice would also be occasioned by the extension. It may perpetuate injustice to the society as murderers would be at large simply because after a second thought, they have retracted their confessions. It would also negate the provision of section 27 of the Evidence Act which reads: "27. (1) A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. (2) Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only." Moreover, the extension would occasion grave injustice to the accused as it would result to depriving him of the right to due consideration of his defence. For the fore going reasons, I conclude that the decisions in Oladejo and Asanya should be overruled and are hereby overruled.[66]

An appraisal of the decision reveals that the submissions of the *amici* were reflected in the reasons for the decision. They addressed the court on the history and trajectory of the application of the Rule in R v. Golder[67] in Nigeria as well as the implications to the society and the criminal justice system were the rule to be extended to extra-judicial confessions of an accused person. The host of authorities in the submissions added valuable information and enriched the discourse as evidenced by their Lordships, Mohammed CJN, Karibi

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65 Supra.
66 Per Bello CJN.
67 (1960) 3 All ER at 459.

Whyte JSC and Olatawura JSC specifically commending the quality of the briefs submitted and acknowledging the contribution of the *amici* in resolving the issue.

In *Adisa v. Oyinwola*,[68] the Supreme Court considered the extent and scope of the jurisdiction of the High Court of the State under the Land Use Act (LUA)[69], particularly whether it extends to land in the non-urban area. Upon the invitation of Counsel for the Supreme Court to overrule its earlier decisions in *Sadikwu v. Dalori*[70] and *Oyeniran v. Egbetola*[71], (on the court vested with jurisdiction to entertain cases on lands subject to Customary Right of Occupancy) the court invited the Attorney General of the Federation and a number of senior counsels as *amici curiae* to assist the court. The lead judgment explained the circumstances that necessitated the invitation of amici, as follows:

> In one or two cases which will be presently considered, this Court decided that exclusive jurisdiction to try proceedings in respect of customary rights of occupancy is vested pursuant to Section 41 of the Land Use Act… in the Area Court, Customary Courts or courts of equivalent jurisdiction in a state. Since the question has arisen in this case whether this Court should depart from those decisions, Counsel, drawn in such a manner as to reflect a wide range of opinion, have been invited to address the court on this issue as *amici curiae*. It is right, at the outset, to acknowledge and put on record the learning and industry that the *amici curiae* have demonstrated in the *amici curiae* briefs which have been of much assistance in the determination of this issue[72].

After submissions of Counsel for the parties and *amici*, the apex court preserved the decision in *Sadikwu v. Dalori*[73], on the ground *inter alia* that it was distinguishable from the instant case having been decided based on different laws. It overruled and departed from the decision in *Oyeniran v. Egbetola*[74] on grounds that the decision

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68 (2000) 6 SCNJ 290.
69 Cap. L5 LFN 2004
70 (1996) 4 SCNJ 20; (1996) 5 NWLR (Part
71 (1997) 5 NWLR (Pt. 504)
72 (Supra) p. 303 paras 5 – 10 per Ayoola JSC.
73 (Supra). This case originated from an action commenced before the commencement of the 1979 Constitution.
74 (Supra)

was given without regard to Section 236(1) of the 1979 Constitution (which vested unlimited jurisdiction on the High Court of the state) and it was given in reliance on the decision in *Sadikwu v Dalori* (which was distinguishable). The Court held that the provisions of Section 236(1) of the 1979 Constitution did not permit the jurisdiction of the High Court of a State to be limited other than as the Constitution itself may have provided.[75] It further held that there was no express exclusion of jurisdiction (of the High Court of a State) in Section 41 of the LUA. The role of the *amici curiae* in the case was crucial as they stressed the import of the unlimited jurisdiction conferred on the High Court of the State by the 1979 Constitution.

Onuoha Kalu v. The State,[76] dealt *inter alia* with the constitutionality of the death penalty in Nigeria. Iguh JSC, in the lead judgment, observed that:

> In view of the constitutional importance of the question posed under Issue 2 in this appeal and the far reaching effect the decision of this Court thereupon would have in our criminal jurisprudence throughout the entire country, a number of senior and eminent learned Counsel were invited by this Court as *amici curiae* to address the court on the questions raised. Following this invitation, Alhaji Abdullahi Ibrahim, SAN and learned Attorney-General of the Federation, C. O. Akpamgbo Esq. SAN, Dr llochi A. Okafor SAN, Chief F. O. Akinrele SAN and A. B. Mahmoud Esq of learned Counsel filed very useful and thought provoking briefs of argument.
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> I think I should at this stage express profound gratitude to these learned gentlemen of both the inner and outer bar for the scholarly presentation of both their briefs of argument and oral submissions before this Court as *amici curiae*. Their respective briefs were comprehensive, stimulating and clearly impressive.[77]

The Court upheld the constitutionality of the death penalty in Nigeria. It also held that the appellant's arraignment complied with the requirements of Section 215 of the Criminal Procedure Law of Lagos state and that a close scrutiny of the record showed that the

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75 (Supra) p. 314 para 10.
76 (1998) 12 SCNJ 1.
77 Ibid., at 17, paras. 5-15.

appellant fully understood the nature and extent of the charge as he was fully conversant with the English language.

The submissions in the *amici* briefs were that: the right to life in section 30(1) of the 1979 Constitution is a qualified right; in determining whether a conflict exists between sections 30 and 31 of the Constitution the interpretation that would serve the interest of the Constitution and carry out its object and purpose should be preferred; relevant provisions of the Constitution should be read together and not disjointedly; and sections 213(2)(d) and 220(1)(e) are other sections of the Constitution that recognize the death penalty. They cited a plethora of foreign authorities to argue that the view of the death penalty as cruel, inhuman, degrading and unconstitutional is a minority view and that even in the USA, the US Supreme Court has ruled that the death penalty is not unconstitutional. They submitted additionally that the abrogation of the death penalty was not the responsibility of the court but that of the legislature. On the issue of whether or not the arraignment complied with the requirements of the law, the *amici* were evenly split.[78]

The crucial role played by the *amici curiae* is reflected in the fact that, not only did Iguh JSC, Uwais CJN, Wali JSC, Kutigi JSC and Ogundare JSC take time to express appreciation to them and acknowledge their assistance to the court,[79] their submissions were carefully analysed and reflected in the judgment of the court, in some cases quoted verbatim:

> The truth is learned Senior Advocate is approaching the wrong forum. As Dr Okafor, SAN, rightly puts it in his brief:-
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> "7.5. Abolition of the death penalty by whatever canon or interpretation inspired by whatever humanitarian considerations, would be a flagrant incursion by the judiciary into the domain of the legislature and would stretch judicial creativity beyond bounds."[80]

Attorney General of the Federation v. Attorney General of Ondo state[81] involved the constitutional validity of the Corrupt Practices

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78 Ibid.
79 Ibid, pp. 17, 50, 56, 69.
80 Ibid, p. 74, para. 30 per Ogundare JSC.
81 (2002) 6 SCNJ 1.

and Other Related Offences Act (Corrupt Practices Act)[82] and the Independent Corrupt Practices and Other Related Offences Commission (ICPC) and its application to the states. One of the main issues for the Court's determination was whether or not the Corrupt Practices Act enacted by the National Assembly pursuant to sections 4(2), 13 and 15[83] and item 60 (a) on the Exclusive Legislative List[84] of the 1999 Constitution was valid and in force in every state of the Federal Republic of Nigeria (including Ondo State).

The SC invited Prof B.O. Nwabueze SAN, Chief Afe Babalola SAN and Olisa Agbakoba SAN as *amici curiae* and they each filed briefs of argument. The court unanimously held that the directive principles could be made justiciable by legislation, in this case the Corrupt Practices Act, the court stated as follows:

> Since the subject of promoting and enforcing the observance of the Directive Principles of State Policy in Chapter II of the 1999 Constitution comes under the Exclusive Legislative List it seems to me that the provisions of item 68 of the exclusive legislative list come into play. Therefore, it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy. Hence the enactment of the Act which contains provisions in respect of both the establishment and regulation of ICPC and the authority for the ICPC to enforce the observance of the provisions of section 15 subsection (5) of the constitution. To hold otherwise is to render the provisions of item 60(a) idle and leave the ICPC with no authority whatsoever. This cannot have been the intendment of the Constitution.[85]

The statement of Uwaifo JSC in this regard is illuminating as to the role played by an *amicus*:

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82 No. 5 of 2000 (Corrupt Practices Act). This Act was later repealed and replaced by the Corrupt Practices and Other Related Offences Act (No 6 of 2003) Cap C31 LFN 2004, s 55.

83 Section 15 of the Constitution provides that the State shall abolish all corrupt practices and abuse of power.

84 Item 60 (a) on the Exclusive Legislative List provides for '[T]he establishment and regulation of authorities for the Federation or any part thereof [t]o promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution'.

85 Supra, p. 38 paras. 10 - 25.

> … the directive principles (or some of them) can be made justiciable by legislation. This is the point Chief Babalola seemed to have elaborated upon when he said that the Fundamental Objectives and Directive Principles had laid dormant in our Constitution since 1979 and that the Act was the first effort to activate just one aspect of them in order that there may be good and transparent government throughout the Federation of Nigeria.[86]

The court affirmed the constitutionality of the Corrupt Practices Act while striking down sections 26 (3) and 35 of the Act as unconstitutional.[87] It preferred the submissions of Afe Babalola SAN to that of another *amicus*, Prof. Ben Nwabueze who contended that the unitary nature of the Act was contrary to the principle of federalism. Two Justices of the Supreme Court quoted copiously from the brief of Afe Babalola SAN on the socio-economic impact of corruption in Nigeria and weighed in on the need for decisive action by the Federal Government to tackle endemic corruption.[88] The Court held that "section 15 (5) of the Constitution directs the National Assembly to abolish all corrupt practices and abuse of office. The National Assembly can exercise such powers effectively only by legislation".[89] It is instructive to note that the Court acknowledged the unitary disposition of the Act, as submitted by Prof. Nwabueze SAN, nevertheless it laid the blame for this on the Constitution, holding *inter alia*:

> Although the provisions of the Act impinge on the cardinal principles of federalism, namely the requirement of equality and autonomy of the State government and non-interference with the functions of State government both the federal and state governments share the power to legislate in order to abolish corruption and abuse of office. If this is a breach of the principles of federalism it is the Constitution that makes provisions that have facilitated breach of the principles.[90]

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86 Supra, p. 107, para. 30.

87 Supra, p. 42. The said sections infringed on the principle of separation of powers and violated the right to liberty respectively.

88 See the judgments of Ogwuegbu JSC, pp. 68; Uwaifo JSC, pp. 110 – 114.

89 Supra, p. 39.

90 Supra, pp. 40 -41, per Uwais CJN. See also p. 192 where Ejiwunmi JSC, *obiter*, opined that the 1999 Constitution cannot be said to be a truly Federal constitution rather it is a hybrid of a Federal and a Unitary system.

FRN v. Osahon[91] dealt with the prosecutorial powers of the police. Because of the importance of this matter to the legal profession and its constitutional implications the court asked for briefs from *amici curiae* in the persons of Chief Bayo Ojo, SAN (then President of the Nigerian Bar Association (NBA)) and Olujinmi SAN, the then AGF. Chief Ojo, upon appointment to the office of AGF, abandoned his brief as President NBA. and adopted the substantially similar brief of his predecessor.[92] Pats-Acholonu JSC, obiter, held a dim view of the amicus brief filed by the AGF (opposing the appeal which had been filed in the name of the Federal Government) -

> I cannot but however fail to comment on the nature of the title of this case which appears strange. The strangeness of this title is even made more difficult as the chambers of the Attorney-General opposed the appeal ostensibly brought in the name of Federal Republic of Nigeria of which *he should or ought at all times under common law be known and referred to as the conscience of the state. The whole thing is weird.* As it is said by Lewis Carol in Alice in Wonderland, it is getting "curiouser and curiouser"[93]. (italics supplied for emphasis)

The opposition to the brief of a federal government agency, in this case the Police Force, by the AGF acting as *amicus* is an unusual but not totally new instance of inter-Agency conflict manifesting in the course of a litigation.[94] Such matters are best resolved within the executive branch.

In the consolidated cases of *First Bank of Nigeria & Anor v. Alh. Salman Maiwada*, and *Framphino Pharmaceutical & Anor v. Jawa International & Ors*[95] the Supreme Court was invited to revisit its decision in *Okafor v. Nweke*[96] on the legal effect of court processes that were not personally signed by a legal practitioner whose name

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91 (2006) 2 SCNJ 348.
92 Ibid, p. 365.
93 Ibid, at p. 382.
94 *The Gray Jacket* 72 U.S. (5 Wall.) 342 (1866) is an old case in which the US Supreme Court heard the Treasury Department, appearing as *amicus*, in opposition to the Federal Attorney General. See Samuel Krislov, op cit., p. 702.
95 (2013) 5 NWLR (Pt. 1348) 444.
96 (2007) 10 NWLR (Pt. 1043) 521.

appears in the roll but by a law firm. Considering the far-reaching consequences the decision would have on legal practice in Nigeria and the divisions between the two schools of thought on the matter, the Chief Justice of Nigeria empanelled a full court and invited a host of legal practitioners to address the court on the matter.[97] As expected the *amici* briefs submitted reflected different schools of thought. The lead judgment by Fabiyi JSC and that of Chuwuma-Eneh JSC drew particularly from the submissions of J.B. Daudu SAN, who was then the President of the NBA, on the rationale for requiring court processes to be signed in the name of a legal practitioner.[98] This is an example of how *amicus curiae* influenced the outcome of the case. Nonetheless Fabiyi JSC in the lead judgment took pains to show that the decision was not based on convincing arguments or the opinion of the majority of counsel but on the court's interpretation of the law.

> While one should appreciate the stand point of each senior counsel/counsel and the effort and dexterity with which each of them marshalled his points, it should be noted that this salient issue shall be determined based on the determination of the applicable law. This is a matter of great concern to legal practitioners which cannot be determined by casting of votes.[99]

He further held:

> The words employed in drafting sections 2 (1) and 24 of the Act are simple and straightforward. The literal construction of the law is that legal practitioners who are animate personalities should sign court processes and not a firm of legal practitioners which is inanimate and cannot be found in the roll of this court.[100]

The positivist stance of the court was reflected as follows:

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97 The SC decision in *Okafor v. Nweke* (supra) had generated a lot of controversy on whether the case would not breed technical justice or injustice on litigants and other stakeholders in the administration of justice. The case of *First Bank v. Maiwada* (supra) afforded the Supreme Court the opportunity to resolve the controversy. Many amici curiae were invited to address the Court on the matter and about 11 filed briefs.

98 (Supra) pp. 483, 488, 497 – 497.

99 (Supra), p. 482 per J.A. Fabiyi JSC.

100 Ibid, 482 – 483, paras F – G.

> I agree that a judge should be firm and pungent in the interpretation of the law but such should be 'short of a judge being a legislator.' This is because it is the duty of the legislature to make the law and it is the assigned duty of the judge to interpret the law as it is; not as it ought to be. That will be flouting the rule of division of labour as set out by the Constitution of the Federal Republic of Nigeria, 1999. The provisions of sections 2(1) and 24 of the Act as reproduced above remain the law and shall continue to be so until when same is repealed or amended. For now, I see nothing amiss about the law.[101]

This case illustrates the utility of *amicus curiae* participation in protecting the interest of the public as well as parties whose interests are likely to be affected by the outcome of the litigation. The device served as an instrument for broad representation of interests transcending that of the parties.

Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (NNPC),[102] dealt with the question of *locus standi* and public interest litigation for environmental protection. The appellant, an environmental NGO, sued the respondent for reinstatement, restoration and remediation of the environment in a community, particularly some streams which had been contaminated by an oil spill. The appellant also asked for provision of potable water as a substitute to the contaminated streams which were the only sources of water supply to the community. The respondent filed a motion challenging the *locus standi* of the appellant to file the action as the appellant was not directly affected by the spillage notwithstanding the mention of some of her members as indigenes of the affected community. The trial court held that the appellants lacked *locus standi* and dismissed the suit; a decision upheld by the Court of Appeal.[103]

On appeal, the Supreme Court invited five *amici curiae*, including the AGF, to address it on "Extending the scope of *locus standi* in relation to issues on environmental degradation: the case of NGOs". Two of the *amici* briefs, including the one filed by the AGF, were opposed to extending the scope of *locus standi* while three argued in favour of expanding the scope of *locus standi*.

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101 Ibid, 484, paras F - G.
102 (2019) 5 NWLR (Pt. 1666) 518
103 (2013) 15 NWLR (Pt.1378) at 556.

The court unanimously allowed the appeal and held that the Appellant NGO has the right to institute the action, thereby expanding the scope of *locus standi* on environmental matters in Nigeria. The court further held that there is nothing in the Constitution that says that the Attorney General is the only proper person clothed with the standing to enforce the performance of a public duty or institute public interest litigation. Citing with approval Diplock L.J. in *Rev. v IRC Ex p. Fed of Self-Employed*[104], Nweze JSC in the lead judgment stated that rules as to standing were made by the Common Law Judges and could accordingly be changed and had indeed over the years been changed "to meet the need to preserve the integrity of the rule of law…"[105] He cited several English and Indian cases in which environmental NGOs were held to have standing to sue for environmental protection.

From a community reading of the section 20 constitutional environmental objective; article 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act; section 17 of the Oil Pipelines Act; and Regulation 9 of the Oil and Gas Pipeline Regulations (requiring an oil pipeline licence holder to institute mechanisms for prevention of accidents and for remedial action for the protection of the environment), the court held that NGOs have the requisite standing to sue in environmental matters such as the present one.

The *amici curiae* played a crucial role in addressing the court on relevant provisions of the Constitution, statute and case law that support the proposition that certain provisions of Chapter II of the Constitution could in certain circumstances be justiciable. They further informed the court of relevant authorities illustrating the relaxation of the *locus standi* rule in the sphere of environmental litigation to accommodate NGOs and how this was important in order to foster the rule of law.[106] *Amicus curiae* participation in this case played a significant role in the relaxation of the *locus standi* rule to permit public interest litigation on the environment.

Governmental *amici* appeared in most of the cases examined. The widespread practice of granting governmental *amici* easier access to private suits is justified by several scholars on the ground that governmental *amici* represent the view of general public welfare and are better able to predict wide range effects of contemplated

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104 (1982) A.C. (H.L. (E) 640 -641.
105 (supra) p. 568 paras B-C, per Nweze JSC.
106 (supra) pp. 558 - 560

adjudication.[107] This paper argues that, notwithstanding, there is a need to interrogate this perception of governmental *amici* as it is not a given that they *always* act in the interest of the public. There remain states in which governmental interests are often antithetical to the welfare of the public. This is most evident in dictatorships, repressive governments, governments that suffer from legitimacy crises, corrupt governments and governments experiencing 'state capture'.[108].

Centre for Oil Pollution Watch v. NNPC[109] is an illustration of the fact that governmental interests and public welfare do not necessarily always coincide. In that case the government owned Oil Corporation was negligent in maintaining its pipelines and this resulted in oil spillage. The relevant regulatory bodies failed to enforce the statutory remedies, hence the institution of the action. The AGF (represented by the Solicitor General of the Federation) made submissions that the matter fell under public nuisance and should only be litigated upon by the AG of the Federation or of the State, in effect that the court should not extend *locus standi* to private citizens and NGOs in matters of environmental degradation.[110] In the case of *FRN v. Osahon*,[111] inter-Agency conflict obscured the interest of the state and of the public in seeing crime addressed.

5. Concluding Remarks

The foregoing discussion establishes that *amicus curiae* participation is in evidence at the Supreme Court and has enriched the jurisprudence of the Court. Its incidence at the Court is low and the device is underutilised: over a period of fifty years (1971 – 2021) we identified ten cases where amici curiae filed briefs and participated. The practice of the Supreme Court is to call on the AGF (representing the executive branch) to serve as *amicus curiae* to

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107 Comment, The Amicus Curiae, 55 Nw. U. L. Rev.

469 469 n.3 (1960)

108 J.M. Mbaku, 'Rule of Law, State Capture and Human Development in Africa' [2018] 33 (4) *American University International Law Review*, 771 – 834; J.S. Hellman, G. Jones and D. Kaufmann, 'Seize the State, Seize the Day: State Capture, Corruption and Influence in Transition', Policy Research Working Paper 2444 (World Bank 2000). Last accessed at www.worldbank/wbi/governance on 12 September 2021. Incidents involving breaches of the human rights of oil producing communities in Nigeria by transnational oil companies in collusion with successive Nigerian government are an example of state capture.

109 (supra)

110 Ibid, pp. 556-558.

111 (supra)

represent public interest. The Court has invited the Attorneys General of the states and AGF of the Federation to serve as *amici* in cases involving the constitutional validity of a law and other cases of constitutional importance;[112] cases involving the public interest;[113] cases in which the outcome of litigation would have implications on governance;[114] and cases where the court is invited to overrule its previous decision.[115] The invitation of *amicus curiae* is a means of protecting governmental interests in litigations in which government is not a party, yet is likely to be affected by the outcome of litigation. This practice of inviting governmental *amici curiae* has translated into greater access to the appellate court for government when compared to private persons. Even in a private suit, a government entity like the AGF would enjoy preferential treatment in terms of access to court as *amici* compared to a nongovernmental organisation that claims to represent the interest of the public.

The study of *amicus curiae* participation in the Supreme Court of Nigeria reveals that in the overwhelming majority of cases, the Court takes the initiative in appointing *amici curiae*, i.e. *amicus curiae* participation was by specific invitation of the court. The practice of the court has been to invite specific counsel, mostly Senior Advocates of Nigeria (SAN) to file amicus briefs on cases before the court. This is not to say that amicus curiae participation cannot be on Counsel's own application as was the case in *Savannah Bank v. Ajilo*[116] and *Ifezue v Mbadugha*.[117]

Findings from the study are that in the Supreme Court it is rare for legal practitioners to take the initiative. This could be one of the factors responsible for its underutilisation in the Court. This trend is in contrast to the trend in the United States Supreme Court where most *amicus curiae* participation proceeds from the initiative of interested parties. The cases examined further reveal that the scope of *amici* participation is normally circumscribed by the court, i.e. the court normally restricts the submissions in the *amici* briefs to a particular issue.

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112 *AG Ondo v. AG Federation* (supra); *Onuoha Kalu v The State* (supra); *Bello v. AG Oyo state* (supra).

113 *Centre for Oil Pollution Watch v NNPC* (supra); *Egboghonome v State* (supra).

114 *AG Ogun v Aberuagba* (supra); *AG Ondo v AG Federation* (supra); *Centre for Oil Pollution Watch v NNPC* (supra); *Bello v. AG Oyo state* (supra).

115 *Adisa v. Oyinwola* (supra).

116 (supra)

117 (supra)

Apart from the FREP Rules, which merely endorses *amicus curiae* participation, and Order 5 rule 4 of the Supreme Court Rules, there are no rules guiding *amicus curiae* participation in Nigeria. The grant of leave to participate as an *amicus* or file *amicus* brief is within the discretion of the courts. In Nigeria, the guiding principle at the Supreme Court seems to be that the court will invite *amicus curiae* participation if it considers itself to be in need of assistance. Furthermore, the court will normally determine those it wishes to appear before it as *amici curiae* and the specific issue it wishes their briefs to address. The Supreme Court, from time to time, calls on distinguished senior legal practitioners (mostly members of the Inner Bar) to offer their expertise and vast knowledge of the law in service to the Court.

The only time there appears to have been an open door stance towards *amicus curiae* briefs was in the case of *FBN v. Maiwada*[118] when eleven legal practitioners filed *amicus* briefs. The case was of interest to all legal practitioners as it touched on an important aspect of legal practice. Thus even though they were third parties, the Supreme Court took into account the implications on legal practice in its decision to open up the space.

Amicus curiae participation at the Supreme Court appears to be a mostly positive experience in terms of its utility. In most instances, the help rendered was acknowledged by their Lordships and reflected in the decision of the court. Although the practice is established in Nigeria and has enriched the jurisprudence of the Supreme Court, its incidence is low. Factors responsible for this could form the subject of further research.

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118 (supra)