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The *Amicus Curiae* opinion as a form of support to a constitutional court during settlement[2]

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Słowa kluczowe: opinia amicus curiae, opinia przyjaciela sądu, postępowanie przed Trybunałem Konstytucyjnym, wpływ opinii amicus curiae na orzecznictwo, udział organizacji pozarządowych w postępowaniu przed Trybunałem Konstytucyjnym

Summary

The institution of *amicus curiae*, commonly found in common law systems, has not yet reached a comprehensive analysis in Polish law. Despite the existing and slowly developing practice of bringing a court friend's opinion within the Polish procedural rules, it is impossible to find *expressis verbis* regulations for the *amicus curiae* institution. This points to the need to undertake a scientific discourse on this subject, in particular its location among the applicable rules relating to the procedure before courts and tribunals. The study of the subject of the search for legal connotations aimed at reconstructing the characteristics of the *amicus curiae* is part of this study. The author's intention is to define the position of a "friend of the court" in proceedings before the Constitutional Tri-

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bunal, the criteria for admission to the case and the determination of his or her legal position and the scope of entitlements.

Streszczenie

Opinia *amicus curiae* jako forma wsparcia sądu konstytucyjnego przy rozstrzyganiu sprawy

Instytucja *amicus curiae*, powszechnie występująca w systemach prawa *common law*, dotychczas nie doczekała się kompleksowej analizy w polskiej nauce prawa. Mimo istniejącej oraz powoli rozwijającej się praktyki wnoszenia opinii przyjaciela sądu w ramach obowiązujących w Polsce przepisów procesowych nie sposób znaleźć regulacji odnoszących się *expressis verbis* do instytucji *amicus curiae*. Wskazuje to na potrzebę podjęcia naukowego dyskursu odnoszącego się do tego zagadnienia, w szczególności umiejscowienia tej instytucji wśród obowiązujących uregulowań odnoszących się do procedur postępowań przed sądami i trybunałami. Próbę podjęcia tematyki związanej z poszukiwaniem konotacji prawnych zmierzających do rekonstrukcji cech charakterystycznych instytucji *amicus curiae* stanowi niniejsze opracowanie. Zamiarem Autora jest określenie pozycji „przyjaciela sądu" w postępowaniu przed Trybunałem Konstytucyjnym, kryteriów dopuszczenia do udziału w sprawie oraz ustalenie jego pozycji procesowej i zakresu przysługujących uprawnień.

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The term "amicus curiae", having its roots and source in Roman law, which is exactly translated as a "friend of the court", has been functioning in the Polish legal reality for a rather short time. Probably this is the reason why the institution of *amicus curiae* has not been fully analyzed, although such a study should be performed in the context of current regulations concerning the proceedings before courts and tribunals. This institution, sometimes appearing in the practice of Polish courts and tribunals, still remains subject to research[3], although the lack of definition of its essential elements is not an obstacle to the functioning and use in the reality of the current judicature.

[3] The author of the only available publication referring to the institution of *amicus curiae* is M. Bernatt,*Opinia przyjaciela sądu (amicus curiae) jako pomocnicza instytucja prawna*

Undoubtedly, it is impossible to find regulations directly referring to the institution of *amicus curiae* in Polish legal provisions or such that create the status and position of a friend of the court in the ongoing proceedings, particularly the criteria of its admission to participate in the case and the procedural authorizations granted in reference to thereof. This enables its full use in situations when, due to different reasons, the entity interested in the proceedings does not have the legitimacy to participate in such proceedings as a party or participant. Nevertheless, there is not even a trace of a legal regulation which does not enable to determine the scope of a situation, in which appealing to the institution of *amicus curiae* can be perceived as being proper to request, from the perspective of the court and also parties being interested to present such an opinion. Taking into account that the institution of a friend of the court has recently become more important, particularly within disputes of greater weightiness and a complicated matter, it seems necessary to try to perform a kind of a summary of the previous experiences related with its utilization, which should become the subject of this work.

I.

The term „amicus curiae", which is present in the Anglo-Saxon legal culture and legal practice, determines a person or an organization that is not a party in proceedings before a court, but one with its own initiative and with no court obligation, one that expresses readiness to present a legal opinion referring to the subject of the proceedings. Being intended solely for the court, the opinion serves to support within the process of settlement of the subject matter case, but the court is not bound by such an opinion, even if it initially agrees to have it presented. A discretional decision of the court is the approval or rejection of the offer to present an opinion by an interested entity. The verdict of the adjudicating court in terms of the need to present an opinion by the friend of a Court is not subject to appeal. The appearance of the *amicus curiae* in some common law systems has reached a precise legal regulation. For example, in the set of rules of proceedings before the Supreme Court of

w orzecznictwie sądów polskich., [In:] *Sprawny sąd. Zbiór dobrych praktyk*. Part II, ed. Ł. Bojarski, Warszawa 2008, pp. 184–190.

the United States[4] it was predicted that an opinion of *amicus curiae* enables the Court to draw attention towards significant matters referring to the case, which have not been previously discussed by the parties and which may constitute significant help for the court when settling the case.

Therefore, an opinion should not constitute an additional burden for the court, and its filing does not lead to favoritism of the statement expressed therein (rule 37, section 1)[5]. In subsequent provisions of the set, a detailed procedure of filing opinions was established which contains, in some matters, the requirement to obtain permission of the parties to file such an opinion or the right to express disapproval within this scope, as well as exceptions from the rule of obtaining approval from the court, introducing limits within the textual scope of the document and restrictive terms. The institution of a friend of the Court also efficiently functions in proceedings being current before international courts, especially those which issue judgments in the subject of human rights, such as: the Inter-American Commission on Human Rights, Inter-American Court of Human Rights and much closer traditions of continental judicature – the European Tribunal of Human Rights.

II.

In the Polish legal system, from the formal point of view – understood as the existence of legal rules determining a particular institution or rules of its utilization – the construction of *amicus curiae* does not appear.

It is also impossible to find it in the interwar legislation period. It was received but not directly to the grounds of acting before national courts, in the end of the nineties by authorities, which were forced – mainly due to the protection of the interests of the State Treasury – to engage in disputes before

[4] Rules of the Supreme Court of the United States, Adopted April 19, 2013, Effective July 1, 2013, Rule 37. Brief for an Amicus Curiae, https://http://www.law.cornell.edu/rules/supct (15.06.2016).

[5] Rule 37. 1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. An amicus curiae brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.

courts in the United States. The interest of Poland in the progress of some proceedings, linked to the inability to direct participation therein due to lack of procedural rights, and additionally the risk of hardship to predict the result before a foreign court settlement, caused that it was needed to utilize the institution of a friend of the Court, which was successfully functioning and was rich in tradition in the Anglo-Saxon system. The opinion of *amicus curiae* was filed by the government of Jerzy Buzek in a case concerning claims of compensation of forced laborers employed in the Third Reich, conducted before a court in Newark, next to New York, against the corporation of Degus[6]. Within the opinion, it was focused to explain the reasons why the forced laborers of the Third Reich were granted the right to an individual claim of compensation, which they may demand directly from German corporations, that employed them.

In reference to the authorities' activity therein, performed particularly before foreign courts, with opinions of friends of Courts, other non-governmental organizations started to bring actions, where the most significant was – from the scope of the wide range of opinions and notions arisen therefrom, is the Helsinki Human Rights Foundation, presenting opinions mainly in proceedings before the European Tribunal of Human Rights in Strasbourg[7] and directing them also to Polish courts.

Despite the functioning and slowly developing practice to file a friend's of Court opinions within the scope of the current Polish procedural provisions, it seems impossible to find regulations referring *expressis verbis* to the institution of *amicus curiae*. A substitute of such provisions may be article 63[5] of the Polish Civil Procedure Code[8] (later referred to as CPC), although the sub-

[6] At that time, in the Polish media, it was stated that the Polish government acted as *amicus curiae* for the first time in matters concerning compensation for forced labor in the Third Reich, cf.: A. Kublik, „Gazeta Wyborcza" of April 4th 1999.

[7] One of the recent opinions, concerning the significant meaning to efficient functioning of the national administration of justice, that is the duty of the plaintiff to indicate the address of the defendant in the document starting the civil proceedings – as a limitation of the right to a trial, arising from article 6 section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Helsinki Foundation for Human Rights filed on July 5th 2016 in the case Orłowski vs. Poland (complaint no 5547/15).

[8] The Civil Procedure Code Act of November 17th 1964 (Journal of Laws of 2014, pos. 101 with changes).

ject matter regulation is not a source of an independent entitlement to present to the court a point of view being significant for the case, but it just determines the manner of its performance by entities, that were granted this right in separate regulations.

Due to these reasons, it is necessary to look for legal connotations leading to the reconstruction of characteristic features of the *amicus curiae* institution. This will enable to determine the position of the "friend of the court" in the process, the criteria of admission to the case and determine the position thereof the court proceedings. On this basis, it will be possible to determine the scope of permitted utilization of the right to court by an entity, that was granted the status of *"amicus curiae"*.

Taking into account that the institution of a friend of the court finds its wider application in cases with a heavy genre burden and referring to significant notions linked to the functioning of a state or determined social groups or problems of institutional character, the utilization thereof will generally be placed in proceedings before courts of higher instances, particularly cassation, that is the Supreme Court and the Supreme Administrative Court. The highest activity of the "friend of the court" is focused on the proceedings before the Constitutional Tribunal and due to these reasons it seems necessary to commence discourse in the subject of the opinions of *amicus curiae* in proceedings before constitutional courts and its character as a form of support while settling a case.

III.

Taking into account that article 36 of the organization and procedure before the Constitutional Tribunal Act[9] (later referred to as the CT act) prevails that in cases which are not regulated therein according to proceedings before the Constitutional Tribunal, provisions of CPC shall be utilized in cases referring to the appearance with an *amicus curiae* opinion, it seems relevant to look for a *iuris* analogy in its regulations. It needs to be underlined that the CT act determines the scope of participants of proceedings before

[9] The organization and procedure before the Constitutional Tribunal Act of November 30th 2016 (Journal of Laws of 2016, pos. 2072).

Constitutional Tribunal very rigorously, through enumerated listing thereof and a precise determination in article 56 points 1–14. It is unknown why the legislator did not include in this place any freedom in terms of allowing to participate in proceeding before a constitutional court, not necessarily as a participant *sensu stricto* of other parties (particularly non-governmental organizations), that could have actually been granted a limited scope of postulation capability. In the above mentioned context, the question concerning the admissibility of a relevant utilization of CPC within this scope appears, and particularly in terms of regulations presented in titles III, IIIA, IIIB and IIIC, chapter II, book one, part one CPC. They refer to the participation of entities, in fact-finding proceedings before courts, that are not entitled to the status of a party in the proceedings. The provisions refer to non-governmental organizations, the National Labor Inspectorate, the county ombudsman suing for the benefit of consumers and entities entitled to participate in proceedings on the grounds of separate provisions. They may, in strictly determined situations, and before obtaining permission of the plaintiff, bring actions and participate in already ongoing proceedings. However, in a situation when they do not participate in a case, they can present to the court a view significant for the case. A much wider clause allowing to participate in civil proceedings of non-governmental organizations was listed in general provisions of CPC. According to article 8, non-governmental organizations, whose statutory task does not concern conducting business activity, may in order to protect the rights of citizens, in cases provided by law, initiate proceedings and enter into ongoing proceedings. The creation – as it would *prima facie* seem as general procedural rights for non-governmental organizations – undoubtedly relates to the determination of values, the protection thereof would be served by this participation, which are the rights of the citizens. However, as it is underlined in literature, non-governmental organizations may participate in civil proceedings to protect the rights of citizens only in cases listed in *lex specialis* provisions. Such matters were pointed by the legislator mainly in provisions of article 61 CPC[10]. Their scope was strictly limited to matters concerning: alimony, environmental protection, consumer protection, industrial

[10] J. Jagieła, *Udział organizacji pozarządowych w postępowaniu cywilnym dla ochrony praw obywateli,* „Gubernaculum et Administratio", Zeszyty Naukowe Instytutu Administracji, Akademia im. J. Długosza w Częstochowie, 2014, no. 1, p. 22.

property rights protection, gender equality, non-discrimination through unfounded direct or indirect diversification of rights and obligations of citizens.

If it is acknowledged that relevant utilization of the aforementioned provisions of CPC in the proceedings before the Constitutional Tribunal is permissible and possible, the detailed analysis of which exceeds this work, and maybe it could lead to different conclusions, an evaluation should be performed concerning the scope in which the parties listed therein could participate in proceedings before a constitutional court. Such deliberations seem to lead to the statement that the participation of non-governmental organizations, that most often express the will to file an *amicus curiae* opinion within proceedings before Constitutional Tribunal would be only limited to the aforementioned matters, which additionally would need to lie within the subject of normative acts regulations, being subject to constitutional evaluation performed by Constitutional Tribunal within the scope of particular proceedings. Such a statement would *de facto* lead to a significant limitation of the friend of court participation within proceedings before Constitutional Tribunal, and consequently to marginalization of such kind of activity.

IV.

Due to these reasons, referrals to particular legal regulations intended for an entity leading to file an *amicus curiae* opinion, should be sought in those provisions of CPC, which refer to the admissibility to express and present a point of view by a non-governmental organization, which is article 63 and 63 § 1^5. According to those, non-governmental organizations or other entities eligible on the grounds of other provisions, that do not participate in the case, may present to the court a relevant point of view expressed in a resolution or statement of its properly empowered organs. In case of presenting by non-governmental organizations or other entities to the court of a view relevant for the case, contrarily to the situation of commencing or joining proceedings, they do not obtain a status of a proceeding's participant, such an activity in the process is described as an indirect one. The Supreme Court states that expressing a view relevant for the case by a social organization is an indirect from of an organization's participation in court proceedings, whereas pre-

senting of a view by an organization does not lead to direct participation of an organization in fact-finding proceedings. In the opinion of the Supreme Court, presenting of a point of view relevant for the case is a right of the organization, not a duty[11].

In the context of these regulations, it may still seem problematic whether the institution of presenting a point of view also remains limited only to such matters, in which non-governmental organizations may bring actions for the benefit of citizens and join a party in ongoing proceedings in order to protect their rights or whether there also exists a possibility to present a point of view in each category of cases. Doubts concerning this scope are still subject to discussion in the doctrine[12], but it should be stated for a wider determination of rights existing in this situation due to a designated aim which should be served by the institution of presenting an opinion, which is the protection of rights of citizens. The infringement thereof may happen not only in matters designated by genre in CPC, and presentation of such a point of view having an indicating character, may only be helpful for the court in noticing the problem.

It seems obvious that the presentation of a point of view in the case may happen from the initiative of an entity, which does not exclude the initiative of the court, as long as it is claimed as helpful and relevant to settle the case. However, the matter of mandatory anticipation of presenting a view through acceptance by court to file a motion containing thereof, seems problematic.

Features of procedural documents cannot be assigned to such a presentation, but it seems necessary to deliver such a statement to all remaining participants of the proceedings, which is linked to a more technical, still a kind of obstacle, action to file a document containing a point of view in a relevant amount of copies. Referring to the scope of formal shortcomings (for example lack of signature, which may happen), questions arise concerning matters related to the supplementation thereof and consequences of lack of such. Surely, a presentation by a non-governmental organization of a view relevant for the case, initi-

[11] Cf.: judgment of the Supreme Court of December 11th 1980, case no. I PR 62/80, Legalis, No. 22393.

[12] Cf.: opposite views presented by: J. Jodłowski, [In:] *Kodeks postępowania cywilnego z komentarzem,* v. I, eds. J. Jodłowski, K. Piasecki, Warszawa 1989, p. 143; M. Jędrzejewska, [In:] *Kodeks postępowania cywilnego, Komentarz,* ed. T. Ereciński, v. I, Warszawa 2006, p. 194.

ated by solely the non-governmental organization does not require obtaining consent of the parties, as bringing an action and joining a party in already ongoing proceedings. Such a condition is not contained in article 63 CPC despite the fact that it refers to preceding provisions (article 61 and 62 CPC) which anticipate such a condition[13]. There is no doubt that it is a fully discretionary decision of a court to summon an entity to a trial in order to present a view. The matter prevailing should be the will and need of a potential development of theses contained in the presented point of view or the confrontation thereof with statements of other participants of the proceedings or other entities, that expressed their points of view. Still, consequences of lack of appearance of organizations' representatives presenting opinions or lack of successful delivery of notice may have influence on further conduct of the proceedings. All indicated problems consequently affect the effectiveness of such a presentation.

V.

As it is underlined in literature, the provision of article 63 CPC, except the statement that the point of view of a non-governmental organization must be significant for the case, does not contain any indications concerning the character of this view, or matters that it is supposed to concern, which is without doubt the reason of the significant discrepancy of views concerning this scope. In terms of the legal character of the view, two directions of considerations have been distinguished. According to the first one, the point of view shall have a general character and it shall refer to the category of matters of particular kind. Therefore, it cannot contain an evaluation of the actual state of a particular case, as well as indications of new facts and proofs in the case, not presented by the party. However, according to the second one, as a view shall be significant for the case, it should express an own opinion of a non-governmental organization from the point of view of settling a case adjudicated by court. It may have a general character but it should not be separated from factual circumstances of a particular case, which would grant an abstract character[14].

[13] J. Jagieła, *Udział...*, p. 63.

[14] J. Jagieła, *Udział...*, p. 65 and the literature cited by the author.

It may limit itself to elements of the actual state, which is indicated in article 227 CPC, according to which the subject of proof are facts having a significant meaning to settle a case. There is also a middle statement, according to which the subject of a view relevant to settle the case may be mainly facts and some assessments included in the content of the factual and legal base of a judgement.

VI.

The conducted analysis of the problem referring to the appearance of non-governmental organizations in the civil process, on the basis of regulations contained in CPC, which should find relevant use in proceedings before Constitutional Tribunal – in a situation of presenting an opinion of a friend of the Court – points a wide range of doubts concerning not only the status of the entity that would be to appear as *amicus curiae*, but also requirements which should be placed before a presented opinion and consequence of presenting thereof. Due to lack of a legal regulation referring directly to the participation of entities, not being participants of the proceedings before Constitutional Tribunal but having the possibility to appear as a friend of the Court of a constitutional court and a rather small proceeding practice within this scope, it is desired to try to create such provisions. They should become part of the Constitutional Tribunal act as relevant use of CPC provisions in this matter seems to be incoherent and due to its specifity of the trial process before Constitutional Tribunal, it does not fulfill its role. At the same time, through statutory indication on the *amicus curiae* opinion, as a form of support of a constitutional court by statements and views of organizations and entities, with no active constitutional legitimacy to initiate proceedings before Constitutional Tribunal for sure, without raising the range of this institution, would enable a much further judicatory discourse in matters concerning a fundamental meaning for the functioning of a state.

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