Amicus Curiae and Non-Party Intervention

The legality of the Provisional Legislative Council (PLC) has long been an issue of great public controversy. This question called for judicial resolution less than a month after the establishment of the Hong Kong Special Administrative Region (HKSAR).[1] It arose from a pending criminal case where three defendants were charged with the common law offence of conspiracy to pervert the course of public justice. The trial court referred two questions to the Court of Appeal for determination. The first question was whether the common law survived the change of sovereignty. The second question was whether the indictment brought against the defendants by the previous government remained valid after 1 July 1997. The Hong Kong Reunification Ordinance,[2] which was enacted by the PLC and came into effect on 1 July 1997, expressly provided for the continuation of pending legal proceedings. It was argued that the PLC was itself illegal. The second question was no doubt one of the most important constitutional issues which the Court of Appeal has ever been asked to decide.

The hearing took place on 22–24 July. On the morning of 22 July, first and second defendants' counsel, who were criminal practitioners with little experience in constitutional law and who acted on the belief that a constitutional lawyer would be appointed by the Legal Aid Department for the third defendant, informed the court that they had no instructions to act for their clients because of a lack of funds. The court agreed to release them, but invited counsel to stay and make submissions on the issues before the court, which they agreed to do. The third defendant was not granted legal aid for this hearing. Instead, the Legal Aid Department assigned counsel to hold a watching brief. In contrast, the legal team for the HKSAR, led by Daniel Fung SC, the Solicitor General, and another senior counsel, was fully prepared to argue that not only was the PLC legally constituted, but also, and more importantly, that the HKSAR courts had no jurisdiction to look into the matter. Daniel Fung SC began his submission on 22 July. In the afternoon, Gladys Li SC, former Chairman of the Bar Association, together with Margaret Ng and Paul Harris, who were worried about inadequate representation on these important constitutional issues, appeared before the court and offered to assist the court as amici on the issue of the legality of the PLC. This offer was turned down by the court, principally on the basis that they could not act as amici without an invitation from the court and that they had no locus standi to intervene in the proceedings. Eventually, the first and second defendant invited Gladys Li SC and her team to lead their counsel to advance submissions on the legality of the PLC

1 *HKSAR v David Ma Wai-kwan* [1997] 2 HKC 315, [1997] HKLRD 761.
2 Ordinance No 110 of 1997.

alone.[3] The new team, which came to court to assist the public interest and without any papers or advance notice, was not granted an adjournment to prepare for the case. Gladys Li SC began her submission on 23 July immediately after Daniel Fung SC closed his speech. Judgment was delivered on 29 July 1997. It was held that the HKSAR courts had no jurisdiction to query the validity of any legislation or acts passed by the sovereign, represented by the National People's Congress (NPC), and that the PLC was legally established in conformity with various NPC decisions.

This note deals with inadequate representation and non-party intervention.

Refusal of legal aid

It is perhaps curious, to say the least, that legal aid was not granted in a case of such constitutional importance. In response to a query from the Bar Association, the Director of Legal Aid wrote:

> In view of the importance of the issues raised by defence counsel for determination by the Court of Appeal, I have sought the opinion of 2 counsel, one of whom is a Senior Counsel. My decision not to instruct counsel to argue the matter was made after careful consideration of all the circumstances of the case including counsel's opinion and the *interests of the legally aided defendant*.[4]

It is difficult to see why refusal to grant legal aid can ever be in 'the interests of the legally aided defendant.' The arguments of the Director of Legal Aid might carry more force if made on the basis that public money should not be spent on cases with no realistic chance of success. It is understood that counsel's advice to the Legal Aid Department was to the effect that there was no realistic chance of success in arguing that the common law or the indictment did not survive the change of sovereignty. This would be sufficient to dispose of the case, and therefore, so it was contended, it would be unnecessary to argue the legality of the PLC. On the other hand, it was obvious that immense public interest was involved in this case. The legality of the PLC, of its formal acts, and of the legislation it enacted had been a matter of some uncertainty. There were sharply divided views on these questions, some aspects of which had been the

[3] The intervening team believed that there was no merit in the challenge that the common law or the indictment did not survive the change of sovereignty. However, being counsel for the first and second defendant and not amici, they were constrained not to make submissions contrary to their clients' interest. This highlights a major difference in the role between an amicus and counsel acting for a party.

[4] Italics added. See Audrey Eu, 'Human Rights Mechanism: Legal Aid — For Whom and At Whose Expense?' a paper presented at the XVth Lawasia Conference, 26–31 August 1997.

subject matter of an unsuccessful application for leave for judicial review before the resumption of Chinese sovereignty.[5] It could not have been assumed that the Court of Appeal would not be prepared to decide these important issues, especially when the HKSAR was fully prepared to argue them.

The jurisdiction of the HKSAR courts over acts and decisions of the NPC which, on their face, were contrary to the provisions of the Basic Law was another issue with far-reaching implications. In the light of the great constitutional importance of the issues raised in this case, the Director of Legal Aid looks miserly in his control of the public purse in this case. In the early days of the establishment of the HKSAR it is likely that many important constitutional issues will be litigated in the courts. It is submitted that, as a matter of principle, legal aid should normally be granted in any case which raises important constitutional issues. It would be a great disservice to the legal system of the HKSAR if these constitutional issues were not properly and fully argued. Granting legal aid in such cases can only be in the interest of justice and of the proper development of our legal system.

Amicus curiae

It has been a long and honourable tradition of the Bar to offer its services to the court as amicus curiae, that is, friend of the court, to present arguments in those cases which may have far-reaching consequences or where legal representation is inadequate.[6] Hence, it was surprising that the offer for assistance was not welcome in the *David Ma* case. In rejecting the offer Mortimer VP said:

> After the short adjournment on the first day, Ms Gladys Li, SC (Miss Margaret Ng and Mr Paul Harris with her) appeared to offer her services to the Court — it would seem as amicus. For my part, there were serious problems about her locus standi. For obvious reasons it would be difficult for the Court to accept as its amicus counsel who appears without invitation. Fortunately, however, the 1st defendant invited Ms Li to lead Mr Egan to advance submission limited to the legality of the Provisional Legislative Council (PLC). This she did. Her closely reasoned and attractively presented submissions, I find both helpful and enlightening.[7]

5 *Ng King-luen v Rita Fan* (1997) 7 HKPLR 281. It was argued that the act of the provisional legislature in enacting laws before the changeover constituted a usurpation of the function of the Legislative Council. Leave to apply for judicial review was refused on the ground that the court's jurisdiction did not extend to Shenzhen where the provisional legislature was seated.

6 The Bar Association maintains a list of barristers who are prepared to offer pro bono services, that is, for free, to appear as amici in courts in restricted types of cases. It has invariably answered the call whenever requests for assistance from the judiciary are made.

7 [1997] 2 HKC 315, 359.

With respect, Mortimer VP failed to distinguish between the two issues of amicus and locus standi. Not being a party to the proceedings, an amicus, almost by definition, does not have any locus. Therefore, in considering whether to accept someone as an amicus, the court has to consider factors other than locus standi.

Although the institution of the amicus curiae is of long standing in the common law, the role, functions, and duties of an amicus have never been clearly defined. Its origin lies in the inherent jurisdiction of the court to request its officers, particularly the lawyers to whom the court afforded exclusive rights of audience, to assist its deliberation.[8] In *Grice v R*, Ferguson J defined an amicus curiae as a bystander who may inform the court where a judge is doubtful or mistaken in a matter of law: 'In its ordinary use the term implies the friendly intervention of counsel to remind the court of some matter of law which has escaped its notice and in regard of which it is in danger of going wrong.'[9] An amicus is not a party to the proceedings, and is independent of the parties to the proceedings. His function is to bring up facts or law not known to the judge.[10]

In the early days when the Bar was very small, an amicus could be any barrister who happened to be in court. Yet participation in proceedings as a friend of the court has always been a matter of grace rather than right.[11] Hence, an amicus has to be invited or appointed by the court, usually because he is a lawyer enjoying great eminence.[12] However, there is no reason why the court could not appoint a person other than a lawyer to be an amicus, for instance, a child psychologist in custody proceedings.[13]

The role of the amicus differs in various jurisdictions. In England, the use of amicus is substantially restricted to three traditional situations.[14] The first is where a matter of importance is before the court which could affect many other persons and the court invites the Attorney General to appear as or to appoint

8 Bernard Dickson, 'A Canadian Development: Non-Party Intervention' (1977) 40 MLR 666, 671, cited with approval in *Borowski v Minister of Justice of Canada* (1988) 144 DLR (3d) 657, 660. See also Samuel Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy' (1963) 72 Yale LJ 694, who found that the practice existed even in Roman law.

9 (1957) 11 DLR 699, 702.

10 *AG of Canada v Aluminum Co of Canada* (1987) 35 DLR (4th) 495, 505; *Romaniuk v Alberta* (1988) 50 DLR (4th) 480, 488, 489–90, 492–3. Krislov cited many instances in the *Yearbooks* where a bystander called the court's attention to manifest error, to the death of a party to the proceedings, to the fact of collusion, and to existing appropriate statutes: Krislov (note 8 above), pp 695–7.

11 In *Chow Wai-hung v Hong Kong Government* [1983] 2 HKC 537, where the unrepresented applicant, a civil servant, challenged the legality of the termination of his employment for good cause under the Colonial Regulations, the Crown applied unsuccessfully to appoint a legal representative or an amicus for the applicant, as the court found that the only issue was whether the applicant had invoked the correct procedure. See also *AG v Killenny Ltd* [1994] 3 HKC 314.

12 See Dickson (note 8 above), p 671.

13 *In the marriage of P W and C A Rogers and Fernandez* (1988) 12 Fam LR 467, 470 Gun J said: 'My understanding of the matter is that, in general, a court will not entertain submissions from a person as amicus curiae unless he or she is a legal practitioner or some other person who has the appropriate qualifications to assist the court.' For a strong attack against appointing non-lawyers to be amici, see *Romaniuk v Alberta* (1988) 50 DLR (4th) 480, 488–9.

14 *AG of Canada v Aluminium Co of Canada* (1987) 35 DLR (4th) 495, 505.

an amicus curiae.[15] The second is to address the court to prevent injustice. The amicus can call the attention of the court to decisions or points of law that might have been overlooked.[16] The third is to advance arguments for an absent or unrepresented party. Although an amicus, not representing any party to the proceedings, is in theory expected to play a non-partisan role and should try to draw the attention of the court to all relevant authorities and arguments rather than to advocate a particular position, in practice the service of an amicus does not preclude commitment to a cause. This is particularly true in the third situation where only one party to the proceedings is present and represented. An amicus is usually invited to present the other side of the arguments so as to enable the court to have a proper consideration of the issues involved,[17] or even to protect the interests of a non-party.[18] Nonetheless, the amicus remains a friend of the court, not an advocate for the parties.

Hong Kong basically follows the practice in England, though the practice of appointing an amicus is not as widespread as in England. Between 1942 and 1997, only 31 cases of amicus appearance can be found in Hong Kong, compared with 874 cases in England for the same period.[19] The Hong Kong cases fall largely into four categories. The first category of cases are those where the parties to the proceedings were represented, but a legal point of public importance had been raised and hence an amicus was appointed to offer impartial assistance to the courts.[20] The second category comprises cases where

15 *Morelle v Wakeling* [1955] 2 QB 379; and *Re Scandinavian Bank Plc* [1987] 2 WLR 752, 756. The Equal Opportunities Commission and the Commission for Racial Equality have been invited to act as amici: see A Lester, 'Human Rights Advocacy in Practice' in J Chan and Y Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong, Singapore, Malaysia: Butterworths, 1993), pp 220–2.

16 See eg *The Protector v Geering* (1656) 145 ER 394; and *R v Wong Yin-ping* [1997] 2 HKC 312 (the amicus in this case happened to be in court for another matter. The defendant was unrepresented. The amicus noted that the Crown was making a point which he thought was incorrect. He therefore asked the trial judge if he could address the court on that point as amicus curiae. A brief adjournment was then granted to allow the amicus to look for some authorities).

17 See eg *Re Sheldon Group Ltd* [1971] 1 WLR 899, 900.

18 In *C v D* [1992] 2 HKC 248, which involved an application for the removal of D as the guardian, an amicus was appointed by the Official Solicitor to ensure that, in the absence of D, the welfare of the two adoptive children was fully protected.

19 Between 1987 and 1997 there were 363 cases of amicus appearance in England and 24 cases in Hong Kong. The Hong Kong figure is compiled from reported cases in HKC, HKLD, HKPLR, and an enquiry by the Bar Council carried out in March 1997. The English figure is compiled from a LEXIS search.

20 *Hong Kong Bar Association v Anthony Chua* (1994) 4 HKPLR 637 (applicability of the Bill of Rights to professional disciplinary action); *AG v Jim Chong-shing* [1990] 1 HKLR 131 (role of prosecuting counsel at the stage of sentencing); *R v Lau Tak-ming* [1990] 2 HKLR 370 (sentencing tariffs in drug trafficking); *R v Leung Chi-yuen* [1989] 2 HKC 24 (duty of defence counsel to assist the court on what evidence was capable of corroborating the accomplice when defence counsel was under instructions not to assist the court on this issue); *AG v Choi Yan-kwong* [1989] 1 HKC 131 (whether a magistrate could try a case summarily against the wish of the prosecution which had applied that no plea be taken); *Harknett v Venning* [1983] 2 HKC 348 (leave to file record of magistrate out of time); *Producers Finance & Investment Ltd v Tse Yee-wan* [1983] 1 HKC 426 (whether imprisonment under Order 49B of the Rules of the Supreme Court was lawful without an order of commital); *Lee Cheuk v Sin Wai-kin* [1946–72] HKC 118 (whether District Court had jurisdiction to order rescission of divorce agreement); *Re Tse Mon-sak, executor of the will of Tse Lai-chiu, deceased* [1946-72] HKC 160 (applicability of English law to testamentary capacity of Chinese testators); *R v Lam Tuk-yu* [1946–72] HKC 237 (whether proper to cross examine on inadmissible statement); and *Chan Lee-kuen v Chan Siu-fai* [1946–72] HKC 337 (jurisdiction to grant decree of divorce to dissolve polygamous marriage of persons domiciled in the PRC).

a party was absent or unrepresented; an amicus was appointed to present arguments for the absent or unrepresented party.[21] Almost half of the cases found fall within this category, suggesting that the court is more ready to appoint an amicus in such situation. On the other hand, the court understandably wishes to guard against an abuse of the amicus system by turning it into a supplemental form of legal aid when legal aid is refused by the Director of Legal Aid.[22] Hence in this category of cases where an amicus was appointed, they invariably raised important legal issues (most of which dealt with the jurisdiction of the courts).

Similar to the second category, the third category of cases comprises mainly ex parte applications.[23] Most of them involved liquidation where an official receiver was present and acted as an amicus curiae.[24] The last category of cases are those where an amicus was appointed to safeguard the interest of someone who was not a party to the proceedings.[25]

Similar to the practice in England where an amicus is paid by the Crown when he is appointed at the instructions of the Attorney General in consultation with the Treasury on the ground of public interest,[26] an amicus who is a private practitioner in Hong Kong is usually paid unless he is prepared to act on a pro bono basis.[27] His fees are negotiated with and fixed by the Registrar or the Assistant Registrar of the High Court, and are at a rate lower than his usual

21 AG *v O'Donnell* [1985] 2 HKC 283 (whether magistrate had jurisdiction to entertain application for remand of accused in police custody); AG *v Watson* [1987] 1 HKC 446 (whether mandamus lies to compel a magistrate to make a forfeiture order); AG *v Dawe* [1987] 3 HKC 132 (whether Court of Appeal had power to deal with breach of recognizance); AG *v Paterson-Todd* [1987] 3 HKC 266 (whether court had jurisdiction to amend an order of mandamus directing a magistrate to 'hear and determine' a certain case); AG *v Yeung Lui* [1988] HKC 871 (whether application for forfeiture of foreign passport deemed to be unlawfully obtained under Immigration Ordinance appropriate); AG *v Chan-tak King* [1989] 1 HKC 48 (guidelines on sentencing); *Lei Sau-fong v Tai Wai-yong* [1991] 1 HKC 61 (whether ambiguous explanatory notes on statutory form gave rise to waiver or estoppel); *R v Alick Au* (1991) 1 HKPLR 71 (whether there was a right to legal aid where applicant had sufficient means); *Fung Yuen-mui v Chan Kam-yee* [1991] 1 HKC 462 (whether law of Hong Kong applicable in Kowloon Walled City); *Tam Hing-yee v Wu Tai-wai* [1992] 1 HKLR 185 (application of the Bill of Rights to inter-citizen disputes); *R v Mirchandani* [1992] 2 HKLR 174, (1992) 2 HKPLR 196 (whether decision of the Director of Legal Aid on means test reviewable); *R v Fu-yan* (1992) 2 HKPLR 109 (whether the court applied the same test of 'interest of justice' as the Director of Legal Aid); AG *v Ng Yuk-tung* [1992] 2 HKC 204 (whether correct to discharge when there were competing inferences to be drawn on the face of the evidence); and *R v Wong Yin-ping* [1997] 2 HKC 312 (types of interlocutory order made by magistrates which could be appealed against).

22 See eg *Chow Wai-hung v Hong Kong Government* [1983] 2 HKC 537. The decision turned on the nature of the Colonial Regulations and whether a challenge against the Colonial Regulations fell within public law or private law. This is a highly technical issue and the court acknowledged that it was a question of public importance. Hence it was surprising that the court decided to refuse the Crown's suggestion of appointing an amicus for the applicant, who appeared in person.

23 *Re Dewar* [1987] 3 HKC 576 (removal of name from jury list); and *Re South China Strategic Ltd* [1997] HKLRD 131 (petition to sanction a scheme of arrangement).

24 *Re Carrian Holdings Ltd (In Liquidation)* [1990] 1 HKC 320; *Re Grandeur Construction Co, ex p Law Hoi-chuen* [1987] 3 HKC 480; and *Re Singapore Insurance Co Ltd* [1985] 2 HKC 244.

25 *C v D* [1992] 2 HKC 248.

26 *Re Scandinavian Bank Plc* [1987] 2 WLR 752, 756. The court made no order as to costs in this case, and the costs of the amicus were borne by public revenue.

27 In both *R v Wong Yin-ping* [1997] 2 HKC 312 and AG *v Yeung Lui* [1988] HKC 871, the amicus, who was arguing the same point in another case, acted on a pro bono basis.

fees but commensurate with the Legal Aid scale.[28] In a civil case, under s 52A(1) of the Supreme Court Ordinance the court has jurisdiction to order the costs of the amicus to be borne by a party to the proceedings.[29]

Amicus curiae briefs in North America

In the United States, the traditional type of amicus has been developed into a practice of intervenors. This is largely a result of judicial recognition that judicial decisions could have far-reaching social, political, and economic impact beyond the interests of the litigating parties, who may not be in the best position to advance arguments from those perspectives. Intervention by amicus, usually in the form of a written brief, is generously received by the courts. This shift from a friend to an advocate is best described by Scriven and Muldoon:[30]

> In the United States this subtle shift from friend to advocate was further extended as the functional evolution of the concept of intervention as friend of the court continued. The appearance of the amicus in the United States was the result of a gradual perception that many interests beyond those of the parties to an action could be affected by the court's final pronouncement. This awareness was particularly true in the case of public interest litigation where various groups found the court to be a suitable forum for the voicing of their cause. This change of focus in the function of the amicus was simply a natural extension of its traditional metamorphosis in the English common law. In this adopted environment, the shift from friend to advocate gradually became legitimized and the friend of the court entered a new era.

Apart from judicial awareness of the broad socio-economic-political implications of its judgments, its desire to have full and complete arguments on these implications, and the universal practice of accepting written briefs in litigation, other social factors contributed to the development of the practice of amicus as intervenors.[31] There were numerous organisations in the United States which did not have the economic leverage to lobby the government. With an active Supreme Court which was prepared to enter into the most controversial constitutional issues such as racial segregation or abortion, these interested

[28] Letter from the Hong Kong Bar Association to the Judicial Administrator dated 11 March 1997.
[29] *Re South China Strategic Ltd* [1997] HKLRD 131; and *Alden Shipping Ltd v Interbulk Ltd* [1988] 1 AC 965.
[30] David Scriven and Paul Muldoon, 'Intervention as Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure' (1985) 6 Adv Q 448, 453-5, quoted by Seaton JA in *AG of Canada v Aluminium Co of Canada* (note 10 above), p 506.
[31] Ernest Angell, 'The Amicus Curiae: American Development of English Institutions' (1967) 16 ICLQ 1017, 1021–3.

groups realised that they could play a useful role in shaping the country's policies or legal development in the areas of their concern. Indeed, the amicus curiae has played a distinct role in American constitutional law in the twentieth century.[32]

Another important factor contributing to the widespread practice of amicus in the United States is that there is no similar rule regarding costs in civil litigation as existed in the United Kingdom. In light of the contingency fees system, it is unnecessary for the United States courts to develop the practice of ordering an unsuccessful litigant to pay the costs properly incurred by the successful party.[33] However, in order to reduce the costs incurred by the litigants due to the intervention of a non-party to the proceedings, the United States courts have largely confined amicus intervention to written amicus briefs instead of oral arguments. Such written briefs are filed with the courts and are available for public inspection, so that there is no compromise on open justice.[34] Gradually, intervention in the form of an amicus brief becomes the standard practice and is institutionalised by the practice rules of the Federal Supreme Court.[35]

Ernest Angell distinguished three general categories of amicus in the United States.[36] First, as in the English practice, the legal representatives of the government, federal or state, counties, municipalities, government agencies, and bodies, who enjoy locus standi on all public matters. Second, private organisations of professional or other occupational membership, such as the Bar Association, labour unions, commercial and industrial employers' associations. Third, private groups voluntarily appointing themselves to represent non-governmental, non-occupational interests, such as minority and religious groups, Jews, and civil libertarians. It is the third category of intervention of private voluntary organisations in publicly sponsored litigation, including

32 Angell, ibid, pp 1018–19, wrote: 'By 1930, private organisations were appearing in this posture, no longer in an essentially professional relation to the court but openly as advocates on behalf of some group or class struggle desiring to support the contentions of a party to the litigation. Appearances *amicus curiae* became much more common, chiefly in the higher federal and state courts, but also occasionally in trial courts of first instance.'

33 Dickson (note 8 above), p 669; and Angell (note 31 above), p 1023.

34 Written briefs of 116 pages were filed by Michael Zander, solicitor acting for the plaintiff, in *Rondel v Worsley* [1966] 3 All ER 657 (CA), and this practice was condemned by Dankwerts LJ at p 669.

35 Scriven and Muldoon (note 30 above), wrote: 'The essence of amicus interventions as an advocate by such organizations gradually became embodied in the form of the amicus brief. Through a written presentation of their views, opinions and supporting documentation, the courts were able to canvass fully the potential effects of their decisions. The amicus brief allowed this to be accomplished without over-extending the length of open court deliberations which are generally reserved for the parties to the proceedings. Eventually, this common route of intervention as friend of the court became institutionalized in the legal framework of the United States. The Federal Supreme Court codified amicus brief interventions in their practice rules and state jurisdiction eventually followed suit. The availability of the written brief signified another distinction between the legal systems of the United States and of England that assisted in the gradual shift in the nature of the amicus intervention. The written amicus brief confirmed the transformation of the device from its initial non-partisan role to its use by organizations and individuals seeking to advocate a position in the proceedings.' (Quoted with approval in *AG of Canada v Aluminium Co of Canada* (1987) 35 DLR (4th) 495, 507.)

36 Angell (note 31 above), p 1019.

prosecution, that has become 'the distinctive feature of modern United States' practice.'[37] The role of an amicus is no longer a mere bystander offering suggestions of facts or law to the court, but an advocate on the merits asserting an interest of its own, separate and distinct from that of the parties.[38] Amici other than legal officers for governmental agencies are, on the whole, responsible entities and persons who have a legitimate concern in the outcome of the litigation.[39]

In Canada, in *Reference Re Certain Titles to Land in Ontario*,[40] which involved a constitutional challenge to the validity of certain transactions in land, the Ontario Court of Appeal appointed one counsel as general amicus curiae, two counsel to argue for the validity of transactions in issue, and two more to argue for their invalidity. Acknowledging that other interests might well be affected by the decision of the court, it further admitted counsel to represent various interests groups such as land purchasers, municipal authorities, and the Ontario Branch of the Canadian Bar Association. While this case was exceptional in that the court was expressly empowered by the Ontario Constitutional Questions Act to appoint counsel to represent unrepresented interests affected by the transactions in issue, the next case of *Attorney General of Canada v Lavell* represented a more typical case of amicus intervention.[41]

The issue in *Lavell* was whether s 12(1)(b) of the Indian Act, which removed the Indian status of an Indian woman if she was married to a non-Indian but contained no similar restriction on an Indian man who married a non-Indian woman, was contrary to the equality protection clause in s 1 of the Canadian Bill of Rights. The Canadian Supreme Court admitted arguments from a number of non-parties, including the Six Nations Band of Indians of the County of Brant, the Native Council of Canada, the National Indian Brotherhood, Indians' committees and associations from almost all provinces and territories, University Women Graduates, the University Women's Club of Toronto, and several other women's organisations.

[37] Dickson (note 8 above), p 672. He cited, as an example, a successful appeal from the dramatic conviction for manslaughter of a physician who performed a lawful abortion in *Commonwealth of Massachusetts v Edelin*, 359 N E 2d 4 (1976), where amici curiae briefs were submitted by the American Ethical Union, American Humanist Association, American Jewish Congress, Board of Church and Society of the United Methodist Church, National Women's Conference of the American Ethical Union, Union of American Hebrew Congregations, Unitarian Universalist Association, United Church Board for Homeland Ministries, Center for Constitutional Rights, National Jury Project, Certain Medical School Deans, Professors and Individual Physicians, Civil Liberties Union of Massachusetts, League of Women Voters of Massachusetts, League of Women Voters of Boston, National Association for the Advancement of Colored People Legal Defence and Educational Fund, Inc, Association of Planned Parenthood Physicians, Inc, and Planned Parenthood League of Massachusetts. The large number of amici curiae briefs in this case is unusual, at least in Canada and international fora where similar amici intervention is permitted.

[38] *United States v Barnett*, 376 US 681, 737-8 (1964).

[39] See Krislov (note 8 above), pp 720–1, and Angell (note 31 above), pp 1043–4 for a positive assessment of the contribution of amici intervention in the United States despite occasional criticisms of its being deployed as 'political propaganda.'

[40] (1973) 35 DLR (3d) 10.

[41] (1973) 38 DLR (3d) 481.

In the following year, in the landmark case of *Morgentaler*[42] where a reputable doctor in Montreal was charged with an offence of performing an illegal abortion, and where the constitutionality of abortion was in issue, Laskin CJ allowed submissions from organisations such as the Canadian Civil Liberties Association, the Foundation of Women in Crisis, and the Alliance for Life. The intervenors were confined to public law issues relating to the legislative power and the effect of the Canadian Bill of Rights; they had no status regarding the merits of the conviction or appeal of Dr Morgentaler. The cases of *Lavell* and *Morgentaler* confirmed judicial approval from the highest court for amicus intervention in both civil and criminal matters. Since then, amicus intervention has been a regular feature in cases involving constitutional issues and the Canadian Charter, as well as in family law matters.[43] An important restriction on amicus intervention, however, is that intervenors are not permitted to take the litigation away from those directly affected by it. Following the practice in the United States, the intervenors must accept the case before the court with the issues defined by the parties. The intervenors are not permitted to widen the lis, introduce new causes of action, call evidence, or raise new issues.[44]

Amicus and third party intervention in international law

Amicus curiae briefs are also prevalent in human rights litigation in international fora. The vast majority of such briefs are filed by non-governmental organisations. Amicus briefs are largely restricted to written submissions. They could cover legal submissions, comparative law arguments, arguments about facts, and materials on domestic law, and the practice of the respondent state.[45] For instance, in *Lingens v Austria*,[46] where the applicant reporter argued that his conviction for criminal defamation in a suit brought against him by a senior politician violated his right to freedom of expression under Art 10 of the European Convention on Human Rights, the International Press Institute was given leave, with the assistance of Interights, to file written submissions. In *Soering v UK*,[47] a case concerning extradition of an offender who would face the death penalty in the United States if he were found guilty, Amnesty International was given leave to file lengthy briefs on the death row phenomenon in

42 (1975) 20 CCC (2d) 449.

43 The practice of amicus curiae interventions in family law matters and the role of an amicus in such proceedings are best summarised by Miller ACJ in *Romaniuk v Alberta* (1988) 50 DLR (4th) 480, 487–94.

44 *Re Clark et al and AG of Canada* (1978) 81 DLR (3d) 33, 38; *Borowski v Minister of Justice of Canada* (1983) 144 DLR (3d) 657, 667; and *AG of Canada v Aluminium Co of Canada* (1987) 35 DLR (4th) 495, 505–8.

45 Interights, 'The Practice and Effectiveness of Submitting Amicus Curiae Briefs by NGOs in Cases before International Human Rights Treaty Bodies and Tribunals: Notes on the Example of the European Court of Human Rights' (January 1997). I am grateful to Professor Yash Ghai who drew my attention to this paper.

46 (1986) 8 EHRR 193.

47 (1989) 11 EHRR 439.

the United States and the legal regulation of the death penalty in Europe. More recently, in *Wingrove v United Kingdom*,[48] which involved the banning of a film on the ground that it offended the religious feelings of the great majority of the population, Interights and Article 19 made submissions on the operation of blasphemy laws and prior restraint in selected countries.

A liberal practice has been adopted regarding the persons who or the types of organisations which may file amicus briefs. Under the European Convention, the President of the European Court may, in the interests of justice, invite or grant leave to 'any person concerned' to submit written comments.[49] 'Persons concerned' refer to organisations whose membership or constituency will be affected by the decision in the case,[50] or whose mandate covers the issues before the court.[51] According to Interights, the court may refuse a request to file an amicus brief if the request comes too late, when there are clear precedents on which the case can be decided and therefore an amicus intervention is unnecessary, when the request is a disguised petition, or when the request may in effect be a disguised attempt to influence other pending cases.[52]

Non-party intervention and locus standi

The common law has jealously guarded against non-party intervention in legal proceedings. Hence, a non-party who wishes to intervene in any proceedings has to show that he has a sufficient interest in the proceedings, and, if he is permitted to intervene, he will join the proceedings as a third party. He may call evidence and cross-examine witnesses, and is subject to the discretionary power of the court regarding the award of costs. Therefore, in *HKSAR v David Ma*, Mortimer VP was right in pointing out that Gladys Li SC and her team were not invited by the court to act as amici. Their intervention was not the traditional form of amici curiae known to English or Hong Kong law. However, one may add that Mortimer VP might have been unduly formalistic, as there was no reason why an invitation could not have been extended there and then. Indeed, the court itself expressly acknowledged in its judgment the valuable assistance rendered by the intervening team.[53] On the other hand, if Mortimer

48 (1997) 24 EHRR 1.

49 Rule 27(2) of the Rules of Court A and Rule 39(2) of the Rules of Court B. See Interights (note 45 above), p 1.

50 For example, in *Malone v United Kingdom* (1983) 5 EHRR 1, involving a complaint against telephone tapping in England, the Post Office Engineering Union pointed out that it had an indirect interest in telephone tapping because its members were concerned with the operation of the telecommunication system, and a direct interest because the tapping was performed by staff drawn from grades including those officially represented by the Union.

51 In most cases they are human rights organisations which have an expertise in a particular area, such as Amnesty International on torture, the death penalty, and disappearance, Interights and Article 19 on freedom of the press, or the Joint Council for the Welfare of Immigrants in the area of British immigration and nationality law and practice.

52 See Interights (note 45 above), p 4.

53 [1997] 2 HKC 315, 322 per Chan CJHC, 359 per Mortimer VP.

VP was suggesting that an invitation could not be extended because Gladys Li SC did not have locus standi, this is plainly misconceived as an amicus necessarily lacks locus. Locus would have been relevant only if Li SC and her team had intended to join the proceedings as a party, which they did not. By failing to consider separately the questions of locus and amicus intervention, the court has missed a golden opportunity to develop the practice of amicus intervention.

Judicial review constitutes an exception to the general reluctance of the common law to allow non-party intervention. Order 53, rule 9(1) of the Rules of the High Court provides that, in an application for judicial review, 'any person who desires to be heard *in opposition* to the motion or summons, and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the motion or the summons.'[54] In *R v Coventry City Council, ex p Phoenix Aviation*,[55] the applicants challenged on public policy grounds the closure of a port and airport which were used for the export of veal cattle to the Continent. The court granted leave to Compassion in World Farming to intervene with a brief to inform the court on the views of the animal welfare lobby. Carol Harlow argued that 'this is effectively the American "Brandeis" or amicus brief, widely used by pressure groups to lobby the courts in public interest cases and broaden the debate by the introduction of social and economic data.'[56]

In Hong Kong, in *Wharf Cable Ltd v AG*, where Wharf Cable challenged the government's proposed licensing of the video-on-demand service for being a violation of the exclusive cable broadcasting franchise granted to Wharf Cable, Hong Kong Telecom, a potential operator of the video-on-demand service, was permitted to intervene and be heard, presumably by way of Order 53, rule 9(1). This rule is an express acknowledgement that judicial review proceedings may well affect a non-party who should be afforded an opportunity to be heard. However, an anomaly is that it only permits those who oppose the application for judicial review to intervene, and not those in support of the application but for different reasons from that of the applicant. As the court retains a discretion to decide whether the intervenor is a proper person to be heard, the restriction to those opposing the application is probably unnecessary.

In recent years, the courts have tended to adopt a more liberal view on locus insofar as who can apply for judicial review is concerned. De Smith, Woolf, and Jowell forcefully argue: 'In summary, it can be said that today the court ought not to decline jurisdiction to hear an application for judicial review on the ground of lack of standing to any responsible person or group seeking, on reasonable grounds, to challenge the validity of governmental action.'[57]

54 Italics supplied.
55 [1995] 3 All ER 37. I am grateful to P Y Lo who kindly drew my attention to this case.
56 C Harlow, 'Back to Basics: Reinventing Administrative Law' [1997] Public Law 245, 255.
57 De Smith, Woolf, and Jowell, *Judicial Review of Administrative Action* (London: Sweet & Maxwell, 5th ed 1995), p 122, para 2-041.

This statement has received judicial blessing in Hong Kong.[58] Hence, Mortimer VP's remark on locus standi in the *David Ma* case is, with respect, contrary to the current liberal tide on locus. While this relaxed stance on locus is developed mainly in judicial review, the underlying rationale is clearly apposite to public interest or constitutional challenges in other types of proceedings.

Conclusion

The Basic Law came into effect on 1 July 1997. Unlike the Letters Patent which had a restrictive scope, the Basic Law covers virtually every aspect of the Hong Kong Special Administrative Region. It lays down the constitutional framework of the HKSAR government, the relationship between the legislature, the executive government, and the judiciary, as well as the distribution of power between the central government and the HKSAR government. It sets out fundamental rights and obligations, and covers the economy, finance, property, shipping, aviation, trade, industry, and commerce, as well education, science, culture, sports, religion, labour, and social services. Being the constitution of the HKSAR, the people of the SAR will rely on, and the SAR courts will have to interpret, the provisions of the Basic Law. Issues that could be raised under the Basic Law will be most wide-ranging, and decisions on the Basic Law will have far-reaching consequences. This is best illustrated by the case of *HKSAR v David Ma* itself: it started off as a run-of-the-mill criminal case and ended up as a landmark constitutional decision on the jurisdiction of the HKSAR courts. It would be most unfortunate if these cases are to be decided without the fullest arguments made before the courts and a proper consideration of the multi-faceted implications which the decision of the courts may have. It would be even more unfortunate if these cases were to be decided by default because of a lack of adequate representation, which might well have been the case if Gladys Li and her team had not been adopted by one of the defendants in the *David Ma* case. The time is ripe for the courts to explore the greater use of amicus curiae and to develop more liberal rules on standing.[59]

The following principles are proposed:

1 The court should welcome assistance in the form of amicus in cases which may have far-reaching implications and importance. Many of these cases are likely to arise in public law litigation.

[58] *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service* (1996) 6 HKPLR 333, 368. Compare the more restrictive view by Litton VP in the earlier decision of *Lee Miu-ling v AG (No 2)* (1995) 5 HKPLR 585, 596.

[59] The courts already enjoy an inherent jurisdiction to allow amicus intervention. Amicus practice can be formalised by a Practice Direction.

2 Intervention or assistance by an amicus requires the leave of the court. In determining whether leave should be granted, the court should consider the nature and public importance of the issues involved, the expertise of the amicus, the assistance that the court is likely to obtain from such intervention, and the interests of the parties. The court may confine amicus intervention to written submissions only.

3 An amicus may be a non-partisan party who will assist the court by drawing the court's attention to all relevant arguments for or against the issue in question, or a person or an organisation who wishes to advocate a particular concern. In both cases, an amicus does not represent the parties to the proceedings. He also has to accept the case as it is before the court. The issues are to be defined by the parties to the proceedings, and an amicus is not permitted to raise new issues or to call evidence. His assistance is normally confined to questions of law, although in appropriate cases, his assistance may be extended to questions of fact.[60]

4 The court should adopt a liberal stance on who could act as an amicus. In general, an amicus should be a lawyer. An amicus could also be an organisation which can show that the issues before the court falls within its mandate, for example, the Bar Association, Human Rights Monitor, or Justice.

5 It would be necessary to develop rules governing the question of costs, especially when the intervention of an amicus has prolonged the court hearing. Section 52A(1) of the Supreme Court Ordinance already provides the legal basis for the court to order a party to the proceedings to pay the costs of the amicus. In appropriate cases, the costs of an amicus may be paid out of public revenue, unless the amicus is prepared to act on a pro bono basis. In order not to deter non-party intervention, the court should not order costs against an amicus unless the intervention is frivolous, vexatious, or otherwise an abuse of process.

6 These principles do not affect the court's traditional power to invite an amicus in appropriate cases.

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[60] Many constitutional issues may involve a judgment on socio-economic data and the court may be assisted by what is known in North America as the Brandeis brief. See *R v Coventry City Council, ex p Phoenix Aviation* [1995] 3 All ER 37.

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