

# COMPARISON OF EVIDENCE BETWEEN STATE ADMINISTRATIVE COURT INDONESIA WITH SOUTH KOREA

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## **Abstract**

The judiciary under the supreme court consists of general courts, religious courts, military courts, and state administrative courts. In each procedural law court, the provisions concerning evidence are regulated. Evidence is the stage where the parties try to convince the panel of judges about the truth of the arguments put forward in a dispute based on valid evidence. Evidence has an important role because the results of evidence can be the basis for consideration by the panel of judges in making a decision. Evidence in the procedural law of the state administrative court is not only carried out in the Indonesian state administrative court but also in the South Korean Administrative Court. The historical development and organizational structure of the South Korean Administrative Court are the basis for analyzing the Evidence in the South Korean Administrative Court. Lessons from the South Korean Administrative Court can see the similarities and differences in the concept of evidence and type of evidence used in the South Korean Administrative Court with the Indonesian State Administrative Court. The approach used in this study is the statutory approach, comparative approach, and conceptual approach.

*Badan Peradilan yang berada di bawah Mahkamah Agung terdiri dari peradilan umum, peradilan agama, peradilan militer, dan peradilan tata usaha negara. Dalam setiap hukum acara peradilan diatur ketentuan mengenai pembuktian. Pembuktian merupakan tahapan dimana para pihak berusaha meyakinkan majelis hakim tentang kebenaran dalil yang dikemukakan dalam suatu sengketa berdasarkan alat bukti yang sah. Pembuktian mempunyai peran penting karena hasil dari pembuktian dapat menjadi dasar pertimbangan majelis hakim*

*menjatuhkan suatu putusan. Pembuktian dalam hukum acara peradilan tata usaha negara tidak hanya dilakukan pada peradilan tata usaha negara Indonesia, tetapi juga dilakukan pada Peradilan Administrasi Korea Selatan. Perkembangan sejarah dan struktur organisasi Peradilan Administrasi Korea Selatan merupakan dasar dalam melakukan analisis Pembuktian dalam Peradilan Administrasi Korea Selatan. Pelajaran dari Peradilan Administrasi Korea Selatan dapat melihat sisi persamaan dan perbedaan konsep Pembuktian dan alat jenis bukti yang digunakan dalam Peradilan Administrasi Korea Selatan dengan Peradilan Tata Usaha Negara Indonesia. Pendekatan yang digunakan dalam penelitian ini adalah pendekatan perundang-undangan (statute approach), pendekatan komparatif (comparative approach), dan pendekatan konseptual (conceptual approach).*

**Keywords:** Evidence, State Administrative Court, Indonesia, South Korea

## Introduction

Indonesia is expressly stated as a state of law listed in the constitution.<sup>1</sup> The implementation of law as a commander is rules which emphasize the limitation of powers in order to prevent absolutism that leads to *onregmatigedaad* even the act of *ongroundwetting* (contrary to the constitution).<sup>2</sup> In the administrative system in the rule of law, decision is generally issued which is an act of enforcing the legislation. Decisions are also actions to hold public interest based on the principle of wisdom.

Related to the State of law, F.J. Stahl formulated *rechtsstaat* (state of law) elements, namely the protection of human rights, separation or division of country power to guarantee human rights, the Government based on regulations and the existence of Administrative Courts.<sup>3</sup> In a state of law, disadvantaged citizens need to be given legal protection through an independent body. The body was formed through Law Number 5 of 1986 concerning State Administrative Court on

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<sup>1</sup> Constitution of the Republic of Indonesia 1945, Article 1 paragraph (3)

<sup>2</sup> Aswanto, *Hukum dan Kekuasaan: Relasi Hukum, Politik dan Pemilu* (Yogyakarta: Rangkang Education, 2012) p. 3

<sup>3</sup> S. F. Marbun, *Peradilan Administrasi Negara dan Upaya Administrasi di Indonesia* (Yogyakarta: Penerbit FH UII Press, 2011), p. 11.

December 29, 1986 and has been implemented since the Act was enacted on January 14, 1991 ago.

Indonesia's administrative courts opened their gates in 1991 on the basis of the Administrative Court Act no. 5 of 1986. To many they came as a surprise, for the Soeharto regime was neither known as very supportive of critique on its performance nor as particularly concerned about the quality of judicial performance.<sup>4</sup>

State administrative disputes arise if a person or civil legal entity feels disadvantaged as a result of the issuance of a decree.<sup>5</sup> State Administrative Court has the duty and authority to examine, decide upon, and resolve State Administration disputes. State Administrative Dispute is a dispute arising in the field of State Administration between a civil person or legal entity and a State Administration Agency or Officer, both at the central and regional levels, as a result of the issuance of a State Administration Decree, including employment disputes based on valid statutory regulations.<sup>6</sup>

In the process of examining state administrative disputes, there are similarities and differences with the examination of criminal cases. There are differences in the examination of state administrative dispute called preparatory examinations. The preparatory examination process is carried out before an examination in a closed hearing (not open to the public). In this examination will be led directly chaired by the Chair of the State Administrative Court. From the results of this examination, the judge will make a decision in accordance with the provisions of the legislation. Whereas in a criminal case is no preparatory examination because no requests submitted by the injured party, proceedings ranging from minutes from the police to the prosecutor and from the prosecutor to the court to the district court.<sup>7</sup>

In procedural law, some provisions contain evidence that is often referred to as evidence law. The law of evidence is the law established by the procedure for establishing the proven facts which are the basis

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<sup>4</sup> Adiaan Bedner, *Administrative Courts in Indonesia* (Leiden, The Netherlands: Brill, 2001), p. 49–51.

<sup>5</sup> Nike K. Rumokoy, "Peran P. TUN dalam Penyelesaian Sengketa Tata Usaha Negara", *Jurnal Hukum Unsrat*, vol. 20, no. 2 (2012), p. 127.

<sup>6</sup> Law No. 5 of 1986 concerning State Administrative Court State Gazette No. 77 of 1986, Article 1 number 4

<sup>7</sup> Latifah Amir, "Pembuktian Dalam Penyelesaian Sengketa Tata Usaha Negara Dan Perkara Pidana", *Jurnal Ilmu Hukum Jambi*, vol. 6, no. 1 (2015), p. 3.

for consideration in issuing a decision. Evidence will provide certainty in accordance with the reasoning about the extension of disputed legal facts.

Likewise, the legal opinion of evidence against many opinions among jurists. Subekti stated that the law of evidence provides rules about how to proceed with the case before the Judge. Another opinion was expressed by Professor Edward W. Clear of the University of Illinois College of Law who stated that:<sup>8</sup>

“The law of evidence is the system of rules and standards by which the admission of evidence at the trial of law suit is regulated.”

Edward W. Clear’s definition above shows the specificity of the evidentiary law in its role by proving it before the trial and also shows a legal system and standards for the entire evidentiary rules. In resolving disputes of state administration, criminal proceedings, before a judge issues a decision to find a truth both material and formal, the judge must first examine the evidence presented by the parties.<sup>9</sup> Evidence carried out by the judge in hearing the case is to determine the actual legal relationship with the parties. Not only events can be proven; however, there is also a right which is proven even in a state administration dispute which is proven as a validity of the conduct of a state administration official.

According to Teguh Samudera, that the issue of evidence is very important to be known by all the people of the community and therefore it is also necessary to be disseminated so that the community is more clear about the problem of evidence by reason of consideration.<sup>10</sup> Evidence is one of the important stages in the procedural law process because the parties try to convince the judge at the evidence stage. The right to hear a case and before making a decision always requires evidence. Evidentiary tools are the basis for achieving a definite case resolution through the Court.

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<sup>8</sup> Edward W. Cleary, *McCormick’s Handbook of the Law of Evidence* (St. Paul Minn : West Publishing Co, 1972), p. 1.

<sup>9</sup> Latifah Amir, “Pembuktian Dalam Penyelesaian...”, p. 1.

<sup>10</sup> Teguh Samudera, *Hukum Pembuktian Dalam Acara Perdata* (Bandung: PT. Alumi, 2004), p. 10.

Evidence is intended to achieve a truth that is the truth of the legal relationship of the parties who litigate. The existence of evidence will guarantee the protection of the rights of the parties to the case in a balanced and fair manner. Evidence can illustrate that the examination of a case is a legal examination according to the law. In the evidence, there are evidentiary tools that have been regulated and determined by law. This can guarantee that the judge in carrying out the evidence is not making it up or not according to the rules. Evidence is also done because in practice there are still law graduates who do not know how to prove a postulated case.

The burden of evidence in the State Administrative Court process is the obligation of the parties to the dispute. Judges can determine the facts and if necessary, they can find/find the facts themselves. Therefore, the stage of examining evidence becomes very important as consideration for judges making decisions.

In the examination of state administrative disputes, the judge's decision which is of permanent legal force (*Inkracht*) that the judge's decision must be based on the evidence set out in Article 100 of Indonesian Law No. 5 of 1986 concerning State Administrative Court. Although examination of state administrative disputes is almost the same as examination of criminal cases, examination of evidence has a significant difference. In the examination of evidence there are principles contained in state administrative justice and this principle is not found in the settlement of criminal cases.<sup>11</sup>

State Administrative Courts are also known in various other countries that adhere to the civil law legal system. Although State Administrative Courts in other countries are known by various names such as Administrative Courts or State Administrative Courts The Administrative Court also put forward evidence as an important stage and consideration for making decisions. South Korea is one of the countries that make up the Administrative Court. Therefore, the author will be to analyze based on the applicable laws and regulations concerning the evidence of state administrative dispute resolution in Indonesia and its comparison with the evidence mechanism in the South Korean Administrative Court.

Based on the background description above, two problems are the focus of this article. First, the history and organization structure of

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<sup>11</sup> Latifah Amir, "Pembuktian Dalam Penyelesaian...", p. 3-4.

the South Korean Administrative Judiciary. Second, a comparison of evidence in the Indonesian Administrative Court with the South Korean Administrative Court.

Normative legal research methods are used to answer the above research problems. The normative legal research method is a scientific research procedure to find the truth based on legal scientific logic from the normative side.<sup>12</sup> In legal research, there are several approaches, namely the statute approach, the case approach, the historical approach, the comparative approach, and the conceptual approach.<sup>13</sup> The approach used in this study is the statutory approach, the comparative approach, and the conceptual approach.

This statutory approach is carried out by studying and examining the laws and regulations relating to the State Administrative Court in Indonesia. The comparative approach is carried out by comparing the regulations in Indonesia with the regulations of South Korea related to the evidence at the trial of the State Administration/Administrative court. Comparisons are made to obtain similarities and differences between the regulations. This conceptual approach moves from the views and concepts related to the evidence at the trial of the State Administration/Administration court contained in various literatures. The data source used is secondary data consisting of primary legal material in the form of legislation, and secondary legal material in the form of literature and research results. The data that has been collected is then described and interpreted according to the subject matter, then systematized, explored, and given analysis. The analytical method applied to obtain conclusions on the issues discussed is through qualitative juridical analysis.

## **History and Organization Structure of the South Korean State Administrative Court**

The current system of judicial review in South Korea was established by the 1987 Constitution. Said Constitution was adopted within a democratization process, occurred between 1985 and 1987. After many months of street protests organized by the opposition,

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<sup>12</sup> J. L. K. Valerine, *Metode Penelitian Hukum (Bagian I)*, (Jakarta: Program Pasca Sarjana Fakultas Hukum Universitas Indonesia, 2015), p. 57.

<sup>13</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2014), p. 133.

where millions of citizens participated, the regime led by President Chun Doo Hwan yielded and finally allowed the discussion of constitutional amendments.<sup>14</sup> The constitution declares the principle of judicial independence by stating, “judges shall rule independently according to their conscience and in conformity with the Constitution and laws.”<sup>15</sup> Independence of the judicial power of judges is ultimately a means to guarantee the independence of trial.<sup>15</sup>

South Korea has Law Number 3992 of 1987 concerning the Court Organization Act as the latest was amended in Law Number 13522 of 2015, on 1 December 2015. This Act was to regulate the court organization which carried out judicial powers as determined by the Constitution.<sup>16</sup> Unless otherwise stated by the Constitution, the court will decide all legal disputes and have the powers granted to them by the Law of the Judicial Organization and other Laws. An exception was found where the Constitution established the power to assess some constitutional issues in the Constitutional Court and encouraged the power to examine qualifications and take disciplinary action against members of parliament in the National Assembly.

In addition to the power to adjudicate disputes, Courts shall administer and supervise affairs concerning registration, registration of family relationships, deposits, executive officers, and certified judicial scriveners.<sup>17</sup> Courts in South Korea are classified into six categories namely the Supreme Court, High Court, Patent Court, District Court, Family Court, Administrative Court.<sup>18</sup> The basic three-tier system consists of a district court, a high court, and the Supreme Court as a general court. Other courts perform special functions with the Patent Court which is placed at the same level as the high court, and the Family Court, Administrative Court, and Bankruptcy Court are positioned at the same level as the district court. The Administrative

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<sup>14</sup> Rodrigo González-Quintero, "Judicial review in the Republic of Korea: an introduction", *Revista de derecho: División de Ciencias Jurídicas de la Universidad del Norte* ], vol. 34 (2010), p. 3.

<sup>15</sup> Chang Soo Yang, "The Judiciary in Contemporary Society: Korea", *Case Western Reserve Journal of International Law*, vol. 25, no. 2 (1993), p. 311-312

<sup>16</sup> Act No. 13522 of 2015 concerning Court Organization, Article 1 (Purpose)

<sup>17</sup> Act No. 13522 of 2015 concerning Court Organization, Article 2 paragraph (3)

<sup>18</sup> Act No. 13522 of 2015 concerning Court Organization, Article 3 (Categories of Courts)

Court is a special court in South Korea in addition to the patent court and family court, the Bankruptcy Court.

For trials, some of the courts and family courts, court and family court can arrange branch courts, family branch courts, city courts, and office registrations under their jurisdiction. Branch courts and family courts can be combined into one branch court.<sup>19</sup>

The Administrative Court, which was newly established in 1994, has actively checked administrative discretions for possible abuses thereof.<sup>20</sup> Seoul Administrative Court was established at the same level as the district court, on March 1, 1998. The only Administrative Court is located in Seoul. The district court concerned carries out the function of administrative courts until a separate administrative court is established in the region. The Administrative Court hears tax disputes, eminent domain, labor, and other administrative cases. In the past, the exhaustion of administrative remedies was a requirement for filing an administrative lawsuit with the court. However, with the establishment of an Administrative Court, administrative lawsuits can be filed without first resorting to an administrative solution unless otherwise stated by law.<sup>21</sup> It means that the person who is affected unfavorably by an administrative activity can bring a suit without specific provision allowing judicial remedy at the individual statutes<sup>22</sup>

The administrative court has a president appointed. The president of the administrative court shall be appointed from among judges. The president of the administrative court shall be in charge of the judicial administrative affairs of the court, and direct and supervise public officials under his/her control.<sup>23</sup> When the chief judge of a high court becomes vacant, becomes vacant, or he/she is unable to perform his/her duties by any avoidable reason, his/her competence shall be exercised by the first chief judge or senior chief judge in charge of

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<sup>19</sup> Supreme Court of Korea, March 2019, p. 9, available: <http://www.eng.scourt.go.kr/>, accessed 4 April 2019.

<sup>20</sup> Kuk Cho, *Litigation in Korea* (Cheltenham: Edward Elgar Publishing, Inc., 2010), p. viii.

<sup>21</sup> Supreme Court of Korea, March 2019. p. 18, <http://www.eng.scourt.go.kr/>, accessed 4 April 2019.

<sup>22</sup> Hee-Jung Lee, "The structures and roles in judicial review of administrative litigation in Korea", *Journal of Korean Law*, vol. 6, no. 1 (2006), p. 48.

<sup>23</sup> Act No. 15490 of 2018 concerning Court Organization, Article 40-2.



division.<sup>24</sup> The secretary to the chief judge of a high court shall be appointed for the high court. The secretary to the chief judge of a high court shall be appointed from among the court officials of Grade V or public officials in extraordinary civil service equivalent to those of Grade V. Grade V is equivalent to Deputy Director in the Republic of Korea Civil Service System which must pass the promotion test and general promotion screening. The secretary-general appointed from court officials of grade V shall be in charge of affairs of the secretariat, bureau or section under the order of senior officials, and direct and control the staff and personnel under his/her responsibility.

Divisions shall be established in the administrative court.<sup>25</sup> The chief judge shall be appointed in each division. The chief judge shall be the presiding judge in a judgment in a division and supervise affairs of the division under the direction of the president of a high court. The administrative court shall judge in the first instance, such administrative cases as prescribed by the Administrative Litigation Act and those falling under the competence of the administrative court under other Acts.<sup>26</sup> The administrative court allowed two subsequent chances of appeal from its decision to the High Court and then to the Supreme Court.<sup>27</sup>

In administrative cases, the court decides on whether feasant or nonfeasant of administrative entities is illegal and resolves disputes surrounding legal relationships in public law. Most administrative cases relate to revocation or affirmation of nullity of dispositions or decisions of administrative entities. Dispositions include tax collection, suspension or revocation of a driver's license, refusal to pay industrial accident compensation, disciplinary measure against civil servants, suspension or revocation of business licenses, refusal to accept applications, and others. Actions for affirming status as civil servants and contractual actions in public law are examples of actions involving legal relations in public law. In addition, actions for affirmation of

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<sup>24</sup> Act No. 15490 of 2018 concerning Court Organization, Article 26 paragraph (4)

<sup>25</sup> Act No. 15490 of 2018 concerning Court Organization, Article 40-3

<sup>26</sup> Act No. 15490 of 2018 concerning Court Organization, Article 40-4

<sup>27</sup> Hee-Jung Lee, "The structures and roles...", p. 47.

unauthorized actions are permitted if an administrative entity fails to respond to an application by the public.<sup>28</sup>

## **Comparison of Evidence Indonesian State Administrative Court and South Korean Administrative Court**

### ***Evidence in Indonesian State Administrative Court***

The regulation of evidence in the procedural law of the State Administrative Court is regulated in Article 100 to article 107 of Indonesian Law no. 5 of 1986 concerning State Administrative Court. The regulation of evidence and evidentiary mechanism in the procedural law of the State Administrative Court is not regulated in the amendment to the Law. Number 9 of 2004 concerning Amendments to the Law. Number 5 of 1986 concerning State Administrative Court and Law. Number 51 of 2009 concerning the Second Amendment to the Law. Number 5 of 1986 concerning State Administrative Court.

In the State Administrative Court procedural law determines facts that are publicly known, it does not need to be proven. From what the public should know if taken as a basis for consideration by judges in making decisions, these facts need not be proven. The State Administrative Court procedural law recognizes five types of evidence, namely:<sup>29</sup>

#### **a. Written Evidence**

Written evidence is anything that contains reading signs that are intended to pour out the contents of the heart or to convey one's thoughts and are used as evidence. Letters or writings are anything that contains reading signs.<sup>30</sup> Letters as evidence consist of 3 types, namely:

- 1) authentic deed, i.e. a letter made by or in the presence of a public official, which according to statutory regulations has

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<sup>28</sup> Supreme Court of Korea, *The Judiciary Administrative*, <https://eng.scourt.go.kr/eng/judiciary/proceedings/administrative.jsp>, accessed 4 April 2019.

<sup>29</sup> Law No. 5 of 1986 concerning State Administrative Court State Gazette No. 77 of 1986, Article 100

<sup>30</sup> Sudikno Marto Kusumo, *Hukum Acara Perdata Indonesia*, 7<sup>th</sup> ed. (Yogyakarta: Liberty, 2006), p. 105.

- the authority to make that letter with the intention to be used as evidence of an event or legal event contained therein;
- 2) a deed under the hand, i.e. a letter that was made and signed by the parties concerned with the intention to use it as evidence of an event or legal event contained therein;
  - 3) other documents that are not deed.
- b. Expert testimony
- Expert testimony is the opinion of a person given under oath in a hearing about what he knows from experience and knowledge. The witnesses were presented at the request of both parties or one of the parties. The Chief Judge may also appoint one or several experts. An expert in a trial must provide information both by letter and word of mouth, which is confirmed by oath or promise according to the truth to the best of his knowledge. Expert witnesses are not absolutely present at the court, and these witnesses appear if they are submitted by the parties or according to the judge expert witnesses are indeed needed
- c. Witness testimony
- Witness testimony is considered as evidence if the information is related to things experienced, seen or heard by the witness himself. The witness' testimony is the conclusions he has drawn from the events he has seen or experienced because the judge has the right to draw those conclusions. Testimony is not a perfect evidence and binding tool for judges, but it is up to the judge to accept it or not. That is, judges are free to trust or distrust the testimony of a witness.<sup>31</sup>
- d. Recognition of the parties
- Recognition of the parties cannot be withdrawn unless based on sound reasons and can be accepted by the Judge. Recognition is a one-sided statement that does not require approval from other parties, especially from the opposing party. Verbal confessions must be made in court and must not be outside the court. Recognition in writing may be done outside the court and

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<sup>31</sup> Fence M. Wantu, *Idee Des Recht: Kepastian Hukum, Keadilan, Kemanfaatan (Implementasi dalam Proses Peradilan Perdata* (Yogyakarta: Pustaka Pelajar, 2011), p. 150

before a judge. Recognition given by the plaintiff or the defendant does not necessarily refer to the material truth related to state administrative regulations, therefore the plaintiff or defendant has given approval, but the court still needs the authority to be questioned given to the parties.

e. Judge's Knowledge

Judge's knowledge is something that is recognized and its truth is acknowledged. The judge's knowledge cannot be supplemented immediately because there must be other supporting tools. With the existence of other evidence, his position strengthens the confidence of judges in drafting decisions, in accordance with the interpretation or interpretation of existing electoral regulations.

because the litigant filed the lawsuit

### **Principle of Evidence in Indonesian State Administrative Court**

Both State Administrative Court procedural law and civil court procedural law share the principle that the burden of evidence lies with both parties. The litigant filed the lawsuit, litigant gets the first chance to prove it. Then the defendant has the obligation to prove to refute the evidence submitted by the plaintiff by submitting stronger evidence.<sup>32</sup>

General Explanation of Indonesian Law No. 5 of 1986, states that the procedural law used in the State Administrative Court has similarities with the procedural law used in the General Courts for civil cases. The difference is that the State Administrative Court, the Judge plays a more active role in the trial process to obtain material truth and for that, the law leads to free evidence as regulated in article 107 of Indonesian Law No. 5 of 1986. The doctrine of free evidence or free evidence theory is teaching or theory that does not require the existence of provisions that bind the judge so that the extent of the evidence is submitted to the judge.

An important principle in the procedural law of the State Administrative Court is the activeness of judges (Article 58, Article 63 paragraph (1) and (2), Article 80 and Article 85 Indonesian Law No. 5

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<sup>32</sup> Fence M. Wantu, *Idee Des Recht:...*, p.15

of 1986 concerning State Administrative Court), in the trial process, the judge must play an active role in obtaining a truth that material.<sup>33</sup> This evidentiary system is carried out like criminal justice, while in civil justice the evidentiary system is carried out by seeking formal truth.

The State Administration dispute involves the plaintiff, namely the community (civil legal entity) and the defendant is the State Administration Agency or Officer. Among the plaintiffs and the defendant, we can ask the defendant to have greater access to information for the evidence process if we compare it with the opportunities needed by the plaintiff. Therefore, the judge of the State Administrative Court cannot escape from the principle of activeness because this will be very detrimental to the Plaintiff. The principle of activeness of judges is a means for judges to obtain material truth during the evidence process.<sup>34</sup>

The role of active judges is to balance the position of the plaintiff and the defendant. It also needs to be stated that with the application of the principle of active judges, this has the consequence of the authority of state administration judges to give *ultra petita decisions*, namely to decide on matters directly related to the main problem being sued, even though it was not requested by the defendant

The judge determines what must be proven, the burden of evidence along with the assessment of evidence, and for the validity of the evidence required at least two pieces of evidence based on the judge's conviction.<sup>35</sup> This means that judges must try to find material truth. Judges must pay attention to everything that happens in the examination without relying on facts and matters submitted by the parties, the Judge of the State Administrative Court can determine for himself:

- a. what must be proven;
- b. who must be burdened with evidence, what matters must be proven by the litigant and what must be proven by the Judge himself;

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<sup>33</sup> Rozali Abdullah, *Hukum Acara Peradilan Tata Usaba Negara* (Jakarta: Radjawali, 1992), p. 3.

<sup>34</sup> M. Ali Abdullah, *Teori dan Praktik Hukum Acara Peradilan Tata Usaba Negara Pasca-Amendemen* (Jakarta: Kencana, 2015), p. 15.

<sup>35</sup> Law No. 5 of 1986 concerning State Administrative Court State Gazette No. 77 of 1986, Article 107.

- c. which evidence is preferred to be used in evidence;
- d. the strength of the evidence that has been submitted.

### **Evidence in South Korea Administrative Court**

Case hearings in administrative justice are regulated in the Administrative Procedure Act No. 5241, which was made in 1996 and finally amended by Law No. 12347 in 2014). The purpose of this Act is to ensure fairness, transparency, and credibility in administrative operations and to protect the rights and interests of citizens, by providing general matters regarding administrative procedures and thereby allowing citizens better access to administrative procedures.<sup>36</sup>

In principle, the administrative process and the civil process have an agreement on how they are arrested. However, because the administrative process is more related to the public interest, there is a greater need for the court to ex officio interference in the administrative process than in civil proceedings. In the administrative process, the court can decide on ex officio evidence and consider facts that are not averaged by the parties related parties are also responsible for making approval and for producing evidence.<sup>37</sup>

The Korean judicial system issues an adversarial system without jury on civil law, judges are given exclusive rights to decide matters from the facts.<sup>38</sup> In Korean civil law only has the right of testimony is limited to the provisions in the application of evidence and there are no other general requirements to be accepted. The effect is that it allows the parties to display a large area of evidence at the hearing.<sup>39</sup>

The facts alleged by the parties need to be proved by evidence. For this reason, evidence is collected and submitted by the parties. Application to present evidence may be made either orally or in writing. The applying party should identify the facts to be proved by evidence.<sup>40</sup>

After determining the relevance and need for specific evidence based on the case, the court can decide whether to approve the

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<sup>36</sup> Act No. 12347 of 2014 concerning Administrative Procedures, Article 1

<sup>37</sup> Supreme Court of Korea, *The Judiciary Administrative*, accessed 4 April 2019.

<sup>38</sup> Si Cheol Kim, Introduction to the Korean Civil Procedure: An Overview, *Presented on April 21, 2008*, p. 10.

<sup>39</sup> Act No. 14103 of 2016 concerning Civil Procedure, Article 293

<sup>40</sup> Kuk Cho, *Litigation in Korea*, p. 20-21.

evidence or not. Any receipt of evidence can be done unless the party is not present on the specified date. Examination of witnesses and parties must be carried out after the convergence and evidence from the parties have been approved. In Evidence Checking, the Chairperson's Acting Officer may, ex officio or upon the application of the interested parties, conduct the necessary examinations and also examine facts relating to the parties that have not been approved. Examination of evidence must be carried out in any of the ways verified below:<sup>41</sup>

1. Collecting evidence data such as documents, ledgers, and materials;
2. Inquiries to relevant witnesses, expert witnesses, etc;
3. Verification or appraisal and assessment;;
4. Other necessary examinations.

If deemed necessary, the chairperson's official may ask the administrative body concerned to submit the required documents or express their opinion. In such cases, the administration of the institution is required to comply with it unless there are special circumstances that impede the performance of its duties. The court may entrust public institutions, schools or other organizations and individuals, or foreign public institutions with the examination required for matters relating to function, or by delivery of official copies or copies of documents stored by it.<sup>42</sup>

South Korea's Administrative Court evidence is explicitly stated in Article 31 paragraph (2) which states that "Interested parties can express their opinions, submit documentary evidence, and answer questions to relevant witnesses, expert witnesses, etc."<sup>43</sup> This shows that the South Korean administrative court recognizes 4 types of evidence, namely: confession of parties, documentary evidence, relevant witnesses, and expert witnesses. The Administrative Procedure Act does not regulate in more detail the types of evidence because in principle the evidence is the same as those stipulated in the Civil Procedure Act.

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<sup>41</sup> Act No. 12347 of 2014 concerning Administrative Procedures, Article 33

<sup>42</sup> Act No. 14103 of 2016 concerning Civil Procedure, Article 294

<sup>43</sup> Act No. 12347 of 2014 concerning Administrative Procedures, Article 31 Paragraph (2)

In principle, administrative proceedings and civil proceedings have similarities in the way they are held.<sup>44</sup> Evidence of the South Korean Administrative Court procedural law, namely:

a. Recognition of the parties

Facts acknowledged by the parties in court and actual facts do not require ratification: Provided that claims that contradict the truth can be revoked when it is proven that the confession was made due to any wrongdoing.

b. Witness Examination

A witness must be examined first by the party asking him to appear, and then by another party. The presiding judge can examine the witness at any time. The presiding judge may limit hearings by parties when they overlap or are not relevant to the problem, or when other situations are needed.

Each witness must be examined separately. Oaths are not given when examining someone under the age of 16 and someone who cannot understand the meaning of an oath. A witness can refuse to give testimony in which the reasons for refusing a testimony must be verified. Testimonies by witnesses are recorded in documents. In the case of false testimony, the witness commits perjury.<sup>45</sup>

c. Expert Testimony

Everyone who has the knowledge and experience needed to give expert testimony must be responsible for giving that testimony. Everyone may refuse to testify or take an oath based on the same conditions as a witness.

The expert witness in Korea is normally regarded either as an individual with advanced scholarship a particular field or discipline or as one holding an occupation requiring a certifiable or licensed skill. As one former Seoul District Court judge explained, the court appointed expert witness is seen as someone who can lend special or critical analysis.<sup>46</sup>

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<sup>44</sup> Supreme Court of Korea, *The Judiciary Administrative*, accessed 4 April 2019., accessed 4 April 2019

<sup>45</sup> Kuk Cho, *Litigation in Korea*, p. 22.

<sup>46</sup> Eric Ilhyung Lee, "Expert Evidence in the Republic of Korea...", p. 605.



An expert witness must be appointed by the court for a lawsuit, an assigned judge, or a trusted judge. The presiding judge may call on expert witnesses to express their opinions both in writing and orally. The presiding judge may, when he orders many expert witnesses, make an expert testimony, ask them to express their opinions together or a little.<sup>47</sup>

The court can if deemed necessary, entrust expert testimony to public institutions, schools, other organizations that have adequate equipment, or foreign public institutions. The court can also ask people appointed by public bodies, schools, other organizations or foreign public agents to make an explanation of the written testimony of expert experts.

d. Documentary Evidence

When the party intends to submit documentary evidence, he must do so by sending a document, or by submitting a request for an order to make the person holding the document submit it. When a party, with the aim of preventing the other party's use of documents that he was ordered to submit, destroy the document, or make it unusable, the court can acknowledge that the other party's allegations regarding such documents are proven true.<sup>48</sup>

Documents concerning the results of the examination of cases and other documents relating to relevant dispositions lie in between the time when notice of the hearing is given and the time when the hearing is concluded.<sup>49</sup>

In general, the South Korean Administrative Court recognizes four types of evidence, namely: Confession of the parties, Witness Examination, Expert Testimony, and Document Evidence. Although other evidence is stated, it is not regulated to fund the example of other evidence. The South Korean Administrative Court does not explicitly state the judge's knowledge as evidence.

Either explicitly or implicitly, give trial judges broad discretion on matters of evidence. For example, explicit rules grant the court independent powers to gather evidence; the absence of provisions on

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<sup>47</sup> Act No. 14103 of 2016 concerning Civil Procedure, Article 339.

<sup>48</sup> Act No. 14103 of 2016 concerning Civil Procedure, Article 350.

<sup>49</sup> Act No. 12347 of 2014 concerning Administrative Procedures, Article 37.

issues such as relevance and hearsay, however, render judges responsible for resolving such matters.<sup>50</sup>

### Principle of Evidence in South Korean Administrative Court

Judges of State Administrative Court have distinctive features that distinguish them from judges at other judicial institutions. The distinctive feature is that the State Administrative Court judge has an active role that dominates the judicial process in the State Administrative Court, because it is bound to the principle of *Dominus Litis*. The Principle of *Dominus Litis* is very necessary to balance the position of the parties in the evidentiary process at the Court.<sup>51</sup>

The principle of active judges (Principle *Dominus Litis*) is applied in South Korean Administrative Court procedural law. This relates to the hearing. In commencing a hearing, the presiding official shall first explain the contents of the scheduled disposition in question, its factual background, legal basis, etc. Concerned parties, etc. may state their opinions, submit documentary evidence, and address questions to relevant witnesses, expert witnesses, etc.<sup>52</sup>

The presiding official of a hearing may take measures necessary to ensure the prompt and orderly progress of the hearing.<sup>53</sup> The presiding official of a hearing may, ex officio or upon the application of a concerned party, conduct necessary examinations and also examine facts that concerned parties, etc. have not claimed.

Examination of witnesses, expert witnesses, documents, and confessions of the parties and other evidence as well as the role of the approval of the progress shows that the judges actively prioritize material truth in connecting administrative law cases.

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<sup>50</sup> Eric Ilhyung Lee, "Expert Evidence in the Republic of Korea...", p. 601.

<sup>51</sup> Riawan Tjandra, *Teori dan Praktek Peradilan Tata Usaha Negara* (Yogyakarta: Universitas Atmajaya, 2010), p. 119.

<sup>52</sup> Act No. 12347 of 2014 concerning Administrative Procedures, Article 31 paragraph (1) and (2).

<sup>53</sup> Act No. 12347 of 2014 concerning Administrative Procedures, Article 31 paragraph (4).

**Table 1.** Comparison of Evidence of Indonesian State Administrative Court with the South Korean Administrative Court

No.	Subject	Indonesian State Administrative	South Korean Administrative Court
1.	Type of evidence	Written evidence expert testimony witness testimony Party confession Judges knowledge.	Party confession Witness examination Expert witness documentary evidence
2.	Follow up/fines to witness not attend	If witness no comes without a reason that can be accounted for, then it must be invited with someone else. The Chief Judge of the Session can give orders taken by the police to the trial.	Sanctions five million won and can be detained for no more than 7 days.
3.	Prohibition of being a witness	Blood relatives or marital relationship according to straight line up or down to the second degree of one of the parties to the dispute wife or husband of the party to the dispute. children who are not yet seventeen years old people who are sick of memory.	It was not explicitly stated that those who were prohibited from becoming witnesses. The Administrative Procedure Act only states that the Examination is carried out with the relevant witnesses.
4.	The right to refuse to become a Witness	Brothers and sisters, brothers and sisters-in-law one of the parties; Everyone who because of his dignity, occupation, or position is required to keep everything related to his dignity, occupation, or position.	If a lawyer, patent attorney, notary public, certified public accountant, certified tax consultant, the person involved in medical care, a pharmacist, or other post holders responsible for keeping secrets under law or religion, is examined on matters which is under the secret of its official functions. When he is examined on matters that are under his technical or professional secrets. If his testimony is related to matters that can lead to prosecution or belief

			in him or can bring shame to himself or them, such as a relative of a witness, or people who were previously in such a relationship; and. A witness's guardian or someone under the witness's supervision.
5.	Expert Witness testimony	Expert testimony is the opinions of people given under oath about what they know according to their experience and knowledge. This means that experts are defined as individual opinions.	If necessary, in addition to the Court entrusting testimony to individual experts, the Court can ask experts from public institutions, schools, other organizations that have adequate equipment, or foreign public institutions.

### Conclusion

The South Korean Administrative Court is a special court other than the Patent Court and Family Court, Bankruptcy Court. The Administrative Court was established in 1994. The administrative court adjudicates administrative cases as determined by the Administrative Law of Litigation, and cases where the administrative court has jurisdiction under other laws. Comparison evidence of Indonesian State Administrative Court and South Korean Administrative Court lies in the type of evidence, sanctions and follow-up for witnesses who refuse to come and give testimony and those who are prohibited from becoming witnesses and those who can become expert witnesses. The South Korean Administrative Court stated that expert witnesses outside the individual are from public institutions, schools, and other organizations.

The Indonesian Administrative Court and the South Korean Administrative Court apply the principle of active judges in settling cases. This is reflected in the provisions related to the mechanism and procedures for evidence at the court. The chief judge takes the steps necessary to ensure rapid and orderly proceedings. The judge conducts the necessary examinations and also checks facts that are not recognized by the relevant parties. In practice, the judge determines which evidence is used, and who has to prove it, and the relevance of the evidence to the statements of the parties.

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