THE DEVELOPMENT OF DOMINI LITIS PRINCIPLE IN INDONESIAN ADMINISTRATIVE COURT

Aju Putrijanti[1]

ABSTRACT

Administrative Court is one of the judicial function under The Supreme Court, and its aim is to settle dispute between Government versus individual or company. Dominis litis principle is one of the important principle in Administrative Court. Judge should be active during the process of the court, gives advise to Plaintiff to complete the claim, also guidance in the evidence process. Due to the development in society, this principle should be understood in a wider sense of substantive and proportional justice. To gives substantive and proportional justice, judge should consider ethic,moral, customs, and others outside law itself, and have to think progressive , in order to give a substantial justice. Refer to this principle, it is shown that there is an important relation between the domini litis principle, and a substantive proportional justice, as should be understood in a progressive way. This is a doctrinal research, data that will be used are secondary data, basically Act, court judicial decision, other related documents. This research based on statute approach, and will be in deductive qualitative descriptive analyzed. This paper will describe the development of domini litis principle refers to Pancasila perspective as the ideology of nations according to gives a substantive proportional justice.

Key Word: domini litis principle, administrative court, substantive proportional justice, Pancasila.

[1]Fakultas Hukum Universitas Diponegoro, Semarang, J.Prof.Soedarto, SH, Tembalang Semarang, Jawa Tengah , Indonesia, E-mail : aputriyanti@yahoo.com, Contact number : (062) 08122871668

I. INTRODUCTION

In the Constitutional State, the judiciary power has an important role and should be independence without interfere from any other power or body. The Administrative Court is one of the judicial function under the Supreme Court, and the existence is important as one condition in the frame of Constitutional State. This Court has a specific task followed by specific principles, remembering that the field of this Court are in administrative law. The Court had an important role in protecting administrative justice for citizens and others affected by public decision-making.

The Administration Court formed under The Act No.5 in 1986, and it had changed twice by Act o.9 in 2004, Act No. 51 in 2009. The changes were made to acclimatize with the Constitutional, and with Act No. 48 in 2009 of Judicial Ascendency. Some changes have been made in two Acts above, in order to gives justice to the people and built an integrated justice system appropriate to each court.

This type of court, usually established in country laid on Civil Law system, we can see in France, Germany, Dutch. In Indonesia, it could be understand there are some similarity system with the three countries as mentioned, but the most important thing, although it have similarity, but there is one point that makes different form others.

In an Administrative Court, when Plaintiff has plead an administrative law – suit, he expect that justice will comes to him. Hence, the court judicial decision could not give justice as expected, the justice that arose is procedural justice. The Plaintiff expected that the case really settled, not only decided, because sometimes the real problem still arose, eventhough the judge decision's won the Plaintiff. This brings the Plaintiff into unjustice and unfavourable condition.

To give justice as expected by the Plaintiff, Judge should bear in mind to give substantial justice, with a wider sense of domini litis principle, the understanding universal value of justice which also have strong relations with local values, moral, ethic and other social matters. The domini litis principle could not be understand any longer as a normative form, but it shifted and followed the justice value as it should be. This simultaneously relations has a great impact to give substantial proportional justice in the frame of Indonesia Constitutional State.

Besides as a Constitutional State and Welfare State, also known as a pluralism country, Indonesia consists of many clan, which each had characterized law, habits, those were influenced in the way of thingking and socialized with other nation. The important point as a different reason, because each nation, people of the nation, have an ideology, philosophy as a guidance, namely Pancasila. This philosophy derivative from the custom law, local value of each clan, but it is very interesting that all this matter can be bond all the clan, pluralism in Indonesia. This pluralism should be warm and inspired to all people in administer the Government in public service.

[1] *Doctor Candidate at Faculty of Law, Diponegoro University , Semarang, Central Java, Indonesia.*

This paper will see the development of domini litis principle in Administrative Court, since there has been a shift in paradigm of justice, formerly it was procedural justice and recently appears substantive justice. To give justice, we have to understand, appreciate the custom law, local wisdom, and nation philosophy, nor neglect the Act or regulation. This combining point hopefully can give substantive justice and proportional to Plaintiff, through the reconceptualization as a development of this principle.

II. THE DOMINI LITIS PRINCIPLE

The Administrative Court formed under The Act No.5 in 1986, as a court to examine Government decree. The aim, function and task of the Administrative Court as mentioned in Article 47 are to examined, decided and accomplished litigation in administrative law, between Plaintiff and Defendant, caused by Government decision-making, and has characterized as an individual, concrete, final and written . The Plaintiff could be individual or company , and the Defendant it must be Government . This spesification party is one characteristic of Administrative Court.

Independence of judiciary and impartial is a universal, and general principle, also as a based of the judiciary function in many countries. This principle might have different meaning, shape, and implementation in Administrative Court, this derivative principle is domini litis principle. This domini litis principle in the frame of independence of judiciary and impartial, could be meant, that Judge has his own independence to explore, respect the law, included unwritten law, in order to give justice to Plaintiff without ignoring the society well-being.

Philipus M. Hadjon stated that some principles are important because as a base of operational of the Administrative Court, there are :[2]

1. *The erga omnes principles*, means that each Administrative Court judicial decision gives consequences will binding not only the party but also to public and the subject which might be related or same in the future.

2.*The presumptio justae causa principles* or *het vermoeden van Rechtmatigheid*, means that every government decision-making is legally right, it has to be executed before its proven on the contrary, and stated by Judge as a against the law.

3. *The principle of Rechtmatigheid and non doelmatigheid*, means that examine to government / public decision making only from the yuridical perspectives. Judge is prohibited to examine the wisdom (*doelmatigheid*) perspectives for the subject. Eventhough, Judge did not agree with the subject.

4. *The domini litis principle*, means this principle related with principle of free refutation, that judge have responsibility to find material rightness over the case.

In the Act No. 5 in 1986, the domini litis principle occured in Article 63 verse 1, and Article 107. In Article 63 verse 1, state, Judge should have hearing before the trial begins, to complete unclear litigation. In the frame of hearing, Judge will order the Defendant to give information related with the subject to Plaintiff. This information could be a decree, data or any other government decree which related the subject.

In Article 107, stated that, Judge decided what should be proven in the trial, the burden and evaluation of evidende, and to legitimate needs minimum two instruments based on Judge's belief. This regulation basically is to find the righteousness matter, as a different system with Private Procedural Law.

The *domini litis* principle laid in the two Articles, basically has two important aims, *first*, is to give protect the rights of people in public decision-making, and *second*, is to give justice . Protection the rights of people is the important point in Constitutional State. The relation between justice and domini litis principle, could be described, as Judge has an authority by act to emulate position between Plaintiff and Defendant. The Defendant as Public Goverment, has more information than Plaintiff, include data, and any paper related the subject. This unequal position also gives unjustice position in administration fields. The perspectives and meaning of domini litis principle under the Article 63 verse 1, is narrow and limited, either is the concept of domini litis principle itself, and it comes out the output is procedural justice.

According to S.F .Marbun, there are two considerations of this principle, *firs*t because the government decree public decision as a part of the law which should be adequate with the applicable law (*rechtsorde*), so the Judge has to burden the righteousness matter, *second*, its goal to emulate position of the Plaintiff. [3]

Paulus Effendi Lotulung stated that principles in Administrative Court gives possibility the Judge to gives a qualify court judicial decision which shows the justice. Legal justice which mentioned in Judge decision, should be aware of people's well-being besides the protection of human rights of individual. [4] In court judicial decision, the legal reasoning has important role, because

[2] W. Riawan Tjandra. 2010. *Teori dan Praktek Peradilan Tata Usaha Negara* .(Yogyakarta : Universitas Atma Jaya Yogyakarta). page 11.
[3] W. Riawan Tjandra. 2009. *Peradilan Tata Usaha Negara Mendorong Terwujudnya Pemerintahan yang Bersih dan Berwibawa.* (Yogyakarta : Universitas Atma Jaya Yogyakarta).page 71.
[4] Paulus Effendi Lotulung. 2013."Mewujudkan Putusan Berkualitas Yang Mencerminkan Rasa Keadilan" dalam *Hukum Tata Usaha Negara dan Kekuasaan*. (Jakarta: Salemba Humanika).page.89.

we can understand the way of Judge's thingking, what are their deeply consideration, also their creativity in implemented the domini litis principle.

The procedural justice means, by following all the system of procedural court, Plaintiff will get justice. When the Act No.5 in 1986 were made , there were different perspectives in political, society , economy, compare with the recent situation, and also different perspectives and meaning of justice. The concept of domini litis principle when it was made, could be right and appropriate with the above situation and perspectives.

Law and justice , is a relation that bind each , and differs from nation to nation, also depends on their way of life and some reasons outside the law that contributes the justice and law itself. Aristoteles, said there were two kinds of justice, natural and legal justice. Natural justice exist everywhere with the same force and is not dependent of the people's thinking in any particular way. Legal justice is originally different but it does not remain so when laid down. He also distinguishes the legally just from the equitable .The equitable is superior to the legal, also is the correction of legal justice. Such correction is needed where law is defective. The defect results from the fact that while law must of necessity speak universally, it is not possible to do so without error. [5]

In Latin, justice as one norm in society, besides humanity, equity, honestly, those four norms are have important role to build and keep justice. In book *Nicomachean Ethics*, Aristoteles stated that justice can be found in two forms, first, the distributive justice, that each person has the same and equal right in State. Second, the corrective justice, where justice as a correction to replace condition to equality condition as a result of law deviation. [6]

The domini litis principle in Article 63 verse 1 connected with distributive justice, could be match, while Judge tried to emulate position between Plaintiff and Defendant, it gives justice to Plaintiff, but actually it is only procedural justice. According to the system of Administrative Court, the domini litis principle is appropriate and gives procedural justice, but sometimes this type of justice, is not relevant any longer refer to the development of society.

Each nations have their own way of life, nation philosophy and mostly came from the customs law. Pancasila, is Indonesia nation philosophy, gives idea to build this nation. In a broad sense, this can be also meant how to give justice in the frame of nation philosophy. Justice in Pancasila perspectives may be is the type of justice that can be appropriate with this nation. As a characteristic of nation, justice in Pancasila, as a universal value that each person have their rights without discrimination in any field. In particular value, justice in Pancasila contains of God's value, humanity value, society value, and all this value as a distinction part to other meaning of justice. Pancasila, as a way of life have distinction value with the capitalism-liberalism, communist – socialism. [7]

The value in Pancasila, came from unwritten law,custom law which lives and it has been using continually over the century. This value had been influenced the society, and can be seen in how they live with others. This value as an unwritten law, and also put together in bunches, and minimize the shattered of clan. According to Eugen Ehrlich, law depends on social facts, not on the state authority; the real source of law is not statutes or reported cases, but the activities of society itself. In Ehrlch's view, the state organizations play a role but only a subsidiary one, and we can discover living law with 3 ways, that is : by judicial decisions, by modern documents against which judicial decisions need be added, by observation of people , by living among them and noting their behaviour.[8]

Formerly, the procedural justice as the one that should be done in every trial. Procedural justice, in fact, could not accompolished the subject, it just decided, granted or not. Since there is a shifting perspectives, paradigm in justice, as it was not procedural justice, but shifted to substantive justice, there were several point of perspectives or opinion, that should be thinking again.

There is a primary point concept of justice which has specific standard and subjective opinion, depends on the person, group, society and nations, as Friedman said and quoted by Achmad Ali , procedure, then is only a mean to and end , the end is whatever collective problem society means to attack. Procedure follows substance, substance tells us which areas of procedure will become important. [9]

Refer to different perspective in justice as it becomes substantive justice, should followed with shifting concept of domini litis princple. Based on goal to give a substantive justice in the frame of Pancasila, the domini litis principle should be a wider sense in conceptualization and implementation. In wider sense of conceptualization, domini litis principle not only to emulate the Plaintiff, but to give substantive justice and accomplish the subject.This two important point in reconceptualization of domini litis principle as a new paradigm to gives justice to Plaintiff.

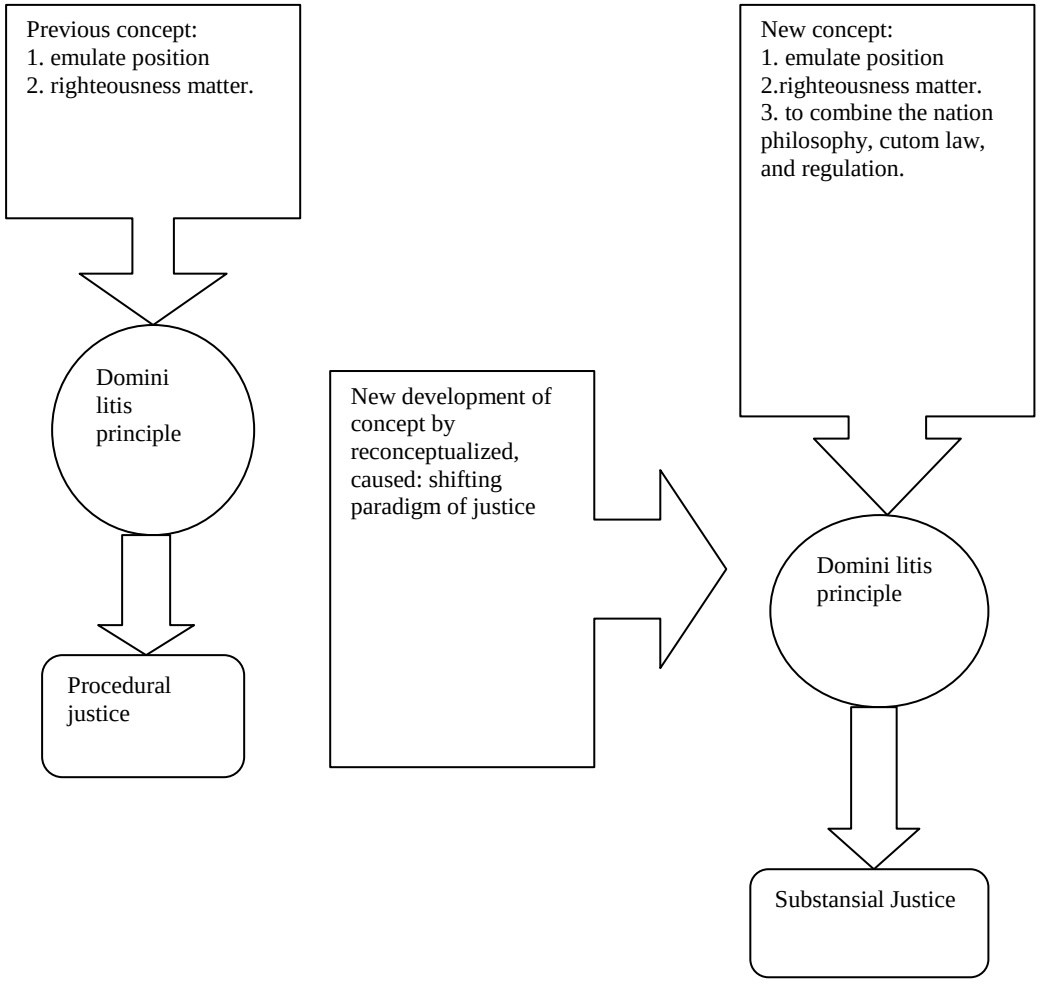
[5] Surya Prakash Sinha. (1993). *Jurisprudence Legal Philosophy in a Nutshell*. St.Paul Minn, West Publishing Co. page. 87.
[6] J.Djohansjah. (2008). *Reformasi Mahkamah Agung Menuju Independensi Kekuasaan Kehakiman* .Bekasi : Kesaint Blanc. 41.
[7] Teguh Prasetyo dan Abdul Hakim Barkatullah. 2012. *Filsafat , Teori dan Ilmu Hukum Pemikiran Menuju Masyarakat yang Berkeadilan dan Bermartabat.* (Jakarta : RajaGrafindo Pers). 369.
[8] Hari Chand. 1994. *Modern Jurisprudence.*International Law Book Services. Kuala Lumpur. 192.
[9] Achmad Ali. 2009. *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence): termasuk interpretasi Undang-undang (Legisprudence).* (Bandung :Kencana). 233.

Implementation of domini litis principle in wider sense, means that this principle could be implemented at any stage of trial, not only at hearing process. Formerly, this principle can be used in hearing, but in reconceptualization principle, this might be use in any stage, from the hearing until the trial. If this principle could be use at any stage, it is possible that there will not a mass subject in the Court, and the general rule of judicial process can be eligible, that the court process should be fast, light, and cheap.

In this reconceptualization, Judge has an important role to understand, appreciate that domini litis principle could not be in a restricted thinking anymore. It has been shifting, and will gives new paradigm in Judge's reasoning. The shifting and new paradigm, will contributes the substantive justice in the frame of Constitutional State's philosophy.

Every changes in court procedural as stated in Act, should be processed in legislative power. This reconceptualization of domini litis principle also should be processed in the same way. It means that, there should be a new Act of Administrative Procedura Law, which stated the main idea of changing of Act and the important role of reconceptualization itself.

New concept of domini litis principle will gives more space to Judge, by exploring the value of Pancasila and effort in susbtantive justice. This substantive justice is important, because it touch the essence of justice itself, and should be remember that this kind of justice also has to be proportional with the Plaintiff. To understand much easier of the development of this principle, as seen below:



Before reconceptualization principle, the input contains of two points and output is procedural justice, and after reconceptualization, the input contains of three points and output is substantive justice.

The development of domini litis principle, as a result of the changes opinion, paradigm in society, it is about how the think and find of justice. This change or we can say the shift of paradigm, because people think and realize, the procedural justice could not bring the real justice. The changes of ethic, moral and value in society, also contributes the way of society / people think about real justice.

Some changes in society mostly influenced by changes of moral, ethic, and value. These three points, have important role in shaped the society, their perception/ thingking/ opinion about the real justice. This demand to bring real justice, will shift the paradigm of justice, when have a trial.

By this changes of paradigm and some important point, this will gives effect, of how Judge should change the paradigm of decides a case, and shift to accomplish a case. This should be followed by leaving the positivist thingking or positivist paradigm, and starts thinking in different way, but still in law frame and the primary aim is to gives substansial justice. This is the role play of domini litis principle, Judge has a wider scope of law and considers the moral, ethic, values, can mix in a one step of giving substansial jutice.The shifting paradigm from decide a case move to accomplish a case, Judge should not only abide the written law, but with deeply consideration in legal reasoning that unwritten law has also important point.

As told by Anthony Hol dan Marc Loth below: [10]

" The most important development in the legal system in the first half of the twentieth century is without doubt the breakthrough of unwritten law. "

"From the beginning of the twentieth century this resulted in an increase in legislation, but also in new interpretations of the codifications in force. As the judge's tasks quickly became even more complex, they became more difficult to be pressed in the straightjacket of the separation of powers. The formation of theory did not lag, and around the turn of the last century new finding the law theories began to emerge"

"In administrative law, the breakthrough of unwritten law did not become visible until the 1950s. The arrival of the welfare state signalled a growth period for administrative law and resulted in both the expansion of Government instruments and the strengthening of the legal protection offered to the citizen. Judicial activism manifested itself in the first instance in a jurisprudential development of general principles of proper administration, which have been codified since 1994in the General Administrative Law Act 1994. The prohibition of detournement de pouvoir, the prohibition against instruments in administrative control, especially where that administration makes use of its freedom of policy. The judge has gone as far as judging that a strict legal application under cinrcumstances should yield to the realisation of the principle of truth or the principle of equality for example (the contra legem case law)."

They also added as follows,

"the decision of the judge is then also no longer simple application of the law instead always adds sometimes to the law. On the other hand, the legislator, since the judge determines the law in concreto (and not in abstracto). Thus according to Scholten, the judge neither creates law nor applies or she finds the law, according the Latin adage ius in cause positum. As a result, the legal judgment is founded upon a decision that is motivated only to a certain point;in this way, it can be regarded as a leap.[11]

The characterized of each nations must be different, and mostly influenced by the ideology, and it will caused the opinion of justice. In Indonesia, as mentioned above, have Pancasila as ideology , influenced of how to think and give justice , by either give the Plaintiff's right and the society's need. This is justice in Pancasila's paradigm.

C. CONCLUSION

As a one of justice body, the Administrative Court have an important role to gives justice. One of primary principle of The Court is, domini litis principle, with its aim are to emulate the Plaintiff's position to Defendant and to find the righteousness matter, as basically different form Private Procedural Law.

Nowadays, law, can not be seen as a writing documents only, but the unwritten law also have a great impact to the nation, especially in how to give justice to people. The unwritten law might be different, each nations have different ideology, philosophy which came out from their habits, value, moral, ethic and have influenced in how the people run the country. Indonesian's ideology is Pancasila which containts of noble of values, will guide this nations to give justice. Pancasila inspiring the reconceptualization of domini litis principle, it can be shown as there is strong impact of the ideology, to give justice.

The former concept of domini litis principle could not fulfilled the justice, or the opini of jusctice in a days. In the reconceptualization of domini litis principle, Judge should consider four important points, *first*, the reconceptualization itself and its aims, *second*, the meaning of justice in Indonesian's ideology, include noble values, moral ,ethic. *Third*, the society perception or opinion, is to have substansial and proportional justice, *fourth*, the written law as a positive law in Constitutional State. This fourth points will gives substansial and proportional justice which adequate with the spirit of Indonesia.

[10] Anthony Hol dan Marc Loth.2004.*Reshaping Justice , Judicial Reform and Adjudication in The Netherlands*. (Maastricht, Shaker Publishing B.V), page. 138-139.
[11] *Ibid*.hlm., 141.

Further implications of domini litis principle on the body of the knowledge, even this principle is one of the important principle, but it could and should be reconceptualized in order to give justice based on humanity. The domini litis principle should be in a wider sense and conceptualized appropriate with the important values from nations.

To reach the aims of this reconceptualization, the legislative should make new Act related to Adminitrative Procedural Law, and clearly stated the main idea of the new Act, and the idea of reconceptualization of domini litis principle, is to give substansial proportional justice in the frame of Constitutional State's philosophy.

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