



Redesign of Positive Fictitious Efforts After the Job Creation Law



Redesain Upaya Fiktif Positif Pasca Undang- Undang Cipta Kerja

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History:

Submitted: 20-02-2023
Revised: 03-04-2023
Accepted: 05-04-2023

Keyword:

Job Creation Law; Positive Fictitious; State Administrative Court; State Administrative Decision.

Kata Kunci:

UU Cipta Kerja; Fiktif Positif; Pengadilan Tata Usaha Negara; Keputusan Tata Usaha Negara.

Abstract

The Job Creation Law has not only changed positive-fictitious construction from ten to five days, but also abolished the administration court authority in deciding positive-fictitious applications. Naturally, every administrative action can be sued by the public to court with the aim that these actions follow legal rules and human rights values. Thus, the administrative court authority in deciding positive-fictitious applications is a control mechanism so that there is no abuse of authority from government. This article discuss: 1) the legal-historical and dynamics of positive-fictitious decisions; 2) the implications of positive-fictitious arrangements in job creation law, and 3) the redesign of positive-fictitious efforts after job creation law. The results of this research indicate that after the Job Creation Law, it is necessary to review the positive-fictitious decisions, especially by paying attention to the institution authorized to decide on fictitious applications, the use of AI applications, and the time of fictitious submissions.

Abstrak

UU Cipta Kerja tidak hanya mengubah konstruksi fiktif positif dari sepuluh hari menjadi lima hari, tetapi juga menghilangkan kewenangan PTUN memutus permohonan fiktif positif. Padahal, keputusan administratif bukan hanya keputusan tertulis tetapi juga tindakan diam resmi. Tentunya setiap tindakan administratif dapat digugat oleh masyarakat ke pengadilan agar tindakan tersebut sesuai dengan aturan hukum dan nilai-nilai hak asasi manusia. Dengan demikian, kewenangan PTUN memutus permohonan fiktif positif merupakan mekanisme kontrol agar tidak terjadi penyalahgunaan kewenangan dalam melaksanakan putusan fiktif positif. Artikel ini akan menjawab tiga permasalahan utama, yaitu: 1) sejarah hukum dan dinamika putusan fiktif positif; 2) implikasi pengaturan fiktif positif dalam UU Cipta Kerja, dan 3) Redesain Upaya Fiksi Positif Pasca UU Cipta Kerja. Hasil dari penelitian ini menunjukkan bahwa pasca UU Cipta Kerja, perlu dilakukan kajian ulang terhadap putusan fiktif positif, terutama dengan memperhatikan institusi yang berwenang memutus permohonan fiktif positif, aplikasi AI dan waktu pengajuan fiktif positif.



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 <https://doi.org/10.31078/jk2029>

A. INTRODUCTION

1. Background

Law Number 11 of 2020 concerning Job Creation (hereinafter: Law 11/2020) has changed several norms of articles in Law Number 30 of 2014 concerning Government Administration (hereinafter: Law 30/2014), one of which amends Article 53 of Law 30/2014 contained in Article 175 of Law 11/2020. Article 53 of Law 30/2014 regulates the timing of the obligation to determine and make decisions and decrees following applicable regulations. Where if the provisions of the laws and regulations do not limit the time limit of obligations, then the agency and/or official of the government must determine and/or carry out a decision and/or action within a maximum of 10 (ten) working days after the application is received in full by the agency and/or government officials. Suppose the bag of time does not stipulate and/or make decisions and/or actions. In that case, the application is considered to be legally granted (Article 53 paragraph (1), paragraph (2), paragraph (3) of Law 30/2014).

Furthermore, Article 53, paragraph (4), paragraph (5), and Paragraph (6) of Law 30/2014 regulate the submission of an application to the judiciary (State Administration Court or PTUN) to obtain a request for receipt of the application. The court decides on the application by 21 (twenty-one) working days from when the application is submitted. Then the government agency and/or officials must determine the decision to implement the court by 5 (five) working days from when the decision is made. Unfortunately, the change in the substance of Article 53 of Law 30/2014 contained in Article 175 of Law 11/2020 has removed the authority of the PTUN to make decisions, namely determining the receipt of applications that are considered legally granted, to obtain decisions and/or actions of the governing body or officials. Thus creating a legal vacuum in its enactment.

If traced, the amendment to Article 53 of Law 30/2014 was granted by the desire of the framers of the law to include an electronic system in submitting applications to government agencies/officials related to the licensing system to realize licensing efficiency. This can be seen in the provisions of the norms of Article 53 paragraph (3) of Law 30/2014 as amended in Article 175 number 6 of Law 11/2020, which states, "If the application is processed through an electronic system and all requirements in the electronic system have been met, the electronic system establishes the Decision and/or Action as a Decision or Action of the authorized Government Agency or Official."

Furthermore, the follow-up regarding the form of determination of decisions/actions that are considered legally granted will be regulated in a Presidential Regulation. However, the framers of the law seem to have forgotten because, in government administrative affairs, the form of application to government agencies/officials is not only in the affairs of licensing using electronic systems, but there are still many applications in government

administrative affairs outside of licensing matters that use conventional mechanics. If we look at the construction of changes to Article 53 of Law 30/2014, which was amended in Article 175 number 6 of Law 11/2020, the following formulation can be found:

Table 1. Positive Fictitious Arrangements in Law 11/2020

Article 53 para (2) and para (4)	Article 53 para (3) and para (5)
<p style="text-align: center;">Paragraph (2)</p> <p>If the provisions of the laws and regulations do not specify the time limit for obligations as referred to in paragraph (1), the Agency and/or Government Official must determine and/or carry out a Decision and/or Action within a maximum of 5 (five) working days after the application is received in full by the Agency and/or Government Official.</p>	<p style="text-align: center;">Paragraph (3)</p> <p>In the event that the application is processed through an electronic system and all requirements in the electronic system have been met, the electronic system establishes the Decision and/or Action as a Decision or Action of the authorized Government Agency or Official.</p>
<p style="text-align: center;">Paragraph (4)</p> <p>If within the time limit as referred to in paragraph (2)', the Agency and/or Government Official does not determine and/or carry out a Decision and/or Action, the application is deemed to be legally granted.</p>	<p style="text-align: center;">Paragraph (5)</p> <p>Further provisions regarding the form of determination of Decisions and/or Actions that are considered legally granted as referred to in paragraph (4) are regulated in a Presidential Regulation.</p>

Based on Table 1 above, it can be seen that there are 2 (two) models to determine and/or make decisions/actions for government agencies/officials on an application, namely:

- 1) Application submitted manually/conventionally with a time limit of 5 (five) days.
- 2) Application processed through an electronic system.

The peak of the problem is not related to the 5 (five) day time limit but because of the legal vacuum caused by the provisions of Article 175 number 6 of Law 11/2020 which eliminates the role of the PTUN to terminate the acceptance of applications that are considered legally granted. Other legal challenges related to who and how, and where the process for obtaining a verdict to obtain a judgment on the acceptance of an application deemed to be legally granted is evidenced by the decision of the PTUN, which essentially decides not to accept the petitioner's application because the PTUN is no longer authorized to examine, adjudicate and terminate the Positive Fictitious Application. That condition is quite different if the application that is processed electronically is limited to the time limit of obligations for the application process through the electronic system, of course, automatically immediately get a reply electronically if all the requirements in the electronic system have been met in the form of electronic exit of legal products as requested. However,

if the requirements of the electronic system are met, the electronic system will accept the application.

According to the background, this study will give a strong novelty due to the topic, positive fictitious decision on Job Creation Law. Furthermore, this paper discusses not only the positive and negative fictitious but also a complex discussion on the dynamic of its implementation in Indonesia. Moreover, this article is separated into several discussions; First, this part will discuss the legal history and dynamics of the application of positive fictitious decisions in Indonesia; Second, this part will discuss the implications of *positive fictitious* arrangements in law number 11 of 2020 concerning job creation; and the Last will discuss Redesign of *Fictitious Positive* Efforts After Law Number 11 of 2020 concerning Job Creation.

2. Research Questions

Based on the background above, there are several problems discussed in this paper, as follows: the history of positive fictitious decisions and their implication on the Job Creation Law. Moreover, this article will explain the redesign concept of positive fictitious efforts after Law Number 11 of 2020 concerning Job Creation was declared conditionally unconstitutional.

3. Research Methods

This paper is the result of legal research with normative methods.¹ The approach used is the statute approach, the conceptual approach, and the historical approach. The statutory approach in this paper is Law Number 30 of 2014 concerning Government Administration and Law Number 11 of 2020 concerning Job Creation Law. The conceptual approach is related to positive fictitious concepts, negative fictitious concepts, and legal protection concepts. In contrast, the historical approach looks at Indonesia's legal history and the dynamics of positive fictitious. The data collection technique is through the study of documents/literature on secondary data in the form of primary, secondary, and tertiary legal materials. The analysis used is descriptive. Every approach is dedicated and elaborated to answer the research question and explore the novelty of this paper's research.

B. DISCUSSION/ ANALYSIS

1. Legal History and Dynamics of The Application of Positive Fictitious Decisions in Indonesia

Historically, the State Administrative Decree (KTUN) recognizes 2 (two) types of fictitious, namely fictitious-positive and fictitious-negative, where both conceptually enter into a concept known as *administrative silence*. According to administrative law, administrative silence, or

¹ Sholahuddin Al-Fatih and Ahmad Siboy, *Menulis Artikel Karya Ilmiah Hukum Di Jurnal Nasional Dan Internasional Bereputasi* (Malang: Inteligencia Media, 2021); Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2014), 27.

in Latin *lex silentio*, is a legal fiction in which the silence of the administrative authority of the government can be interpreted as approval or rejection.² If the administration's silence is equated with a written decision containing a refusal, the decision is considered a *fictitious negative* decision. Conversely, if interpreted as an agreement, then the decision is a *positive fictitious* decision. According to Vera Parisio, administrative silence occurs when the organs of public administration are *silent a de facto*, i.e., not taking relevant decisions within the allotted time. At the same time, it is expected to do so. The law has anticipated that such de facto silence means a positive or negative response, equating it with a positive or negative decision following approved regulations.³ Furthermore, Eralda Methasani Çani, in her article entitled *Administrative Silence: Omission of Public Administration to React as An Administrative Decision-Taking*, gives a reasonably detailed understanding between negative-administrative silence and *positive-administrative silence* as follows:⁴

"Negative administrative silence' or denial, turning down of applications, is the situation in which an administrative body is required to act within a certain period, but does not do it, while the law gives effect to this situation, by stating that this situation would mean rejection. Therefore, if the public administration does not resolve a claim, lack of prompt reaction of the administration, or its silence, is defined by law as a rejection or denial of the request.

Positive administrative silence or acceptance of the application, its approval, is a situation in which an administrative body is required to act within a certain period, but does not do so, while the law gives effect to this situation by stating that this situation implies approval of the request. Thus, if the administration does not address a request with a decision-making, its lack of reaction or silence is defined by law as acceptance or approval of the request."

When compared with other countries, Continental European countries tend to use positive fictitious terms. Spain, Germany, the Netherlands, and France are known as countries in Europe that have implemented positive fictitious status in their legal systems. The Netherlands applies a positive fictitious decision model to the extent its basic rules have provided for it. In the *Algemene wet bestuurecht* (AWB), which is a Dutch General Administrative Law Code, does not contain general provisions relating to *Lex Silentio Positivo* but refers to the systematics of Chapter 4.1.3.3 AWB, the application of *Lex Silentio Positivo* is allowed only as long as it is more regulated explicitly in the relevant regulations. The legal provision in the Netherlands allows the application of positive fictitious decisions in Article 28 of the *Dienstenwet* (Dutch Public Service Law).⁵

² Enrico Simanjuntak, "Prospek Prinsip Fiktif Positif Dalam Menunjang Kemudahan Berusaha Di Indonesia," *RechtsVinding* 7, no. 2 (Agustus 2018): 314, <https://doi.org/dx.doi.org/10.33331/rechtsvinding.v7i2.250>.

³ Vera Parisio, "The Italian Administrative Procedure Act and Public Authorities' Silence," *Hamline L. Rev.* 36, no. 1 (2013): 20–25.

⁴ Eralda (Methasani) Çani, "Administrative Silence: Omission of Public Administration to React as an Administrative Decision-Taking 1," *Studime Juridike (Juridical Studies), Juridical Scientific Journal* XV, no. 4 (2014): 161-173.

⁵ Enrico Simanjuntak, "Perkara Fiktif Positif Dan Permasalahan Hukumnya," *Jurnal Hukum Dan Peradilan* 6, no. 3 (November 2017): 379, <https://doi.org/10.25216/jhp.6.3.2017.379-398>.

While in France, the change in the decision model from negative fictitious turned into positive fictitious after the passage of Law Number 2000-321 by the French parliament (*Assemblée Nationale*), which is a law to simplify the relationship between administrative and public authorities. The procedure for issuing a positive fictitious decision in France is accompanied by the obligation of the administrative authority to issue a confirmation letter (*attestation*) on the condition that it is issued no later than 2 (two) weeks from the issuance of the decision. Notification and/or confirmation of this deadline is crucial because it relates to the basis for calculating the time for filing legal remedies both by the applicant and resistance to third parties. According to Mirlinda Batalli’s article, “*Consequences of Administrative Silence in Public Administration*,” both kinds of negative and positive fictitious decisions have different focuses and interests.⁶ *Negative fictitious* decisions are interpreted as an effort to protect the autonomy or primary control of the administrative authorities so that policies will not be affected due to administrative silence.⁷ On the contrary, *positive fictitious* decisions emphasize the protection of the right of individuals to obtain KTUN within a reasonable period of time. Thus, the imposition of administrative silence as a form of consent becomes an instrument to protect individual rights in government administration.

The paradigm differences of each type of fictitious decision can also be seen when comparing the types of fictitious decisions adopted in Law Number 5 of 1986 concerning the State Administration Court and its amendments (PTUN Law) with Law Number 30 of 2014 concerning Government Administration, as follows:

Table 2. Negative Fictitious and Positive Fictitious in the PTUN Law and the Government Administration Law

Article 3 Law Number 5 of 1986 concerning the State Administrative Court	Article 53 Law Number 30 of 2014 concerning Government Administration
(1) If the State Administrative Agency or Official does not issue a decision, while it is their obligation, then it is equated with a State Administrative Decree.	(1) The deadline for the obligation to determine and/or carry out Decisions and/or Actions in accordance with the provisions of laws and regulations.

⁶ Mirlinda Batalli, “Consequences of Administrative Silence in Public Administration,” *SEER Journal for Labour and Social Affairs in Eastern Europe* 20, no. 1 (2017): 139–52, <https://doi.org/10.5771/1435-2869-2017-1-139>; Tonye Clinton Jaja and Zaka Firma Aditya, “Promoting the Good Governance by Advancing the Role of Parliamentarians and the Term Offices Limitation (Comparing Nigeria and Indonesia),” *Journal of Indonesian Legal Studies* 7, no. 1 (June 2022): 265-269, <https://doi.org/10.15294/jils.v7i1.54776>.

⁷ Gordon Anthony, “Administrative Silence and UK Public Law,” *The Juridical Current* 34 (2008): 39–40.

Article 3 Law Number 5 of 1986 concerning the State Administrative Court	Article 53 Law Number 30 of 2014 concerning Government Administration
<p>(2) If an Agency or State Administrative Officer does not issue the requested decision, while the period as determined by the said legislation data has passed, then the State Administrative Agency or Official is considered to have refused to issue the decision in question.</p>	<p>(2) If the provisions of the laws and regulations do not specify the time limit for obligations as referred to in paragraph (1), then the Agency and/or Government Official must determine and/or carry out a Decision and/or Action within a maximum of 10 (ten) working days after the application is received in full by the Agency and/or Government Official.</p>
<p>(3) In the event that the relevant laws and regulations do not determine the period as referred to in paragraph (2), then after the lapse of four months from the issuance of the application, the Agency or Administrative Officer concerned is deemed to have issued a rejection decision. Part Two Standings</p>	<p>(3) If within the time limit as referred to in paragraph (2), the Agency and/or Government Official does not determine and/or carry out a Decision and/or Action, then the application is considered to be legally granted.</p>

Table 2 above shows that the PTUN Law recognizes fictitious negative, while the Government Administration Law adopts positive fiction. This means there has been a tremendous shift towards administrative law in Indonesia. It is termed ‘fictitious’ because, factually, the government does not issue a written decision but is deemed to have issued a written decision. In contrast, the term ‘positive’ means because the content of the decision is equated with “granting” an application. According to Enrico Simanjuntak in his article entitled *Positive Fictitious Cases and Legal Problems*, the positive fictitious conception in Law 30/2014 is a legal fiction that requires the administrative authority to respond to or issue decisions/actions submitted to it within the specified time limit and if this prerequisite is not met the administrative authority is considered to grant the application issuance of decisions/actions requested to him.⁸

Furthermore, in the nature of its development, Law Number 11 of 2020 concerning Job Creation (Law 11/2020) amends the formulation of the regulation of Article 53 of Law Number 30 of 2014 concerning Government Administration (Law 40/2014). The changes in the formulation in detail can be seen in Table 3 below:

⁸ Simanjuntak, “Perkara Fiktif Positif Dan Permasalahan Hukumnya.”

Table 3. Positive Fictitious Changes in Law 30/2014 and Law 11/2020

Article 53 Law Number 30 of 2014 on Government Administration	Article 175 Law Number 11 of 2020 on Job Creation
(1) The deadline for the obligation to determine and/or carry out Decisions and/or Actions in accordance with the provisions of laws and regulations.	(1) The deadline for the obligation to determine and/or carry out Decisions and/or Actions is given in accordance with the provisions of laws and regulations.
(2) If the provisions of the laws and regulations do not specify the time limit for obligations as referred to in paragraph (1), then the Agency and/or Government Officials must determine and/or carry out a Decision and/or Action within a maximum of 10 (ten) working days after the application is received in full by the Agency and/or Government Official.	(2) If the provisions of the laws and regulations do not specify the time limit for obligations as referred to in paragraph (1), the Agency and/or Government Official must determine and/or carry out a Decision and/or Action within a maximum of 5 (five) working days after the application is received in full by the Agency and/or Government Official.
(3) If within the time limit as referred to in paragraph (2), the Agency and/or Government Official does not determine and/or carry out a Decision and/or Action, then the application is considered to be legally granted.	(3) If the provisions of the laws and regulations do not specify the time limit for obligations as referred to in paragraph (1), the Agency and/or Government Official must determine and/or carry out a Decision and/or Action within a maximum of 5 (five) working days after the application is received in full by the Agency and/or Government Official.
(4) The petitioner submits an application to the Court for a judgment on the acceptance of the application as referred to in paragraph (3).	(4) If the provisions of the laws and regulations do not specify the time limit for obligations as referred to in paragraph (1), the Agency and/or Government Official must determine and/or carry out a Decision and/or Action within a maximum of 5 (five) working days after the application is received in full by the Agency and/or Government Official.

Article 53 Law Number 30 of 2014 on Government Administration	Article 175 Law Number 11 of 2020 on Job Creation
(5) The court shall decide on the application referred to in paragraph (4) no later than twenty-one (21) working days from the time the application is filed.	(5) Further provisions regarding the form of determination of Decisions and/or Actions that are considered legally granted as referred to in paragraph (3) are regulated in a Presidential Regulation.
(6) Government Agencies and/or Officials shall determine the Decision to implement the Court's decision as referred to in paragraph (5) no later than 5 (five) working days from the date the Court's decision is determined.	

Based on Table 3 above, several records of changes to the construction of positive fictitious decisions can be formulated after the promulgation of Law 11/2020, including:⁹

1. Trimming the time limit on the obligation to establish and/or carry out decisions and/or actions that were initially for 10 (ten) days in Law 30/2014 to 5 (five) days in Law 11/2020. From the basic idea, this change affirms the commitment to provide ease of business as one of the mandates in Law 11/2020. Although what, sincerely, it turns out that in the Academic Manuscript of Law 11/2020, there is not a single primary and specific reason for what is considered for changing the time limit, which was initially 10 (ten) days to 5 (five) days.
2. The existence of a new paradigm in the determination of decisions and/or actions issued by electronic systems is equated with decisions and/or actions issued by authorized government agencies or officials. Although the basic idea is to follow digital transformation in all government institutions, it needs to be studied further. Some of the questions that will arise concerning this electronic system are whether the electronic system can be equated with the authorized Government Agency or Official in determining decisions/actions or not. According to Dian Agung Wicaksono, the fundamental question is, of course, who operates the electronic system? Is it done autonomously by electronic system algorithms or *artificial intelligence*, or is it still operated by staff from the Agency or Government Officials? Suppose the staff of a

⁹ Dian Agung Wicaksono, Bimo Fajar Hantoro, and Dedy Kurniawan, "Quo Vadis Pengaturan Kewenangan Pengadilan Tata Usaha Negara Dalam Penerimaan Permohonan Fiktif Positif Pasca Penataan Regulasi Dalam Undang-Undang," *Jurnal Rechtsvinding* 10, no. 2 (August 2021): 325, <https://doi.org/10.33331/rechtsvinding.v10i2.715>.

Government Agency or Official operates it. Is the basis of authority so that the results of the operation of an electronic system can be equated with the determination of an authorized Agency or Government Official?

3. Law 11/2020 has eliminated the mechanism for applying to the PTUN to obtain a decision on the acceptance of an application. Interestingly, Law 11/2020 provides a *delegate provision* to the Presidential Regulation regarding further provisions for the forms of determination of Decisions and/or Actions that are considered legally granted. This change will undoubtedly create a legal vacuum regarding the form of determination of decisions and/or actions that are considered legally granted because as long as the Presidential Regulation has yet to be formed, there is no mechanism to declare the applicability of positive fictitious decisions. In addition, with the conditional unconstitutionality of Law 11/2020 and suspending all actions or policies that are strategic and have a broad impact, it is not justified to issue new implementing regulations related to Law 11/2020.

2. Implications of Positive Fictitious Arrangements in Law Number 11 of 2020 Concerning Job Creation

Changes in *positive fictitious* substances after Law 11/2020 resulted in legal implications and consequences. The implication that can be felt directly is the time cut from 10 (ten) days to 5 (five) days. On the one hand, this is a good thing because it requires administrative agencies or officials to work faster. However, on the other hand, it has the potential to harm the quality of service because the government will rush to check the requirements of an application with a deadline of only 5 (five) days and not heed the principles of prudence and accuracy as stipulated in the General Principles of Good Government (*Asas-Asas Umum Pemerintahan yang Baik* or AAUPB). In addition to these time cuts, the change in the fictitious substance of positive post-Law 11/2020 gives rise to other legal consequences, as follows:

First, the removal of the authority of the PTUN to decide on positive fictitious admission applications. In the PTUN Law, it is regulated that the Court has the duty and authority to examine, decide, and resolve TUN disputes as stipulated in Article 47 of Law Number 5 of 1986 concerning the State Administrative Court as last amended by Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning the State Administrative Court (PTUN Law). The article's formulation shows the competence of the PTUN, which is based on the existence of a TUN dispute. That is, the existence of a TUN Decision is a vital aspect of the absolute competence of the PTUN because the TUN Dispute was born because of a TUN Decision.¹⁰

¹⁰ See also, Zaka Firma Aditya, "Judicial Consistency dalam Putusan Mahkamah Konstitusi tentang Pengujian Undang-Undang Penodaan Agama" *Jurnal Konstitusi* 17, no. 1 (2020): 80–81, <https://doi.org/10.31078/jk1714>; Wicaksono, Dian Agung, Hantoro, Bimo Fajar, Kurniawan, "Quo Vadis Pengaturan Kewenangan Pengadilan Tata Usaha Negara Dalam Penerimaan Permohonan Fiktif Positif Pasca Penataan Regulasi Dalam Undang-Undang," 326.

In addition, the *positive fictitious* arrangements in 11/2020 caused the TUN Decision to include not only formal decisions of public administration in written form but also all acts and actions of government agencies and silence and did not provide answers of government agencies to individual applications (*unwritten form*). The standard form of the TUN Decision should be a *written form* with the aim of the effectiveness of government administration. So, a TUN Decision born with a *positive fictitious* construction is only given legal fiction and is considered legally granted according to Article 175 of Law 11/2020 without going through a verdict on the acceptance of a positive fictitious application by the PTUN. The fundamental question is whether there is a justification for the existence of the TUN with such positive fictitious constructions. Whereas previously, the PTUN, based on Article 53 of Law 30/2014, was given the authority to terminate the receipt of *positive fictitious* applications.

Although Article 10 of Law Number 48 of 2009 concerning judicial power recognizes the principle of *ius curia novit* that the Court is prohibited from refusing to examine, adjudicate, and decide a case filed under the pretext that the law does not exist or is not clear, but if the Court (PTUN) does not have the basis of authority to examine, adjudicate, and decide a case (*in casu* positive fictitious pleading), then the verdict of the case by rational reasoning will be decided by the judgment is inadmissible (*Niet Ontvankelijke Verklaard*).

This argument was also guided by the Directorate General of the Military Court and State Administrative Agency (Direktorat Jenderal Badan Peradilan Militer dan Tata Usaha Negara or Ditjen Badmiltun) by issuing Circular Letter Number 2 of 2021 which provides instructions for judges and clerks who receive cases of Positive Fictitious Decisions “should” examine and adjudicate the case based on Article 10 paragraph (1) of the Judicial Powers Law. But unfortunately, this will become a legal issue when a court institution that, according to the provisions of the latest law, is not authorized continues to examine and decide on cases outside its authority. It can potentially create a conflict of authority and lead to legal uncertainty. The next thing is the enforceability of the law. That is, as long as it is not specified otherwise in the law, the rule is valid from when it is enacted (*ex nunc*), so it is not justified to use a law that the latest law has amended. The Supreme Court has confirmed this provision by establishing the Supreme Court Circular Letter Number 5 of 2021, which contains the Formulation of the Supreme Court Chamber, one of which concerns positive fictitious institutions that are no longer the authority of the Administrative Court.

Second, upon further scrutiny, positive fictitious constructions without going through the PTUN ruling create legal uncertainty. Because TUN Decisions with positive fictitious constructions have a *constitutive* nature that creates a new legal relationship, namely the existence of rights and obligations,¹¹ any TUN Decision born with a positive fictitious

¹¹ Laga Sugiarto, “Pemaknaan Surat Keputusan Yang Bersifat Deklaratif Dan Konstitutif (Implikasi SK Menkumham Tentang Pengesahan Perubahan Anggaran Dasar Rumah Tangga Serta Komposisi Dan Personalia Dewan Pimpinan Pusat Golongan Karya),” *Jurnal Kajian Hukum* 2, no. 2 (November 2017): 243, <http://e-journal.janabadra.ac.id/index.php/KH/article/view/LAS>.

construction requires a mechanism to justify its existence, in this case, a written decision. With the abolition of the authority of the PTUN to decide on positive fictitious admission applications, the justification of the TUN Decision with positive fictitious constructions has disappeared. This makes the TUN Decision with a positive fictitious construction create legal uncertainty for legal subjects who are considered to have a legal relationship based on the TUN ruling. It is different if the TUN Decision is negatively fictitious that does not cause a change in the existing legal circumstances or, in other words, states the state of the law at the status quo condition, so to assert the existence of the TUN with a negative fictitious construction there is no need for a particular mechanism because a negative fictitious TUN Decision does not alter or create a new legal state.

Third, the loss of authority of the PTUN to terminate positive fictitious admission requests has led to the closure of access to justice for the justice-seeking community (*justiciabelen*). This includes access to justice for third parties who feel that their interests are harmed due to the inability to enter as a party to a *positive fictitious* case and as a result of the issuance of a decision as an implementation of a positive fictitious case court decision. Moreover, in resolving this *positive fictitious* application, the decision of the PTUN is *final and binding*, meaning that the direct judgment has permanent legal force (*inkracht van gewisde*) in the court of the first instance.

Fourth is the loss of the judicial body's control over TUN decisions. This can undoubtedly increase the occurrence of abuse of power, especially in the era of Law 11/2020. Judicial control has several aspects, one of which is preventing the emergence of all forms of deviation from government duties. Judicial control is one of the main characteristics of the task of the judicial body, which is to assess the validity of a government's actions. Moreover, judicial control oversees the government's actions on its decisions and matters beyond those decisions. The primary purpose of judicial control is to protect the rights and freedoms of citizens by ensuring the legality of administrative actions. Whereas the ultimate goal of judicial control over administrative actions is to ensure their legality and, thus, protect citizens from violations of the law, constitutional rights, and other rights.

3. Redesign of Fictitious Positive Efforts After Law Number 11 of 2020 concerning Job Creation

Constitutional Court Decision Number 91/PUU-XVIII/2020 on Formal Judicial review of Law No. 11 of 2020 on Job Creation states that Law 11/2020 is conditionally unconstitutional so that legally-formally does not apply until there is a formal improvement during the grace period of 2 (two) years since the verdict was pronounced. The 2 (two) year period is a period of formal improvement, and in the repair period, it is not closed to the possibility of changes or improvements in substance made by the framers of the Law. Moreover, in Decision Number 7, the Court ordered to suspension of all actions/policies that are strategic

and have a broad impact. It is not allowed to issue new implementing regulations related to Law Number 11 of 2020 concerning Job Creation.¹²

Suppose it is associated with the abolition of the authority of the PTUN in deciding positive fictitious applications, then in fact. In that case, the conditional unconstitutionality of Law 11/2020 is the right momentum to correct it again. This is because citizens often used Article 53 of the Government Administration Law to test the attitudes or actions of state administrative officials/entities, including responding to permit applications for a certain period. Suppose the regulations do not specify the time limit, a maximum of 10 (ten) working days from when the TUN official receives the application. The application is legally granted if the official in question silences or responds to the application after a certain period expires.

The positive fictitious case has been tested at the Constitutional Court in case Number 10/PUU-XX/2022 concerning the Review of Article 175 point 6 of Law No. 11 of 2020 concerning Job Creation. Unfortunately, in this case, the court declared that the Petitioners' petition could not be accepted due to having any legal standing, and even if the Petitioners had legal standing, the main point of the Petitioners' petition was premature due to the job creation law had been declared conditionally unconstitutional during two years. As for the four things recorded as positive fictitious enactment after Law 11/2020, as outlined in the previous chapter, they must be responded to immediately so that positive fictitious decisions provide more usefulness, justice, and legal certainty. In this context, the author suggests a redesign of the positive fictitious effort, i.e.:

First, it incorporates the amended material into Law 11/2020 on the return of the function of the PTUN as an authorized institution to test *positive fictitious* decisions. Because when viewed from its authority, only the PTUN has this authority. This is done so that the resulting judgment provides legal certainty and justice for the people affected by *positive fictitious* decisions and enforces the function of judicial institutions as supervisors or controls in carrying out the functions of state power.¹³ Control mechanisms become very important, so there is no abuse of authority in applying *positive fictitious* decisions.

Every act of granting an administrative application becomes the authority of the TUN Agency/Official, which is further formalized through the issuance of a TUN Decision so that not only TUN Decisions can be filed lawsuits but also every action taken in the context of preparing, forming and fulfilling state administrative decisions. Naturally, any administrative action can be sued by citizens to court with the aim that all administrative actions must be scrutinized to ensure that these actions are following the rules of law and human rights

¹² Zaka Firma Aditya and Abdul Basid Fuadi, *Konsep Kedudukan Hukum Pemohon Dalam Perkara Pengujian Undang-Undang Di Mahkamah Konstitusi* (Depok: Rajawali Pers, 2022), 79–80; See also, Zaka Firma Aditya and Abdul Basid Fuadi, "Questioning the Legal Standing Conception in the Formal Review at Indonesian Constitutional Court," *International Journal of Civil Law and Legal Research* 2, no. 1 (2021): 43–44.

¹³ Kartika Widya Utama, "Surat Keputusan Tata Usaha Negara Yang Bersifat Fiktif Positif," *Notarius* 8, no. 2 (2015): 151, <https://doi.org/10.14710/nts.v8i2.10259>.

values.¹⁴ Thus, any form of arbitrariness of administrative action will be overturned by the courts. So, in this first design, the author argues that the PTUN is again given the authority to decide on *positive fictitious* applications.

Second, the use of Artificial Intelligence (AI) in determining Decisions and/or Actions issued by electronic systems is equated with Decisions and/or Actions issued by authorized Government Agencies or Officials, which must be controlled by humans and not run by automated systems that are prone to sabotage mechanisms, malware attacks and the like. Because, until now, in a similar context, for example, the holding of elections, the Government has yet to dare to implement technology such as e-vote because cybersecurity is questionable and needs more in-depth study. Thus, the application of Decisions and/or Actions issued by electronic systems must be controlled by humans. An electoral system is only an auxiliary tool that may reduce the presumption of KKN (corruption, collusion, and nepotism) and so on.

Article 175 paragraph (3) of Law 11/2020 states that if an application is processed through an electronic system and all requirements in the electronic system have been met, the electronic system determines the Decision and/or Action as a Decision or Action of the authorized Government Agency or Official. The phrase “the electoral system establishes a Decision and/or Action as a Decision or Action of an authorized Government Agency or Official” indicates that there is a defect of substance in it because the electronic system is not a legal subject as a TUN official, so the electronic system cannot be used as a justification for establishing a Decision and/or Action as a Decision or Action of an authorized Government Agency or Official. According to Rachmadi Usman, the subject of law is everything that can obtain rights and obligations from the law, so everything referred to in that sense is a human being (*natuurlijke persoon*) and a legal entity (*rechts persoon*).¹⁵ Such legal subjects can perform legal actions (*recht handelingen*) and or concrete actions (*feitelijke handelingen*), while electronic systems do not have them. Moreover, as outlined in the previous section, the fundamental question that will inevitably arise is who operates the electronic system—done by electronic systems, artificial *intelligence*, or officers? If it is operated by officers or staff of a Government Agency or Official, what is the basis of authority?¹⁶

Third, regarding the time limit, which was initially 10 (ten) days to 5 (five) days, it is essential to conduct an in-depth study of the principles of justice and the protection of human rights. The time limit of 5 (five) days is concise, and it is irrelevant to some positive fictitious application practices in some countries, such as 2 (two) weeks in France, 1 (one) month in the Netherlands, and so on. The question is, does the 5 (five) days consider the principle of prudence and accuracy of TUN officials? Do not let the TUN official issue his

¹⁴ Owen E. Hughes, *Public Management and Administration, An Introduction* (Springer, 1998), 81-85.

¹⁵ Rachmadi Usman, *Aspek-Aspek Hukum Perorangan Dan Kekeluargaan Di Indonesia* (Jakarta: Sinar Grafika, 2006), 60.

¹⁶ Wicaksono, Dian Agung, Hantoro, Bimo Fajar, Kurniawan, “Quo Vadis Pengaturan Kewenangan Pengadilan Tata Usaha Negara Dalam Penerimaan Permohonan Fiktif Positif Pasca Penataan Regulasi Dalam Undang-Undang,” 325.

decision by not considering the impact on the broader community, for example, in the case of the Director General of Foreign Trade of the Ministry of Trade who granted a crude palm oil (CPO) export permit which caused scarcity and skyrocketing cooking oil prices in 2022.

In the debate on the Government Administration Law regarding the period, the Indonesian Democratic Party of Struggle (*Partai Demokrasi Indonesia-Perjuangan* or PDIP) Faction proposes to reduce the substance in the sentence “no longer than 7 (seven) working days” to be changed to “no longer than 3 (three) working days.”¹⁷ Regarding this proposal, the government believes that the issuance of decisions is sought as soon as possible; however, a maximum of 7 (seven) working days is needed to ensure a more appropriate decision.¹⁸ Meanwhile, currently, there are no minutes of discussion meetings or academic manuscripts that corroborate the reason for the positive fictitious period of 5 (five) days. Even if it maintains 5 (five) days, it must pay attention to the principles of prudence, accuracy, and other AAUPB. According to the author, the ideal period is 7 (days) of work because if the reason is for efficiency and ease of licensing, then 7 (days) is the most efficient time. Not too fast and not too long.

Fourth, Regarding the final and binding nature, it is also necessary to consider because in resolving this positive fictitious application, the decision of the PTUN is *final and binding*, meaning that the direct judgment has permanent legal force (*inkracht van gewisde*) in the court of first instance. There is likely a case carried out by the Judicial Review because of corrective justice. According to I Gusti Ngurah Wairocana, although there are limited periods in handling positive fictitious cases as regulated by law, judges must continue to pay attention to the principle of prudence and accuracy in the examination of related cases so that there are no new legal problems with cases that have been decided considering the nature of the final and binding judgment.¹⁹ Furthermore, there are also several weaknesses and other obstacles encountered in the implementation of positive fictitious as follows:

- a. The period for resolving the dispute examination of a Positive Fictitious application is limited to 21 (twenty-one) days and eliminates several stages of the trial (preparatory examination, replica-duplication, conclusion) requires the Administrative Court Judge to conduct a quick and brief examination which sometimes has the potential to override the principles of prudence and prudence.
- b. In the limited examination process that has been limited in the settlement time, the Administrative Court Judges often face inconsistencies of the parties in following the agenda of the trial, so the evidentiary process is not optimal.

¹⁷ Tim Penyusun, *Anotasi Undang-Undang No. 30 Tahun 2014 Tentang Administrasi Pemerintahan* (Jakarta: Universitas Indonesia – Center for Study of Governance and Administrative Reform, 2017), 251–253.

¹⁸ Tim Penyusun, *Anotasi Undang-Undang No. 30 Tahun 2014 Tentang Administrasi Pemerintahan*.

¹⁹ I Gusti Ngurah Wairocana et al., “Kendala Dan Cara Hakim Peradilan Tata Usaha Negara Pasca Uu Administrasi Pemerintahan: Suatu Pendekatan Atas Penanganan Perkara Fiktif Positif,” *Jurnal Hukum & Pembangunan* 50, no. 3 (July-September 2020): 563, <https://doi.org/dx.doi.org/10.21143/jhp.vol50.no3.2755>.

- c. The final and binding nature of the judgment, there is no remedy, so the higher courts cannot assess and correct the judgment of the Administrative Court (found the Review submission on the Fictitious Positive judgment).
- d. The effectiveness of the implementation of the decision is still returned to the compliance and observance of the Government Agency/Official.

There are still applications that, at the end of the judgment, are inadmissible due to non-fulfillment of the formal conditions of filing the application.

C. CONCLUSIONS

The State Administrative Decree (KTUN) recognizes 2 (two) types of fictitious, namely fictitious-positive and fictitious-negative, where both conceptually enter into a concept known as *administrative silence*. Then, the positive fictitious developed fastly and was used in Job Creation Law cases. The Job Creation Law has not only changed positive fictitious construction from ten to five days, but it also abolished the authority of the administrative court in deciding on positive fictitious applications as in the decision of the Constitutional Court. Whereas administrative decisions are not only written decisions but also official silent actions. The redesign of positive fictitious efforts after Job Creation Law can be done in several ways, i.e., 1). Include the material of the amendment into Law 11/2020 on the return of the function of the PTUN as an institution authorized to test positive fictitious decisions; 2). The use of *Artificial Intelligence (AI)* in determining Decisions and/or Actions must be controlled by humans and not run by automated systems prone to sabotage mechanisms, *malware* attacks, and the like; 3). Review the time limit of 5 (five) days in the determination of Decisions and/or Actions because they are not under human rights, and 4). Regarding the final and binding nature, it is also necessary to consider because in resolving this positive fictitious application, the decision of the PTUN is final and binding, meaning that the direct judgment has permanent legal force (*inkracht van gewisde*) in the court of first instance. The Judicial Review likely carries out a case because of corrective justice.

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