

Assessing the Dilemmatic Problem of Positive Fictitious State Administration Settlement Examination in Government Administration

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ABSTRACT

The establishment of the Job Creation Law has an impact on testing positive fictitious state administrative decisions. The enactment of the Employment Creation Law has an impact on changes in the absolute competence of the State Administrative Tribunal. This article aims to examine the changes in the total competence of the State Administrative Tribunal. The research used is legal research. The research results are that the State Administrative Tribunal can be said to have lost its authority to test positive fictitious applications. This can be seen from the disappearance of the phrase Court in the Job Creation Act.

Keywords: *positive fictitious, omnibus law, state administration tribunal*

1. INTRODUCTION

President Jokowi at the National Coordination of Regional Heads and Regional Leaders Forum organized by the Ministry of Home Affairs held on November 13, 2019 in Sentul, stated that our country has excessive regulation and that the nation is not a 'country of regulation.' The President's statement is true because the amount of regulation in our country is too many at the time. Then the President mentioned five pillars of development, one of which was cutting rules and preparing the Omnibus Law on Job Creation [1]. In accordance with the government's plan in controlling regulations, the government submits the Draft Law (RUU) on Job Creation to the House of Representatives [2]. The Job Creation Law is one of the Omnibus Laws that it first discussed out of 4 (four) existing laws, in which this Law immediately gave rise to various pro and contra opinions by the Indonesian people [3].

The concept of the Omnibus Law is one way out that the government can take to improve the progress of the nation through the field of law. The problem with the Omnibus Law concept as a solution is that there are conflict issues between government administrators in carrying out innovations or policies that clash with statutory regulations. The excessive amount of

convoluted laws and regulations causes the country's economic development to be said to be not improving. However, Omnibus Law must be made at the level of Law. The assumption is that the concept of Omnibus Law seems to be able to answer the problem of overlapping laws and regulations [4].

The need for Omnibus Law can indeed be a solution to overlapping issues of regulations in Indonesia [5]. The government formulated the vision of Indonesia Onward 2045 as a strategic step to make Indonesia one of the world's top five great economic powers by 2045. To achieve this, the government expects a wave of investment to accelerate the development process. The reality of circumstances is overlapping, and the disharmony of sectoral laws is the main obstacle to creating a friendly investment climate for investors. On that basis, deregulation and de-bureaucracy need to be carried out through trimming, changing and creating new norms that did not exist in the previous Law to one Law at the time, popularized as the Omnibus Law, which was later ratified into Law No. 11 of 2020 on Job Creation (Law on Job Creation) [6].

The scope regulated in the Job Creation Law consists of 11 clusters, one of which is related to the support for the enforcement of government administration, the substance of which is normatively making changes to

several articles in Law No. 30 of 2014 on Government Administration (Law of Administration). The formation of the Job Creation Law had an impact on the positive fictitious of state administrative decision, which was originally regulated in Law No. 30 of 2014 on State Administration. The enactment of the Job Creation Law, it impacts changes in the absolute competence of the State Administrative Tribunal, which is then an interesting topic to do research on.

2. RESEARCH METHODOLOGY

This article uses legal research methods [7]. The laws and regulations are used for analyzing legal issues related to changes in legal basis and substance of Positive Fictitious in State administrative decision. After that, collecting primary law and secondary legal materials as support to construct this research. In reviewing the legal issues discussed, legal prescriptions are used which aim to provide depth, systematic and comprehensive details regarding legal issues related to the Positive Fictitious of State administrative decision, which should be in accordance with the current regulations related to legal theory and law enforcement practices for the implementation of good governance that is investment friendly.

3. RESULTS AND DISCUSSION

The Law on Government Administrative/Law of Administration (Law No. 20 of 2014) by legal fiction considers administrative silence as “approval,” thus contradicting with the principle of legal fiction previously adopted by Law on State Administrative Tribunal (Law No. 5 of 1986). The terminology or terms of Fictitious Positive that are now becoming known in Indonesian legal literature can be said match with the meaning of the term *lex silencio positive*. In simple terms, it can be said that the principle and the conception of *lex silencio positive* is a legal rule that requires an administrative authority to respond or to issue decision/action submitted to it within the time limit as determined by the regulation and if this prerequisite is not met, the administrative authority is automatically considered granted the request for issuance of the decision/action. The term *lex silencio positive* is a mixed terminology between Latin (*lex*) and Spanish (*Silencio Positivo*), which in English legal terminology equated with the term *fictitious approval* or *tacit authorization* [8]. Eko Prasajo explained that *fictitious positive* institutions are intended to encourage government agencies/officials to provide good public services to the people. The government is legally required to respond to public requests for certain decisions/actions. If there is no response within the stipulated time, the community has the right to take the matter to court. The *positive fictitious* is to encourage better public services by government agencies/officials [9].

The definition of the term *positive fictitious* is used and developed from a concept of a situation when government administrative authorities remain silent and do not serve (*administrative inaction*) or act of *unresponsiveness* (*delaying services*) as it should be on a request from citizens submitted to them [10]. As can be seen from the provisions of Article 53 of the Law of Administration, both the term ‘*fictitious positive*,’ as well as the term ‘*fictitious negative*’ as seen in Law No. 5 of 1986 on State Administrative Court, is not explicitly stated in each of the relevant laws, these two terms, or to be precise *neologism*, are legal fictions used to facilitate legal construction in Article 3 of the Law of Administration, or Article 53 of the Law of Administration. In other words, the term *positive fictitious* is not explicitly mentioned in the Law of Administration [11]. Because the existence or definition of the silence of state administrative officials is not definitive, the concept of a *positive fictitious* of State administrative decision can only be interpreted in several articles that regulate the issue of the enactment of a decision, namely in Article 53 of the Law of Administration which states that:

- “(1) The time limit for the obligation to determine and/or carry out Decisions and/or Actions in accordance with the provisions of the laws and regulations.
- (2) If the provisions of laws and regulations do not determine the time limit for obligations as referred to in section (1), the Agency and/or Government Officials are obliged to determine and/or make decisions and/or actions within a maximum period of 10 (ten) 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 section (2), the Government Agency and/or Official does not make a decision and/or take action, then the application is considered legally granted.
- (4) The applicant submits an application to the Court to obtain a decision on the acceptance of the application as referred to in section (3).
- (5) The court is obliged to decide on the application as referred to in section (4) no later than 21 (twenty-one) working days after the application is submitted.
- (6) Government agencies and/or officials are obligated to stipulate a Decision to implement the Court's decision as referred to in section (5) no later than 5 (five) working days after the Court's decision is enacted.”

Positive fictitious decree is the purpose of the legal politics of the Law of Administration so that in providing services to the community, they are more responsive. However, in the Law of Administration there is no

definition of the meaning of positive fictitious decisions or actions [12]. Nevertheless, positive fictitious in the Law of Administration requires that if there is no response from the government agency of official to the applicant's application, the application is considered legally granted when the Court accepts the applicant's application. The Court referred to in Article 1 point 18 of the Law of Administration is the State Administrative Tribunal. This means that the provisions of Article 53 section (4) of Law No. 30 of 2014 on Government Administration (Law of Administration) provide attribution of authority for the State Administrative Tribunal to accept, review, decide and resolve cases of positive fictitious State administrative decision requested. The existence of this Positive Fictitious Administrative Decree is to provide legal protection for citizens to obtain government official decisions, and also in order to encourage bureaucratic reform to provide excellent service. In the course of time, the concept of the positive fictitious state administrative decision changed along with the enactment of Law No. 11 of 2020 on Job Creation.

The enactment of Law No. 11 of 2020 on Job Creation has legal consequences for the settlement of state administrative disputes in the State Administrative Tribunal. Before the ratification of the Job Creation Law, the applicant's application for a decision that is not followed up by a government agency and/or official with a decision and/or action, is considered legally granted (positive fictitious). Based on Article 53 section (5) juncto Article 1 point 18 of the Law of Administrative, it is stated that the State Administrative Tribunal is the court that has the authority to decide on positive fictitious state administration applications. This is regulated in Article 53 section (4) and (5) of the Government Administration Law. However, with the enactment of the Job Creation Law, there has been a change in the pattern of testing positive fictitious applications. This can be seen in the provisions of Article 175 of the Job Creation Law, which reads as follows:

- “(1) The time limit for the obligation to determine and/or carry out Decisions and/or Actions is given in accordance with the provisions of the laws and regulations.
- (2) If the provisions of laws and regulations do not determine the time limit for the obligations as referred to in section (1), the Government Agency and/or Official must evaluate and/or make decisions and/or actions within 5 (five) working days after the application is received in full by the Agency and/or Government Official.
- (3) In the event that the application is processed through the electronic system and all requirements in the electronic system have been met, the electronic system shall stipulate the Decision

and/or Action as a Decision or Action of an authorized Agency or Government Official.

- (4) If within the time limit as referred to in section (2), the Government Agency and/or Official does not make a decision and/or take action, the application is considered legally granted.
- (5) Further provisions regarding the form of the stipulation of Decisions and/or Actions deemed legally granted as referred to in section (3) shall be regulated in a Presidential Regulation."

The provisions in Article 175 of the Job Creation Law expressly do not contain the phrase 'Court' in examining a legally granted application (positive fictitious). If it is based on Article 175 of the Job Creation Law, the State Administrative Tribunal does not have the authority to test positive fictitious applications. However, if it's based on the *Ius Curia Novit* principle and the *rechtweigening* principle, it means that the judge is considered to know all the laws so that the Court may not refuse to review and hear cases. State Administrative Tribunal in the context of examining, adjudicating, and deciding fictitious State administrative decision does not necessarily refuse when there is a registration of positive fictitious applications. Article 5 section (1) of Law No.8 of 2009 on Judicial Power states, "Judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice that live in a society." This principle is closely related to Article 10 section (1) of Law No. 48 of 2009 on Judicial Power which states that "The court is prohibited from refusing to accept, review, decide and resolve on a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and judge him." According to Sudikno Mertokusumo, a judge who has brought a case to him is obliged to examine and try the case until it is finished, even if the law is incomplete or does not exist, he is obliged to find the law by interpreting, exploring, following and understanding the legal values that live in the society. The application of the *Ius Curia Novit* Principle requires judges' creativity in using tools to make it happen in the form of legal discovery methods.[13]

In order to be details regarding the positive fictitious comparison in the Law of Administrative and Law of Job Creation, it will be explained in the following table:

Table 1. Positive fictitious comparison

No	Comparison	Law of Administrative	Law of Job Creation
1	Legal Base	Article 53 Law on Government Administration	Article 175 Law on Job Creation
2	Deadline for Quiescent of Government Agencies/Officials	10 working days	5 working days

3	Examination	State Administrative Tribunal	Will be regulated in Presidential Decree
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The existence of the substance of the law which is general in nature, unspecific and attributing further regulations to the regulations below it. It is not without reason, but with the following considerations [14]:

- a. Substantively, the law must be able to apply for an extended period in accordance with the needs of the community
- b. The technical aspects of implementer regulations can be adaptive because they are regulated through implementer regulations
- c. The existing legal instruments under the law are easier and do not require a long period of time to form
- d. The flexible ability of the regions at the provincial, regency/city level in administering the government because its implementation takes into account the conditions and capabilities of the concerned region.

Specific regulations are regulated in the implementer regulations. The authority to form these regulations can be obtained through the delegation of attribution or delegation [14]. Article 4 section (1) of the 1945 Constitution of the Republic of Indonesia gives attribution to the President as the holder of government power and in carrying out his government is authorized to issue a Presidential Regulation (Presidential Decree), three things, namely can cause the substance of the Presidential Decree:

- a. In the context of administering the government, based on Article 4 section (1) of the 1945 Constitution of the Republic of Indonesia, the decision material is regulated and independent, so the scope is uncertain.
- b. To carry out the orders of the law which instructs to provide further regulations from the relevant laws
- c. In order to fulfill the delegation given by the Government Regulation, the contents of the Presidential Regulation are in a particular scope

If the command what means by does not exist, other things that can underlie the formation of a Presidential Decree are (a) a technical matter for government administration (b) solely intended for the internal implementation of the provisions of Laws and Government Regulations [15]. On this basis, what is mandated by Article 175 section (5) of the Job Creation Law is not something that is contrary to existing legal rules because it is an implementing regulation. However,

it is not a rigid matter if paying attention to the existence of the Presidential Decree in Article 175 as an implementer regulation because it will certainly affect the application of positive fictitious principles in the existing administrative law space, thus avoiding lame duck government bureaucracy as much as possible [16].

Implementer regulations that are mandated to regulate state administrative decision reviewing institutions in Article 175 section (5) of the Job Creation Law must pay attention to four essential things related to the requirements of implementer regulations [17].

- a. Consulting of Interest
- b. Control by Parliament
- c. Publication of Statutory Instruments
- d. Challenge in the Court

The existence of a Presidential Regulation is something that is inevitable for a country with a presidential system. In practical terms, the Presidential Regulation has the potential to be used as a means to abuse power, which is not impossible based on the experience of the New Order era. Another thing that should be considered is that the norms and materials contained in the Presidential Regulation are not always correct. The need for the role of the community as a means of evaluating policies is needed, the existing efforts are in the form of testing the Presidential Decree material to the Supreme Court so that both the substance of the material and the effectiveness of the implementation of the related Presidential Decree can be made immediately. The number of Presidential Decrees issued between 2019 and mid-August 2021, which total 243 Presidential Decree [18], makes the issuance of Presidential Decree potential to be delayed if the President is in more pressing business needs. Recalling the delay in the Presidential Decree related to the existing arrangements for anti-corruption institutions, the Anti-Corruption Commission depended on Commission employees' status and the mechanism for coordinating relations between the Supervisory Board and the Anti-Corruption Commission Leadership [17].

4. CONCLUSION

The provisions in Article 175 of the Job Creation Law expressly do not contain the phrase 'Court' in reviewing a legally granted application (positive fictitious). So that the State Administrative Tribunal does not have the authority to test positive fictitious applications as it in Article 53 section (5) of the Administrative Law which gives the authority to test it. However, if it is based on the *Ius Curia Novit* principle and the *rechtweigening* principle, it means that the judge is considered to know all the laws so that the Court in this case the State Administrative Tribunal cannot refuse to review and hear cases related to the Fictitious Positive State

Administration Decree application. So that the State Administrative Tribunal in the context of examining, adjudicating and deciding on a positive fictitious state administration decree does not necessarily reject it when there is a registration for examining a positive fictitious state administrative decision

Suggestions in this article are the form of determining decisions and/or actions that are considered legally granted which will later be regulated in a Presidential Regulation, it is necessary to pay attention to the content that will be included so that the spirit of bureaucratic reform in government administration goes well.

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REFERENCES

- [1] Wicipto Setiadi, "Simplifikasi Regulasi dengan Menggunakan Metode Pendekatan Omnibus Law [Simplification of Regulation by Using the Omnibus Law Approach]," *Rechtsvinding*, vol. 9, no. 1, p. 40, 2020.
- [2] Muhamad Azhar, "Omnibus Law as a Hyper-Regulatory Solution Towards Synchronization of Laws and Regulations in Indonesia [Omnibus Law Sebagai Solusi Hiper-Regulasi Menuju Sinkronisasi Peraturan Per-Undang-Undangan di Indonesia]," *Administrative Law Gov. J.*, vol. 2, no. 1, p. 171, 2019.
- [3] Delfina Gusman, "Morality of the Omnibus Law of the Job Creation Act in the Framework the Legal Needs of the Community [Moralitas Omnibus Law Undang-Undang Cipta Kerja Dalam Rangka Pemenuhan Kebutuhan Hukum Masyarakat]," *Nagari Law Rev.*, vol. 4, no. 2, p. 201, 2021.
- [4] Sodikin, "Paradigm of Law with the Concept of Omnibus Law [Paradigma Undang-Undang dengan Konsep Omnibus Law]," *Rechtsvinding*, vol. 9, no. 1, p. 148, 2020.
- [5] Suwandi Arham dan Ahmad Saleh, "Omnibus Law Dalam Perspektif Hukum Indonesia [Omnibus Law in the Perspective of Indonesian Law]," *Petiturum*, vol. 7, no. 2, p. 77, 2019.
- [6] Rizky. P. P. Karo Karo dan Amanda Fitri Yana, "Omnibus Law Conception on the Protection of Female Workers in Indonesia [Konsepsi Omnibus Law terhadap Perlindungan Tenaga Kerja Wanita di Indonesia]," *War. Dharmawangsa*, vol. 14, no. 4, p. 723, 2020.
- [7] Hezron Sabar Rotua Tinambunan dan Bagus Oktafian Abrianto, "The Dilemma of Regional Representative Institutions in the Indonesian State Administration System [Persoalan Dilematis Lembaga Perwakilan Daerah dalam Sistem Ketatanegaraan Indonesia]," *J. Magister Huk. Udayana (Udayana Master Law Journal)*, vol. 10, no. 1, p. 67, 2021.
- [8] Enrico Simanjuntak, "Fictitious Proceedings and Its Legal Problem," *J. Huk. dan Peradil.*, vol. 6, no. 3, p. 382, 2017.
- [9] Azza Azka Norra, "Conflicting Norms Between Tacit Refusal and Tacit Authorization and Its Contextualization in The Light of Government Administration Law," *J. Huk. Peratun*, vol. 3, no. 2, p. 147, 2020.
- [10] Denny Kristian, "Efforts to Apply for Positive Fictitious Decisions Against the Principle of Legal Certainty in the Scope of Government Administration [Upaya Permohonan Putusan Fiktif Positif Terhadap Asas Kepastian Hukum Dalam Lingkup Administrasi Pemerintahan]," *Lex Adm.*, vol. 8, no. 1, p. 116, 2020.
- [11] Enrico Simanjuntak, "Prospect of Fictitious Approval Principle in Supporting the Ease of Doing Business in Indonesia," *Rechtsvinding*, vol. 7, no. 2, p. 306, 2018.
- [12] Dola Riza, "State Administrative Decisions According to the Law on State Administrative Courts and the Law on Government Administration [Keputusan Tata Usaha Negara Menurut Undang-Undang Peradilan Tata Usaha Negara Dan Undang-Undang Administrasi Pemerintahan]," *J. Bina Mulia Huk.*, vol. 3, no. 1, p. 99, 2018.
- [13] Yuristyan Pambudi Wicaksana, "Implementation of the Ius Curia Novit Principle in Legal Interpretation of Judge's Decisions on the Legality of Determining Suspects [Implementasi Asas Ius Curia Novit Dalam Penafsiran Hukum Putusan Hakim Tentang Keabsahan Penetapan Tersangka]," *Lex Renaiss.*, vol. 3, no. 1, p. 91, 2018.
- [14] Zaelani, "Delegation of Authority the Establishment of Legislation Regulation [Pelimpahan Kewenangan Dalam Pembentukan Peraturan Perundang-undangan]," *J. Legis. Indones.*, vol. 9, no. 1, pp. 119–134, 2012.
- [15] A. Husen, "The Existence of Presidential Regulations in the Legislative System [Eksistensi Peraturan Presiden Dalam Sistem Peraturan Perundang-Undang]," *Lex Sci. Law Rev.*, vol. 3, no. 1, pp. 69–78, 2019, [Online]. Available:

<https://journal.unnes.ac.id/sju/index.php/lslr/article/view/30733>.

- [16] K. F. Sulaiman, *The Theory of Legislation and Its Examiner Aspects [Teori Peraturan Perundang-Undangan dan Aspek Pengujinya]*. Yogyakarta: Thafamedia, 2017.
- [17] M. Yasin, "Mengenal Lebih Jauh Jenis Peraturan Bernama Perpres [Getting to Know More Types of Regulations Called Perpres]," *Hukum Online*, 2020. <https://www.hukumonline.com/berita/baca/1t5e255e98a68ae/mengenal-lebih-jauh-jenis-peraturan-bernama-perpres/> (accessed Aug. 15, 2020).