

**RECONSTRUCTION OF THE AUTHORITY OF THE STATE  
ADMINISTRATIVE COURT REGARDING THE  
DETERMINATION OF APPLICATIONS POSITIVE FICTION  
( Analysis Critical Post The Birth Constitution Number 6 of 2023  
concerning Determination Regulation Government Replacement  
Constitution Number 2 of 2022 concerning Create Work )**

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*ABSTRACT*

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*The problem the disappearance authority State Administrative Court in set application submission fictitious positive Post The Birth Constitution Number 6 of 2023 concerning Determination Regulation Government Replacement Constitution Number 2 of 2022 concerning Create Work (UUCK) is necessary done reconstruction and carried out arrangement more carry on in Regulation Government or Regulation President . Method research used that is legal normative with approach critical legal studies . Research result show that if attitude silent official government considered granted then the Fictitious Decision Positive post UUCK will direct implemented by officials government That Alone without need submit application to PTUN matter This impressed deviate judicial power in set application fictitious positive that must be obeyed by Officials Government .*

**Keywords : Fiktir; Positive; Creation; Work .**

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## INTRODUCTION

Change concepts and elements of internal decisions matter This accompanied with improvement amount application For obtain a decision from the Agency and/ or State Administrative Officer . This matter in the practice can appear pending application or No served so that there is decisions that are of a nature fictitious . In its development , the decision fictitious starting in Article 3 of the Law State Administrative Court based on chapter the to application for a decision that has been made beyond time based on provision regulation existing legislation so application the considered rejected in a way law so that known with draft decision

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fictitious negative . Concept the has experience changes , namely based on Article 53 of the Law Administration The government that provides provision that to the application that has been past time as determined in regulation legislation so application the granted in a way law which is also known with term decision fictitious positive .<sup>1</sup>

Positive fictitious decisions are certainly related to administrative law. When viewed from an administrative law perspective, positive fictitious decisions are one of the government's legal actions. From this, of course, it can be seen that there are three types of governmental legal action, namely carrying out material acts (*materiele daad*), issuing regulations (*regeling*) and issuing decisions/decrees (*beschikking*). This means that positive fictitious decisions are part of government legal actions that are decisions in nature. Before the term positive fiction was known, the term known was negative fiction. So at that time the government could not file a lawsuit against the government's silence because there was no decision. However, in principle the government should not take advantage of its *silence (i'administration ne peut beneficier de son inaction)*.<sup>2</sup> So that the introduction of positive fictitious terms will influence developments related to administrative law.

Transition from fictitious negative to fictitious positive after UUCK became problem if bumped into with characteristic concrete , individual and final decisions . So , no There is object concrete to attitude his silence official government that is considered granted without existence decision court . And in philosophical , digging truth material , can equated determination state administrative court against application fictitious positive with attitude his silence official government that is considered granted .

Effort law that can done on objections that are not responded to and considered granted so existence fictitious-positive accommodated with Constitution Number 30 of 2014 concerning Administration Government as in Article 53 paragraph :

- (1) Deadline obligation For determine and/ or make appropriate decisions and/ or actions with provision regulation legislation .
- (2) If the terms regulation legislation No determine limit time obligation as referred to in paragraph (1), then the Agency and/ or Official Government must determine and/ or carry out decisions and/ or actions in maximum time 10 ( ten ) days Work after application accepted in a way complete by the Agency and/ or Official Government .

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<sup>1</sup> Andika Risqi Irvansyah, "Kedudukan Hukum Keputusan Fiktif Positif Sejak Pengundangan Undang-Undang Cipta Kerja," *Japhtn-Han* 1, no. 2 (2022), <https://doi.org/10.55292/japhtnhan.v1i2.31>.

<sup>2</sup> Desy Wulandari, "Pengujian Keputusan Fiktif Positif Di Pengadilan Tata Usaha Negara," *Jurnal Lex Renaissance* 5, no. 1 (2020): 32–56, <https://doi.org/10.20885/jlr.vol15.iss1.art3>.

- (3) If in limit time as referred to in paragraph (2), the Agency and/ or Official Government No determine and/ or make decisions and/ or actions, then application the **considered granted in a way law** .
- (4) Applicant submit application to Court For to obtain decision reception application as referred to in paragraph (3).
- (5) Court must decide application as referred to in paragraph (4) no later than 21 ( two) days tens one day Work since application submitted .
- (6) Body and/ or Official Government must set the decision for carry out decision Court as referred to in paragraph (5) no later than 5 (five) days Work since decision Court set .

Based on Article 1 number 9 of the Law Republic of Indonesia Number 5 of 1986 Concerning The State Administrative Court states : " State administrative decisions are a determination written statement issued by the agency or state administrative officials who contain action state administrative law based on regulation applicable legislation , which is of a nature concrete , individual, and final, which gives rise to consequence law for individuals or legal entities civil law ." However, for positive fiction, the form of the administrative official's decision is different, because in the case of positive fiction there is no decision letter issued by the state administrative official as the person authorized to make a decision. So it is interesting to study the status of the written TUN decisions.

## METHOD

Type research used that is study law legal normative .<sup>3</sup>Data collection techniques used namely through studies document and also literature against secondary data in the form of ingredients primary, secondary and tertiary law . The analysis used is in a way descriptive .

Critical Legal Studies studies seem to be very relevant for use in analyzing legal processes in Indonesia, analyzing the processes of formation and its implementation, and also to analyze a doctrine law And How studies law critical has functioning to validate a system social or policy certain.<sup>4</sup>

## DISCUSSION

### **Dynamics Authority State Administrative Court In Set Application Fictional Positive**

Existence institution The State Administrative Court is manifestation from theory sovereignty people For realize protection right basic man from arbitrariness rulers and absolutism . As law formal , philosophical The procedural law of the State Administrative Court is reflected in consideration weigh Constitution

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<sup>3</sup> Eka NAM Sihombing, Cynthia Hadita, *Penelitian Hukum* (Malang: Setara Press, 2022).

<sup>4</sup> Abdul Halim Barkatullah, *Buku Ajar Filsafat Hukum* (Bandung: Nusa Media, 2017).

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Republic of Indonesia Number 5 of 1986 Concerning The State Administrative Court , namely existence protection to society by the State Administrative Court in order to realize harmonious , balanced and harmonious relationships between apparatus in the field of State Administration with inhabitant public .<sup>5</sup>

Referring to the provisions of Article 24 paragraph 2 of the 1945 Constitution, it is stated that "Judicial power is exercised by a Supreme Court and judicial bodies subordinate to it in the general court environment, the religious court environment, the military court environment, the state administrative court environment, and by a Court Constitution". The formulation of this article can certainly be seen that the PTUN and other courts within the scope of the Supreme Court have an equal position.

In Indonesia, the State Administrative Court is part of the judiciary which in organizational structure is under the Supreme Court and does not stand alone like in civil law system countries in general. Because it is under the Supreme Court, the judicial technical, organizational, administrative and financial guidance of the Court is carried out by the Supreme Court. Normatively, the PTUN is not an independent court outside the judiciary's authority, so the system for resolving state administrative disputes follows the pattern of resolving civil disputes which recognizes the terms first level court, appeal level, cassation and judicial review. <sup>6</sup>

Existence state administrative courts do not can separated from Indonesia as a country of law , because its existence is one of characteristics from the rule of law . It is expected his role in enforcement law functioning administration as government . As institution control legal external Not yet show optimal results . Data shows Still existence application execution by the plaintiff to chairman state administrative court . This is show absence obedience state administrative officials regarding decision State Administrative Court. <sup>7</sup>

HD Stoud as quoted Ridwan HB explaining about definition authority “ Overall the rules that apply with acquisition and use authority government by subject law public in connection law public ”. There are two elements contained in understanding draft the authority presented by HD Stoud , namely :<sup>8</sup>

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<sup>5</sup> Sudarsono, Rabbenstain Izroiel, *Petunjuk Praktis Beracara Di Peradilan Tata Usaha Negara Konvensional Dan Elektronik* (Jakarta: Kencana, 2019) p. 5.

<sup>6</sup> Umar Dani, “Memahami Kedudukan Pengadilan Tata Usaha Negara Di Indonesia: Sistem Unity of Jurisdiction Atau Duality of Jurisdiction? Sebuah Studi Tentang Struktur Dan Karakteristiknya / Understanding Administrative Court in Indonesia: Unity of Jurisdiction or Duality of Jurisdiction System? A Study of Hierarchy and Characteristic,” *Jurnal Hukum Dan Peradilan* 7, no. 3 (2018): 405, <https://doi.org/10.25216/jhp.7.3.2018.405-424>.

<sup>7</sup> Untoro, “Self-Respect Dan Kesadaran Hukum Pejabat Tata Usaha Negara Menuju Keadilan,” *Jurnal Pandecta* 13, no. 1 (2019): 38.

<sup>8</sup> Ridwan HR, *Hukum Administrasi Negara* (Jakarta: RajaGrafindo Persada, 2008) p. 10.

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1. The existence of rules law
2. Nature of the relationship law .

Body or State Administration Officials ( TUN Officials ) in operate his job For emit a State Administrative Decision must based on the respective authorities that exist to him or delegated to him . Sources and methods to obtain authority government sourced from Constitution basics and laws . By theoretical authority derived from from regulation legislation that was obtained through 3 ( three ) ways that is Attribution ( *Attributie* ), Delegation ( *Delegatie* ), and Mandate ( *Mandate* ).<sup>9</sup>

All ordinary state administrative decisions called *beschikking* can sued by every citizen or subject other Indonesian laws to state administrative court . The existence of institution court that can used For oppose or sue the state if the decision he made cause injustice for citizens in general , is one of the characteristics important rule of law ( *rechtsstaat* ). With Thus , it is expected Who only those who occupy position the government of the country does not will make arbitrary decisions with harm rights citizens who should be served with as best as possible by officials government .<sup>10</sup>

Dynamics PTUN's authority in set fictitious positive namely UUAP which has put aside draft fictitious negative in Constitution State Administrative Court , although in Constitution Administration Government No in a way firm to pull out provision about draft fictitious negative in Constitution State Administrative Court but matter the confirmed by the Supreme Court in a Circular Letter Supreme Court 1 of 2017 concerning Enforcement Formulation of Meeting Results 2017 Supreme Court Chamber Plenary Session as Guidelines Implementation Task For Court ( hereinafter called as SEMA 1 of 2017 ) which in the State Administrative Chamber Formulation provides provision that to lawsuit fictitious negative set in Constitution The State Administrative Court is considered No can enforced Because has There is provision in Article 53 of the Law Administration The government that regulates decision fictitious positive . Settings the has to signify that draft fictitious positive is the concept applied when there is the application that has been past time .<sup>11</sup>

Existence fictitious positive reflected in the AP Law as regulated by article 53, in Articles (2) and (3) state : (2) If the provisions regulation legislation No determine limit time obligation as referred to in paragraph (1), then the Agency and/ or Official Government must determine and/ or carry out decisions and/ or actions

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<sup>9</sup> Ridwan HR, *Hukum Administrasi Negara* (Jakarta: PT. Raja Grafindo Persada, 2006).

<sup>10</sup> Ismu Gunadi Widodo Titik Triwulan, *Hukum Tata Usaha Negara Dan Hukum Acara Peradilan Tata Usaha Negara Indonesia* (Jakarta: Kencana, 2019). p. 8.

<sup>11</sup> Triartha Yuliani, Erlin. "Perbandingan Antara Konsep Fiktif Negatif Dalam Uu 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara Dengan Konsep Fiktif Positif Dalam Uu 30 Tahun 2014 Tentang Administrasi Pemerintahan," *Jurnal Komunikasi Hukum (JKH)* 6, no. 1 (2020): 64.

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in maximum time 10 ( ten ) days Work after application accepted in a way complete by the Agency and/ or Official Government . (3) If in limit time as referred to in paragraph (2), the Agency and/ or Official Government No determine and/ or make decisions and/ or actions, then application the considered granted in a way law . Based on the above provisions , it is known that the AP Law determines limit 10 days time For official government processing application society . If you pass by limit time , and officials No visit set decision on application submitted , then application the considered has granted according to law . More continue , in frame give certainty law will decision granted in a way law ( fictional) positive ) that , then the AP Law regulates that applicant must submit to the PTUN for get decision fictitious positive in accordance rule Article 53 paragraph (4), and in Article (5) stipulates that the PTUN is required to to cut off for 21 days Work since application accepted . However, in UUCK, 10 days shortened to be 5 days and things This show that official government must show service public in prime condition.

Previously , there were rule technically which procedural arrange about Application Fictional Positive set up as in PERMA Number 8 of 2017 for finish due to Agency/ Official Government No set or do action . If The State Administrative Court accepted application this , then must completed 21 days Work since application registered

Post UUCK, Article 175 UUCK in substance arrange that if the process of change long law obstruct matter This For achieved in time close . Therefore that , the government must take a different strategy with arrange in a way clear procedures identification fictitious positive in regulation legislation in the form of rule implementer , for example through regulation government . Because , the elimination of the role of the PTUN which " produces " decisions fictitious positive will make decision administrative like acknowledged its existence However left alone so just without clear evidence its validity . This is Of course will cause uncertainty in its implementation so that harm society . government must act fast with change .

### **The urgency Reconstruction Authority State Administrative Court Against Determination Application Fictional Positive Post The birth of UUCK**

State Administrative Court procedural law as procedural law specifically applicable in the environment state administrative court . as a judicial procedure special , then have its characteristics alone , following character its judiciary . state administrative court as justice special , formed For give protection law to people on action government that is indicated harm rights and or interest individual . but beside that , also the judiciary This formed protection law to the body or official

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government as subject the law that must be respected and guarded his authority for and interest government .<sup>12</sup>

Due to the existence of a positive fictitious concept, it is necessary to see whether this concept can be justified or not. Regarding this problem, of course we can see it based on legal principles. There are at least 3 (three) principles that can be used as a reference for analyzing the positive fictitious concept as intended, including the principles of *lex superior de rogat lex inferior*, *lex specialist derogat lex generalis*, *lex posterior de rogat lex priori*. Jazim Hamidi further explained that based on the study of legal science 3 (three) principles as referred to are important pillars in understanding the construction of statutory law in Indonesia in detail, it can be explained that: a) The principle of *lex superior de rogat lex inferior*, higher regulations will override lower regulation when regulating the same and conflicting substances. b) As a *lex specialist derogat lex generalis* principle, more specific rules will override general rules when regulating the same and contradictory substances. c) The principle of *lex posterior de rogat lex priori*, the new regulation will override the old regulation.<sup>13</sup>

Draft decision fictitious positive regulated by the State Administrative Law replaces decision fictitious negative as defined by law State Administrative Court , the existence of dualism draft decision fiction based on the principle *Lex posteriori derogate legi priori* . Concept decision fictitious positive , in terms of historical appear from various development in Implementation decisions that occur in Common Law countries . According to Oswald Jansen, fictitious positive as *lex in Latin* , *silence positive* in literature law Spanish , and other terminology used in English literature like agreement tacit , agreement fictitious , or authorization secretly , all of which refers to understanding that That considered given .<sup>14</sup>

No existence action by the government , which is deep matter This can investigated in a way comprehensive about what does action mean silent that . action in the form of calm body and/ or Officer State Administration can caused by lack of skills administration That alone ( not can operate its function ) or on purpose cause ( to reject) For carry out obligation ).<sup>15</sup>

Article 175 Number 6 of the Job Creation Law Work discuss fictitious positive , even though it turns out the substance change a number of the principles

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<sup>12</sup> Farah Syah Reza, *Hukum Acara Peradilan Tata Usaha Negara* (Makassar: Sosial Politic Genius (Sign), 2018).

<sup>13</sup> Eka N.A.M Sihombing dan Cynthia Hadita, "Analisis Wacana Hukuman Pancung Di Provinsi Aceh," *Jurnal Legislasi Indonesia* 6, no. 4 (2019) hal 521.

<sup>14</sup> Desy Wulandari, "Pengujian Keputusan Fiktif Positif Di Pengadilan Tata Usaha Negara," *Jurnal Lex Renaissance* 5, no. 1 (2020): 5.

<sup>15</sup> Enrico Simanjuntak, "Prospek Prinsip Fiktif Positif Dalam Menunjang Kemudahan Berusaha Di Indonesia," *Jurnal Rechtsvinding: Media Pembinaan Hukum Nasional* 7, no. 2 (2018): 112.

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that have been discussed previously related fictitious positive . Attitude silent State Administrative Officer before considered positive do changed from 10 to 5 days . Body and/ or Official Government must decide and/ or carry out decisions and/ or actions in term maximum time 5 (five) days Work after day the taking .

This is so that the Agency or TUN officials must Work more fast in give service public . However need noted , reduction time the precisely will impact negative to standard inspection condition application submitted Because government will in a hurry take decision to fulfill deadline time of only 5 days .

With Thus , the decision fictitious positive No need Again submitted to PTUN later day For get verdict . This is impact No straight to the loss authority absolute PTUN in the Job Creation Law Work in determine application positive fake . Author evaluate No appropriate If remove PTUN input in choose fiction positive . Why ? Because in matter This maker Constitution to abolish mechanism control justice on action identical government with category maladministration , such as negligence administrative , no responsive , processing application in a way slow ( delay) service ) , and so on .

Whereas Article 53 paragraph (5) UUAP in conjunction with UUCK has arrange to be about fictitious positive set up more carry on with Regulation President . More crucial Again , Article 185 of the UUCK regulates that regulation executor for UUCK must set no later than three month after the UUCK was passed , but it is very unfortunate that the UUCK has been set since November 2, 2020 and/ or Post The Birth Constitution Number 6 of 2023 concerning Determination Regulation Government Replacement Constitution Number 2 of 2022 concerning Create Work become The law was enacted on the date March 31, 2023. That meaning , has pass 3 ( three ) month limit For to form rule the executor in form Regulation President , so that No give certainty law to draft fictitious positive without the court judicial cq State Administrative Court in set Application Fictional Positive diverted become formal technical requirements that must be met implemented by Officials Government without must There is determination state administrative court .

Determination written It means refers to content , not form decisions issued by bodies or state administrative officials . State administrative decisions must written , not in formal forms , such as as it is letter decision appointment For make it easier in evidence in court . Issued by an agency or state administrative official meaning is determination written the must issued by the body or state administrative official .<sup>16</sup>

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<sup>16</sup> dan Dewi Mayaningsih Zulkarnaen, *Hukum Acara Peradilan Tata Usaha Negara Di Indonesia* (Bandung: CV Pustaka Setia, 2018).



Regulation the president in essence can also provide legal standing of choice fictitious positive so that president have authority For carry it out . However if regulation the will made in form directions president or directions government , then need be noticed that directions government and direction side the is implementation laws that are of a nature administrative . Therefore that , direction the No may create rule constitutional like arrange improvement jurisdiction court , because matter This will make government No Possible take action similar in the future . Need designed different systems because the PTUN was given authority to judge fictitious positive based on provision beginning through Regulation Government or Regulation President .<sup>17</sup>

In fact , the judge's decision is a statement made by the judge as State officials who are given authority For that , was said at the hearing and was aimed at For end or finish a case or dispute between the parties Decision court according to Article 185 paragraph (1) HIR is differentiated on two kinds , namely decision end ( line voonis ) and not decision end ( interim decision ( tussen) verdict ). Verdict end is decisions of a nature end a dispute in level certain , whereas interim decision is the decision issued by the judge before emit decision end with Meaning make it easier inspection case furthermore in frame give decision end .<sup>18</sup>

Ideally , so that a order implemented by officials government so needed role judicial , in matter This the urgency reconstruction PTUN's authority in set application fictitious positive . And preferably , there is rule executor even rule technical about implementation application fictitious positive in Indonesia.

## CONCLUSION

The concept of positive fiction was introduced from the birth of UUAP to UUCK. In this provision, Positive Fictitiousness at a glance overrides the concept of Negative Fictitiousness which is known in the State Administrative Court Law. However, as time goes by, there has been a shift with the existence of Supreme Court Circular Letter 1 of 2017 concerning the Implementation of the Formulation of the Results of the 2017 Supreme Court Chamber Plenary Meeting as Guidelines for the Implementation of Duties for the Court (hereinafter referred to as SEMA 1 of 2017) which is in the Formulation of the State Administrative Chamber provides provisions that negative fictitious lawsuits regulated in the State Administrative Court Law are deemed unenforceable because there are provisions in Article 53 of the Government Administration Law which regulates fictitious decisions positive. In addition, there is PERMA Number 8 of 2017 to resolve the consequences of

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<sup>17</sup> Surya Mukti Pratama, "Pengaturan Baru Keputusan Fiktif Positif Dalam Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja Dan Kaitannya Dengan Kompetensi PTUN," *Jurnal RECHTSVINDING*, no. November (2020): 1–4.

<sup>18</sup> Dezonda Rosiana Pattipawae, "Pelaksanaan Eksekusi Putusan Pengadilan Tata Usaha Negara Di Era Otonomi," *Jurnal Sasi 1*, no. 2019 (25AD): 96.

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Government Agencies/Officials not determining or taking action. If the State Administrative Court accepts this application, it must be completed 21 working days after the application is registered. So that it affects the dynamics of the authority possessed by the State Administrative Court.

Authority State Administrative Court in set application fictitious positive since the PTUN Law, UUAP, to UUCK experienced distortion to role judicial in set application fictitious positive . The problem of State Administrative Decisions in the form of determination written in a formal manner concrete , individual, and final, especially to the concrete nature of KTUN contradictory with attitude silent official government that is considered granted that is not own object concrete certainty law so that needed reconstruction PTUN's authority in set application fictitious positive .

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