

LEGAL IMPLICATIONS OF THE APPLICATION OF POSITIVE FICTIONAL PRINCIPLES IN THE REQUEST OF DECISION AND/OR ACTION GOVERNMENT APPARATUS INVOLVE THE STATE ADMINISTRATIVE COURT

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**LEGAL IMPLICATIONS OF THE APPLICATION OF POSITIVE
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ADMINISTRATIVE COURT**

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ABSTRACT

Nowadays administrative law paradigm begins to be developed the principle of "silence means to agree" or known as a positive fictitious principle. This study aims to identify, understand and analyze the ratio legis the application of positive fictitious principles in Article 53 of Law Number 30 of 2014 concerning Government Administration and how legal implications can arise from the application of positive fictitious principles that still require efforts to the State Administrative Court. The research was conducted through normative legal research by carrying out several approaches, namely the legislative, conceptual, comparison and case approach. The results of this review reveal that the positive fictitious principle is an attempt to obtain a court decision, the judicial process is an advanced procedure, so that the positive fictional principle is not the final determinant. Legal implications arising from the application of positive fictitious principles involving the courts, namely inconsistency with the principle of division of authority between government organs and judicial institutions, inconsistencies in the principle of free and independent justice and not guaranteeing the legal protection of third parties related to positive fictional cases.

Keywords: Positive fictional principles, legal implications, Government apparatus decisions/actions, State Administrative Courts.

INTRODUCTION

The opening of the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated as the 1945 Constitution of the Republic of Indonesia) mandated the aim of the Republic of Indonesia to "protect the entire Indonesian nation and the entire bloodshed of Indonesia, promote public welfare and educate the nation"⁷. The obligation of the government to provide public services in the context of realizing general welfare (welfare state) requires that administrative authorities who carry out public services must serve every request submitted by the public. If the government administration apparatus does not serve as it should, ignores, or is late in carrying out its obligations, then administrative law is equated with silence. Silence implies rejection or approval. Today's administrative law paradigm begins to be developed the principle of "silence means to agree" or known as a positive fictitious principle.

The application of positive fictional principles in public services is appreciated through several views, as:

⁷ Opening of the Constitution of the Republic of Indonesia in the fourth paragraph of the Constitution of the Republic of Indonesia 1945.

1. breakthrough in strengthening community citizens' rights related to guaranteeing improvements in public services⁸.
2. resolving bureaucratic problems in governance⁹.
3. the form of government efforts to improve services more leverage¹⁰.
4. the application of positive fictional principles is able to answer the needs of legal instruments¹¹.

The term "positive fictional principle" is used formally in the decision of the Constitutional Court (hereinafter referred to as the Constitutional Court) case Number 77/PUU-XV/2017. The Court provides an interpretation of Article 53 of Law Number 30 Year 2014 concerning Government Administration (hereinafter referred to as UUAP), stating:

"That Article 53 paragraph (3) of Law 30/2014 confirms that if a Government Agency/Officer does not set and/or take action within the specified time limit, then the application is deemed **to be granted** by law. This is known as a **fictitious-positive decision**. Therefore, the recognition of **positive fictional principles** in **Law 30/2014** is in the context of building a culture of serving or providing good services for citizens.

That the existence of Article 53 paragraph (5) which states, the Court is obliged to decide on a request no later than 21 (twenty one) working days after the application is submitted as such, and is a continuation of the stages and process of the previous paragraph, to obtain a decision and/or decree from the official state Administration.

That **Positive Fictitious** is basically an attempt to obtain the decision of the State Administrative Court which is the opposite of the Fictive Negative in which this authority is in the a quo court to examine and decide upon the receipt of the petition and the court orders that the state administration's body or officials issue a Decree and/or carry out Agency Actions and/or Government Officials. The word "**Fictitious**" is used because it is a proposed application that is considered or as if there is a decision, while it is called "**Positive**" because the application submitted by the Applicant has been received and submitted an application to the Court **to obtain a decision on the acceptance**. Furthermore, the Court will examine whether the petition submitted has legal grounds to be granted or rejected or unacceptable. If granted, the Court instructs the Agency and/or Government Official to issue a decision or action regarding the request of the official in question"¹².

⁸ Muhammad Yasin et.all., *Anotasi Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan*, (Jakarta: Universitas Indonesia–Center for Study of Governance and Administrative Reform (UI-CSGAR), 2017), pp. 253.

⁹ Supandi, *Penyelesaian Perkara Keputusan dan/atau Tindakan Fiktif-Positif di PTUN*, (Presentation of the Chairperson of the Supreme Court of the Republic of Indonesia for State Administrative Court Affairs, delivered at the opening of Diklat Kapita Selekt, July 5, 2017).

¹⁰ M. Aschari and Fransisca Romana Harjiyatni, *Kajian Tentang Kompetensi Absolut Peradilan Tata Usaha Negara Dalam Menyelesaikan Sengketa Keputusan Fiktif Positif*, (Journal of Legal Studies, (2)1, 2017), pp. 33.

¹¹ Enrico Simanjuntak, *Prospek Prinsip Fiktif Positif Dalam Menunjang Kemudahan Berusaha Di Indonesia*, (Journal of Rechts Vinding, (7) 2, August 2018), pp. 302.

¹² Decision of the Constitutional Court Number 77/PUU-XV/2017, (Jakarta, Wednesday 9 May 2018), pp. 49-50.

Explanation of UUAP states Article 53 Sufficiently Clear. The court referred to in Article 53 paragraph (4) UUAP is as stipulated in Article 1 point 18 of the UUAP states: "The Court is a State Administrative Court" (hereinafter referred to as PTUN).

The interpretation of the Constitutional Court towards Article 53 paragraph (3) of the UUAP in the phrase "application deemed to be granted legally" is known as a fictitious-positive decision, which is a recognition of the positive fictitious principle of UUAP. Used the word "Fictitious" because it is a request that is submitted is considered or as if there is a decision, while it is called "Positive" because the application submitted by the Applicant has been received. So "the application is deemed to be legally granted" the meaning of a particular application is considered or as if there is an Acceptance Decision.

1 The essence of a positive fictional principle in the field of government administration is guaranteeing legal certainty. Requests for decisions and/or actions of 1 Government Apparatus that have been received in full by the Government Apparatus that is authorized and ignored within a certain time or 10 working days, still need efforts to PTUN to cause 1 legal uncertainty. The application of positive fictitious principles requires that a request must have been received in full by the Government Apparatus and ignored within a certain time or 10 working days. What should be "tried" by the Administrative Court as a judicial institution for the complete application? As for problems through the time of obligation, only the issue of "forced power" law enforcement. The involvement of the judiciary is not in accordance with the principle of free and independent power/authority, and the principle of judicial power in accordance with the 1945 Constitution of the Republic of Indonesia. Furthermore, this paper will discuss further the application of positive fictitious principles in Article 53 of Law Number 30 Year 2014 concerning Government Administration 1 which requires the application of decisions and/or actions of Government Apparatus that have been received completely and ignored within a certain time or 10 working days still requires an effort to the State Administrative Court, what legal implications can arise from the application of positive fictitious principles that still require effort to the State Administrative Court.

RESEARCH METHOD

1 The study conducted in this writing uses a type of normative legal research. This study tends to research the principles of law examining the application of positive fictitious principles in cases of requests for decisions and/or actions of government officials th 1 have been received completely but ignored in a certain time, still have to make legal efforts to the state administrative court. The research approach used includes the legal, conceptual, comparison and case approach. The initial step is to collect legal materials that are categorized as primary legal materials, secondary legal materials and tertiary legal materials. These legal materials are traced through library studies, then systematically reviewed and analyzed in depth and then synchronized with the main issues..

DISCUSSION

2 Legal Considerations for the Application of Positive Fictitious Principles in the Field of Government Administration by Involving the State Administrative Court

In connection with the application of positive fictitious principles, it is necessary to explore what constitutes legal considerations (ratio legis) from the establishment of Article 53 of the UUAP which is a recognition of positive fictitious principles. When discussing the Legislative Terms of Decision, there is not much debate in the executive and legislative circles. At the Consignment Meeting of the Formulating Team and Synchronization Team of the Government Administration Law (Commission II) with the Ministry of PAN-RB on

September 3, 2014, the House of Representatives even immediately gave their approval. Chairperson of the hearing (Agum) said:

“ ... Then Chapter IX of Government Decisions, okay? Part 1. The conditions for the validity of the decision, this is correct. Conditions for the validity of the decision, a, b, c. If paragraph (2) is clear. Article 53 is clean, Article 54 is okay, it has changed its position, constitutively, so that it rises to be declarative”¹³.

Change in time period from 17 days to 10 working days. Other changes to Article 53 are more related to the adjustment of verse numbers and not to the substance, including in the case of changes from generally negative fictions to positive fictions in paragraph 3 which state: "If within the time limit referred to in paragraph (2), The Agency and/or Government Officials do not determine and/or make Decisions and/or Actions, then the application is deemed to be legally granted". A statement that the request will be deemed granted or legally accepted if within the time limit the government does not determine or make a decision and/or action is a form of positive fiction, and this is very different from the previous provision which takes a negative fictitious form.

Guntur Hamzah argued that the existence of a change from negative to fictitious to positive fictional is more due to urging the government to be able to process the application more quickly so that the community or parties who submit the application will get certainty the results of decisions are faster and less complicated. This is certainly in line with the process of bureaucratic reform, especially in terms of improving public services¹⁴.

Referring to the opinion above that negative fictional changes become positively fictitious so that the government can be faster in processing an application so that legal certainty still needs to be studied further. This is because the provisions of Article 53 of the Act on Article (4) still involve the court. Such conditions do not differ substantially or procedure with the application of negative fictitious principles. The consequence is that there are still opportunities for the Government Apparatus who has the authority to act arbitrarily, by letting the application of citizens even if they have been accepted as complete. Through or take refuge in further procedures in the court which could have given the final verdict in the form of an application rejected as such because the judiciary exercised independent and impartial judiciary powers.

The ratio of Article 53 of the UUAP which involves the PTUN in requests that are ignored no later than 10 working days after the application is received in full by the government apparatus is a positive fictitious principle criterion, just as opposed to the negative fictional principle with the same procedure involving the Administrative Court Positive fiction is only an attempt to PTUN, not as a principle or determining principle to end legal problems.

Requirements for applications are considered legally granted in Article 53 paragraph (2) UUAP:

- a. The application has been received in full by the competent authority;
- b. A certain time limit or 10 working days is exceeded, the application is not fulfilled.

Legal considerations of the Constitutional Court Decision 77/PUU-XV/2017 state that the Positive Fictitious Principle (assumed to be a decision of acceptance) is an attempt to obtain a State Administrative Court decision, contained in Article 53 paragraph (3) of the UUAP on the phrase "... the request is deemed granted legally". This concept does not meet the criteria

¹³ Consensus Meeting for the Team Administration Bill for the Administration of Commission II with the Ministry of Religion of the Republic of Indonesia Wednesday, 3 September 2014 at 09.00 WIB in Kopo.

¹⁴ Muhammad Yasin et. all., *Anotasi Undang-Undang... Op. Cit.*, pp. 201.

of the TUN object which must be final and detrimental. The party deemed to issue a decree of acceptance is a government apparatus but further authority is given to the Administrative Court so it is not clear the division of authority between the branches of power. Requirements for a maximum of 10 working days after the application is received in full by the Agency and/or Government Officials, raises a problem when further authority is granted to the Administrative Court, namely the urgency of the judicial body to adjudicate over time issues. Requests that have been declared complete and neglected so that they meet the criteria for a positive fictitious principle, when examined by PTUN as a free and independent judiciary can the PTUN provide a rejection decision.

The involvement of the court actually extended the procedure and did not guarantee legal certainty for applications that were declared complete. The deadline violation is overcome by an instrument of forced power in the form of strengthening sanctions involving internal supervisors or the ombudsman. Courts may not take over the functions of administering the government¹⁵. The function of the Administrative Court is to resolve conflicts between the government and the community due to the KTUN. The concept used in Article 53 paragraph (4) UUAP is an application while the PTUN function resolves conflicts through a lawsuit.

Legal Implications of the Application of Positive Fictitious Principles Involving the State Administrative Court

Judicial Power in Indonesia is regulated in the 1945 Constitution of the Republic of Indonesia, namely Article 24 A, Article 24 B, Article 24 C, Article 25. Judicial Power in Article 24 of the 1945 Constitution of NRI is declared as independent power to conduct justice in order to enforce law and justice. by a Supreme Court and a subordinate judicial body consisting of 4 judicial environments, namely the general justice environment, the religious court environment, the military justice environment, the State Administrative court environment, and by a Constitutional Court. The use of the term judiciary according to Sjachran Basah¹⁶, refers to the process of providing justice in order to uphold the law, while the body or container that provides justice is referred to as court.

Article 1 point 4 of Law No. 5 of 1986 concerning State Administrative Courts provides limits on absolute competence as follows: "State administrative disputes are disputes arising in the field of state administration between people or civil legal entities with state administrative bodies or officials, both at the central and regional levels. , as a result of the issuance of the KTUN, including staffing disputes based on applicable laws and regulations".

Article 53 UUAP regulates the authority of two institutions at once, namely; paragraphs (1), (2) and (3) of the organizers of government functions and paragraphs (4), (5) and (6) of judicial institutions. The positive fictional principle contained in paragraph (3) seems to be intended as a "bridge" dividing each other's territory. The positive fictional according to the Constitutional Court "is considered to have a decision of acceptance" instead it confirms that the problem is in the administration of the government, can not be tested in court because the nature of the acceptance is not final and not detrimental. Requirements for positive fictitious decisions are that a request must be received in full (no problem) by the Government Agency or Official, what issues need to be examined by the court so that the PTUN needs to be given authority, because the core problem is only the issue of time limit exceeded. Such conditions indicate inconsistencies in the division of authority between the organs of government and judicial institutions. Article 53 of the UUAP and the explanation / interpretation of the

¹⁵ S. Marbun, *Peradilan Tata Usaha Negara*, (Yogyakarta: Liberty Publisher, 1988), pp. 7.

¹⁶ Sjachran Basjah, *Eksistensi dan Tolok Ukur Peradilan Administrasi di Indonesia* (Bandung: UNPAD (Dissertation), 1984), pp. 25-26.

Constitutional Court have implications not in accordance with the principle of division of power / authority. "Judges cannot sit in the executive chair".

Construction of Article 53 UUAP is that if the Government Agency/Officer does not make a decision/action that is requested for an application, then according to Article 53 paragraph (4) UUAP, the applicant can submit an application to the court to obtain a decision to accept the application. Furthermore, the court is obliged to decide on an application no later than 21 (twenty one) working days. After the court has decided, the Government Agency/Officer must determine the decision to carry out the Court's decision no later than 5 (five) working days from the decision of the Court.

PTUN in exercising its authority based on Article 53 paragraph (4) and (5) UUAP on fictitious-positive applications if giving a final verdict in the form of "refusal decision", then the judge's decision contradicts the provisions of Article 53 paragraph (3) UUAP on the phrase "the application is deemed granted legally". This means that the court may only give an "obedience decision". Regulations on limiting court decisions may only "grant" contrary to the principle of free and independent justice according to the constitution. Article 53 paragraph (3) of the UUAP is not in accordance with the principles of free and independent justice guaranteed by Article 24 of the 1945 Constitution of the Republic of Indonesia.

In the trial process for positive fictitious applications, third parties who feel they have an interest do not have access to be involved in the trial, as stipulated in Article 11 paragraph (4) Supreme Court regulation (PERMA) Number 8 of 2017 states "In the case of an Application to obtain a decision and/or action of the body and/or government officials are not allowed to enter third parties as litigants or Intervention parties".

The enactment of Article 53 UUAP which was followed up with PERMA Number 5 of 2015 (later replaced with PERMA Number 8 of 2017) concerning the involvement of third parties (intervention), the Court stated that Article 83 of the Peratun Law gave an opportunity to third parties (intervention) to enter as parties in the process of examining cases in the State Administrative Court. Different things stated in Article 11 paragraph (4) PERMA Number 8 of 2017 state "... it is not possible to enter a third party as a litigant or Intervention". Indeed, there is the legal principle of superior lex legion inferior derogate namely the principle of legal interpretation which states that high law (lex superior) overrides low law (lex inferior). But in practice at PTUN, still using Article 11 paragraph (4) PERMA Number 8 of 2017 third parties are not given the opportunity to intervene as the PUU applicant experiences in the Constitutional Court Number 77/PUU-XV/2017.

PTUN decisions in positive fictional cases are final and binding, as stipulated in Article 18 PERMA Number 8 of 2017 states "Court Decisions on receipt of Application to obtain a Decision and/or Action of the Agency or Government Official are final and binding", which means that legal remedies It is normal for parties, especially third parties, for parties to be able to use extraordinary legal efforts, namely a judicial review.

This provision also has problems if the follow-up does the PTUN ruling on positive fictitious decisions cause harm to third parties? In this case, can a positive fictitious decision issued on the basis of the PTUN order be sued to the PTUN again? This condition will bring a dilemma between legal certainty (the authority of court decisions) and substantial justice (the interests of third parties). In this condition, a legal clash will occur between the provisions of Article 53 of the UUAP with the provisions of Article 2 letter (e) of the Peratun Law which regulates the exception of objects of Peratun dispute issued as a result of the examination of the judicial body that has permanent legal force.

Enforcement of Regulation No. 8 of 2017, Article 11 paragraph (4) (intervention) and Article 18 (final and binding decision) does not provide third party legal protection, creates legal uncertainty and injustice for third parties who feel involved, because they have an interest or feel disadvantaged examination of requests for positive fictitious decisions, as well as decisions that were born as a follow-up to the implementation of the PTUN ruling from a positive fictional application process.

CONCLUSION

Legal Considerations for the application of Positive Fictitious Principles in Government Administration involves the State Administrative Court according to the legislation ratio of the establishment of Article 53 of the UUAP in the DPR that is positively fictional in an attempt to obtain an administrative court decision. the same as the MK decidendi ratio in case decisions Number 77/PUU-XV/2017. This consideration ignores the requirement that the application must be received in full vide Article 53 paragraph (2) UUAP.

Legal Implications arising from the Application of Positive Fictitious Principles involving the court are:

- a. inconsistency with the Principle of Sharing Authority between Organ Organizations and Judicial Institutions.
- b. inconsistency with the principle of Free and Independent Justice.
- c. does not guarantee the legal protection of third parties relating to positive fictitious cases.

The positive fictional principle is time as a legal principle that determines legal certainty, not just as an effort to PTUN. The Government and Parliament need to remove the authority of the court in the process of the realization of a positive fictitious decision, return it to the organs of government and its internal supervisory institutions, as the forced power over the time the obligation is reinforced by existing sanctions. Courts are required after the issuance of a decision from a positive fictitious process, to protect the interests of third parties (ultimum remidium), rather than being involved in a positive fictitious process.

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