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THE ELIMINATION OF THE STATE ADMINISTRATIVE COURT'S AUTHORITY TO MAKE POSITIVE FICTITIOUS DECISIONS AFTER THE AMENDMENT TO LAW NUMBER 30 OF 2014 CONNECTED WITH THE GENERAL PRINCIPLES OF GOOD GOVERNANCE

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ABSTRACT

Government agencies and/or officials carry out the task of administering the state using legal instruments, one of which is decisions. If within the allotted time a government official does not respond to the request filed against him, his silence is equated with a fictitious decision. The fictitious decisions that apply in Indonesia are positive fictitious decisions, implicitly contained in Article 53 paragraph (3) of Law Number 30 of 2014, namely that the government's silence means a form of acceptance. A positive fictitious decision needs to be submitted to the Administrative Court to get an acceptance decision. After the UUCK, PTUN's authority to decide on positive fictitious decisions was abolished, so what are the legal consequences and whether this is by the AUPB. The research method uses normative juridical with statutory, case, and conceptual approaches. The results of the research show that PTUN does not have the authority to decide on a positive fictitious decision request due to the abolition of Article 53 paragraph (4) in UUCK, so the settlement lies with government agencies. However, there is a disparity in the judge's decision regarding the authority of PTUN to decide on a positive fictitious decision request caused by two approaches, namely legalistic positivism and action. It is possible to enter a positive fictitious case by filing a lawsuit for unlawful acts by government agencies and/or officials. The abolition of PTUN's authority is not by AUPB, especially the principles of legal certainty, expediency, accuracy, and fairness.

Keywords: positive fictitious decision; administrative court; job creation law.

INTRODUCTION

Government agencies and/or officials in carrying out their functions, whether carrying out service, regulation, development, or empowerment functions, must take various actions. In public law, there are several legal instruments used by the government to carry out its functions, including statutory regulations, policy regulations, and decisions. Decisions that are part of actions carried out by government agencies and/or officials are included in unilateral public legal actions. Government bodies and/or

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officials may not issue decisions requested by them. If within the specified period, government agencies and/or officials do not issue the decision requested by them even though this is their obligation, then the action/silence of the government agency and/or official is equated with a State Administrative Decree (KTUN), which in law State administration is known by the term fictitious decisions.

The word "Fictitious" indicates that the KTUN is intangible. It is simply a manifestation of the silence of government agencies and/or officials which is then "considered" and equated with a real written KTUN, whether deemed to be granted or deemed to be rejected. The terminology of fictitious decisions is not expressly contained in statutory regulations. Law Number 5 of 1986 concerning State Administrative Courts (UU PTUN), Article 3 states, that if government agencies and/or officials do not respond to a decision requested by them within a certain period then the decision is considered rejected (negatively fictitious). After the promulgation of Law Number 30 of 2014 concerning Government Administration (UU AP), Article 53 paragraph (3) stated the opposite of Article 3 of the PTUN Law (positive fiction). Two types of fictitious decisions were recognized in Indonesia, with the issuance of SEMA Number 1 in 2014. 2017, then the fictitious decisions that have been implemented until now are positive fictitious decisions.

Assuming that a decision is granted (positive fictitious), this does not mean that the decision can be implemented immediately, there still needs to be a process that can "verify" the positive fictitious decision so that there is evidence that states that the decision deemed to be granted can be implemented. This is stated in Article 53 paragraph (4) of the AP Law which states that the Applicant must first apply to the PTUN to obtain a decision on the acceptance of the application which is further regulated in Perma Number 8 of 2017 concerning Procedure Guidelines for Obtaining a Decision on Acceptance of the Application for Use. Obtain Decisions and/or Actions from Government Agencies or Officials (Perma 8/2017).

Perma is a type of statutory regulation regulated in Article 8 paragraph 1 of Law Number 12 of 2011 concerning the Formation of Legislative Regulations. The legal regulations established by the Supreme Court are recognized for their existence and have binding legal force if they are ordered by higher statutory regulations or are formed based on authority.¹ Perma is a special regulation, and its content contains provisions that are procedural law.²

¹ Pasal 8 ayat 2 Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan.

² Nafiatul Munawaroh, "Kekuatan Hukum Produk Hukum MA: PERMA SEMA, Fatwa, dan SK KMA", https://www.hukumonline.com/klinik/a/kekuatan-hukum-produk-hukum-ma--perma-sema--fatwa--dan-sk-kma-cl6102/#_ftn11, accessed September 2, 2023.

In the section considering point b in Perma 8/2017, Perma 8/2017 was born because Article 53 of the AP Law regulates the authority of the Court to examine and decide on the acceptance of applications to obtain decisions and/or actions by government bodies or officials which therefore require regulation. further regarding the proceedings in Perma. In examining and deciding on applications for fictitious positive decisions, the PTUN does not always have to grant the applicant's request. Even though it is considered legally granted, there needs to be an institution that can assess, which in this case is the Administrative Court, whether the silence of government bodies and/or officials is the fault of the bodies and/or officials themselves or because of requirements that are not fulfilled by the community.

After the promulgation of Law Number 6 of 2023 concerning the Determination of Government Regulations instead of Law Number 2 of 2022 concerning Job Creation as Law (UUCK), Article 53 of the AP Law changed. These changes are stated in Article 175 number 7 UUCK. Apart from changing period for Government Agencies and/or Officials to respond to a public request, namely a maximum of 5 days, the change that is considered the most significant is the elimination of the PTUN's authority to decide on requests for positive fictitious decisions. This can be seen from the deletion of the provisions of Article 53 paragraph (4) of the AP Law in the UUCK. Article 175 number 7 UUCK also states that there will be an electronic system that will process public requests. However, further provisions regarding this matter will be regulated in a Presidential Regulation (Perpres), which at the time of this writing, has not yet been issued.

The elimination of the PTUN's authority has resulted in several opinions among judges as to whether the PTUN still has the authority to decide on requests for fictitious positive decisions or not. This can be seen from the existence of several differences between judges in deciding applications for fictitious positive decisions submitted to the PTUN. For example, the Jakarta PTUN Decision Number 6/P/FP/2021/PTUN.JKT explicitly states that the decision cannot be accepted because the PTUN no longer has authority. However, in the Surabaya PTUN Decision Number 7/P/FP/2021/PTUN.Sby, the judge stated that the PTUN still has authority over positive fictitious decisions. Then there is also the Jakarta PTUN Decision Number 10/P/FP/2021/PTUN.JKT, even though the application was accepted after the UUCK had come into effect, in its decision the judge did not mention the UUCK at all.

Regarding the abolition of the PTUN's authority to decide on requests for fictitious positive decisions, there is already a circular which can be said to provide guidance for the courts. The circular letter in question is the Circular Letter of the Director General of

the Military Justice and State Administrative Agency Number 2 of 2021 concerning the Handling of Case Registration to Obtain Decisions on the Acceptance of Applications to Obtain Decisions and/or Actions of Government Agencies or Officials After the Entry of Law Number 11 of 2020 concerning Job Creation (SE Dirjen Badilmiltun 2/2021) and Supreme Court Circular Letter Number 5 of 2021 concerning the Implementation of the Formulation of the Results of the 2021 Supreme Court Chamber Plenary Meeting as Guidelines for the Implementation of Duties for the Court (SEMA 5/2021).

Furthermore, in government administration, there are General Principles of Good Government (AUPB). AUPB is a principle used as a guideline for the use of authority for government officials in issuing decisions and/or actions in government administration.³ Further developments are related to good governance, AUPB is not only linked to executive power, but also to other branches of power, namely the legislature, judiciary, and even to all existing state bodies.⁴ Therefore, based on the matters above, the author is interested in examining the legal consequences of abolishing the PTUN's authority to decide on requests for positive fictitious decisions, why there are differences in judges in assessing whether the PTUN still has the authority or not to decide on requests for positive fictitious decisions and what matters? is by AUPB.

RESEARCH METHODS

The research method used is the normative juridical research method, which is legal research carried out by examining library materials or secondary data.⁵ The three approaches used in the research are the statutory approach⁶ namely the approach taken by reviewing all laws and regulations related to the legal issue being handled, then approaching the case⁷ which is carried out by reviewing cases related to the issue being faced which has become a court decision that has permanent force, as well as a conceptual approach⁸ that draws from various views and doctrines from legal experts. Data collection techniques were carried out by examining library materials (including court decisions) as well as interviews with sources who had competence in the field of state administrative law, including PTUN judges.

³ Pasal 1 Angka 17 Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan.

⁴ Eny Kusdarini, (2019). *Asas-Asas Umum Pemerintahan yang Baik dalam Hukum Administrasi Negara*, Yogyakarta: UNY Press, pp. 10-13.

⁵ Soerjono Soekanto dan Sri Mamudji, (1995). *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Jakarta: Raja Grafindo, p. 15.

⁶ Peter Mahmud Marzuki, (2019). *Penelitian Hukum*, Jakarta Timur: Prenadamedia Group, p. 133

⁷ *Ibid*, p. 134.

⁸ *Ibid*, p. 135.

DISCUSSION

Settlement of Requests for Positive False Decisions Post Job Creation Law

After UUCK, the existence of positive fictitious decisions is still recognized. However, the application for submission to the PTUN to obtain an acceptance decision has been abolished. So the PTUN's authority to accept requests for fictitious positive decisions no longer exists. Although the court is prohibited from refusing to examine, try, and decide on a case submitted on the pretext that the law does not exist or is unclear as an embodiment of the principle of *ius curia novit*, if the court does not have the authority to examine, try and decide on a case, then the decision of the case must be unacceptable.⁹

The abolition of the PTUN's authority to decide on applications for positive fictitious acceptance means that the justification mechanism for KTUN with positive fictitious construction has been lost, giving rise to KTUN with positive fictitious construction which creates legal uncertainty for legal subjects who are deemed to have a legal relationship based on that KTUN.¹⁰

Article 53 of the AP Law as amended by the UUCK has twice been requested for judicial review by the Constitutional Court, namely petition number 30/PUU-XIX/2021 and number 10/PUU-XX/2022. However, application number 30/PUU-XIX/2021 was withdrawn by the applicant. Regarding petition number 10/PUU-XX/2022, the Constitutional Court in its legal considerations stated that:

"..... there is no legal vacuum as argued by the Petitioners, even if the Presidential Decree has not regulated it or the material is in conflict with the regulations above, then this is not within the Court's authority to assess it."

The legal consequences of the elimination of the PTUN's authority to decide on requests for fictitious positive decisions cause the public's access to justice to be hampered.¹¹ The resolution regarding positive fictitious decisions also means that it lies with the government agency/official that issued the decision in question.¹² So the resolution of a positive fictitious decision, if the PTUN no longer has authority, the public needs to take administrative action against the relevant agency and/or official.

The issue regarding the PTUN's authority to decide on requests for fictitious positive decisions after the UUCK was also discussed in the Bandung PTUN Reboan

⁹ Dian Agung Wicaksono, Bimo Fajar Hantoro, dan Dedy Kurniawan, (2021). "*Quo Vadis* Pengaturan Kewenangan Pengadilan Tata Usaha Negara dalam Penerimaan Permohonan Fiktif Positif Pasca Penataan regulasi dalam Undang-Undang Cipta Kerja", *Jurnal RechtsVinding*, Volume 10 (2), p. 334.

¹⁰ *Ibid.* p. 335.

¹¹ Interview Dr. Syofyan Iskandar, S.H., M.H., Wakil Ketua PTUN Bandung on May 9, 2023, at 13:26 WIB.

¹² Interview Dr. Eko Yulianto, S.H., M.H., Hakim PTUN Jakarta on May 17, 11:42 WIB.

discussion.¹³ There are two different views regarding whether the PTUN still has the authority or not to decide on requests for positive fictitious decisions. The view that states that the PTUN is still authorized has arguments, namely that the Presidential Decree has not yet been issued, Perma 8/2017 has not been revoked, and it is necessary to provide opportunities for people who want to sue positive fictitious cases at the PTUN.

It is unlikely that positive fictitious decisions in Indonesia can still be implemented in all fields.¹⁴ Maybe for permit issues (the existence of the OSS system), a positive fictitious decision can be applied, but in other cases such as making a passport, driver's license, or birth certificate, for example, even though it is starting to transform to digital and online, it is still like making a passport and not getting a decision. for 5 days and if we consider the application to be accepted, we cannot immediately go abroad. There is still a need for a process and verification that these fictitious decisions can be implemented.

Until this article was written, the Presidential Decree regarding the form of decision-making and/or action that is deemed to be legally approved has not yet been issued, while there are still many cases of fictitious decision requests submitted by the public. There is also a lack of uniformity among judges in assessing whether the PTUN still has the authority or not to decide on requests for positive fictitious decisions.

PTUN Decision Declaring Fictitious Decision Requests Cannot Be Accepted Post-UUCK

Jakarta PTUN Decision Number 6/P/FP/2021/PTUN.JKT in its legal considerations, the judge stated the authority of the PTUN in Article 53 of the AP Law with the enactment of the provisions of Article 175 number 6 UUCK of the applicant's legal efforts to apply the PTUN to obtain a decision on accepting the application was removed.

SE Director General Badilmiltun 2/2021 is a direction for the PTUN to continue accepting and registering cases if there are still people seeking justice who wish to register petition cases using the procedures according to Perma 8/2017, not as a direction for the PTUN to still have the authority to examine, decide, and resolve the case to obtain

¹³Formulation of Discussion Results Reboan PTUN Bandung. (2020). Implikasi Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja terhadap Sengketa Tata Usaha Negara, [https://ptun-bandung.go.id/assets/dokumen/RUMUSAN%20HASIL%20DISKUSI%20REBOAN%20IMPLIKASI%20UU%20CIPTAKER%20THD%20SENGKETA%20TUN%20\(PTUN%20BANDUNG%2025112020\)%20\(1\).pdf](https://ptun-bandung.go.id/assets/dokumen/RUMUSAN%20HASIL%20DISKUSI%20REBOAN%20IMPLIKASI%20UU%20CIPTAKER%20THD%20SENGKETA%20TUN%20(PTUN%20BANDUNG%2025112020)%20(1).pdf), accessed June 8, 2023.

¹⁴Interview Dr. Oce Madril, S.H., M.A, Administrative Law Lecturer Universitas Gadjah Mada on May 25 2023, at 10:57 WIB.

a decision on the acceptance of the application to obtain a decision and/or action from a Government Agency or Official.

Perma 8/2017 refers to Article 53 of the AP Law, but the provisions of Article 53 of the AP Law have been amended by Article 175 number 6 UUCK. The abolition of paragraphs 4 and 5 in Article 53 of the AP Law provides legal certainty for applicants so that they no longer have to proceed in court. Unlike decision Number 6/P/FP/2021/PTUN.JKT which states that "Perma 8/2017 refers to Article 53 of the AP Law, where this provision has been amended by Article 175 number 6 UUCK" (as if stating that Perma is no longer relevant for use after the UUCK), PTUN decision Number 1/P/FP/2021/PTUN-JKT stated that even though the court accepted the respondent's exception regarding the absence of PTUN authority (after the UUCK), the PTUN still based the conditions on Perma 8 /2017.

Furthermore, there are two PTUN decisions, namely Decision Number 10/P/FP/2021/PTUN.JKT and Decision Number 23/P/FP/2020/PTUN-JKT, which even though the application was accepted after the UUCK, the judge did not use the UUCK as a The basis states that PTUN no longer has authority in requests for fictitious decisions but is still guided by Perma 8/2017.

PTUN Decision Accepting and Granting the Application for a Fictitious Decision Post-UUCK

Several PTUN decisions were taken from the official website of the Surabaya and Pekanbaru PTUN Case Tracking Information System (SIPP) with the classification of cases requesting fictitious positive decisions, which the author grouped based on the date the cases were registered after the promulgation of the UUCK, namely November 2020, it turns out that the PTUN is still accepting requests for positive fictitious decisions with a decision to grant the petition. This can be seen in the Surabaya PTUN decision Number 7/P/FP/2021/PTUN.Sby, Number 15/P/FP/2021/PTUN.SBY, Number: 16/P/FP/2021/PTUN.SBY, Number 17/ P/FP/2020/PTUN.SBY, Number 20/P/FP/2021/PTUN.SBY; and Pekanbaru PTUN Decision Number: 8/P/FP/2021/PTUN.PBR

PTUN Decision Number 7/P/FP/2021/PTUN.Sby which was stipulated on 20 April 2021 and PTUN Decision Number 15/P/FP/2021/PTUN.SBY which was stipulated on 21 September 2021, the judge in his legal considerations stated that:

"...."And until this application case is submitted and registered, the implementing regulations have not yet been issued, so that the Surabaya PTUN has the authority to examine, hear, and decide on the application case."

In PTUN Decision Number 20/P/FP/2021/PTUN.SBY which was stipulated on 17 November 2021, the judge's considerations in his decision regarding whether or not the PTUN still has the authority to decide on positive fictitious applications are the same as PTUN decision Number 7/P/FP/2021 /PTUN. Sby above with the addition:

"...referring to the provisions of Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power... because the essence of law is substantive justice and not merely normative justice."

The same thing is found in PTUN Decision Number: 16/P/FP/2021/PTUN.SBY which was stipulated on 15 October 2021 that:

"... by no longer regulating the process to the Court, it shows that there is a legal vacuum to resolve disputes regarding applications for the issuance of decisions..."

PTUN Decision Number: 8/P/FP/2021/PTUN.PBR which was determined on November 19 2021, the judge's legal considerations are:

"...with consideration of the legal principle "justice delayed is justice denied", the Panel of Judges concluded that the Court still has the authority to examine and adjudicate Positive Fictitious Petitions at least until the Presidential Regulation is issued;"

PTUN Decision Number 17/P/FP/2020/PTUN.SBY the judge's legal considerations are:

"... by the transitional article of the Law which states that implementing regulations that do not conflict with this Law is still in effect, the dispute process in Court can still be applied to disputes regarding applications to obtain the KTUN requested."

Disparity in State Administrative Court Decisions Regarding Applications for Positive Fictitious Decisions After the Job Creation Law

In several cases of requests for fictitious positive decisions after the UUCK above, there is a disparity in PTUN decisions in deciding requests for fictitious positive decisions, this indicates that the judges do not check and do not refer to other judicial decisions when adjudicating decisions.¹⁵

The difference in the judge's perspective on this matter is caused by two different approaches,¹⁶ the first possibility, which sees that Article 53, especially regarding the authority of the PTUN, has been removed so that the PTUN no longer has authority, where this concept is included in the one officially used by the Supreme Court in its circular letter. Namely SEMA 5/2021, then this is a positivist legalistic/*letterlijk*

¹⁵ Interview Richo Andi Wibowo, S.H., LL.M., Ph. D, Administrative Law Lecturer Universitas Gadjah Mada on May 12, 2023, at 13:59.

¹⁶ Interview Dr. Oce Madril, S.H., M.A, *Op. Cit.*

approach, what is written in the law is what is used. If this approach is used by the judge, then the application for a fictitious positive decision that is entered will be declared inadmissible.

The second approach would say that the PTUN has the authority to adjudicate the actions of officials so that the government's silence constitutes action. If you use the second approach, namely that the judge cannot reject the case and the government's silence is part of the action, and if it is not tried there is no place for it to be tried, then the second approach will continue to examine the application for a fictitious decision with the possibility of being granted or rejected. but not unacceptable.

In several cases, judges in deciding a case interpret statutory regulations in different ways. In fact (in several Surabaya PTUN decisions regarding this matter) the judge acknowledged that there had been a change in the legal situation between the AP Law and the UUCK, but it is very possible that the judge felt there was a need that had to be responded to. Furthermore, the judge will continue to look for reasons, and for the sake of justice, because there is no longer a forum to resolve it, the judge must examine and decide on the request for a positive fictitious decision. So judges have another point of view apart from the perspective of the law, namely a view of substantive justice even though it is normatively problematic.¹⁷

Lawsuit for Government Action for Not Taking Action in the form of Publishing KTUN

Even though the PTUN no longer has the authority to decide on applications for fictitious decisions, which means that this can confuse the public regarding what they have to do to get a decision to accept a fictitious decision, if the public still wants to take action to court then it is possible to enter a positive fictitious case by filing lawsuit for Unlawful Acts (PMH) by Government Agencies and/or Officials (*onrechtmatig overheidsdaad/ OOD*).¹⁸

The terms used in the AP Law and Perma 2/2019 are government actions, government administration actions, factual actions, and PMH by government officials.

¹⁷Interview Dr. Oce Madril, S.H., M.A., *Op. Cit.*

¹⁸This is in line with the opinions of the Deputy Chairman of the Bandung State Administrative Court, Dr Syofyan Iskandar, S.H., M.H., Gadjah Mada University State Administrative Law Lecturer Richo Andi Wibowo, S.H., LL, P. hD, and Dr Oce Madril, S.H., M.H. However, Jakarta State Administrative Court Judge Dr Eko Yulianto, S.H., M.H., stated that this could not necessarily be done because the positive fictitious is an application while PMH is a complaint. Furthermore, regarding the guidelines for resolving disputes on government actions and the authority to adjudicate PMH, it is regulated in Perma Number 2 of 2019, which states that if the lawsuit is granted, the court is obliged to the administrative official to take action, stop action, and not take action, there is no need to "issue a decision", while if the positive fictitious is a request to issue (or cancel) a decision.

Theoretically, government action is the parent of decisions, meaning that decisions are part of actions.¹⁹

Community members can file a lawsuit against decisions and/or actions of government bodies and/or officials to the PTUN. Government Administrative Actions, hereinafter referred to as Actions, are actions by Government Officials or other state administrators to carry out and/or not carry out concrete actions in the context of administering government.²⁰ The limitations of State Administrative Actions, both Factual Actions and Legal Actions, one of which is *Onrechtmatig*.²¹ Government actions that can cause OOD can be in the form of legal actions and real actions, namely actions that are not intended to have legal consequences but can give rise to legal consequences.²² When a legal subject, be it a person, legal entity, state or government, commits an act that is detrimental to another party, then he or she is burdened with the obligation to compensate the loss fairly and proportionally.²³

PMH carried out by government bodies and/or officials must proven that the action is indeed an action of the official/body carried out in their position as an official, not as an individual. Filing a PMH lawsuit simply uses Article 87 of the AP Jo Law.²⁴ Article 53 paragraph (2) of the PTUN Law is accompanied by PMH elements in 1365 of the Civil Code.

In connection with requests for fictitious positive decisions that are no longer the authority of the PTUN, on the basis that government actions include not carrying out concrete actions in the context of state administration, the public can file a lawsuit against government actions and/or PMH by Government Agencies and/or Officials, based on the guidelines in Perma 2/2019, and submitted a petitum, namely to take government action. Before a lawsuit is submitted to the PTUN, the public must carry out administrative efforts as intended in the AP Law and Perma 6 of 2018 concerning Guidelines for Resolving Government Administrative Disputes after Taking Administrative Efforts.

¹⁹Ridwan, Despan Heryansyah. & Dian Kus Pratiwi, (2018). "Perluasan Kompetensi Absolut Pengadilan Tata Usaha Negara dalam Undang-Undang Administrasi Pemerintahan", *Jurnal Hukum Ius Quia Iustum*, Volume 25 (2), p. 353.

²⁰Pasal 1 Angka 8 Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan.

²¹Muhammad Adiguna Bimasakti, (2018). "*Onrechtmatige Overheidsdaad* oleh Pemerintah dari Sudut Pandang Undang-Undang Administrasi Pemerintahan", *Jurnal Hukum Peratun*, Volume 1 (2), p. 276.

²²Nafiatul Munawaroh. (2022). Perbuatan Melawan Hukum oleh Penguasa (*Onrechtmatige Overheidsdaad*), <https://www.hukumonline.com/klinik/a/perbuatan-melawan-hukum-oleh-penguasa-ionrechtmatige-overheidsdaad-i-lt4d1cdbcf06b6/>, accessed June 5, 2023.

²³Ridwan, (2022). "Pengujian Tindakan Faktual dan Perbuatan Melanggar Hukum oleh Pemerintah dalam Sistem Peradilan Tata Usaha Negara", *Jurnal Magister Hukum Udayana*, Volume 11 (1), p. 99.

²⁴Muhammad Adiguna Bimasakti, "*Onrechtmatige Overheidsdaad* oleh Pemerintah dari Sudut Pandang Undang-Undang Administrasi Pemerintahan", *Op. Cit.*, p. 278.

Regarding the Presidential Regulation concerning Positive Fictitious Decisions that Have Not Been Issued

Article 175 number 7 UUCK which amends the provisions of Article 53 paragraph (5) of the AP Law states that further provisions regarding the form of decisions and/or actions that are deemed to be legally granted are regulated in the Presidential Decree. If we look further, it is very likely that through the amendment to Article 53 of the AP Law in the UUCK, the PTUN's authority over requests for positive fictitious decisions will be eliminated.

This is because regulations regarding bodies whose functions are related to judicial power must be regulated in law²⁵ not the regulations below. The Presidential Decree will at least regulate how the mechanism for issuing the decision will be granted in the executive area.²⁶ The description of the presidential decree will be more bureaucratic, regarding how the government grants fictitious positive decisions, the model will be similar to the OSS system.²⁷

When the AP Law was drafted, technological developments were not as massive as they are now, so an institution, in this case, the PTUN, was still needed to provide evidence regarding requests for positive fictitious decisions that the decisions could be implemented.²⁸ The Presidential Decree must also clearly provide regulations regarding, for example, who has the authority to give positive fictitious decisions, and what institutions, and procedures make it easier for requests submitted by the public.

In May 2023, regarding the planned positive fictitious presidential decree, a coordination meeting was held by the government. The proposed main material in the draft presidential regulation includes decisions and/or actions from government agencies and/or officials which are processed through an electronic system, criteria and process for determining, forms and processes for determining decisions and/or actions that are considered legally approved in an electronic system, legal consequences, and administrative disputes arising as a result of decisions and/or actions that are considered legally approved in the electronic system.²⁹

In May 2023, regarding the planned positive fictitious presidential decree, a coordination meeting was held by the government. The proposed main material in the draft presidential regulation includes decisions and/or actions from government

²⁵ Pasal 24 ayat (3) UUD 1945 "Badan-badan Lain yang Fungsinya Berkaitan dengan Kekuasaan Kehakiman Diatur dalam Undang-undang."

²⁶ Interview Dr. Eko Yulianto, S.H., M.H, Hakim PTUN Jakarta, *Op. Cit.*

²⁷ In line with the results of the interview with Dr. Oce Madril & Prof. Guntur Hamzah.

²⁸ Interview Prof. Dr. M Guntur Hamzah, S.H., M.H, administrative law Professor and Constitutional Justice on May 12 2023, 13:26.

²⁹ Interview Dr. Hj. Rini Irianti Sundary, S.H., M.Hum.

agencies and/or officials which are processed through an electronic system, criteria and process for determining, forms and processes for determining decisions and/or actions that are considered legally approved in an electronic system, legal consequences, and administrative disputes arising as a result of decisions and/or actions that are considered legally approved in the electronic system.³⁰

The Urgency of Digital Bureaucracy and E-Government

The rapid digitalization in almost all fields, including government, makes it possible that all public services in the future will be digital-based. Positive fictitious decisions, initially require court institutions to provide evidence that the fictitious decisions have been granted and can be implemented. Presumably with the idea of the draft presidential decree that will be made, all public requests related to public services will be implemented digitally.

However, there are several basic problems towards digital bureaucracy, namely the absence of standard structures and metadata in ministries/institutions/regional governments (K/L/Pemda), the use of technology is still fragmented with many applications created by K/L/Regional Government, and low application sustainability. because the development does not follow good technology and management standards, resulting in the application becoming digital waste and prone to being hacked.³¹

Until now there are around 24,000 applications in government institutions so there is a need to integrate all K/L data in one database. There is also talk of implementing a one-data policy by closing existing applications and creating a super app where there will only be 8-10 applications owned by all ministries/institutions and regional governments.³²

concerning positive fictitious decisions, if an electronic system is to be created that will provide evidence that if a decision is not responded to within 5 days it will be granted, then it would be better to have a system like in South Korea, namely the Internet Civil Service (www.egov.go.kr) which is an administrative service that can be accessed anytime and anywhere, via the internet, searching through 5,300 services and obtaining detailed information. The public can also apply for up to 720 civil services without

³⁰Humas Ditjen Peraturan Perundang-Undangan. (2023). Koordinasi Rperpres tentang Penetapan Keputusan dan/atau Tindakan yang Dianggap Dikabulkan Secara Hukum, https://ditjenpp.kemenumham.go.id/index.php?option=com_content&view=article&id=5748:koordinasi-rperpres-tentang-penetapan-keputusan-dan-atau-tindakan-yang-dianggap-dikabulkan-secara-hukum&catid=268&Itemid=73&lang=en, accessed June 10, 2023.

³¹Eko Prasajo. (2021). Membangun Birokrasi Digital, <https://www.kompas.id/baca/opini/2021/09/28/membangun-birokrasi-digital>, accessed June 10, 2023.

³²Antonius Galih Prasetyo. (2022). Prasyarat Keberhasilan dan Nilai Tambah" Super App", <https://www.kompas.id/baca/opini/2022/07/28/prasyarat-keberhasilan-dan-nilai-tambah-super-app>, accessed June 10, 2023.

having to go to an administrative office and receive the results by post and can issue 28 civil documents themselves online.³³

Application of General Principles of Good Government (AUPB) to the Elimination of PTUN Authority in Deciding Positive Fictitious Decisions in UUCK

Most of the AUPB are still unwritten, abstract principles and can be explored in the practice of people's lives. Some other principles have become written legal rules and are scattered in various positive legal regulations.³⁴ In the AUPB, there is the word "government", in a broad sense, government is everything that is done by the state to carry out the welfare of its people and the interests of the state itself which is not only limited to carrying out executive duties, but also includes the legislature and judiciary.³⁵

This is in line with Article 4 of the AP Law that the scope of Government Administration regulations includes all activities of Government Agencies and/or Officials carrying out Government Functions within the scope of executive, judicial, legislative, and other Government Agencies and/or Officials carrying out Government Functions mentioned in Constitution and/or laws.

Regarding the application of the AUPB to the elimination of the PTUN's authority to decide on requests for fictitious decisions in the UUCK, which in this case the UUCK was made by the DPR together with the president, there are several principles that the legislature seems to have ignored in formulating the amendment articles to the AP Law. Maybe in the legislative environment, some principles regulate how to make good laws and regulations but they are not called AUPB. For example, in Article 5 and Article 6 of Law Number 12 of 2011 concerning the Formation of Legislative Regulations, we can relate the principle of clarity of formulation to the principle of legal certainty and the principle of accuracy in the AUPB, because with clarity of formulation in regulation, then this will provide certainty to the public.

The principle of legal certainty regarding the abolition of PTUN authority in applications for fictitious positive decisions has not been realized. It is legally granted if, within a certain time, the government body/official has not responded, if there is no further mechanism that will validate the decision, then can the decision be implemented immediately? and what will happen to the applicant if the government's silence means acceptance is detrimental to the applicant so that the applicant asks for the decision to

³³Toto Suryaningtyas. (2021). Adaptasi Dengan Perkembangan Teknologi, <https://www.kompas.id/baca/riset/2021/01/06/adaptasi-dengan-perkembangan-teknologi>, accessed June 10, 2023.

³⁴Nomensen Sinamo, (2010), *Hukum Administrasi Negara*, Jakarta: Jala Permata Aksara, p. 142.

³⁵Moh. Kusnardi dan Harmaily Ibrahim, (1983) *Pengantar Hukum Tata Negara Indonesia*, Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, p. 12.

be revoked, to whom will the applicant bring this problem? So in this case, the public does not yet have legal certainty.

Likewise, the principle of accuracy is because the legislature should be able to assess and predict whether changes to articles in a law can be implemented or not. The abolition of the PTUN's authority to apply for fictitious positive decisions does not reflect the principles of justice. Because it could happen, the applicant applies the PTUN because he needs an intermediary institution that will assess whether or not the automatic granting of a request for not responding for 5 days is by the existing legislation. Ideally, a neutral institution that is not a party to the dispute, so if there is a separate institution that will resolve the problem of positive fictitious decisions, that would be better.

With the loss of the PTUN's authority and the possibility that all positive fictitious decision resolution lies with the executive, it needs to be seen whether the public will feel the benefits more or if it is the opposite. It seems that things like this are not thought about by the legislators, what is important is that everything is fast and investment increases, because that is the essence of the UUCK which is still problematic, the formation of which ignores many legal principles.

CONCLUSION

The legal consequence of not needing to apply for a positive fictitious decision to the PTUN is that the PTUN no longer has the authority to decide on a request for a positive fictitious decision due to the abolition of Article 53 paragraph (4) of the AP Law in the UUCK so that the resolution regarding positive fictitious decisions rests with the government body itself. Furthermore, there are disparities in judges' decisions regarding the PTUN's authority to decide on requests for fictitious positive decisions caused by two approaches.

The first approach uses a legalistic positivist approach so that the elimination of the PTUN's authority to decide on requests for fictitious positive decisions in the UUCK which is confirmed by the existence of SE Director General Badilmiltun 2/2021 and SEMA 5/2021 has eliminated the PTUN's authority. The second approach, namely that in essence the PTUN has the authority to adjudicate the actions of officials. In addition, the implementing regulations of the UUCK, especially the Presidential Decree regarding positive fictitious decisions, have not yet been issued, Perma 8/2017 has not been revoked, and it is necessary to provide an opportunity for people who want to sue positive fictitious cases at the PTUN. Because the essence of law is substantive justice and not merely normative justice. The differences in several PTUN decisions in deciding applications for fictitious positive decisions are very likely to cause confusion and

uncertainty, not only among the public but also among judges. Regarding the Presidential Decree regarding positive fictitious decisions which has not yet been issued, there may be an electronic system that will regulate positive fictitious decisions.

In its development, the AUPB is not only intended for the executive but also for the legislature as a benchmark and direction for making laws in a broad sense to create good laws and regulations. about the abolition of the PTUN's authority to decide on requests for fictitious positive decisions in the UUCK, in which case the UUCK is a legislative product, the abolition of the PTUN's authority is not by the AUPB, especially the principles of legal certainty, expediency, precision, and justice

If the public still wants to take action to court, it is possible to enter a positive fictitious case by filing an Unlawful Act (PMH) lawsuit by a Government Agency and/or Official (*onrechtmatig overheidsdaad/ OOD*). Apart from that, if the court still receives a positive fictitious application and already knows that the final decision will not be accepted, then it is better that when the clerk carries out administrative research on the application, the registrar informs the applicant that the authority to decide on a positive fictitious application at the PTUN has been abolished. Litigating in court takes time, energy, and money, so why would an applicant hold a trial for days only to hear that the final decision cannot be accepted because the PTUN no longer has authority? Furthermore, the Presidential Regulation which will further regulate positive fictitious decisions, in which case it is very possible to have an electronic system for positive fictitious decisions, must be able to provide convenience and benefits for the community, not the other way around. Apart from that, rule makers must be able to project whether the rules they will make can be implemented by all levels of society. It is also necessary to consider that creating a new system to realize the e-government concept must be integrated so that it can avoid "junk" systems or applications that waste the budget but are not effective and efficient and are prone to being hacked.

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