

# The Anomaly of Social Wealth Realization Following Reinstatement of Negative Fictitious Disputes in Administrative Court

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| Article Info                                                                                                                                                                                                                                                                                                                                                     | Abstract                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
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| <p><b>Corresponding E-Mail:</b><br/>✉ <a href="mailto:alif.wili31@ui.ac.id">alif.wili31@ui.ac.id</a></p> <p><b>History:</b><br/>Submitted: 23 June, 2026<br/>Revised: 1 July, 2026<br/>Accepted: 6 July, 2026</p> <p><b>Keyword:</b><br/>Administrative Court,<br/>Bureaucratic Reform; Legal<br/>Certainty; Negative Fictitious;<br/>Dispute Social Wealth.</p> | <p><i>Bureaucratic reform in Indonesia has been designed to strengthen good governance, improve the ease of doing business, and maximize social welfare through efficient public administration. One of the major legal transformations in administrative law was the shift from <i>lex silentia negativa</i> to <i>lex silentia positiva</i> under Law Number 30 of 2014 on Government Administration, which interpreted governmental silence as approval rather than rejection, thereby accelerating legal certainty for citizens and investors. This reform was further reinforced by Law Number 6 of 2023 on Job Creation, which shortened the response period for administrative decisions to five working days. However, the absence of implementing regulations concerning the formalization of positive fictitious decisions created a legal vacuum regarding enforcement mechanisms. In response, the Supreme Court issued Supreme Court Circular Letter Number 2 of 2024, effectively reviving the doctrine of negative fictitious disputes under Article 3 of the State Administrative Court Law. This study examines the anomaly arising from the reimplementation of negative fictitious dispute mechanisms within the framework of bureaucratic reform and social wealth maximization. Using a normative juridical method with statutory, conceptual, and historical approaches, this article analyzes whether the reinstatement of <i>lex silentia negativa</i> contradicts the reform agenda aimed at legal efficiency and investment facilitation. The findings indicate that the reactivation of negative fictitious disputes risks prolonging legal uncertainty, weakening bureaucratic responsiveness, and undermining the principle of wealth maximization as conceptualized by Richard Posner. Therefore, immediate regulatory harmonization is required to ensure legal certainty and preserve the objectives of bureaucratic reform in Indonesia.</i></p> |



## **I. Introduction**

Bureaucratic reform is a middle ground for responding to the accelerating pace of industrialization and investment in the 21st century. Consequently, the bureaucracy is required to facilitate the ease of doing business in the private sector, increase employment opportunities, expand commercial activities, and increase incomes for many. Since the economic crisis that hit Indonesia in 1998, bureaucratic reform has been a priority for the revival of the Indonesian nation from various aspects. This is especially true for the economic aspect, which has significantly influenced the development of the Indonesian legal system in balancing the fulfillment of social welfare following the massive crisis during the New Order era. To borrow a term from Richard Posner in his landmark work "Economic Analysis of Law," law, in principle, plays a significant role in maximizing social welfare or wealth maximization.<sup>1</sup> By maximizing regulations to recover from the economic crisis, Indonesia initially began with a commitment to developing a clean bureaucracy, as stipulated in People's Consultative Assembly Decree No. XI/1998 and Law No. 28 of 1999 concerning Clean State Administration Free from Corruption, Collusion, and Nepotism. Subsequently, approximately a century later, the government seriously pursued bureaucratic reform through Presidential Regulation No. 81 of 2010 concerning the Grand Design of Bureaucratic Reform 2010-2025.

Good governance is the cornerstone of bureaucratic reform. Not without reason, an effective and efficient bureaucracy has a significant impact on its success in responding to accelerated industrialization and investment, which can guarantee social wealth. This was evident during the New Order era, when the economic crisis was caused by several factors, such as strong state dominance and intervention, a complex bureaucracy and rampant corruption, legal uncertainty and a lack of investor protection, a reliance on political connections and patronage, and a lack of transparency and accountability. Some of these factors are the impact of poor bureaucracy as described by Robert Merton as the Pathology of Bureaucracy.<sup>2</sup> Starting from a history of poor bureaucracy, Indonesia is committed to building good governance with several instruments, including:<sup>3</sup> 1) reduce and ultimately eliminate any abuse

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<sup>1</sup>D.T. Ostas, "Postmodern economic analysis of law: Extending the pragmatic visions of richard A. Posner," *American Business Law Journal*, Vol. 36 No. 1 (1998), hlm. 195.

<sup>2</sup> Robert Kent Bunch, "Robert K. Merton's Sociology of Deviance: From Theory to Application," (Disertasi State University of New York, New York, 1993), hlm. 23.

<sup>3</sup> Kementerian Pendayagunaan Aparatur Negara dan Reformasi Birokrasi, *Grand Design Reformasi Birokrasi*, (Jakarta: 2010), hlm. 3.

of public authority by officials in relevant agencies, 2) establish the country as having the most improved bureaucracy, 3) improve the quality of public service, 4) improve the quality of formulation and implementation of agency policies/programs, 5) increase efficiency (cost and time) in the implementation of all aspects of organizational tasks, 6) make the Indonesian bureaucracy anticipatory, proactive, and effective in facing globalization and the dynamics of strategic environmental change.

One of the main discussions in the Grand Design for Bureaucratic Reform is the issue of ease of doing business; points 5 (five) and 6 (six) above are highly relevant to this issue. When the idea of reform began to be promoted in 2010, data still showed that Indonesia was unable to provide good services to investors doing business or intending to do business.<sup>4</sup> This is reflected in data from the International Finance Corporation in 2009, which ranked Indonesia 122nd out of 181 countries in terms of ease of doing business, or 6th out of 9 ASEAN countries. This is despite Indonesia being a major market for global investors. To address this issue, Law Number 30 of 2014 concerning Government Administration (UUAP) regulates a reasonable time limit mechanism for State Administrative Officials in providing public services. This is expected to support the ease of doing business, which has long been a bureaucratic obstacle in Indonesia. One of the administrative law concepts that has shifted in UUAP is the concept of fictitious decisions (administrative silence). Previously, the Indonesian bureaucracy adopted the concept of *lex silencia negativa*, which means that if the government does not issue a decision requested by a person/civil legal entity within a period of 4 (four) months, it is considered to have issued a rejection decision (fictitious negative).<sup>5</sup> Following the enactment of the UUAP, the timeframe for obtaining legal certainty regarding the government's silence has become more efficient, with a 10-day period. Furthermore, this government silence is interpreted inversely, implying a willingness or acceptance (positive fictitious) of an obligation or a request from the public. This concept is commonly referred to as *lex silencia positiva*.<sup>6</sup> The shift from negative to positive fiction is a desired change in bureaucratic reform.

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<sup>4</sup> *Ibid*, hlm. 7.

<sup>5</sup> *Undang-Undang Tentag Peradilan Tata Usaha Negara*, UU Nomor 5 Tahun 1986 LN Tahun 1986 No. 77. TLN No. 3344, Sebagaimana diubah oleh UU Nomor 9 Tahun 2004 Tentang Peradilan Tata Usaha Negara, LN Tahun 2004 No. 35 TLN No. 4380, sebagaimana telah diubah oleh UU Nomor 51 Tahun 2009 Tentang Peradilan Tata Usaha Negara, LN Tahun 2009 No. 160 TLN No. 5079, Pasal 3 ayat (1), (2) dan (3).

<sup>6</sup> *Undang-Undang Administrasi Pemerintahan*, Undang-Undang Nomor 30 Tahun 2014, LN Tahun 2014 No. 202 TLN No. 5601, sebagaimana diubah oleh UU Nomor 11 Tahun 2020

Amidst the country's struggle to implement bureaucratic reform, targeted from 2010 to 2025, challenges have once again hit Indonesia's economic sector, with major events and the impacts of COVID-19. Instead of enjoying ease of doing business, the post-COVID-19 pandemic has seen numerous layoffs, resulting in companies experiencing losses. However, overall data shows that domestic investment (PMDN) employment has tended to increase over the past five years (2015-2020), with the highest absorption in 2020 at 611,335 people.<sup>7</sup> This is because the ease of doing business ranking in Indonesia is still on a positive trend in 2020, namely at 73rd out of 190 countries, but still behind Malaysia which is ranked 6th.<sup>8</sup> This is very different from before the bureaucratic reform was launched, Indonesia's ease of doing business ranks 110 out of 133 countries since the Ease of Doing Business (EoDB) was first published in 2004.<sup>9</sup> In its development, Indonesia's EoDB continues to experience quite positive improvements, namely from rank 106 in 2016 to rank 72 in 2018. Furthermore, in 2024, although there is no official ranking, Indonesia's EoDB based on B-Ready World Ranks data is ranked 20 out of 50 countries.<sup>10</sup> Based on this data, Bureaucratic Reform has brought tangible changes to the ease of investment and business in Indonesia over the past two centuries.

The government's response to the tangible impact of Covid-19 is not simply facilitating investment; it also requires maximizing the absorption of the workforce. It appears that the reforms planned for the period from 2010 to 2025 have two priority dimensions: facilitating investment and absorbing the workforce. These two dimensions are further enhanced by the enactment of Law Number 6 of 2023 concerning Job Creation, which has previously undergone amendments. In order to reduce the reasonable time limit for fictitious decisions, which had previously been changed from four months to ten days, the fictitious decision has now been made more efficient by changing it to five days without requiring approval from the State Administrative Court. This means that the government is automatically deemed to have granted

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Tentang Cipta Kerja, LN Tahun 2020 No. 245, TLN No. 6573, selanjutnya disebut UU CK, Pasal 53.

<sup>7</sup> Pusat Kajian Anggaran Badan Keahlian Sekretariat Jenderal Dewan Perwakilan Rakyat RI, *Referensi: Perkembangan PMDN dan PMA Tahun 2016-2020*, (Jakarta: 2021), hlm. 2.

<sup>8</sup> World Bank Group, "Ease of Doing Business rankings," dapat diakses pada <https://archive.doingbusiness.org/en/rankings>, diakses Pada Tanggal 24 Mei 2025.

<sup>9</sup> The International Bank for Reconstruction and Development *Doing Business in 2004*, (Washington DC: Oxford University Press, 2004), hlm. 119.

<sup>10</sup> Muhammad Wildan, "Beda dengan EoDB, B-Ready World Bank Tak Cantumkan Ranking Per Negara," diakses pada: <https://news.ddtc.co.id/berita/nasional/1806573/beda-dengan-eodb-b-ready-world-bank-tak-cantumkan-ranking-per-negara>, Diakses pada 24 Mei 2025.

requests submitted by citizens within five days. However, a new problem arises after the 5 days, what if the Government does not issue a Decision/take action as required by Article 53 of the Job Creation Law? After the PTUN's authority to issue a Decision and supervise the execution of Positive Fictitious Decisions was removed, now the mechanism for resolving decisions or actions that result in positive fictitious decisions is the sole authority of the Government as a State Administrative Official. Until now, the Presidential Regulation as mandated in Article 53 Paragraph (5) which will regulate the form of determination of the Decision or Action that is deemed to be granted is not yet available. So there is a legal vacuum.

Since the enactment of the CK Law in 2020, positive fictitious no longer requires a State Administrative Court Decision to be enforced, but can be efficiently followed up after 5 (five) working days after the application is submitted, this is because the application is deemed to have been granted.<sup>11</sup> The problem is where can citizens file legal action against requests that have been submitted to government officials but ignored/not answered, while the government officials themselves do not know the procedures or forms of Positive Fictitious Decisions that must be determined. There are at least 3 possibilities to answer this question, namely 1) Negative fictitious has never been revoked so that it is possible to re-enact it to overcome the legal vacuum of positive fictitious, 2) PTUN still has temporary authority to handle positive fictitious before the issuance of presidential regulations, 3) the public can file a lawsuit for Government Action, considering that the actions of Officials who ignore/ignore the requests of citizens can be categorized as omission.

It didn't take long for the Supreme Court to respond to this question by issuing Supreme Court Circular Letter Number 2 of 2024, which revived the concept of negative fictitiousness and returned the authority to resolve fictitious decisions to Article 3 of the PTUN Law, using the concept of *lex silencia negativa*. This means that by implementing the concept of negative fictitiousness, our bureaucracy has returned to the concept that existed during the New Order era when Indonesia experienced an economic and monetary crisis. Certainly, the bureaucratic reforms that have been established since two centuries ago with the aim of facilitating investment and creating the widest possible job opportunities are now experiencing an anomaly that contradicts the historical facts outlined in the first three paragraphs of this introduction. Article 3 of the PTUN Law, which causes citizens to protractedly receive fictitious decisions (for four months), potentially contradicts the spirit of reform that has been designed by policymakers in our country with a

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<sup>11</sup> *Undang-Undang Cipta Kerja, ... Pasal 53 ayat (4)*

projected Grand Design of 15 years. Therefore, this article will discuss how negative fiction has the potential to conflict with the spirit of bureaucratic reform and how to guarantee legal certainty regarding existing positive fiction before the issuance of a Presidential Decree as intended in Article 53 paragraph (5) of the CK Law.

## **II. Research Method**

This study employs a doctrinal legal research method, focusing on the systematic analysis of legal norms, principles, and doctrines governing fictitious administrative decisions in Indonesian administrative law. The doctrinal approach is used to examine the coherence and consistency of legal rules concerning the reinstatement of negative fictitious disputes within the framework of bureaucratic reform and social wealth maximization.

The research relies primarily on secondary legal materials, consisting of primary legal sources such as the 1945 Constitution of the Republic of Indonesia, Law Number 5 of 1986 concerning the State Administrative Court and its amendments, Law Number 30 of 2014 concerning Government Administration, Law Number 6 of 2023 concerning Job Creation, and Supreme Court Circular Letter Number 2 of 2024. Secondary legal materials include scholarly books, journal articles, legal commentaries, and doctrinal opinions, particularly those related to administrative law, bureaucratic reform, and law and economics theory developed by Richard Posner.

## **III. Results and Discussion**

### **A. The Concept of Fiction in the Shadow of Bureaucratic Reform**

Negative Fiction is a concept that illustrates a decision deemed fictitious. This decision initially stemmed from the silence of a State Administrative Official who was deemed to have failed to approve a request from an individual or legal entity after the time limit stipulated by law had passed. This concept originated from legal principles that developed in administrative law practices in Central European countries.<sup>12</sup> This decision, known as the Negative Silence Model, has been implemented in European countries such as Spain, Slovenia, and Portugal since 2015. Furthermore, a concept called the Positive Silence

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<sup>12</sup> Dacian C. Dragos, Polonca Kovač, dan Hanna D. Tolsma, "The Sound of Silence in European Administrative Law," *Palgrave Macmillan* (Cham: Springer Nature, 2020, ), hlm. 18.

Model, also known as Positive Fiction, is the opposite of the negative fictitious concept. While negative fictitious means that the silence of the State Administrative Official is interpreted as rejecting the request, positive fictitious is interpreted as accepting the request. However, both negative fictitious and positive fictitious decisions still require a Court Decision to be implemented. This was the case before the CK Law was passed in 2020. For comparison, the application of positive fictitious can be seen as practiced in the Netherlands since 2009, which is also transforming towards bureaucratic reform as regulated in the General Administrative Law Act and Art. Section 4.13.3.<sup>13</sup>

The term fictitious decision above, is actually not taboo among our practitioners or academics because both negative fictitious and positive fictitious have also been recognized in the practice of Indonesian administrative law as in Article 3 paragraph (2) of Law Number 5 of 1986 concerning State Administrative Courts (UU PTUN) which describes a Negative Fictitious Decision and Article 53 paragraph (3) of Law Number 30 of 2014 concerning the Law on State Administration (UU AP) which adopts the concept of Positive Fictitious.<sup>14</sup> Article 3 paragraph (2) of the State Administrative Court Law states:

"If a State Administrative Agency or Official fails to issue the requested decision, even though the time period specified in the relevant statutory regulations has expired, then the State Administrative Agency or Official shall be deemed to have refused to issue the requested decision."

This contrasts with the conceptual change in the presumption that decisions and/or actions of government administrative officials are granted under Article 53 paragraph (3) of the State Administrative Court Law, which states:

"If, within the time limit referred to in paragraph (2), the State Administrative Agency and/or Official fails to issue and/or take a Decision and/or Action, the request shall be deemed legally granted."

In the practice of legal proceedings in the State Administrative Court (PTUN), this conceptual change has different implications for the judicial review of fictitious decisions. Although both the PTUN Law and the AP Law require the State Administrative Court to decide and resolve fictitious disputes, the PTUN's authority has been expanded, extending beyond

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<sup>13</sup> *Ibid*, hlm. 176

<sup>14</sup> Azza Azka Norra, "Pertentangan norma fiktif negatif dan fiktif positif serta kontekstualisasinya menurut Undang-Undang Administrasi Pemerintahan," *Jurnal Hukum Peratun*, Vol. 3. No. 2 (2020), hlm. 143.

reviewing written decisions. Therefore, decisions in the form of actions are also within the authority of the State Administrative Court (PTUN), including positive fictitious actions. Furthermore, the enactment of Article 53 paragraph (3) of the AP Law has eliminated the existence of negative fictitious actions in Article 3 paragraph (2) of the PTUN Law. Finally, the article regulating existing negative fictitious actions is no longer applicable, as the provision was clarified in Supreme Court Circular Letter Number 1 of 2017, which states:

1. Based on the provisions of Article 53 of the AP Law, which regulates positive fictitious applications, the provisions of Article 3 of Law Number 5 of 1986 concerning negative fictitious lawsuits are no longer applicable, as they would create legal uncertainty regarding the procedures for resolving legal issues that must be implemented by the PERATUN.

2. Because the provisions of Article 53 of the Government Administration Law and Article 2 of Law Number 5 of 1986 regulate the same legal issues, namely the procedures for providing legal protection for citizens to obtain decisions from government officials, and also to encourage bureaucratic performance to provide excellent service based on the principle of *lex posteriori derogat lex priori*.

The PTUN's authority to adjudicate and resolve fictitious positive applications has only been in practice for approximately five years, namely from the enactment of the UUAP in 2014 until the enactment of Law Number 11 of 2020 concerning Job Creation (UUCK). The revision of Article 175 concerning the Government Administration cluster in the UUCK resulted in the removal of Article 53 paragraph (4) of the UUAP, which served as the basis for the PTUN's authority to adjudicate and resolve fictitious positive applications, which stipulates that "The applicant shall submit an application to the Court to obtain a decision on acceptance of the application as referred to in paragraph (3)." After the Article was removed, until now the PTUN no longer has the authority to adjudicate on positive fictitious applications and Article 53 of the UUAP which previously consisted of 5 paragraphs now only contains 4 paragraphs. Setelah babak baru Keputusan fiktif positif tidak lagi menjadi kewenangan PTUN, ternyata tidak menyelesaikan permasalahan yang sebenarnya terjadi. Tujuan dihapuskannya kewenangan mengadili fiktif positif pada PTUN sebenarnya untuk mendorong beberapa tujuan kemudahan aktivitas industri dan akses lapangan kerja yang dicanangkan UU CK di antaranya:

1. Facilitation, protection, and empowerment of cooperatives and micro, small, and medium enterprises.
2. Improvement of the investment ecosystem.

3. Acceleration of national strategic projects, including improving worker protection and welfare, as stipulated in various laws.

However, the resolution of fictitious disputes, which are expected to be resolved by State Administrative Officials, has given rise to new problems. These problems are evident in several lawsuits filed with the State Administrative Court (PTUN) regarding the omission of State Administrative Officials who are unable to resolve the needs requested by the relevant individuals or legal entities. Disputes that should be categorized as fictitious disputes are misrepresented as factual action disputes. This distraction has resulted in the Supreme Court issuing two policy regulations, stipulated in Supreme Court Circular Letter Number 3 of 2023 (SEMA 3/2023) and Supreme Court Circular Letter Number 2 of 2024 (SEMA 2/2024). SEMA 3/2023 stipulates that "The Ignoring of a Request for Cancellation of a State Administrative Decision Cannot Be Sued as a Dispute of Government Action." Meanwhile, SEMA 2/2024 regulates that the silence of the State Administrative Agency/Official who does not include or grant the Request in the Minerba One Data Indonesia list is not a factual act of omission but rather an act of refusing to issue a State Administrative Decision according to Article 3 of Law Number 5 of 1986. The two Policy Regulations issued by the Supreme Court are a response to refine the understanding regarding the categorization of disputes included in Fictitious Decisions and Factual Actions. Although normatively, there are no provisions that regulate the difference between fictitious decisions and factual actions. This difference can only be found at the theoretical level. The author is of the view that currently there has been an expansion of the meaning of the concept of Factual Action which also includes the government's silence (omission) which can be interpreted as acceptance (Article 53 of the AP Law in conjunction with the CK Law) and can be interpreted as rejection (Article 3 of the PTUN Law). This gives rise to the understanding that the emergence of both positive and negative fictions stems from factual actions.

However, the enactment of Circular Letter No. 2 of 2024 partially interprets silence as a form of rejection. On the other hand, the enactment of this Circular Letter, a contrario to the interpretation of Article 53 of the AP Law in conjunction with the CK Law, which views silence as a form of acceptance. Numerous problems have emerged since the enactment of this Circular Letter, including legal uncertainty due to conflicting norms and objectives, which the author believes are inversely proportional to the commitment to bureaucratic reform. It is important to view law not merely as a legal science separate from other sciences (*sui generis*), but as a social reality deeply influenced by social

and cultural contexts. Therefore, positive law must align with moral principles that are socially believed to serve the common good (public good). Statements like this are often found in narratives affirming natural law. Not only that, the interdependence of legal science with the surrounding sciences means that legal science is often seen as a tool for engineering social life, as stated by Roscoe Pound, who is very popular, "law is a tool of social engineering."

Bureaucratic reform and the validity of negative fictitious claims in Article 3 of the PTUN Law are an anomaly. This can be observed by the very long time required to resolve negative fictitious disputes in the State Administrative Court. For example, in the context of obtaining legal certainty regarding negative fictitious claims, it takes 4 (four) months to simply find out that a Government Official has issued a rejection decision. This time period has been rigidly limited by Article 3 paragraph (3) of the PTUN Law. After the 4-month period has passed, only then can members of the public file a lawsuit with the State Administrative Court. The negative fictitious claim process can be seen in Decision Number 19/G/2013/PTUN-SMD, PT. Mutiara Etam Coal as the Plaintiff against the Mayor of Samarinda as the Defendant who at that time did not issue changes to the Mining Business Permit that had been requested by the Applicant. The Panel concluded that the rejection decision (negative fictitious) or the Defendant's silence in not processing the Plaintiff's application to issue or process changes to the IUP of PT. Mutiara Etam Coal, as stated in Letter Number: 036/MECSP/I/13 dated 28 January 2013, has violated the principles of legal certainty, the principles of state administration and the principles of fair play and therefore must be cancelled.<sup>15</sup> If accumulated, the reasonable time limit that PT. Mutiara Etam Coal has undergone to obtain legal certainty regarding the silent action of the Mayor of Samarinda is 11 (eleven) months. PT. Mutiara Etam Coal submitted an Application to the Mayor of Samarinda on January 28, 2013, registered and declared to have passed the dismissal at the Samarinda Administrative Court on June 27, 2013, until the Decision on March 5, 2014.<sup>16</sup> Negative Fictitious Decisions can also be seen in Case Number 30/G/2014/PTUN-SMD, CV. Permata Hitam Indah as Plaintiff against the Regent of Kutai Kartanegara as Defendant.<sup>17</sup> In this case, it took at least 1 (one) year from the time the application was submitted to the Regent of Kutai Kartanegara on March 3, 2014, then CV. Permata Hitam Indah filed a lawsuit with the Samarinda PTUN

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<sup>15</sup> Pengadilan Tata Usaha Negara Samarinda, Putusan Nomor: 19/G/2013/PTUN-SMD., *PT. Mariawai Abadi melawan Walikota Samarinda* (2013), hlm. 25.

<sup>16</sup> *Ibid.*

<sup>17</sup> Pengadilan Tata Usaha Negara Samarinda, Putusan Nomor 30/G/2014/PTUN-SMD., *CV. Permata Hitam Indah Melawan Bupati Kutai Kartanegara* (2014), hlm. 1-2.

on October 24, 2014, until it received a court decision on March 17, 2015.<sup>18</sup> By looking at 2 (two) examples of negative fictitious dispute decisions as per Article 3 of the PTUN Law, it takes approximately 1 (one) year to obtain legal certainty due to the silence of citizens' requests. The reasonable time limit needed to obtain legal certainty is actually shorter if we refer to the Positive Fictitious Dispute Decision. In Case Number 010/FP/P2016/PTUN.SMG for example, the Applicant only needed 1 (one) month and 11 (eleven) days from the submission of the Application on May 18, 2016, the Application to the PTUN on June 8, 2016, to the Court Decision on June 29, 2016.<sup>19</sup> There is also Case Number 4/P/FP/2020/PTUN.JKT PT. Muara Wisesa Samudera obtained legal certainty from a positive fictitious decision issued by the Governor of DKI Jakarta with a time of approximately 5 months since the Application to the Governor of DKI Jakarta Province on November 29, 2019,<sup>20</sup> until submitting a request for positive fictitious dispute resolution to the JKT PTUN on March 16, 2020 and obtaining a decision on April 27, 2020.<sup>21</sup>

Based on the comparison of the settlement of several negative and positive fictitious cases above, it can be seen that the settlement of positive fictitious disputes in the Court tends to align with the spirit of bureaucratic reform by providing good service to investors in the context of ease of doing business with very short dispute resolution. It can even be resolved in just 1 (one) month. This makes it easier for investors to obtain legal certainty quickly and efficiently if they encounter obstacles in the licensing process. On the other hand, the obstruction of legal certainty and delays in the licensing process (justice deny justice delay) for a long period of time occurs if the licensing dispute resolution process is resolved using a negative fictitious approach. This is because citizens need up to 1 (one) year to obtain legal certainty. Therefore, it can be concluded that the re-enactment of negative fictitious using the approach of Article 3 of the PTUN Law can clearly return the atmosphere of the Indonesian bureaucracy to the old model before the reform era was encouraged. At that time, Indonesia was recorded as a country that was not friendly to investors with the bureaucracy's inability to provide easy services for investment. Until 2009, Indonesia's ease of doing business was ranked 122nd out of 181 countries or ranked 6th out of 9 ASEAN

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<sup>18</sup> *Ibid.*

<sup>19</sup> Pengadilan Tata Usaha Negara Semarang, Putusan Nomor 010/P/FP/2016/PTUN.SMG., *Ratna Untari, dkk. Melawan Bupati Temanggung* (2016), hlm. 1-48.

<sup>20</sup> Pengadilan Tata Usaha Negara Jakarta, Putusan Nomor 4/P/FP/2020/PTUN.JKT., *PT Muara Wisesa Samudera melawan Gubernur DKI Jakarta* (2020), hlm 3.

<sup>21</sup> *Ibid*, hlm. 39.

countries. The ranking is relatively low as a country that has abundant natural resource wealth.

## **B. Legal Certainty of Fictitious Decisions and/or Actions in Factual Action Disputes**

Following the enactment of the Job Creation Law, Article 175 of the Government Administration Cluster amended Article 53 of the AP Law, which eliminated the authority of the State Administrative Court to handle disputes over positive fictitious decisions. This was based on the government's original intention in enacting the CK Law, which was to facilitate business operations and encourage investment in Indonesia.<sup>22</sup> Therefore, as an implication of the analysis and evaluation related to investment requirements, one of the policies chosen is the application of the positive fictitious principle with the burden of proof on the government.<sup>23</sup>

However, since the ratification of the elimination of the PTUN's authority to handle positive fictitious disputes, the Government appears unprepared to implement the mandate of the Amendment to Article 53 of the AP Law in the CK Law, which states:

Article 53 paragraph (2):

"If the provisions of laws and regulations do not specify a time limit for the obligations referred to in paragraph (1), the Agency and/or Government Official must determine and/or implement a Decision and/or Action within a maximum of 5 (five) working days after the application is received in full by the Agency and/or Government Official."<sup>24</sup>

The Government's inability to resolve fictitious positive disputes can be seen in the existence of fictitious positive decisions that have not been followed up by the Government based on Article 53 paragraph 2 above. This can be witnessed by the existence of lawsuits regarding factual actions with positive fictitious nuances at the Jakarta State Administrative Court with case numbers 426/G/TF/2022/PTUN/JKT and 213/G/TF/2022/PTUN/JKT. Furthermore, the Government's unpreparedness is due to the lack of initiative to issue a Presidential Regulation as a mechanism for resolving fictitious positive disputes within the State Administrative Agency/Official

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<sup>22</sup> Kementerian Koordinator Bidang Perekonomian Republik Indonesia, "Naskah Akademik RUU Cipta Kerja," *ekon.go.id*. 14 Februari 2020, tersedia pada [https://ekon.go.id/source/info\\_sektoral/Naskah%20Akademis%20RUU%20tentang%20Cipta%20Kerja.pdf](https://ekon.go.id/source/info_sektoral/Naskah%20Akademis%20RUU%20tentang%20Cipta%20Kerja.pdf), diakses pada 28 Mei 2025, hlm. 183.

<sup>23</sup> *Ibid*, hlm. 186.

<sup>24</sup> UU Cipta Kerja, ... Pasal 53 ayat (2).

environment, as mandated by Article 53 paragraph (5). Consequently, this implies that the government's silence, interpreted as granting the request, cannot provide legal certainty. Therefore, there is no legitimacy that can be used as evidence for the applicant. Even though the request is deemed granted, there is no enforceable power for the action, resulting in the Applicant being unable to obtain legal certainty.

Until finally the applicant made the Government's administrative silence a Factual Action lawsuit that can be tried by the PTUN. In Case Number 426 / G / TF / 2022 / PTUN / JKT, PT. Patowonua Cipta Mandiri argued that the government's actions in casu Defendant did not process the registration of PT. Patowonua Cipta Mandiri's Mining Business Permit Based on the Decree of the Regent of North Konawe Number: 532 of 2013 Concerning the Granting of PT. Patowonua Cipta Mandiri's Production Operation Mining Business Permit Dated December 6, 2013 into the List of Mining Business Permits that meet the provisions in the Directorate General of Minerals and Coal, Ministry of Energy and Mineral Resources of the Republic of Indonesia as per the Application Letter for Activation and Registration of MODI PT. Patowonua Cipta Mandiri Number: 197/SP.PCM/MODI-ESDM/VIII/2023 dated August 5, 2023 constitutes an unlawful act by government agencies and/or officials (onrechmatige overheidsdaad).<sup>25</sup> The lawsuit filed by PT. Patowonua Cipta Mandiri against the Director General of Minerals and Coal of the Ministry of Energy and Mineral Resources of the Republic of Indonesia as the Defendant resulted in the Plaintiff's lawsuit being granted, thus requiring the Defendant to take Administrative Action in the form of submitting/processing the mining business permit submitted by the Plaintiff.<sup>26</sup> In its consideration, the Panel of Judges held the following view:

"...the Panel should consider the opposite, that the Defendant actually ignored or ignored the Plaintiff's request, so that the Plaintiff never knew the Defendant's response to the request he submitted, namely whether to grant, reject, or provide further instructions regarding the matters that must be fulfilled by the Plaintiff so that his request can be responded to or processed by the Defendant."<sup>27</sup>

Furthermore, case Number 213/G/TF/2022/PTUN also granted the Factual Action lawsuit due to the silence of State Administrative Officials. In this case, PT. Mariwai Abadi as the defendant against the Minister of

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<sup>25</sup> Pengadilan Tata Usaha Negara Jakarta, Putusan Nomor 426/G/TF/2022/PTUN/JKT., *PT. Patowonua Cipta Mandiri melawan Bupati Konawe Utara* (2022), hlm. 8.

<sup>26</sup> *Ibid*, hlm. 52.

<sup>27</sup> *Ibid*

Investment/Head of the Investment Coordinating Board, also the Minister of Energy and Mineral Resources, respectively as Defendant I and Defendant II, won the Factual Action Case. The reason that became the ratio decidendi of the Decision was that Defendant I did not provide a response regarding the Issuance of Mining Business Permits that had been submitted by the Plaintiff, and Defendant II who did not provide a response regarding the registration and activation of the Plaintiff's data as a Mining Business Permit Holder. The same thing was also seen in case Number 212/G/TF/2022/PTUN Jakarta. PT. Sumber Surya Gemilang as the Plaintiff against the Minister of Investment/Head of the Investment Coordinating Board, also the Minister of Energy and Mineral Resources, respectively as Defendant I and Defendant II. Through this case, Defendant I was proven to have not responded to the application for Extension of the Mining Business Permit for Production Operations made by the Plaintiff to the BPMDP of Central Kalimantan Province, and Defendant II was also proven to have not responded in relation to the registration and activation of the Plaintiff's data as the holder of the Mining Business Permit for Production Operations. Therefore, each Defendant is required to carry out government administrative actions due to the silent actions they have taken.<sup>28</sup>

The two cases mentioned above indicate that the public still needs legal certainty derived from State Administrative Court decisions to guarantee and prove that the government's administrative silence can provide legal certainty by challenging it as a factual action lawsuit. Until now, other than the factual action lawsuit mechanism, since the enactment of the CK Law, no other mechanism has been found to provide enforcement power over government actions deemed to have granted a request. In practice, the legal breakthrough pursued was to convert administrative silence into a factual action lawsuit. However, legally, it has become *notoire feiten* that the PTUN's authority to adjudicate government silence, as stipulated in Article 53 paragraph 4 of the UUAP, no longer applies with the enactment of the CK Law. The Supreme Court, which has the function of issuing regulations to fulfill the needs in practice, of course responds to existing legal developments by issuing SEMA Number 2 of 2024. This policy regulation states that the silence of the State Administrative Agency/Official who granted the Plaintiff's Application in the Minerba One Data Indonesia (MODI) list cannot be viewed as a factual act of omission but rather an act of refusing to issue a State Administrative Decision according to Article 3 of Law Number 5 of 1986. Why does the Supreme Court

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<sup>28</sup> Pengadilan Tata Usaha Negara Jakarta, Putusan Nomor 213/G/TF/2022/PTUN/JKT., *PT. Maruwai Bara Abadi melawan Kepala BPMD Provinsi Kalimantan Tengah* (2022), hlm. 142.

not follow Article 53 paragraph (4) of the UUAP? According to the author, this is due to the Supreme Court's desire to provide legal certainty to the public regarding the Government's actions in ignoring an Application that has not been successfully implemented by the State Administrative Agency/Official. This is proven by the fact that the Government's actions are still being challenged through the Factual action mechanism. This step of returning negative fiction is considered very appropriate because if it still uses the positive fiction perspective adopted in Article 53 paragraph (4) of the AP Law, the PTUN does not have the authority to provide legal certainty regarding the Government's silent actions.

However, the pseudo-reform adopted by the Supreme Court through Circular Letter No. 2 of 2024, which revives negative fiction, contradicts the spirit of bureaucratic reform as explained in the previous discussion. Furthermore, the Circular Letter changes the substance of Article 53 of the AP Law in conjunction with Article 175 of the CK Law, which still requires the implementation of positive fiction. Thus, instead of providing legal certainty, it actually creates new legal uncertainty. According to Jan Michael Otto, this legal uncertainty is due to the lack of clear and consistent legal regulations.<sup>29</sup> Interpreting the government's silence as a form of rejection (negative fiction) based on SEMA Number 2 of 2024 is not easy to do when Article 53 of the AP Law, which requires the Government's silence as a form of granting a request (positive fiction), is still declared valid. This clearly gives rise to a conflict of norms that has implications for the uncertainty of the implementation of the two different legal norms. There is no benchmark that can be used as a legal or philosophical basis for assessing the government's silence as a form of acceptance or rejection because it is impossible for both concepts to be applied simultaneously to assess the government's silence (administrative silence). Moreover, if we talk about the existence of Article 3 of the PTUN Law, it is stated that it can be applied even though it was previously amended by Article 53 of the AP Law. Since the enactment of the AP Law, the concept of negative fiction as in Article 3 of the PTUN Law cannot be applied anymore by referring to the principle of preference "lex posteriori de rogat lex priori."<sup>30</sup> Although Article 3 of the Administrative Court Law was not directly revoked by the Administrative Law, Article 53 of the Administrative Law has already excluded the validity of negative fictitious matters. From the perspective of the

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<sup>29</sup> J.M. Otto, dkk., *Kepastian Hukum yang Nyata di Negara Berkembang [Real legal certainty in Developing Countries]*, (Dempasar: Pustaka Larasana, 2012) Hlm. 122.

<sup>30</sup> Farid Ramdani, "Keputusan Tata Usaha Negara Fiktif Berdasarkan Hukum Positif Di Indonesia," *Jurnal Cakrawala Hukum*, Vol. 9 No. 2 (2018), hlm. 148.

Administrative Law, we can conclude that as long as positive fictitious matters are recognized in our legal system, provisions governing negative fictitious matters cannot be enforced for the sake of legal certainty. This aligns with the philosophical purpose of establishing the State Administrative Court, which is to protect citizens' rights. Clearly, one of the rights citizens must protect is legal certainty. As stated in Article 28D paragraph (1) of the 1945 Constitution, it states: "Everyone has the right to recognition, guarantees, protection, and fair legal certainty, as well as equal treatment before the law." In relation to the theory proposed by J.M. Otto, legal certainty refers to the availability of clear and consistent regulations governing the anomalous existence of negative and positive fictitious matters.

The implications of the aforementioned legal uncertainty, in addition to creating inconsistent norms, also give rise to new problems, namely increasingly protracted licensing processes, which contradict the principle of good public service that prioritizes efficiency. The process of resolving fictitious negative disputes takes a very long time. Based on Indonesia's historical experience during the pre-bureaucratic reform era, Indonesia was an unfriendly country for investors and often ranked among the lowest in ease of doing business.

Of course, to address the delays in the licensing process, the PTUN's authority to handle fictitious positive disputes was eliminated, and the government's inability to resolve fictitious positive disputes on its own was discovered, as mandated by the CK Law. We must recognize that the paradigm of State Administrative Law continues to evolve over time. Referring to the concepts adopted before the AP Law and the PTUN Law, silence was interpreted only as a fictitious act, which had implications for the emergence of fictitious negative disputes (before the AP Law) and fictitious positive disputes (after the AP Law and the CK Law). Following the issuance of the AP Law, which was clarified in Supreme Court Regulation No. 2 of 2019, a new paradigm emerged, stating that the concept of silence can also be interpreted as an unlawful act by the authorities (*onrechmatige overheidsdaad*). This provides an understanding that the implications of the silent action can not only be interpreted as a positive or negative fictitious action, but also *onrechmatige overheidsdaad* regulated in the dispute resolution mechanism for Factual Actions as described in Case Number 426/G/TF/2022/PTUN/JKT and 213/G/TF/2022/PTUN/JKT. Therefore, the silence of the State Administrative Agency/Official who does not include or grant the Plaintiff's Application in the Minerba One Data Indonesia (MODI) list as regulated by SEMA Number 2 of 2024 can be interpreted as a Factual Action of omission.

This interpretation can be based on the reason to support the commitment to the spirit of bureaucratic reform by providing instruments for ease of doing business and providing protection to citizens through ensuring fair legal certainty, especially for business actors. This goal is broader to open up the widest possible job opportunities in realizing social wealth. From an administrative law perspective, government silence can be interpreted as a form of omission. Therefore, a thorough reexamination of the concept of silence, which has evolved into a factual action that can be tested by the State Administrative Court, is necessary. This broadening of the meaning of factual action can eliminate the existence of both positive and negative fictitious actions, even those that currently fail to provide legal certainty to citizens.

#### **IV. Conclusion**

The reinstatement of negative fictitious disputes creates serious concerns for legal certainty and bureaucratic efficiency, as it potentially forces citizens to wait excessively long to obtain legal certainty, thereby delaying justice and hindering investment. This condition reflects a regression in Indonesia's bureaucratic reform, particularly because the pre-reform bureaucracy was widely recognized as inefficient and unfriendly to investors, as reflected in Indonesia's low ease of doing business ranking in 2009. Moreover, the revival of negative fiction creates normative conflict between Article 53 of the Government Administration Law in conjunction with the Job Creation Law and Article 3 of the State Administrative Court Law. Government silence should not merely be interpreted as giving rise to positive or negative fictitious decisions, but may also constitute an omission, as recognized under Supreme Court Regulation Number 2 of 2019 and reflected in Cases No. 213/G/TF/2022/PTUN/JKT and No. 426/G/TF/2022/PTUN/JKT. Following the removal of the State Administrative Court's authority over fictitious disputes and the absence of a Presidential Regulation governing the mechanism for resolving such disputes, interpreting governmental silence as omission (*onrechtmatige overheidssdaad*) in factual action disputes may serve as a temporary legal remedy. This approach not only ensures legal certainty and protects citizens' fundamental rights, but also remains consistent with the objectives of bureaucratic reform in promoting ease of doing business and maximizing social wealth.

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