

THE APPLICABILITY OF LEGAL RULES ON FICTITIOUS NEGATIVE DECISIONS AND FICTITIOUS POSITIVE DECISIONS

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Received : 20 January 2025

Published : 23 March 2025

Revised : 31 January 2025

DOI : <https://doi.org/10.54443/ijerlas.v5i2.2649>

Accepted : 18 February 2025

Link Publish : <https://radjapublika.com/index.php/IJERLAS>

Abstract

The objective of this study is to examine the legal validity of Negative and Positive Fictitious Decisions from the perspective of state administrative law. This study uses normative legal research methods by analyzing variety of literature. The research methods is based on legislation and uses secondary data consistin primary legal materials, secondary legal materials, presented in a wualitative descriptive manner. The findings indicate that the authority of the PTUN to Adjudging disputes of positive fictitious disputes has been removed in the provisions of Article 175 of the Job Creation Law and the provisions for derogation (revocation) of the provisions of Article 3 of the Peratun Law are not regulated in the State Administration Law and the Job Creation Law, so the principle of preference *lex posteriori derogat lex priori* is no longer appropriate to use. Additionally, the PTUN authority standards that attempt both positive and negative fake disagreements are no longer in conflict. Since the PTUN still has the authority to attempt Negative Fictitious, Positive Fictitious essentially has the executive's complete authority. Therefore, one example of a legal safeguard for citizens against false judgments made by government officials is the requirements of Article 3 of the Peratun Law.

Keywords: *Negative fictitious, Positive fictitious, Job Creation Law.*

INTRODUCTION

In state administrative law, government actions (*bestuurshandelingen*) are divided into two categories, namely Material Actions/Factual Actions (*feitelijke handelingen*) and Legal Actions (*rechthandelingen*) in the form of Written Decisions (*beschiking*) (Nugraha, Hayati, Erliyana, & Mamudji, 2007). In its development, Legal Actions in the form of decisions also practically include non-written decisions, known as "fictitious decisions." Decisions that are considered to exist, even though they are not actually made, are what often cause problems. This occurs when the government or authorized officials fail to fulfill their obligations. For example, when individuals or legal entities submit formal requests that should be processed by the government or those officials, but they do not issue any decisions, this silence or inaction is considered a decision. Furthermore, this silence or Fictitious Decision is divided into two types: negative and positive. The terms 'fictitious-negative' and 'fictitious-positive' are not explicitly mentioned in any of the laws. The terminologies 'fictitious-negative' and 'fictitious-positive' are legal phrases used to facilitate the interpretation of law in Article 3 of the State Administrative Court Law (fictitious-negative) with the norm rules of Article 53 of the State Administrative Law (fictitious-positive) (Simanjuntak, Rahman, Dani, Cahyati, & Susmito, 2021).

The term "Fictitious Negative" is adopted from the "Negative Decision" used by Utrecht and Moh. Saleh Djindang, which was developed by adding "fictitious" as an extension of the meaning of a written State Administrative Decision (KTUN) that becomes the object of a State Administrative Dispute. Silence, meaning refusal (fictitious negative), is a direct legal norm transplantation from the Dutch AROB, which was adopted in the formulation of Article 3 of the State Administrative Court Law (Peratun Law). Peratun Law authorizes the State Administrative Court (PTUN) to adjudicate "fictitious negative" lawsuits. The term "fictitious negative" is a legal fiction or principle stating that the silence of a Government Official will be deemed to issue a refusal determination. The term "fictitious" implies that the State Administrative Decision (KTUN) requested to the State Administrative Court is, in principle, intangible. Thus, this fictitiousness is the silence of a government official that is then equated

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with a written (real) KTUN. And the terminology "negative" indicates that the Government official's determination will be considered a rejection of the application submitted by a citizen (Simanjuntak, Rahman, Dani, Cahyati, & Susmito, 2021). Article 3, paragraph (1) Peratun Law can be interpreted to mean that if an applicant requests the issuance of a State Administrative Decision (TUN) to a state administrator and that official does not follow up on the request by not issuing a decision/determination within a certain period of time, then citizens can sue the Government Official in the State Administrative Court (PTUN) on the grounds that a refusal decision has been deemed issued.

Then, the State Administrative Law was enacted, bringing very significant changes to the formal and material of Peratun Law, one of which was the change in the "fictitious-negative" regime in the Peratun Law to the "fictitious-positive" regime in the State Administrative Law (Jaelani, 2017). The concept of fictitious-positive is a new legal rule aimed at simplifying administration. It is known that in France, Germany, and the Netherlands, or as also applies to other countries, regardless of whether it was previously rooted in their respective legal histories, the principle of fictitious-positive is a new or updated legal concept, especially with the 2009 European Union directive that encourages the simplification of administrative procedures; fictitious-positive is also called *Lex Silencio Positivo* (Simanjuntak, Rahman, Dani, Cahyati, & Susmito, 2021). The term "*Lex Silencio Positivo*" is a combined vocabulary of Latin (*Lex*) and Spanish (*Silencio Positivo*), which, when defined in English, is equated with the meaning of "fictitious approval" and "*tacit authorization*" (Heriyanto, 2019). Fictitious negative is a legal phrase to state that the passive action or silence of an Official is interpreted as having issued a refusal decision. Conversely, Fictitious Positive, or the term used for the *Lex Silencio Positivo* concept, is a regulation to oblige government officials to respond to and follow up on KTUN requests submitted within the time limit stipulated in the basic regulations. If this provision is not fulfilled (time has passed), then the government official is automatically deemed to have approved the application for the issuance of a decision requested by a person/legal entity (Heriyanto, 2019).

However, at the end of 2020, the Indonesian public was surprised by the government and the DPR's policy of forming and ratifying the Job Creation Law (Law 11 of 2020). The presence of the Job Creation Law simplifies and amends more than 88 laws, one of which is in the government administration cluster, which revokes the authority of the State Administrative Court (PTUN) to resolve "fictitious positive" applications. The resolution of fictitious positive applications is carried out by the Government Official themselves, but the implementing provisions will be regulated in a Presidential Regulation. However, until this research was conducted, the implementing regulations for resolving these applications had not been issued, resulting in legal uncertainty for citizens regarding the officials' silence. Because the authority to adjudicate Fictitious Positive has been revoked, there is a phenomenon of fictitious positive resolutions being smuggled into the concept of Factual Actions in the form of silence (*omission*).

The Job Creation Law has also been subjected to judicial review at the Constitutional Court, and based on the Constitutional Court Decision Number 91/PUU-XVIII/2020, in its legal considerations, the formation of the Job Creation Law was deemed to be in conflict with the 1945 Constitution and conditionally had no binding legal force unless improvements were made within 2 years from the pronouncement of the Constitutional Court's decision. However, instead of revising the Job Creation Law, the government issued Government Regulation in Lieu of Law Number 2 of 2022, which was followed by the ratification of Law Number 6 of 2023 concerning the Enactment of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation. Although the 2020 Job Creation Law has been repealed by the provisions of the 2023 Job Creation Law, the substance containing the "Fictitious Positive" provisions in Article 53 of the State Administrative Law remains unchanged. Of course, with the existence of 2 fictitious regimes in Indonesia today, it shows the inconsistency of the government's legal politics in the development of government administration, especially in the field of regulating fictitious negative decisions and fictitious positive decisions. In addition, the spirit of forming the Job Creation Law is not reflected in the implementation of government duties, as there are still legal actions by Government Officials who do not implement good governance as aspired to in the enactment of the State Administrative Law and the Job Creation Law. However, the government's silence does not provide access for citizens to file applications/lawsuits to the court to obtain legal certainty regarding the government's silence.

Based on the background description above and in accordance with the originality of the research, the purpose of this study is to analyze the legal position of "fictitious negative" and "fictitious positive" in Indonesia today by using the theory of legislation as a test tool so that it can analyze legal certainty for citizens regarding the passive action or silence of government officials in issuing fictitious decisions after the enactment of the Job Creation Law.

LITERATURE REVIEW

Similar research has also been conducted previously, published in a journal written by Edi Pranoto and Kukuh Sudarmanto titled "The Principle of Positive Fiction Post the Implementation of the Job Creation Law: Prophetic Legal Paradigm" which was published in the IUS Journal of Law and Justice, 2023 Journal (Pranoto & Sudarmanto, 2023). This research provides three ways that can be done based on the orientation of the prophetic legal paradigm in regulating the principle of positive fiction post-regulation in the Job Creation Law by restoring the competence of the State Administrative Court (PTUN) or delegating authority to other institutions as guarantors of legal certainty regarding the submission of the principle of positive fiction, and the government must prepare and formulate technical provisions in a Presidential Regulation regarding the provisions of the principle of positive fiction as a follow-up to the provisions in the Job Creation Law.

Another study was conducted by I Gusti Ngurah Wairocana, et al. with the title: "Obstacles and Ways of State Administrative Court Judges Post State Administrative Law: An Approach to Handling Positive Fictitious Cases," published in: Journal of Law & Development, 2020 Journal (Wairocana, et al., 2019). The results of the study are regarding the discussion of the validity of Positive Fictitious before the issuance of the Job Creation Law, which concludes that the provisions of the positive fictitious institution by the State Administrative Court Judges found weaknesses and obstacles both normatively and practically. And the State Administrative Court Judges are careful in accepting and/or deciding positive fictitious applications from the beginning of receiving case files (administrative research of the registrar), making a map of legal problems by determining the legal issues, making and agreeing on a court calendar at the beginning of the examination of dispute applications.

Another study was conducted by Bagus Oktafian Abrianto, Xavier Nugraha, Julienna Hartono, and Indah Permatasari Kosuma with the title: "Problems of Fictitious Positive State Administrative Decisions After Law Number 11 of 2020," published in the Journal of Law: Arena Hukum in 2023. (Abrianto, Hartono, & Kosuma, 2023) The conclusion of this study regarding the most effective way to obtain a fictitious positive State Administrative Decision (KTUN) is to file a lawsuit for government action disputes, because the legal product is a court decision that has executorial power.

METHOD

This research is normative legal research, by conducting an in-depth critical analysis of legal concepts, legal principles, and legislation relevant to the issues being resolved. The approaches used in this study are the statutory approach and the analytical and conceptual approach. In this study, primary legal materials are obtained through library research and legislation, while secondary legal materials are derived from previous studies. Qualitative data analysis is used as a data analysis technique in this study.

RESULTS AND DISCUSSION

A. Meaning and concept of "fictitious negative" and fictitious positive" after the enactment of the Job Creation Law

In the theoretical study of State Administrative Law, Van Wijk divides government actions (*bestuurshandelingen*) into 2 categories, namely legal actions (*rechtshandelingen*) and real/factual actions (*feitelijke handelingen*). To understand further explanation of the classification of Government Administrative Actions/Government Actions, it will be explained in more detail as follows:

1. Legal action (*rechtshandelingen*)

Legal actions (*rechtshandelingen*), also known as legal acts, are "a declaration of intent made by an administrative body/government official in certain circumstances with the aim of producing legal consequences in the field of administrative law" (HR, 2016).

Legal actions or acts can also be defined as a series of actions that, based on their characteristics, produce specific legal consequences. Alternatively, it can be interpreted that a legal act is an action/act whose purpose is to create rights or obligations (HR, 2016). Based on Peratun Law, part of the form of legal acts/actions within the scope of state administration is the State Administrative Decision (KTUN/*beschikking*), which is the object of dispute in State Administrative Court cases. According to Article 1 number 9 of Peratun Law,

"A State Administrative Decision is a written determination issued by a government official, which has the characteristics of a state administrative legal action based on laws and regulations, being concrete, individual, final, and having legal consequences for individuals or private legal entities."

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Government decisions have a variety of forms, including decisions delivered orally (without a decision letter), decisions made in writing (with a decision letter), and fictitious decisions that occur due to the silence or passivity of government officials. Decisions can be classified based on how they are made, namely unilateral, bilateral, or multilateral. In addition, decisions can also be distinguished based on their scope of validity, namely within the agency or outside the agency. The forms or types of decisions related to the terms and conditions of the decisions above are (Indra, 2021):

- Written and non-written/Oral Decisions (*mondeling beschikking*)

The differences between types of decisions can be identified based on the level of importance and urgency in their issuance. Written decisions become essential when there are parties who feel aggrieved by the decision and must contain a comprehensive explanation of the reasons underlying the issuance, so that related parties can understand the considerations used. Written decisions are generally made because they are very important and fundamental. However, decisions can be made orally (*mondeling*) (Agung, 2011).

- Fictitious Decisions

In essence, state administrators have an obligation to provide services for all applications submitted by the public to them. However, sometimes the officials concerned do not respond to public applications due to other matters.

Government officials who do not respond or remain silent regarding public applications are interpreted by law as having issued a decision. This assumption and meaning of having issued a decision is what is called a fictitious decision. Fictitious, meaning that physically the decision does not exist or is intangible, but it is considered to have issued a decision by the authorized official. The basic content of the norms regarding fictitious decisions is regulated in the provisions of Article 3 of the State Administrative Court Law (Fictitious Negative) and Article 53 of the State Administrative Law (Fictitious Positive).

The fundamental difference between the concept of fictitious positive in Article 53 of the State Administrative Law (UUAP) before and after the amendments by the Job Creation Law lies in its constitutive nature. Previously, a fictitious positive decision had to be based on a decision from the State Administrative Court (Pengadilan TUN), but now it is no longer mandatory to go through the State Administrative Court decision process. It can be said that the Job Creation Law has brought a paradigmatic change to the concept of fictitious positive. Previously, fictitious positive required a court decision as absolute authorization, but now the concept is more flexible and does not require absolute authorization through a court decision.

To understand more clearly about the changes in the State Administrative Decision (KTUN) regime in the form of Fictitious Decisions, a comparison can be made in the following comparison table:

Table 1

Changes in the Fictitious Decision Regime in the State Administrative Court Law (UU Peratun), State Administrative Law (UU AP), and the Job Creation Law (UU Cipta Kerja).

CATEGORY	NEGATIVE FICTITIOUS (State Administrative Court Law/UU Peratun)	POSITIVE FICTITIOUS (State Administrative Law/UU AP)	POSITIVE FICTITIOUS (Job Creation Law/UU Ciptaker)
Characteristics of Decisions	Decisions deemed rejected on the Applicant's Application	Decisions accepting the Applicant's Application	Decisions accepting the Applicant's Application
Subject	Individuals/Private Legal Entities against State Administrative Officials	Individuals/Private Legal Entities against State Administrative Officials	Not/Not yet determined because there are no implementing regulations in the form of a Presidential Regulation as mandated by the Job Creation Law

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Time Limit for Decision Enactment	Regulated based on the basic regulations or has exceeded 4 months since the Application was received by the authorized government officials.	Regulated based on the basic regulations or has exceeded 10 working days since the Application was received by the authorized government officials.	Regulated based on the basic regulations or has exceeded a maximum of 5 working days since the Application was received by the authorized government officials.
Legal Consequences	REJECTED	ACCEPTED, allowing for filing a lawsuit to the State Administrative Court (PTUN)	ACCEPTED, further regulations not yet set.
Procedural Matters	Not regulated, but implementation is through Applications to the State Administrative Court (PTUN)	Regulated by special procedures, namely Applications to the State Administrative Court (PTUN).	Not/Not yet regulated because there are no implementing regulations.
Dispute Resolution Institute	State Administrative Court (PTUN)	State Administrative Court (PTUN)	Not/Not yet because there are no implementing regulations in the form of a Presidential Regulation as mandated by the Job Creation Law.
Legal Remedies	Appeal, Cassation, and Judicial Review (PK) can be filed	Legal Remedies cannot be filed, but Review (as a corrective justice means) is possible if the judex facti (PTUN) has made a clear mistake.	Not/Not yet because there are no implementing regulations in the form of a Presidential Regulation as mandated by the Job Creation Law.

Source: Author's Personal Document

2. Real/Factual Actions (*feitelijke handelingen*)

Factual actions became the authority of the State Administrative Court (PTUN) after the State Administrative Law was issued. Previously, the PTUN was only authorized to receive, adjudicate, and resolve State Administrative Disputes related to Legal Actions in the form of State Administrative Decisions (KTUN) or generally known as *beschikking*. According to the provisions of Article 87 of the State Administrative Law, the definition of KTUN is not only a "written determination but also factual actions." It can be concluded that disputes over Factual Actions are also included in Administrative Disputes as regulated in Article 1 paragraph (10) of the State Administrative Court Law.

Literally in Administrative Law, real actions or often called Material Actions of government officials (or State Administrative officials) are known as *feitelijke handelingen*. There is a lack of uniformity in interpretation among state administrative law experts regarding the meaning of the phrase "*feitelijke handeling van de overheid*." Ernst Utrecht uses the term "actions that are not legal actions" to describe the concept, while Kuntjoro Purbopranoto interprets it as "government actions based on facts" (Hadjon, et al., 2008) and this interpretation includes actions that do not have a direct relationship or significant legal consequences with the authority possessed, such as the holding of a highway inauguration ceremony and the construction of a dam. (Purbopranoto, 2018). Ernst Utrecht terms "*feitelijke handelingen*" as "a group of actions that are not legal actions," which he considers irrelevant in the context of administrative law. (Hadjon, et al., 2008) Actions such as the construction of buildings or toll roads, which are real physical activities, fall into this category.

In the reconstruction of norms in the State Administrative Law, the concept of "*Feitelijke Handelingen*" is regulated in Article 87 letter a as "Factual Actions," while "*Rechtshandelingen*" is regulated in Article 1 paragraph (8) of the State Administrative Law as "Government Administrative Actions".

Furthermore, the legal system in common law distinguishes between active (intentional) acts and passive (unintentional, including inaction) acts. In the common law system, torts committed by government officials can be categorized into several main concepts (Simanjuntak, Materials on the Difference Between Active Actions (Commission) and Passive Actions (Omission), Training on Disputes Over Government Actions and the Authority of the State Administrative Court to Adjudicate Unlawful Acts of Rulers (Ontrechmatige Overheids, 2022). "*Nonfeasance*" refers to the failure to perform a legal duty (fault of omission), while "*misfeasance*" is an action performed incorrectly, whether it is an action that is an obligation or an action that is legally permitted. In addition, there is also "*malfeasance*," which is an action performed when the perpetrator has no right to do so (Simanjuntak, Materials on the Difference Between Active Actions (Commission) and Passive Actions (Omission), Training on Disputes Over Government Actions and the Authority of the State Administrative Court to Adjudicate Unlawful Acts of Rulers (Ontrechmatige Overheids, 2022).

B. Legal Validity of "Fictitious Negative" and "Fictitious Positive" Post the Job Creation Law

From a rule of law perspective, the removal of the PTUN's authority to establish positive fictitious decisions from government officials has an impact on the loss of legal certainty for the community. The existence of the PTUN aims to protect the rights of individuals and the community, thereby creating harmony, balance, and harmony in the relationship between citizens and state administrators.

Philipus M. Hadjon states that attribution is the source of authority for the division of power and is associated with state sovereignty being in the hands of the people through democratic means. This division of power is divided into 3 types, namely executive, legislative, and judicial, which in principle have equal power and have different duties and functions. This division of power is also carried out to ensure that there is a check and balance between the executive, judicial and legislative branches because the aim is to avoid tyranny and arbitrariness. So that an institution cannot intervene with other institutions because it has obtained authority from the constitution.

The consequence of Indonesia adhering to the rule of law is that the government in carrying out its duties and authorities must adhere to legal provisions. Because the conception of a rule of law essentially contains the principle of legality, the principle of separation of powers and the principle of an independent and independent judicial power, all of which are aimed at controlling the state or in this case state administrators to act arbitrarily and abuse power.

The Job Creation Law has changed the order of the PTUN's authority, especially in OSS licensing, to encourage ease of doing business. In the OSS system, the government's silence for 5 days is considered as approval of a permit. However, this does not apply to other legal actions such as the issuance of land certificates, where the PTUN is still needed. After this change, the settlement of fictitious cases is mostly carried out through factual actions, which the author considers to be an effort that is not in accordance with the law.

The fundamental difference between legal actions and factual actions lies in their origins and impacts. Legal actions begin with a citizen's request and result in a change in legal status if government officials do not respond. Factual actions, on the other hand, are actions that do not require a request and only produce real consequences without changing the citizen's legal status.

Regarding the provisions of Fictitious Positive, there are various studies that suggest a conflict of norms between Fictitious Negative and Fictitious Positive, the resolution of which is based on the principle of preference *lex posteriori derogat lex priori*. The author argues that at the time the State Administrative Law was enacted, the application of the legal preference *lex posteriori derogat lex priori* was correct. This opinion is reinforced by the formulation of the State Administrative Chamber of 2017 which contains legal principles:

“Based on the provisions of Article 53 of the Peratun Law which regulates fictitious-positive applications, the provisions of Article 3 of the State Administrative Court Law (Peratun Law) regarding fictitious-negative lawsuits cannot be applied again, as it would create legal uncertainty regarding the procedures for resolving legal issues that must be applied by the State Administrative Court (Peratun).”

Given that the authority of the State Administrative Court (PTUN) to adjudicate positive fictitious disputes has been removed by the Job Creation Law, the application of the legal preference *lex posteriori derogat lex priori* becomes irrelevant. This is because Article 53 of the State Administrative Law does not revoke the provisions in Article 3 of the Peratun Law. Furthermore, with the removal of the PTUN's authority to decide positive fictitious disputes by Article 175 of the Job Creation Law, there is no longer a conflict of PTUN

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authority norms that both resolve "fictitious negative" lawsuits and "fictitious positive" applications. Currently, fictitious positive is fully under the authority of the executive, while fictitious negative remains under the authority of the PTUN.

Maria Farida Indrati Soeprapto states that if there is a new legal rule that replaces an old legal rule, the old legal rule must be explicitly revoked in the new legal rule (Soeprapto, 2007). To maintain legal certainty, the derogation (revocation) of part or all the legislation should not be formulated in general terms, but by clearly stating which legislative content is declared no longer valid (Soeprapto, 2007). Furthermore, Maria adds that the derogation (revocation) of legislative norm content must be accompanied by an explanation regarding the legal status of implementing regulations, lower regulations, or decisions that have been issued based on the revoked legislation. (Soeprapto, 2007)

The existence of laws and regulations plays a central role in creating the unity of the national legal system. Through the unity of the legal system, legal certainty can be realized, and the values contained in each norm can be evaluated for validity within the framework of the hierarchy of laws and regulations.

According to Titon Selamet Kurnia, the laws and regulations of a country are fundamentally built upon a system. This means that although there are many laws and regulations, they are all integrated and interconnected as part of a coherent system. (Kurnia, 2016) The unity of the legal system is intended to integrate and maintain the consistency of laws and regulations, so that they are in line with the development of vertical legal norms, thus the legal norms contained in a legislation become constitutional and have validity. (Soeprapto, 2007) Because the main purpose of the existence of laws and regulations is to realize legal certainty (Kurnia, 2016).

Currently, fictitious positive and fictitious negative coexist, giving citizens the choice to resolve issues through the government or the State Administrative Court (PTUN). This is considered a setback due to legal inconsistency and indicates a lack of good public service. The author suggests that lawmakers choose one fictitious decision system and recommend changes to the Peratun Law, the State Administrative Law, and the Job Creation Law, while still giving the PTUN the authority to resolve issues of government silence.

Based on the analysis, the author concludes that the "Fictitious Negative" provisions contained in Article 3 of the Peratun Law remain valid, considering that there are no norms that explicitly revoke or amend these provisions in Article 53 of the State Administrative Law or Article 175 of the Job Creation Law. The provisions of Article 3 of the Peratun Law can be used as a form of legal certainty for citizens regarding the silence of state administrators in issuing State Administrative Decisions (KTUN).

CONCLUSION

Since the State Administrative Court (PTUN) no longer has the authority to adjudicate positive fictitious disputes according to the Job Creation Law, and there are no rules that revoke Article 3 of the State Administrative Court Law, the application of the preference *lex posteriori derogat lex priori* is no longer relevant. There is no longer a conflict of PTUN authority because fictitious positive is under the authority of the government, while fictitious negative is still under the authority of the PTUN. Therefore, Article 3 of the State Administrative Court Law can be used to protect citizens from fictitious government decisions.

Comprehensive discussions by lawmakers are needed to determine the most appropriate fictitious decision regime in Indonesia. As a recommendation, substantive changes or improvements need to be made to the provisions of Article 3 of the State Administrative Court Law, Article 53 of the State Administrative Law, and Article 175 of the Job Creation Law, with the principle of maintaining the authority of the State Administrative Court (PTUN) to resolve issues of government silence regarding legal actions (fictitious decisions).

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