Actualization of Corrective Justice in Settling Cases of Government Silence action: Positive Fictitious Decisions in Indonesian

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Abstract

This article aims to examine the implementation of corrective justice in the settlement of fictitious positive decision in the Indonesian administrative courts. A change in paradigm and concept about government decisions from negative fictions in accordance with Article 3 of Act No. 5/1986to a positive fictitious decision as regulated in Article 53 of Act No. 30/2014. After the transition, fictitious positive decision tried by the Administrative Court is final and binding, but in practice there is a positive fictitious case that is requested for judicial review and Indonesia's Supreme Court adjudicates through decisions No. 175 PK/TUN/2016.

Keywords: Corrective Justice, Fictitious Positive Decision

A. Introduction

One type of government actions in Indonesian administrative legal system is government decisions (*beschikking*). Government decision includes the government's unilateral legal actions, in the sense of doing andnot doing legal actions of state administration that has the legal force,ultimately depends on the unilateral will of the State Administration Officer who have the authority of government to do so (Indroharto, 2002, p. 147-148).Furthermore, referring to the provisions embedded in Article 1 paragraph 3 of Act No. 51/2009 concerning the Second Amendment of Act No. 5/1986 on the Administrative Court, the decision of State Administration is defined as 'a written stipulation that is issued by a state administration agency/official,which contain state administration legal actions based on applicable laws and regulations, that is concrete, individual and final in character, and causelegal consequences for a person or a civil legal entity'.After the enactment of Act No 30/2014, state administration provisions have expanded of meaning as stated in Article 1 point 7 Act No 30/2014 explain that 'state administration provisions is a written decree issued by the state administration agencies/officials in governance.' Based on the two regulations,it can be described that the State Administrative Court Law gives the narrower meaning of a State Administration Decree(object of a State Administration dispute) rather than the Government Administrative Law. A more comprehensive explanation related to the definition of State Administration Decree is explained in detail in the provisions of Article 87Act No 30/2014confirmthat with theenactment of Government Administrative Law, Government Administrative Lawas referred to inthe State Administrative Court Law must be interpreted as: (1) a written stipulation that also includes factual actions; (2) Decision of the state administration agencies/officials in the executive,legislative, judicial, and other state administration circles; (3) Based on statutory provisions and General Principlesof Good Governance; (4) The final character in a wider sense; (5) The decisions that have the potential to cause legal consequences; (6) The decisions that apply to Citizens. Regardless of the expansion of meaning of state administration decision, the regulations relating to fictitious decisions (also referred to as the 'government silence') also experiencing a friction (Kars J. de Graaf and Nicole G. Hoogstra, 2013, p. 14-16).

Previously, the terminology of "Fictitious" indicates that the lawsuit of state administration decision is actually intangible. It is only a silence of state administration agencies/officials, which is then linked with a real written of state administration decision (Putra Astomo, 2014, p. 364.). Relating to the fictitious decision, Article 3 ofAct No. 51/2009 explainif the state administration agencies/officials are not doing their duty to issue a decision, so it is linked withState Administration decision. Related to the period of validity of negative fictitious decisions, if it is not regulated in the relevant law, it is assumed that after four months have passed since the receipt of the petition, the state administration agencies/officials deemed to issue a rejection decision.

The concept is known as *negative fictitious decision*. Terminology of 'Negative' indicates that aState Administration decision is considered to contain a rejection of the petition that has been submitted by individuals or civil legal entities to the State Administration agencies/officials.

AState Administration agencies/officials who receives a request, but it was not an obligation to answer, then their silence can not be regarded as negative fictitious of State Administration decision. Therefore, it can not be sued (Zairin Harahap, 1997, p. 29.). On its development, the negative fictitious decision stipulated in the Act of State Administrative Court is experiencing a friction in meaning after the enactment of Government Administration Law. The fictitious decision in Government Administration Law changes into a positive fictitious that means if the silent actions of the State Administration agencies/officials as a form of the granting of the petition of the community member or the party submitting the application. The provision is stipulated in Article 53 paragraph (3) concerning Government Administration which claim that if the Government agencies/officials does not set and/or make decisionand/or actions, within the period in the statutory provisions or within a maximum period of 10 (ten) working days if it is not regulated inlegislations, then the request shall be deemed legally granted. After the enactment of the Government Administration Law, the concept of a fictitious decision that applies today is a positive fictitious decision as stipulated in Article 53 of the Government Administration Lawwhich states a fictitious decision lawsuit can be submittedto the State Administrative Court to obtain a admission decision. Furthermore, to complement the rules regarding positive fictitious institution, the Supreme Court issued a Supreme Court Regulation No. 5 of 2015 onProcedural Guidelines for Obtaining a Decision on Acceptance of an Application to Obtain Decisions and/or Actions of a Government Agency or Official. Article 3 of Supreme Court Regulation No. 5/2015 states that the application is submitted to the State Administrative Court whose jurisdiction covers the Respondent's domicile.

Furthermore, in Article 16 of Supreme Court RegulationNo. 5/2015 confirms that Court's decision on acceptanceof an application for a decree and/or act of government agencies or officials are final and binding. Positive fictitious verdicts are*final and binding* and legal effort cannot be made. On its development, there is a case regarding to the application for a fictitious positive case decided by the State Administrative Court in its Decision No.19/P/FP/2016/PTUN.PLK,later on the case made legal efforts reconsideration and by the Supreme Court accepting legal remedies and acceding to the lawsuit through Decision No. 175 PK/TUN/2016 on December 22, 2016 on the basis of considerations based on the concept of corrective justice. On its development, Decision No. 175PK/TUN/2016, later used as a *landmark decision* of the Supreme Court of the Republic of Indonesia on 2017. Based on the explanation above, this article then wants to present an analysis regarding the actualization of corrective justice in the completion of a fictitious case in which the Supreme Court made a legal breakthrough in the form of providing legal remedy space for decisions that are final and binding.

B. Discussion and Analysis

1. Fictitious decision in State Administrative Law System in Indonesia.

Silence is defined as an agreement that is identical to the oneofmaxim of the law in Roman times, that is *qui tacet consentire videtur*(Silence implies consent). In the context of contemporary law, the concept or principleof positive fictitious is used and developedfrom a condition or circumstance whenadministrative authorities do not behave as they should that ignorethe petition addressed to him (administrative inaction), notserve optimally (unprofessional), being unresponsive (unresponsive),process a request in protracted (delaying services) and others, which are identical with things that are included in the category of mala-administration (Enrico Simanjuntak, 2018, p. 304-305). Fictitious positive decision is born of the existence of a tacit principle of authorityor *(lex Silencio / silencio positivo)* which is expected to overcome variouscomplaints regarding licensing procedures in member countries of the European Union (Enrico Simanjuntak, 2017, p. 381).Administrative developments in the European Union slowly and surely spread intoin the Indonesian legal system. Act of Government Administration adopt the concept of *Lex Silencio Positivo*in Article 53 of Government Administration Law, later known as the fictitious decisionpositive. The concept of "silence means consent" in Government Administration Law synonymous with the concept of *LexSilencio Positivo (tacit authorization)* in the European Union Parliament Directive No. 123(Directive 2006/123/EC) or the provisions of Article 6 on ECHR. Indonesia's legal systemhas adopted the legal principle of 'silence means consent' or commonly known asfictitious positive. The principle of positive fictitiousis a reversal of the legal principle previously known in Indonesian administrationlaw as fictitious negative principle. The term 'fictitious' means notissue a written decision, but considered to have been issued a decisionwriting, while 'negative' means for the content of the decision was equated with'rejection' of a petition. At the start of the enactment of Government Administration Law, the practice of negative fictitious andits transition to a positive fictitious, become a problem in itself and must be adjusted immediatel. In Government Administration Law, the silence of administration officials is considered(fictitious) same asagree, so it is

contrary to the conception of the State Administrative Court Law which adheres to the principle that the silence of state administration agencies/officials issame with a refusal. Positive fictitious conception have broader scope. If government officials are already following up on a petition butif when followed up by the defendant, the request issued evidently exceed the specified time, then in such conditions the petition of the applicant is considered to be granted by the defendant.

Based on these descriptions as well as to clarify the difference between the fictitious negative and positive fictitious, the author retell the comparison between two legal institutions through the writings of Budiamin Rodding, as follows (Budiamin Rodding, 2017, p. 33):

No.	**Comparison**	**Fictitious decision Negative**	**Fictitious decision Positive**
1	Legal basis	Article 55 of Act No. 5/1986	Article 53 of Act No. 30/2014and the Supreme Court Regulation No. 5/2015
2	Form of Submission to Court	With an ordinary lawsuit	by request
3	Legal Subject	Plaintiff: The person or agency. Civil Law Defendant: State Administration agencies/officials	Petitioner: the party whose application is considered legally granted. Defendant: Agency and/or Officer Government
4	Grace Period	Regulated in paragraphs (2) and (3) that after the expiry date and if not regulated then the duration is 4 months and is guided by Article 55 Act No. 5/1986	If the grace period is not stipulated in the regulations, then 10 days after submission of the petition, if it had passed, then the application can be submitted to the Court.
5	Decision / Action	considered as rejection	considered as grantedpetition
6	Procedural Law	Regular procedural law as stipulated in the State Administrative Court Law	In accordance on Supreme Court Regulation No. 5/2015
7	Implementation of Decision	The timing of implementation of decision is not regulated if it granted, so it keep referring to the implementation of the Verdict at an regular events.	Implementation of the Decision if the petition granted isno later than 5 working days since the Decision established (Article 53 paragraph 6 Act 30/2014)
8	Legal Effort	can take Ordinary and Extraordinary Legal Efforts	no legal effort

2. Corrective Justice in Case Settlement of Fictitious Positive Decision.

a. Corrective Justice: An Overview.

Parameters of justice are always interpreted differently. Justice itself-even dwells in plural dimension, in diverse fields, such as economics and law. Nowadays, justice is always placed in a equal position related to the settlement of issues related to law enforcement. Law enforcement and justice are in the spotlight due of many legal cases are not resolved because they are mixed with political interests. The truth and justice law are systematically manipulated so that justice could not find the real situation (Muchsan, 1985, p. 42.). Justice embodies the results of philosophical thinking and showing its portion in abstraction. The abstract character of justice is that justice can not always be born from rationality, but is also determined by the social atmosphere that is influenced by the values and norms in society. Therefore, justice also have dynamic properties which sometimes can not be accommodated in the positive law. So, the application of positive law by the judge must consider the values and sense of justice in society as well as possible, so that the decision produced by judges could be accepted by the parties (Rosalinda Elsina Latumahina, 2014, p. 374). One type of justice that is known in the dynamics of legal studies are corrective justice. Corrective justice in terminology, comes from the word "correct" which means true and "justice" which means fairness. From these definitions can be said that corrective justice is a kind of justice which aims to correct the wrong thing into right. Some experts argue that corrective justice is part of the distributive justice. They assume that the corrective jutice closely associated with the punishment while punishment is also one of the distribution elements of distributive justice (Faturochman, 2002, p, 36).The author argues that corrective justice is a justice that runs on compensation payment for deeds that have been done which resulted in the existence of an imbalance or inequality. In line with the opinions of the authorabove, Jules L. Coleman believes that 'the principle of corrective justice is the principle that individuals who are responsible for the wrongful losses of others have a duty to repair the losses'. Coleman added that corrective justice is justice that provides an obligation for someone to fix (a duty to repair) damage/loss that has been done. Coleman added that the responsibility to repair the damage / loss that has been done is the moral burden of an obligation (a moral norm

of duty in corrective justice) (Jules L. Coleman, 1995, p. 27-30). Furthermore, in the view of Carl Joachim Friedrich, corrective justice is focusing on correcting something wrong. If an offense is violated or an error is committed, then corrective justice seeks to provide adequate compensation to the injured party; if a crime has been committed, then the appropriate punishment should be given to the offender. However, inequality will lead to disruption of "equality" that have been established or have been formed. Corrective Justice in charge of rebuilding the equality.

From this description, it appears that corrective justice is a judicial area while distributive justice is the field of government (Carl Joachim Friedrich, 2004, p. 24.).

b. Actualization of Corrective Justice In State Administration Court Verdict.

Reconsideration Decision Number 175 PK/TUN/2016 is a form of legal action of the verdict of a positive fictitious petition for a first-level State Administrative Court Number 19/P/FP/2016/PTUN.PLK. The defendant in this case areon two parties. Respondent I is the OfficeHead of MiningCentral Kalimantan Province, Respondent II is the Head of the Mining and Energy East Barito District.The object in this case is the silcence of Kalimantan Tengah Province (Province Department of Mining and Energy) and Barito Timur District (District Department of Mining and Energy)in the form of not followed up by issuing clear and clean recommendations for the Mining Business License of PT. Coalindo Utama covering 315 hectares in East Barito Regency. The petitioner in the main petition argues that the silence ofRespondent I and Respondent II has been contradictoryboth with applicable Laws and Regulations and General Principles of Good Governance. Based on that argument, the Respondent denies that the petitioner's petition is not basedon facts / *feitelijk onjuist* and/or at least there is a factual error / *feitelijkeonjuistheden,* and even contrary to the laws in the intended applicationso it is worth and deserves to be rejected.Both Respondent I (Province Department of Mining and Energy) and Respondent II (District Department of Mining and Energy) declarestheir actions that are manifested in the objects of dispute are not contrary to the applicable laws and regulations and the general principles of good governance. However, after the enactment of Act No. 23 of 2014 regarding Regional Government, the recommendation isissued by the Governor of Central Kalimantan as Respondent I, besidesrefers to Article 14 paragraph (1) of Act No. 9 of 2015 on the Second Amendment of Act No. 23 of 2014 concerning Local Governmentwhich states that "Implementation of Government Affairs in forestry, marine, and energy and mineral resources are divided betweenCentral and ProvincialGovernment." Panel of Judges of the State Administrative Court through Decision Number 19/P/FP/2016/PTUN.PLK states Respondent I and Respondent II are required to determine and/or make decisions and/or actions in accordance with the petitioner's request. Respondent I and Respondent II thensubmit a judicial review that the Supreme Court tried and decided the case through Decision No.175PK/TUN/2016 which states granting the request of judicial review from the Petitioner of reconsideration: Head Office of Mining Central Kalimantan Province and canceling thePalangkaraya Administrative Court Decision No.19/P/FP/2016/PTUN.PLK. The basis considerations of Judges: Article 53 of Government Administrative Law*juncto* Supreme Court Decision No. 5 of 2015, did not seta judicial review of legal remedy, however,The Supreme Court needs to open it as a means of "corrective justice". Supreme Courtbelieves if *judexfactie* of first degree court whose its decisions are final and bindinghave made a real mistake.

1) "Positive fictitious" institutions in Legal of Government Administration are intended to doimprovement of service quality based on law, notvice versa, that may disrupt the essence of the quality of public servicesby granting the petitioner's applicant who is not based in law through the slit delays in service.
2) *In casu,* the petitioner's petition (now Respondent of Reconsideration)in the fictitious positive must still be assessed for completeness of petition requirements,whether fulfilled or not, and in this case the request fornotarize a document permissions and request for *clear andclean* statement are two different things, so the petition regardingit must be separated.
3) Besides, if there are overlapping between WIUP (Mining Business LicenceArea) with PT. PadangMulia must be completed first, and the Director-General orGovernors can settle it in the manner specified inArticle 12 paragraph (1) of the Minister of Energy and Mineral Resources RegulationNumber 43 of 2015 regarding Procedures for Evaluation of Business License Issuancein Mineral and Coal Mining.

Based on these considerations, one of the judges who tried the case argues that if desired public services in government administration are 'excellent' public services and the practice of positive fictitiousis as one way to support the desire able public service.The application of fictitious positive decision by the judicial review onDecision No. 175PK/TUN/2016 is associated with implications of Government Administration Lawas a means of corrective justice against judges' error in State Administrative Court decisions.The implementation of public services is not only required to be fast, but also still pay attention to the fulfillment of the requirements procedures of the petitioners to the State Administration Agencies/Officials, thus improving the quality of public services can be held as it envisioned in the Government Administration Law. For the next prospect of positive fictitious regulation, positive fictitious provision is temporary,if the condition of public services and good governance has been reached and stabilized, or in condition

where the State Administration Agencies/Officials are no longer being silent and actively providing services in the decision of State Administration, then the positive fictitious regulations can be deleted and reinstated to negative fictitious,

by still paying attention to the objectives in law enforcement, such as legal certainty, justice, and expediency. Equalization of the application of Electronic Government/E-government services in the administrationgovernment needs to be optimized in order to support the acceleration of servicepublic towards good governance.

C. Conclusions

The adoption of fictitious positive decision with legal effort reconsiderations onDecision Number 175 PK/TUN/2016 is associated with the implications of Government Administration Law as a means of corrective justice against their oversight inthe application *judex factie*of State Administrative Court decisions. The implementation of public services to realize a good governance is not only required to be fast services, but also still pay attention to the fulfillment of the requirements procedures of the petitioners,thus improving the quality of public services can be held as it envisioned in the Government Administration Law.For the next prospect of positive fictitious regulation, positive fictitious provision is temporary,if the condition of public services and good governance has been reached and stabilized, then the positive fictitious regulations can be deleted and reinstated to negative fictitious, by still paying attention to the objectives in law enforcement, such as legal certainty, justice, and expediency.

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