



Positive Fictional Authority Legislative Ratio in Government Administration Laws and Job Creation Laws

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Abstract:

This study aims to determine the causes of the low fulfillment of wife and children's income after divorce and the efforts that can be made to optimize the fulfillment of wife and children's income, especially in divorce cases. The research method used is normative with a case approach (statute approach) and a conceptual approach. The results of the study show that the percentage of women's and children's rights in religious courts has a very low percentage, so it is necessary for judges to use their ex officio rights massively for the optimal fulfillment of women's and children's rights. In addition, the position of the SEMA which is considered to be a guideline or policy and does not have strong binding power, it is necessary to have rules recognized by the national legislation formation system, preferably in the form of a Supreme Court Regulation or Government Regulation. The results of the study show that the percentage of women's and children's rights in religious courts has a very low percentage, so it is necessary for judges to use their ex officio rights massively for the optimal fulfillment of women's and children's rights. In addition, the position of the SEMA which is considered to be a guideline or policy and does not have strong binding power, it is necessary to have rules recognized by the national legislation formation system, preferably in the form of a Supreme Court Regulation or Government Regulation. The results of the study show that the percentage of women's and children's rights in religious courts has a very low percentage, so it is necessary for judges to use their ex officio rights massively for the optimal fulfillment of women's and children's rights. In addition, the position of the Sema which is considered to be a guideline or policy and does not have strong binding power, it is necessary to have rules recognized by the national legislation formation system, preferably in the form of a Supreme Court Regulation or Government Regulation.

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Introduction

Law Number 30 of 2014 concerning Government Administration is a manifestation of the will of lawmakers to improve government administration. The promulgation of the Public Administration Law on October 17, 2014, was seen as a progressive step in implementing government administration reforms. This is partly because the Public Administration Law is considered further to emphasize the responsibility of the State and government to ensure the implementation of a government oriented towards fast, convenient, and inexpensive public services. On this basis, Public administration Law is positioned as one of the pillars of bureaucratic reform and good governance.(Wicaksono, Hantoro, and Kurniawan 2021)

Moreover, the public administration Law shifts the old paradigm of government administration to a new paradigm. This paradigm accompanies the direction of the paradigm of public service in the administration of government which is growing, especially in line with the era of openness, which demands the widest possible access to information for the public. This is undoubtedly given the increasingly complex tasks of government regarding the nature of work and types of tasks and the people who carry them out. In this context, the need arises to set minimum service standards in the day-to-day administration of the State, including the need to provide legal protection to the public as part of the work of executors of state administration.

In considering the Public Administration Law, it emphasizes that to improve the quality of government administration, government agencies and officials must use their authority to refer to the general principles of good governance based on



statutory provisions. To solve problems in governance, arrangements regarding government administration are expected to be a solution in providing legal protection, both for citizens and government officials. To realize good governance, especially for government officials, laws on government administration are the legal basis needed to underlie government officials' decisions and actions to meet the community's legal needs in administering government.

The above description emphasizes that the government is very concerned about the quality of good governance, which must be based on the principles of good governance in general and based on applicable laws and regulations, especially in serving the community, which is often found not providing legal guarantees and uncertainty in making decisions. And actions of government officials in the field of government administration services.

However, after the existence of the Job Creation Law, everything underwent significant changes in all legal regulations. This is evidenced by the loss of the Administrative Court's authority over fictitious legal remedies previously regulated by Article 53 of Law No. 30 of 2014 concerning Government Administration. Then it became Article 175 point 6 of the Job Creation Law which changed Article 53 of the Government Administration Law, whereby the authority of the State Administrative Court was removed. With these changes, many parties are harmed, not only the people who do not have their rights to obtain legal protection and services as they should, but the Advocate profession is also disadvantaged in this case, unable to fight for justice in the community. As stated by Viktor, an advocate for one of the clients who filed a positive fictitious lawsuit at the Administrative Court, he said, "after the Job Creation Law came into effect, there were changes in the Government



Administration Law, especially Article 53 of the Government Administration Law. Previously, positive fictitious attempts were made through the Administrative Court mechanism. However, in Article 175 of the Job Creation Law, amending Article 53 of the Government Administration Law where positive fictitious efforts through the Administrative Court mechanism are deleted. Therefore, since the Job Creation Law was promulgated, the State Administrative Court no longer has the authority to examine, adjudicate and decide on fictitious applications. Example of a case in Case Decision Number 24/P/FP/2021/Administrative Court.PL, which states that the State Administrative Court is no longer given the authority to examine, decide, and resolve requests to Government Agencies and Officials to determine and make decisions and Actions, refers to the provisions of Article 175 of the Job Creation Law which has amended Article 53 of the Government Administration Law.

The problem is, since the publication of the Job Creation Law until now, the President of the Republic of Indonesia has not issued a Presidential Decree which regulates further provisions regarding the form of a stipulation of Decisions and Actions which are deemed legally granted based on the mandate of Article 53 paragraph (5) of the Government Administration Law as contained in Article 175 of the Job Creation Law. This is detrimental to the interests of the plaintiff, who works as an Advocate. This is because the impact of this legal vacuum made the plaintiff, when he received power of attorney, make a positive fictitious attempt because an administrative request to the Ministry of Law and Human Rights for five days according to the Amendment to Article 53 of the Government Administration Law contained in Article 175 of the Job Creation Law was not answered or responded to. Even after ten days, the Administrative Court did not respond. (Shabani n.d.)



Even though the government administration law has the goal of creating an orderly administration of government administration, creating legal certainty, preventing abuse of authority, guaranteeing the accountability of government bodies and officials, providing legal protection to citizens and government apparatus, implementing statutory provisions, and implementing general principles of good government; and provide the best possible service to the community.

After the issuance of decision Number 91/PUU-XVIII/2020, it was read out in a decision hearing which was held on Thursday (25/11/2021) by the Constitutional Court, which declared the formation of the Job Creation Law contrary to the 1945 Constitution and did not have binding legal force conditionally as long as it is not interpreted corrections are not made within 2 (two) years since this decision was pronounced. "Declaring that the Job Creation Law will remain in effect until repairs are made following the time limit specified in this decision, " said Anwar, accompanied by eight other constitutional judges.(HumasMKRI n.d.)

Previously, in Article 53 of the Law on Government Administration, it was stated that applications submitted by citizens to government agencies and officials to obtain determinations and decisions, and actions were not responded to within ten working days after the files were received in full, then the request was considered granted. However, with the mechanism of applying to the Administrative Court to obtain a decision on acceptance of the application. However, in Article 175 number 6 of the Job Creation Law, requests submitted by citizens to government bodies and officials to obtain determinations and decisions, and actions are not responded to for five working days after the complete file is received, then the application is granted. However, the mechanism for obtaining a decision on accepting an application is



unclear. This is because the word "court" in the amendment to Article 53 of the Government Administration Law as amended in Article 175 number 6 of the Job Creation Law is omitted/deleted.

Problem Statement

So from the description above, a legal problem arose which did not reflect the General Principles of good governance conceptualized by Crinice le Roy, which included: the principle of legal certainty, the principle of balance, the principle of acting carefully, the principle of motivation for every decision of a government agency, the principle of not mixing authority, the principle equality in decision-making, the principle of fair play, the principle of fairness or fairness, the principle of responding to reasonable expectations, the principle of eliminating the consequences of an invalid decision, and the principle of protecting personal views on life. Koentjoro added two more principles, namely: the principle of wisdom and the principle of organizing public interest. (Azhar 2015)

Method

The type of research used in this article is normative legal research which focuses on literature studies. So, the data used is secondary data consisting of primary legal material (in the form of relevant laws and regulations) and secondary (consisting of references in the form of scientific articles and books relevant to the focus of the study). Aimed at facilitating analysis, conceptual approaches and statutory approaches are used to assist in the mapping of research objects, and the



analysis is carried out with qualitative juridical. The legal materials that have been obtained and are available are then reviewed and analyzed systematically and logically.

Discussion

A positive fictitious decision is the silence or neglect of a state administration official who does not issue a state administration decision submitted in writing by a civil legal person or entity within a certain time, which is his obligation. Due to the silence or neglect of the state administration official, a civil legal person or entity must apply to the court to obtain a decision on acceptance of the application. Professor of Administrative Sciences at the University of Indonesia, Eko Prasajo, explained that positive fictitious institutions encourage government agencies/officials to provide good public services to the community. (Yasin n.d.)

In the provisions of Article 53, fictitious means that the object of the application submitted to the court to obtain an acceptance decision is, in fact, intangible because the silence of officials or state administrative bodies is considered the same as a written State Administrative Decision (Komang et al. 2019)(Komang et al. 2019). According to (Simanjuntak 2018), the positive fictitious concept in Public Administration Law is a legal fiction that requires administrative authorities to respond to or issue decisions/actions submitted to them within the specified time limit. If these preconditions are not met, the administrative authority is deemed to grant the request for the issuance of decisions/actions that was requested of him.



Furthermore, the positive fictitious existence states that if the provisions of the laws and regulations do not specify the time limit for the obligations referred to in paragraph (1), then the Government Agency and Officials are required to determine and carry out a decision and action within a maximum period of 10 (ten) working days after the Agency and Government Official receive the complete application.

If within the time limit in paragraph (2), the Government Agency and Official does not stipulate and carry out a Decision and Action. Then the application is considered legally granted. Based on the provisions above, it is known that the Public Administration Law stipulates a 10-day time limit for government officials to process community requests. If the deadline has passed, and the official has not decided on the application submitted, then the application is deemed to have been granted according to Law. Furthermore, in order to provide legal certainty regarding the legally granted (fictitious positive) decision, the Public Administration Law stipulates that the applicant must apply to the Administrative Court to obtain a positive fictitious decision following the provisions of Article 53 paragraph (4), and in paragraph (5) stipulates that Administrative Court must terminate within 21 working days from the time the application is received (Primary 2020).

Regarding the filing of a Positive Fictitious State Administrative Decision application, the Supreme Court, through Perma No.5/2015, which was subsequently repealed by Perma No.8/2017 concerning Guidelines for Procedures to Obtain Decisions on the Acceptance of Applications to Obtain Decisions and Actions by Government Bodies/Officials, has regulated regarding the said application procedure. In Perma 8/2017, applications may not be accepted if: the application does not meet the formal requirements, the applicant does not have legal standing, or the court is



incompetent. Furthermore, the application is rejected if the reason for the application is not based on Law. The criteria for applications to obtain decisions and actions of government agencies/officials are Applications within the scope of authority of government agencies and officials; Requests for decisions and actions to carry out government functions; Requests for decisions and actions that have never been determined and carried out by government agencies and officials; and Application for the benefit of the applicant directly. Meanwhile, the application is considered invalid if the Petitioner does not appear at the trial twice in a row at the first and second sessions without a valid reason or if the Petitioner is not serious (Admin 2019).

1. Positive Fiction After the Job Creation Law

Afterward, observing the impact of Article 175 point 6 of the Job Creation Law, it turns out that the content material changes several positive fictitious regulations as reviewed above. First, the time limit for silence for administrative bodies or officials, originally set at ten days in the Public Administration Law to be considered positive fictitious, was changed to 5 days in the Ciptaker Law. The full rules state as follows: (2) If the provisions of the laws and regulations do not specify the time limit for the obligations referred to in paragraph (1), then the Government Agency and officials are obliged to determine and a decision and action within 5 (five) working days after the Agency and Government Official receive the complete application. In the author's opinion, cutting time to be faster is a good thing because it means giving responsibility to agencies or administrative officials to work more quickly in public services. However, it should also be realized that cutting time, on the other hand, will harm by reducing the quality of examining the requirements of a submitted application because the government will rush to decide with a deadline of only five days from the date the application is received. Second, Article 157, point 6 of the Job Creation Law also deletes paragraphs (4), (5) of article 53 of



the Public Administration Law, which regulates the mechanism for requesting a positive fictitious determination through the Administrative Court.

This means that in the future, positive fictitious decisions will no longer need to be submitted to the Administrative Court to obtain a decision. Indirectly, this impacts the absolute authority of the State Administrative Court in deciding positive fictitious applications to be lost with the enactment of the Job Copyright Law. In the author's opinion, eliminating the Administrative Court's role in deciding positive fiction is wrong. Because here, it means that the legislator eliminates the judicial body's control mechanism over government actions that ignore a request addressed to him (administrative inaction), be unresponsive, process a protracted request (delaying services), and so on that are identical to matters -things that are included in the category of maladministration. In addition to eliminating the involvement of the Administrative Court, which "produces" positive fictitious decisions, it seems as if this fictitious positive is a type of "half-life" administrative decision because its existence is acknowledged but left unchecked without clear evidence of legality, of course, this will cause uncertainty in its execution so that will harm society.

2. Positive Fiction After the Job Creation Law Ratio Legis of Authority to Adjudicate Positive Fictitious Cases in Laws and Regulations

After the changes/amendments were made, Article 24 of the 1945 Constitution of the Republic of Indonesia stipulates: (1) Judicial Power is an independent power to administer justice in order to uphold Law and justice; (2) Judicial power is exercised by a Supreme Court and judicial bodies under it in the General Court environment, the Military Court environment, the State Administrative Court environment and by a Constitutional Court (Wiyono 2008).



The State Administrative Court is a court that has the authority to examine, adjudicate and decide on state administrative disputes. Article 1 point 10 Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning the State Administrative Court (after this referred to as the State Administrative Court Law) states that: State Administrative Disputes are disputes arising in the field of state administration between individuals or civil legal entities and state administration bodies or officials, both at the Central and Regional levels, as a result of the issuance of state administration decisions, including employment disputes based on applicable laws and regulations. The State Administrative Court Law is a source of material law from state administrative law and a formal legal source from the procedural Law of the State Administrative Court. Articles 1 to 52 are material laws governing state administrative law, and Articles 53 to 145 are formal laws governing procedural Law of the State Administrative Court. The establishment of the State Administrative Court through the State Administrative Court Law is expected to balance the interests of the government and the interests of the community. This balance of interests can be achieved by upholding government administrative law. This balance is accommodated in the State Administrative Court by allowing citizens to review government decisions deemed detrimental to the interests of citizens. With this test, if the court grants the citizen's lawsuit, the government will be able to correct the government's actions that it carries out (Yuslim 2015).

The State Administrative Court Law also regulates state administrative law (material), including regulating State Administrative Decisions and procedures, so that the State Administrative Court Law provides an opportunity for individuals or civil law entities to obtain justice from administrative decisions. Countries that are considered detrimental to society. A State Administrative Agency or Officer issues this decision;



anyone and anything based on applicable laws and regulations have the authority to carry out a field of government affairs, then he can be considered as having a position as a State Administrative Agency or Officer (Indroharto 1993).

The nature of the establishment of the State Administrative Court is intended to provide legal protection to citizens from the possibility of abuse of authority or arbitrary actions by the government. In addition, the preamble to the State Administrative Court Law states that the establishment of the State Administrative Court Law took into account several considerations, namely:

- 1) With the existence of the State Administrative Court Law, it is hoped that the State will be able to create a life system for the life of the State and nation that is prosperous, safe, peaceful, and orderly, which guarantees equality of position of citizens in the Law, and which guarantees the maintenance of harmonious, balanced relations, as well as harmony between apparatus in the field of State Administration and community members;
- 2) With the existence of the State Administrative Court Law, it is hoped that apparatus in the field of State Administration will be able to become efficient, effective, clean, and authoritative tools, and that, in carrying out their duties, is always based on the Law based on the spirit and attitude of community service;
- 3) With the existence of the State Administrative Court Law, it is hoped that all conflicts of interest, disputes, or disputes between State Administrative Agencies or Officials and members of the public that can harm or hinder the course of national development can be resolved in the fairest way possible through the State Administrative Court;



- 4) With the existence of the State Administrative Court Law, it is hoped that the State Administrative Court will be able to uphold justice, truth, order, and legal certainty, so that it can protect the community, especially in the relationship between State Administrative Agencies or Officials and the community.

Based on these considerations, the State Administrative Court has the authority to examine, decide and resolve disputes whose object is State Administrative Decisions. Decisions that are the object of dispute in the State Administrative Court are regulated in Articles 1 to 52 of the Law on State Administrative Courts because these laws also act as material Law. Issuance of said State Administrative Decree is an administrative action carried out by a State Administrative Agency or Official. As a public servant serving the community in the administrative field, every administration of a State Administration Agency/ official in making decisions is what is meant by government administration.

In the implementation of government administration, various obstacles have been experienced by the government so far. The constraints referred to include the rapid development of technology, public demands for access to information to be as wide open as possible, the need to set service standards, the need to provide legal protection for the community, the need for legal rules governing legal relations between state administration administrators and society. These matters require forming new regulations that can be accommodated as a legal basis for acting for every government administrative apparatus. Administrative Law of the State is closely related to the power and activities of the authorities carried out, hence the birth of state administrative law. In other words, state administrative law, like state constitutional law, is closely related to issues of power (administrative Law deals with one aspect of the problem of power). Considering that the State is an organization of power (*machtenorganisatie*), in the end,



state administrative law will emerge as an instrument to oversee the use of government power. Thus, the existence of state administrative law arises because of the implementation of State and governmental power in a rule of Law, which demands and requires the implementation of state, governmental, and social tasks based on Law. (H.R 2011)

In addition, in the preamble to the Government Administration Law, several considerations were stated as the reason for the formation of the Government Administration Law, namely:

- 1) The Government Administration Law is expected to improve the quality of government administration. Government agencies and officials, in exercising their authority, must refer to the general principles of good governance based on the provisions of laws and regulations;
- 2) The Government Administration Law is expected to be able to solve problems in government administration; regulations regarding government administration are expected to be a solution in providing legal protection, both for citizens and government officials;
- 3) The Government Administration Law is expected to create good governance, especially for government officials; the Law on government administration becomes the legal basis needed to base government officials' decisions and actions to meet society's legal needs in administering government;

Based on these considerations, on October 17, 2014, Law Number 30 of 2014 concerning Government Administration was enacted (after this, referred to as the Government Administration Law). Article 3 of the Government Administration Law states that the purpose of forming a Government Administration Law is:



- 1) to create an orderly administration of government administration;
- 2) create legal certainty;
- 3) prevent abuse of authority;
- 4) guarantee the accountability of Government Agencies and Officials;
- 5) provide legal protection to community members and government officials;
- 6) implement the provisions of laws and regulations and apply the general principles of good government; and:
- 7) provide the best possible service to the community.

The Government Administration Law regulates the legal relationship between government administration bodies or officials and the public in public Law. This Law stipulates boundaries and rules that contain the obligations and rights of both parties (government administration bodies or officials and the community). This Government Administration Law is an important regulator of the bureaucratic reform process because it emphasizes government management so that it can properly carry out its main functions (Dewi and Yudanto 2017).

Lawsuits against violations of the provisions of this Law can be submitted to the State Administrative Court. The Government Administration Law regulates the orderly administration of government in running the government, including regulating decisions and procedures. So that in the context of law enforcement in the field of state administration, this Government Administration Law also becomes a new basis for the State Administrative Court in examining State Administrative disputes; this is because the Government Administration Law also regulates the object of dispute in the State Administrative Court namely State Administrative Decision, applications that are silenced by the State Administrative Agency or Officials, filing lawsuits through



administrative efforts, (procedures). As is known, that provision has also been previously regulated in the State Administrative Court Law. The enactment of the Government Administration Law makes State administrative law move towards a new paradigm, so alignment is needed with the procedural Law of the State Administrative Court to create synchronization and harmonization in Indonesian laws and regulations. The implementation of synchronization and harmonization of laws and regulations in Indonesia is already an urgent need because issues of legal development increasingly require a more comprehensive approach.

Another difference from the work copyright law, which is the background for forming this Law, is that too many regulations have been made, creating problems, such as overlapping regulations. As a result, it has led to several policy or authority conflicts between one ministry/agency and other ministries/agencies, and also between the Central Government and Regional Governments. These overlapping regulations ultimately have an impact on hampering the implementation of development programs and worsening the investment climate in Indonesia. Thus, the accelerated development program and improving people's welfare are difficult to achieve.

At the same time, the challenges of the era of the digital society ecosystem are also growing, and Indonesia can no longer be entangled in formal procedures. Based on this, the only way is to simplify and, at the same time, standardize regulations quickly, namely through the Omnibus Law scheme.



Conclusion

The regulatory framework (at the low level) in the field of government administration is still in quite an apprehensive condition. Based on the search conducted by the author of the article in the government administration law regarding positive fiction, which was amended in the work copyright law, it experienced many setbacks and not only has the potential to open up loopholes for injustice but also a legal vacuum and the blurring of legal certainty. Departing from this, implementing the order of laws and regulations in the field of government administration also illustrates the ineffectiveness and lack of benefits obtained by the Indonesian people in the field of positive fiction. When viewed from the perspective of the purpose of Law to provide certainty, justice, and benefit, the current arrangement of laws and regulations is still too far from the expected results. Therefore, improvements are needed, and even breakthroughs in the Indonesian legal system, especially in the field of positive fiction.

Recommendation

It is necessary to reform the current legal system to overcome the problems that occur in it. The large number of regulations that lead to overlap and disharmony starts from the normative level to difficulties in implementing the general principles of good governance. Therefore, reforming the legal system in the field of positive fiction must be carried out carefully and involve all the necessary components to produce a good and progressive legal system.



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