

Administrative Silence in Indonesia: Negative or Positive Legal Fiction?

Keheningan Administratif di Indonesia: Fiktif Negatif atau Fiktif Positif?

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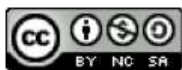
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Abstract

The Government Administration Act introduced the positive legal-fiction model, apparently to replace the negative legal-fiction model under the State Administrative Courts Act. However, this regulatory choice has generated legal controversy because it did not fully achieve that objective. As a result, the positive and negative legal-fiction models now coexist without a clear hierarchy or priority of application. This article examines the legal controversy arising from the adoption of these two models in different statutes. The issue is broader than a mere conflict between statutes because it concerns the legal consequences of administrative silence in administrative decision-making generally. This research employs a doctrinal legal method. It finds that the Government Administration Act and the State Administrative Courts Act regulate distinct subject matters; therefore, the positive legal-fiction model does not automatically revoke or supersede the negative legal-fiction model. Consequently, administrative silence in Indonesia may be treated under either the negative or the positive legal-fiction model, meaning that it may be deemed either a rejection or an approval of an application. A future General Administrative Law Act or General Administrative Procedure Act should adopt either the negative or the positive legal-fiction model as the general rule, with any exceptions expressly stipulated by law.

Abstrak

Undang-Undang Administrasi Pemerintahan memperkenalkan model fiktif positif yang tampaknya dimaksudkan untuk menggantikan model fiktif negatif dalam Undang-Undang Peradilan Tata Usaha Negara. Namun, pengaturan tersebut menimbulkan kontroversi hukum karena tidak sepenuhnya mencapai tujuan tersebut. Akibatnya, model fiktif positif dan fiktif negatif kini berlaku berdampingan tanpa hierarki atau prioritas penerapan yang jelas. Penelitian ini mengkaji kontroversi hukum yang timbul dari adopsi kedua model tersebut dalam dua undang-undang yang berbeda. Persoalan ini lebih luas daripada sekadar konflik antarundang-undang karena menyangkut akibat hukum dari keheningan administratif dalam pengambilan keputusan administrasi pemerintahan secara umum. Penelitian ini menggunakan metode penelitian hukum doktrinal. Hasil penelitian menunjukkan bahwa Undang-Undang Administrasi Pemerintahan dan Undang-Undang Peradilan Tata Usaha Negara mengatur materi muatan yang berbeda; oleh karena itu, model fiktif positif tidak secara otomatis mencabut atau mengesampingkan model fiktif negatif. Konsekuensinya, keheningan administratif di Indonesia dapat diperlakukan berdasarkan model fiktif negatif maupun fiktif positif, sehingga dapat dianggap sebagai penolakan atau persetujuan atas suatu permohonan. Undang-Undang Hukum Administrasi Umum atau Undang-Undang Prosedur Administrasi Umum pada masa mendatang sebaiknya mengadopsi salah satu model sebagai aturan umum, yaitu model fiktif negatif atau fiktif positif, dengan pengecualian yang dinyatakan secara tegas dalam undang-undang.



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A. INTRODUCTION

1. Background

Administrative silence occurs when an administrative body fails to respond to an application for the issuance of an administrative decision within the statutory deadline.¹ In such situations, the law creates a fiction that the administrative body has either rejected the application, under the negative legal-fiction model, or approved it, under the positive legal-fiction model. Under the negative legal-fiction model, administrative silence is treated as a tacit rejection of the application, thereby entitling the applicant to file a lawsuit in an administrative court.² Under the positive legal-fiction model, administrative silence is treated as tacit approval, thereby deeming the application approved and allowing the applicant to proceed with the relevant activity.³

The law may adopt either the negative or the positive legal-fiction model to address administrative silence, depending on the circumstances. However, if no statutory provision classifies administrative silence under either model, administrative silence constitutes legal non-compliance by the administrative body.⁴ The negative legal-fiction model is adopted in Law No. 5 of 1986 on State Administrative Courts (hereinafter the State Administrative Courts Act). Article 3 of the State Administrative Courts Act provides that if an administrative body fails to issue the requested administrative decision within the time limit prescribed by law, it is deemed to have refused to issue the decision. The positive legal-fiction model is adopted in Government Regulation No. 27/1999 on Environmental Impact Assessment (hereinafter the EIA Government Regulation). Article 16, paragraph (3), of the EIA Government Regulation provides that if the responsible agency fails to issue a decision within the time limit set out in paragraph (2), it is deemed to have accepted the terms of reference. The positive legal-fiction model was later adopted in Law No. 30 of 2014 on Government Administration (hereinafter the Government Administration Act). Article 53 of the Government Administration Act provides that if an administrative body fails to issue a decision within the statutory time limit, the application is considered legally granted.

¹ Lenka Jančová, Meenakshi Fernandes, and Anne Meuwese, *Digitalisation and Administrative Law: European Added Value Assessment* (Brussels: European Parliament, November 2022), 15, [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/730350/EPRS_STU\(2022\)730350_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/730350/EPRS_STU(2022)730350_EN.pdf).

² Gordon Anthony, "Administrative Silence and UK Public Law," accessed March 14, 2025, https://revcurentjur.ro/old/arhiva/attachments_200834/recjurid083_43F.pdf.

³ Jowanka Jakubek-Lalik, "Administrative Silence as the Challenge in Regulation of Administrative Proceedings: Best Practices and Successful Measures Adopted by Selected EU Countries in the Context of Ukrainian Law 'On Administrative Procedure,'" *Problems of Legality*, no. 163 (December 28, 2023): 167, <https://doi.org/10.21564/2414-990x.163.294425>.

⁴ Vera Parisio, "The Italian Administrative Procedure Act and Public Authorities' Silence," *Hamline Law Review* 36, no. 1 (2013): 9, <https://digitalcommons.hamline.edu/cgi/viewcontent.cgi?article=1005&context=hlr>

The Government Administration Act appears not only to replace the negative legal-fiction model under the State Administrative Courts Act with a positive legal-fiction model, but also to replace the lawsuit-based dispute mechanism with a petition-based mechanism.⁵ Under the State Administrative Courts Act, the negative legal-fiction model gives the applicant the right to sue the administrative body deemed to have refused to issue the requested administrative decision. By contrast, under the Government Administration Act, the positive legal-fiction model gives the applicant the right to petition the administrative court to obtain the requested administrative decision. The shift from the negative legal-fiction model under the State Administrative Courts Act to the positive legal-fiction model under the Government Administration Act aims to improve public-service quality as part of bureaucratic reform.⁶ The applicant should not bear the consequences of the administrative body's fault; therefore, administrative silence should be deemed approval of the application, and the applicant should be entitled to carry out the relevant activity.

However, the paradigm shift from the negative to the positive legal-fiction model has generated legal controversy in administrative-court proceedings. The controversy concerns whether the shift applies to all types of decisions, including environmental and business-sector decisions, or whether certain decisions remain subject to the negative legal-fiction model while others are governed by the positive legal-fiction model. It also concerns whether the positive legal-fiction model under the Government Administration Act completely replaces the negative legal-fiction model under the State Administrative Courts Act.

In administrative-court practice, the Supreme Court, through Supreme Court Circular Letter No. 2 of 2024 concerning the Implementation of the Formulation Results of the Plenary Meeting of the Supreme Court Chamber in 2024 as Guidelines for the Implementation of Duties for Courts (hereinafter Circular Letter No. 2 of 2024), states that administrative silence in an application for inclusion in the Minerba One Data Indonesia list (hereinafter MODI) constitutes a refusal to issue a decision pursuant to Article 3 of the State Administrative Courts Act.⁷ Based on Circular Letter No. 2 of 2024, the Supreme Court does not automatically interpret administrative silence under the positive legal-fiction model of the Government Administration Act, but instead treats it under the negative legal-fiction model of the State Administrative Courts Act.

⁵ Umar Dani, "Irregularity Protection of Citizens' Constitutional Rights to the Administrative Silence," *Jurnal Konstitusi* 20, no. 3 (September 1, 2023): 456, <https://doi.org/10.31078/jk2035>.

⁶ Bambang Heriyanto, "Problematisa Penyelesaian Perkara 'Fiktif Positif' di Pengadilan Tata Usaha Negara," *Pakuan Law Review* 5, no. 1 (2019): 41, <https://doi.org/10.33751/palar.v5i1.1185>.

⁷ Mahkamah Agung Republik Indonesia, *Surat Edaran Mahkamah Agung Nomor 2 Tahun 2024 tentang Pemberlakuan Hasil Rumusan Rapat Pleno Kamar Mahkamah Agung Tahun 2024 sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan* (2024), <https://jdih.mahkamahagung.go.id/legal-product/sema-nomor-2-tahun-2024/detail>.

The adoption of the negative legal-fiction model under the State Administrative Courts Act and the positive legal-fiction model under the Government Administration Act within the same regulatory framework raises the question of which model should take priority in cases of administrative silence. In concrete cases, administrative courts struggle to justify the application of either model because existing laws do not provide a clear legal basis. Disputing parties invoke arguments based on negative or positive legal fiction according to their respective perspectives and interests. This uncertainty illustrates the consequences of adopting both models imprecisely.

Previous research on the principle of administrative silence by Pranoto and Sudarmanto found that the positive legal-fiction principle under Law No. 11 of 2020 concerning Job Creation, viewed from the perspective of the prophetic paradigm, created injustice and legal uncertainty.⁸ Wicaksono, Hantoro, and Kurniawan found that the adoption of the positive legal-fiction model in the Government Administration Act contributed to debate over the ambiguity of its formulation in that Act. They also found that the adoption of the positive legal-fiction model in Law No. 11 of 2020 concerning Job Creation resulted in the loss of administrative courts' jurisdiction to hear applications concerning positive fictitious decisions, because such fiction is deemed legally granted without an administrative court decision, thereby creating legal uncertainty.⁹ Syamsu and Fauzi found that, for the sake of efficiency and effectiveness in resolving positive fictitious disputes, the mechanism for requesting opposition to a positive fictitious decision under the Government Administration Act should be used.¹⁰ Dewi Cahyandari states that the right to seek review of positive fictitious cases before the enactment of Law No. 11 of 2020 concerning Job Creation remains within the scope of legal certainty for legal subjects whose legal relations are based on administrative court decisions.¹¹ Aditya and Al-Fatih found that Law No. 11 of 2020 on Job Creation abolished administrative courts' jurisdiction to hear petitions for positive fictitious decisions, even though the scope of administrative decisions extends beyond written decisions to include administrative silence.¹²

⁸ Edi Pranoto and Kukuh Sudarmanto, "The Positive Fictional Principle after the Implementation of the Job Creation Law: A Prophetic Legal Paradigm," *Jurnal IUS Kajian Hukum dan Keadilan* 11, no. 1 (April 1, 2023): 56, <https://doi.org/10.29303/ius.v11i1.1168>.

⁹ Dian Agung Wicaksono, Bimo Fajar Hantoro, and Dedy Kurniawan, "Quo Vadis Pengaturan Kewenangan Pengadilan Tata Usaha Negara dalam Penerimaan Permohonan Fiktif Positif Pasca Penataan Regulasi dalam Undang-Undang Cipta Kerja," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 10, no. 2 (August 2021): 334.

¹⁰ Syamsir Syamsu and Muhammad Alifian Geraldi Fauzi, "Meaning and Follow Up of Positive Fictional Decisions According to the Government Administration Law," *Fiat Justisia: Jurnal Ilmu Hukum* 15, no. 2 (April 7, 2021): 203, <https://doi.org/10.25041/fiatjustisia.v15no2.2297>.

¹¹ Dewi Cahyandari, "The Good Governance Principle in Fictitious-Positive Case Applications after the Job Creation Law," *Yustisia Jurnal Hukum* 12, no. 1 (April 2023): 90–91.

¹² Zaka Firma Aditya and Sholahuddin Al-Fatih, "Redesign of Positive Fictitious Efforts after the Job Creation Law," *Jurnal Konstitusi* 20, no. 2 (June 1, 2023): 355, <https://doi.org/10.31078/jk2029>.

This study addresses a problem different from those examined in previous studies. It finds that the adoption of negative and positive legal-fiction models in two statutes within the same regulatory framework requires legal reform to eliminate contradictions in their application to administrative silence.

2. Research Questions

Based on the foregoing background, this study examines which legal-fiction model should be adopted as the general rule for administrative silence, and how its adoption can avoid contradictions between the negative and positive models.

3. Research Methods

To answer the research question, this study uses doctrinal legal research. Doctrinal legal research systematically explains what the law is in relation to administrative silence. This corresponds to the function of doctrinal legal research, namely to identify the law in a particular field.¹³ Doctrinal legal research involves formulating legal problems, collecting and analyzing legal sources, and applying that analysis to answer the formulated legal issues. The legal sources used in this study consist of authoritative legal sources, including legislation and case law, and secondary legal sources, including non-authoritative legal publications relevant to the research problem. The results provide prescriptions regarding administrative silence, framed under either the positive or the negative legal-fiction model. This follows from the function of doctrinal legal research, which is to prescribe what the law is in a particular case.¹⁴

B. DISCUSSION AND ANALYSIS

1. Legal Fiction of Administrative Silence

Administrative silence is a factual condition in which an administrative body fails to respond to a request for an administrative decision, meaning that it neither approves nor rejects the request within the statutory deadline. In this situation, the law treats silence as a decision either to reject the request, known as a negative fictitious decision, or to grant it, known as a positive fictitious decision. Whether the silence results from intent or negligence is legally irrelevant. In reality, the administrative body does not issue a decision granting or rejecting the request before the statutory time limit expires. This silence gives rise to a legal fiction under which the administrative body's silence is deemed either a refusal to

¹³ William Hamilton Byrne and Henrik Palmer Olsen, "Doctrinal Legal Science: A Science of Its Own?," *Canadian Journal of Law and Jurisprudence* 37, no. 2 (August 2024): 347, <https://doi.org/10.1017/cjlj.2024.16>.

¹⁴ Gareth Davies, "The Relationship between Empirical Legal Studies and Doctrinal Legal Research," *Erasmus Law Review* 13, no. 2 (June 2, 2020): 8, <https://doi.org/10.5553/elr.000141>.

issue an administrative decision, under the negative legal-fiction model, or an approval of the requested decision, under the positive legal-fiction model, depending on the law that adopts the relevant fiction. The law may adopt administrative silence as either a negative or a positive legal-fiction model, depending on the objective it seeks to achieve.

Fiction is a statement that is false or contains false statements.¹⁵ In his well-known work *Legal Fiction*, Fuller defines fiction as (1) a declaration made with full or partial awareness of its falsity, or (2) a false declaration that is purported to have utility.¹⁶ Fiction is false from the outset, but it is deliberately constructed because it serves a purpose in resolving a particular problem. From a legal perspective, a legal fiction is a knowingly false hypothesis imposed by law and cannot be rejected.¹⁷ Legal fiction refers to something that the law recognizes as false but accepts as factual because it is necessary to resolve a particular legal case. It is a fact that law assumes to be true, even though it is not, for the purpose of resolving a legal case.¹⁸ Legal fiction is also a false presumption of fact created by law as the basis for resolving a particular legal case, with the purpose of adjusting the outcome of that case to the applicable law.¹⁹ A well-known legal fiction is the maxim that everyone knows the law. This statement is plainly false; even judges and lawyers do not necessarily know all laws, yet the maxim is treated as a legal fiction.

Legal fiction continues to develop as new legal cases arise. This means that law may create new legal fictions as new legal cases emerge. A court introduces a new legal fiction when (1) it makes ostensibly factual assumptions as a basis for creating or modifying legal rules, or for refusing to modify existing legal rules; and (2) those factual assumptions are descriptively inappropriate.²⁰

Legal fiction exists in all areas of law, including administrative law. One example in administrative law is the principle of *praesumptio iustae causa*, under which an administrative decision is presumed valid until it is annulled.²¹ This is a legal fiction because not every administrative decision is valid, yet it is presumed valid unless and until it is overturned.

¹⁵ Constantin Luft, "What's in a Name? Legal Fictions and Philosophical Fictionalism," *Law and Literature* (2024): 12, <https://doi.org/10.1080/1535685X.2024.2354043>.

¹⁶ John W. F. Allison, "Current Legal Fictions in Public Law," *Current Legal Problems* 77, no. 1 (2024): 418, <https://doi.org/10.1093/clp/cuae013>.

¹⁷ Manish Oza, "Fictions in Legal Reasoning," *Dialogue: Canadian Philosophical Review* 61, no. 3 (December 1, 2022): 452, <https://doi.org/10.1017/S0012217322000312>.

¹⁸ Parita Mashruwala, "Legal Fictions: Do They Fit the Juristic Reality?," *International Journal of Legal Science and Innovation* 2, no. 3 (2020): 76, <https://www.vidhiaagaz.com>.

¹⁹ Ian Randall Kerr, "Legal Fiction" (thesis, Faculty of Graduate Studies, The University of Western Ontario, 1995), 2, <https://ir.lib.uwo.ca/digitizedtheses/2526>.

²⁰ Peter J. Smith, "New Legal Fictions," *The Georgetown Law Journal* 95 (2007): 1441, https://scholarship.law.gwu.edu/faculty_publications.

²¹ Katerina Frumarová, "Nullity and Other Defects of Administrative Decisions in the Czech Republic," *Baltic Journal of European Studies* 5, no. 2 (October 1, 2015): 73, <https://doi.org/10.1515/bjes-2015-0014>.

Administrative silence is also a fiction in administrative law because it is treated as meaning that an administrative body has either issued or rejected an administrative decision, even though, in fact, the administrative body has not responded to the application for that decision. Administrative silence includes negative silence, which results in rejection of the application, and positive silence, which results in approval.²² The refusal or approval is only a presumption because the administrative body does not actually decide the request; it is therefore a legal fiction.

In simple terms, administrative silence is the failure of an administrative body to fulfill its obligation to act.²³ More specifically, it is the failure to act within a prescribed time limit.²⁴ Administrative silence occurs when an administrative body fails to exercise its authority to issue the requested administrative decision within the period established by law.

Administrative silence in relation to applications for administrative decisions has implications under both the negative and positive legal-fiction models.²⁵ Under the negative legal-fiction model, if an administrative body fails to decide an application for the issuance of an administrative decision within the time limit established by law, the application is deemed negatively resolved, meaning that it is rejected.²⁶ This model does not alter the existing legal circumstances, and the applicant is not entitled to carry out the relevant activity. As a result, the applicant may suffer losses in terms of effort, time, and cost. Under the negative legal-fiction model, the risk of administrative silence is borne by the applicant. However, this model may prevent erroneous approvals caused by incomplete or deliberately manipulated documents. Under the positive legal-fiction model, if an administrative body fails to decide an application for the issuance of an administrative decision within the time limit established by law, the request is deemed positively resolved, meaning that it is approved.²⁷ This model creates a new legal circumstance in which the applicant is entitled

²² Thiago Marrara, "What Does the Silence of the Public Administration Mean? Decision Duty, Administrative Silence, and Tacit Consent," *Administrative Law Review* 280, no. 2 (2021): 227–64, <https://periodicos.fgv.br/rda/article/download/84496/80433>.

²³ Agata Jurkowska-Gomułka, Kamilla Kurczewska, and Katarzyna Kurzępa-Dedo, "Understanding Administrative Silence: A View of Public Officers from the Subcarpathia," *Public Administration Issues*, no. II (January 2020): 99, <https://doi.org/10.17323/1999-5431-2020-0-6-98-117>.

²⁴ Republic of Latvia Supreme Court Senate and ACA-Europe, *Seminar Organized by the Supreme Court of the Republic of Latvia in Cooperation with ACA-Europe: The Judge and Inert Administration—Administrative Discretionary Power* (Riga, April 27, 2023), 16, https://aca-europe.eu/seminars/2023_Riga/2023_Riga_General_Report_en.pdf.

²⁵ Republic of Latvia Supreme Court Senate and ACA-Europe, *Seminar Organized by the Supreme Court of the Republic of Latvia in Cooperation with ACA-Europe: Questionnaire—The Judge and Inert Administration, Administrative Discretionary Power: Netherlands* (Riga, April 27, 2023), 1, https://www.aca-europe.eu/seminars/2023_Riga/Netherlands.pdf.

²⁶ Bojan Blagojević, "Legal Protection against Administrative Silence," *Facta Universitatis, Series: Law and Politics* 19, no. 2 (2022): 151–62, <https://doi.org/10.22190/fulp2102151b>.

²⁷ Blagojević, "Legal Protection against Administrative Silence."

to carry out the relevant activity. Under the positive legal-fiction model, the risks arising from administrative silence are borne by the administrative body vested with the authority to issue the administrative decision. The positive legal-fiction model provides significant benefits in the relationship between administrative bodies and individuals because it requires administrative bodies to respond when performing public-service functions. It therefore supports efficient public service oriented toward fulfilling citizens' needs.²⁸ However, the positive legal-fiction model may be dangerous if applicants submit incomplete or manipulated documents and the administrative body deliberately remains silent, thereby causing the application to be deemed approved. This creates risks for the public.

Overall, the negative and positive legal-fiction models differ in the following respects.²⁹

Table 1. Characteristics of the Negative and Positive Legal-Fiction Models

	Negative Legal-Fiction Model	Positive Legal-Fiction Model
Social background	Balances conflicting interests in administrative decision-making and emphasizes the public interest.	Accelerates bureaucratic processes and emphasizes business orientation, deregulation, and legal certainty.
Legal background	Emphasizes the administrative body's accountability and exclusive authority; therefore, an in-depth review is required to ensure that the requirements for granting rights have been met.	Emphasizes the principle that the burden of administrative inactivity should not be placed on the applicant; therefore, any application that is not rejected before the deadline expires is deemed approved.
Basic characteristics	The administrative body's failure to observe the statutory time limit results in the application being rejected. The applicant may file a lawsuit in the Administrative Court to seek an order requiring the competent authority to act.	The administrative body's failure to observe the statutory time limit results in the application being deemed approved and the claimed right being granted. However, a subsequent procedure is required to obtain evidence that the application has been approved.

²⁸ Agata Jurkowska-Gomułka et al., "Administrative Silence: A Polish Perspective," in *The Sound of Silence in European Administrative Law*, ed. D. C. Dragos, P. Kovač, and H. D. Tolsma (London: Palgrave Macmillan, 2020), 436, https://doi.org/10.1007/978-3-030-45227-8_14.

²⁹ Blagojević, "Legal Protection against Administrative Silence," 154.

	Negative Legal-Fiction Model	Positive Legal-Fiction Model
Exceptions	In systems dominated by the negative legal-fiction model, exceptions for certain sectoral decisions are based on the positive legal-fiction model.	Exceptions apply to sensitive decisions for which tacit consent is considered risky, such as decisions concerning public finance, the environment, social issues, spatial planning, international obligations, and other matters.
Advantages	Some legal systems have a long tradition of using the negative legal-fiction model. Under this model, there is no risk that public-interest and third-party interests will be overlooked in decision-making.	This model encourages administrative bodies to comply with prescribed time limits by subjecting them to the threat of liability.
Disadvantages	This model may delay decisions, justify administrative inactivity, equate silence arising from objective and subjective reasons, and allow administrative bodies to remain deliberately silent in order to shift responsibility to the court.	This model may recognize rights without sufficient regard for the public interest, create corruption risks and reliance on incomplete required documents, and potentially enable collusion between the administrative body and the applicant when the application does not meet the legal requirements.

Source: *Bojan Blagojević, 2022.*

2. Indonesian Case

In Indonesia, the negative legal-fiction model is adopted under the State Administrative Courts Act, while the positive legal-fiction model is adopted under the Government Administration Act. These two Acts adopt different paradigms for interpreting administrative silence.³⁰ The introduction of the positive legal-fiction model in the Government Administration Act is considered a significant legal breakthrough, because the State

³⁰ I Gusti Ngurah Wairocana et al., "Kendala dan Cara Hakim Peradilan Tata Usaha Negara Pasca UU Administrasi Pemerintahan: Suatu Pendekatan atas Penanganan Perkara Fiktif Positif," *Jurnal Hukum & Pembangunan* 50, no. 3 (2020): 565, <https://doi.org/10.21143/jhp.vol50.no3.2590>.

Administrative Courts Act had previously applied the negative legal-fiction model.³¹ The positive legal-fiction model encourages the government to process applications for administrative decisions more quickly, allowing applicants to obtain certainty about decision outcomes sooner and with fewer complications, in line with bureaucratic reform aimed at improving public services. The positive legal-fiction model also requires administrative bodies to be more responsive to public requests for administrative decisions.³²

The adoption of the positive legal-fiction model in the Government Administration Act has been said to invalidate the negative legal-fiction model under the State Administrative Courts Act based on the principle of *lex posterior derogat legi priori*.³³ The negative legal-fiction model under the State Administrative Courts Act is therefore considered no longer valid, even though the Government Administration Act does not expressly revoke it.³⁴ Did the negative legal-fiction model “die” after the promulgation of the Government Administration Act? Not necessarily. The Supreme Court, pursuant to Circular Letter No. 2 of 2024, “reactivated” the negative legal-fiction model adopted in the State Administrative Courts Act. Circular Letter No. 2 of 2024 states that an administrative body’s silence regarding an application for inclusion in the MODI list constitutes a rejection of the decision under Article 3, Paragraph (1), of the State Administrative Courts Act.³⁵

The use of the principle of *lex posterior derogat legi priori* to conclude that the negative legal-fiction model has been repealed by the positive legal-fiction model must be examined legally. The application of *lex posterior derogat legi priori*, meaning that newer legal rules supersede earlier legal rules, requires that (1) the two legal rules have the same hierarchical status;³⁶ and (2) the two legal rules regulate the same subject matter. The first condition is met because the State Administrative Courts Act and the Government Administration Act have the same hierarchical status. As to the second condition, do the State Administrative Courts Act and the Government Administration Act regulate the same subject matter? The Government Administration Act is neither a law on administrative courts

³¹ Muhammad Yasin et al., *Anotasi Undang-Undang No. 30 Tahun 2014 tentang Administrasi Pemerintahan* (Jakarta, 2017), x, <https://www.menpan.go.id/site/download/category/311-anotasi-undang-undang-no-30-tahun-2014-tentang-administrasi-pemerintahan>.

³² Yasin et al., *Anotasi Undang-Undang No. 30 Tahun 2014*, 201.

³³ Erlin Triartha Yuliani, “Perbandingan antara Konsep Fiktif Negatif dalam Undang-Undang No. 5 Tahun 1986 tentang Peradilan Tata Usaha Negara dengan Fiktif Positif dalam Undang-Undang No. 30 Tahun 2004 tentang Administrasi Pemerintahan,” *University of Bengkulu Law Journal* 5, no. 1 (April 2020): 10, <https://ejournal.unib.ac.id/ubelaj/article/view/7775>.

³⁴ Bitu Gadsia Spaltani, “Rekonsepsi Keputusan Fiktif Positif Pasca Undang-Undang Cipta Kerja,” *Jurnal Hukum dan Administrasi Publik* 2, no. 2 (2024): 93, <https://doi.org/10.61813/jhap.v2i2.121>.

³⁵ Panca Yuniur Utomo, “Diskusi Reboan PTUN Bandung: Fiktif Negatif, Aktif Kembali,” January 2, 2025, <https://marinews.mahkamahagung.go.id/berita/diskusi-reboan-ptun-bandung-fiktif-negatif-aktif-kembali-0u>.

³⁶ Kelik Iswandi, “Supreme Court’s Legal Advice: Limits, Procedures, and Need for Change,” *Jurnal Hukum dan Peradilan* 13, no. 3 (2024): 607–34, <https://doi.org/10.25216/jhp.13.3.2024.607-634>.

nor a law on administrative law.³⁷ The Government Administration Act is connected to the State Administrative Courts Act because its general explanation states that it serves as the substantive law of the administrative court system. However, the Government Administration Act is not a law on administrative law, but a law on government administration. Under Article 1(1) of the Government Administration Act, government administration means the making of decisions and/or actions by government bodies and/or officials. The subject matter of the Government Administration Act therefore differs from that of the State Administrative Courts Act; accordingly, the positive legal-fiction model does not revoke the negative legal-fiction model.

For comparison, the revocation of the negative legal-fiction model and the adoption of the positive legal-fiction model in the Netherlands are discussed below. In the Netherlands, before the enactment of the General Administrative Law Act, Article 3 of the Administrative Law Act on Administrative Decisions of 1976 (*Wet administratieve rechtspraak overheidsbeschikkingen*) provided that administrative silence constituted a rejection of the requested administrative decision.³⁸ The Administrative Law Act on Administrative Decisions of 1976 has been repealed and is no longer in force. The Dutch General Administrative Law Act provides that administrative silence constitutes a response to an application for a decision and is deemed a decision subject to judicial review by an administrative court.³⁹ The General Administrative Law Act also provides that public officials may be sanctioned for their silence if specified conditions are met.⁴⁰ In the Netherlands, the new law expressly provides that the positive legal-fiction model repeals the negative legal-fiction model.

The negative legal-fiction model under the State Administrative Courts Act and the positive legal-fiction model under the Government Administration Act create different concepts, legal consequences, and forms of legal protection. The negative legal-fiction model under the State Administrative Courts Act refers to tacit rejection of the decision. Its legal effect is a negative fictitious decision. A fictitious decision is a decision that does not exist but is deemed to exist, while a negative decision means that the non-existent decision is treated as a rejection.⁴¹ The legal protection available to the applicant is to file a lawsuit in the administrative court to compel the administrative body to issue the requested decision.

³⁷ Philipus M. Hadjon, "Peradilan Tata Usaha Negara Konteks Undang-Undang No. 30 Th. 2014 Administrasi Pemerintahan," *Jurnal Hukum dan Peradilan* 4, no. 1 (March 2015): 52, <https://doi.org/10.25216/jhp.4.1.2015.51-64>.

³⁸ Kars J. de Graaf, Nicole G. Hoogstra, and Albert T. Marseille, "Remedies against Administrative Silence in the Netherlands," in *The Sound of Silence in European Administrative Law*, ed. D. C. Dragos, P. Kovač, and H. D. Tolsma (London: Palgrave Macmillan, 2020), 179–212, https://doi.org/10.1007/978-3-030-45227-8_6.

³⁹ De Graaf, Hoogstra, and Marseille, "Remedies against Administrative Silence in the Netherlands."

⁴⁰ De Graaf, Hoogstra, and Marseille, "Remedies against Administrative Silence in the Netherlands."

⁴¹ Budiamin Rodding, "Keputusan Fiktif Negatif dan Fiktif Positif dalam Peningkatan Kualitas Pelayanan Publik," *Tanjungpura Law Journal* 1, no. 1 (January 2017): 30, <https://doi.org/10.26418/tlj.v1i1.18328>.

The positive legal-fiction model under the Government Administration Act constitutes tacit approval of the decision. Its legal consequence is a positive fictitious decision. The Constitutional Court of the Republic of Indonesia's Decision 77/PUU-XV-2017 interprets a fictitious decision to mean that the decision does not exist but is deemed to exist, while a positive decision means that the non-existent decision is treated as an approval.⁴² The legal protection available to the applicant is to file a petition with the court, and if the petition is granted, the court orders the administrative body to issue a decision.⁴³

The simultaneous adoption of both the negative and positive legal-fiction models contradicts the law of identity: administrative silence cannot be both negative and positive at the same time. The simultaneous adoption of the negative and positive legal-fiction models in two laws that regulate general provisions on decisions, or all types of decisions, creates legal uncertainty and inconsistent law enforcement. Laws on decision-making should adopt either the negative or the positive legal-fiction model, while sectoral laws may regulate exceptions.

For comparison, the treatment of administrative silence in Slovenia and Spain is discussed below. In Slovenia, administrative silence is adopted as a negative legal-fiction model. Administrative silence constitutes a tacit rejection of the decision, and the applicant may exercise the appropriate legal remedies.⁴⁴ In Slovenia, this negative legal-fiction model was adopted in Supreme Court case I Up 121/2021, 25 October 2021.⁴⁵ Positive legal-fiction models are adopted outside the scope of the Slovenian General Administrative Procedure Act.

In Spain, under the Spanish Administrative Procedure Act, administrative silence is deemed positive fictitious unless the applicable special legislation provides otherwise. Therefore, administrative silence constitutes a positive decision.⁴⁶ In Spain, only the positive legal-fiction model is adopted unless legislation outside the Administrative Procedure Act provides otherwise.

The legal controversy surrounding the adoption of the negative and positive legal-fiction models in two laws that contain general rules on decision-making concerns the difficulty of interpreting administrative silence under special laws governing particular decisions.

⁴² Mahkamah Konstitusi Republik Indonesia, *Putusan Nomor 77/PUU-XV/2017* (2017).

⁴³ Mahkamah Konstitusi Republik Indonesia.

⁴⁴ Polonca Kovač, "Administrative Appeal in Slovenian Practice—Current Dilemmas and Future Solutions," paper presented at the EGPA Conference, Athens, 2024, 8, https://upravna-svetovalnica.fu.uni-lj.si/content/gradiva/EGPA24_Kovac_PritožbaUpravSvet_jul24_ENG.pdf

⁴⁵ Polonca Kovač, "Challenges in Exercising the Right to Appeal: The Case of Slovenian Administrative Consultation," *Central European Public Administration Review* 22, no. 2 (2024): 236, <https://doi.org/10.17573/cepar.2024.2.11>.

⁴⁶ Eurne Navarro and Sergio Baches, "Competition Court Rules against Positive Administrative Silence," *Uría Menéndez*, October 1, 2024, <https://www.uria.com/en/prensa/334-competition-court-rules-against-positive-administrative-silence>.

For example, in cases of administrative silence regarding applications for mining or land decisions, it may be unclear whether the negative or the positive legal-fiction model applies. In law enforcement, the simultaneous adoption of the two models creates inconsistency.

The Supreme Court issued Supreme Court Regulation No. 8/2017 on Guidelines for Procedures to Obtain Decisions on the Receipt of Requests to Obtain Decisions and/or Actions of Government Agencies or Officials, thereby adopting the positive legal-fiction model based on the Government Administration Act. Later, however, the Supreme Court issued Circular Letter No. 2 of 2024, which states that, for applications for inclusion in the MODI list, the negative legal-fiction model under the State Administrative Courts Act applies. The negative legal-fiction model is intended to fill the legal vacuum, provide legal certainty, and prevent irregularities in factual-action disputes in MODI cases.⁴⁷ The Supreme Court's "reactivation" of this negative legal-fiction model was not incorrect because the negative legal-fiction model under the State Administrative Courts Act was not revoked by the positive legal-fiction model under the Government Administration Act.

Based on the Dutch, Slovenian, and Spanish models, only one model is adopted as the general rule: either the negative or the positive legal-fiction model. Under the Dutch model, the positive legal-fiction model is adopted in the General Administrative Law Act; Slovenia adopts the negative legal-fiction model in the General Administrative Procedure Act; and Spain adopts the positive legal-fiction model under the Administrative Procedure Act. In essence, the legal systems of these three countries adopt only one of the two models, either negative or positive, with exceptions specified in sectoral laws. The negative and positive legal-fiction models should not be adopted rigidly, given their respective characteristics, advantages, and disadvantages.

C. CONCLUSIONS

Indonesian law adopts both the negative and positive legal-fiction models simultaneously in two statutes within the same regulatory framework. These models coexist without a clear priority for their application. The negative and positive legal-fiction models should not coexist within the same regulatory framework. Only one of these models should be adopted and codified, either in a General Administrative Law Act, following the Dutch model, or in a General Administrative Procedure Act, following the Slovenian and Spanish models. By contrast, the alternative model should be expressly regulated in separate legislation. The model adopted in the General Administrative Law Act or the General Administrative Procedure Act should apply automatically unless specific legislation provides otherwise.

⁴⁷ Redaksi Kami, "Diskusi Reboan Seri Ke-41 Ini, Diadakan di Ruang Sidang Kartika PTUN Bandung," *Harian Kami*, January 21, 2025, <https://www.hariankami.com/hukum-kami/23614390199/diskusi-reboan-seri-ke-41-ini-diadakan-di-ruang-sidang-kartika-ptun-bandung?page=3>.

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