



Critical Note The Authority Of TUN To The Cluster Of Government Administration Of Omnibus Law “Cipta Kerja” In Indonesia

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ABSTRACT

In the concept of a state of law, everything must be done according to law, so that the government must submit to the law, not the law that must submit to the government, especially to the Mahakamh decision of the Constitution number 91/PUU-XVIII/2020 regarding the formal Uuck test that has broad consequences for the interests of the community, especially in testing the authority of TUN, such as the discretionary requirement that eliminates the “provisions in the legislation”, and changes in Article 53 of the Government Administration Law that releases the authority of TUN in testing the government's silence. The formulation of the problem in this paper is intended to provide a critical note and / or input for the improvement of the substance of UUCK to kewenangan Tun, especially in the cluster of Government Administration in Article 175 UUCK (changes to Law No. 30 year 2014 on Government Administration (ADPEM law)). Provisions that should be maintained or should be abolished. The research method used is normative jurisi research method. Normative research requires the approach of legislation (statute Approach) and conceptual approach. Data collection techniques used are through the study of documents and literature on secondary data in the form of primary, secondary and tertiary legal materials. The analysis used is descriptive. The conclusion in this paper is found that, first: Uuck's legal politics can be read as the spirit of the state in synchronizing, harmonizing, and eliminating sectoral egos; second: Uuck's provisions that must be maintained are Article 24 of the ADPEM law; third: the amendment to Article 53 of the ADPEM law on the “release “of the Administrative Court's authority in” testing “ a government silence to be considered a positive fictitious decision is not necessary, because the Administrative Court's authority to test the government silence that is considered granted is important and vital.

INTRODUCTION

Budiarjo said that the ultimate goal of every country is to create happiness for its people (*bonum publicum, common good, common weal*).¹ It can be realized by the implementation of the functions of the state, namely: first. Law and order, in which the state functions as a stabilizer; second. The welfare and prosperity of the People; third. Defense; fourth. Uphold justice. The enforcement of justice is one of the main concepts of the state of law.

Wade stated in the concept of a state of law, everything must be done according to law, so that the government must be subject to the law, not the law that must be subject to the government.² The law is placed as a rule in the administration of state, government, and society, while the purpose of the law is in between "...opgelegd om de samenleving vreedzaam, rechtvaardig, en doelmatig te ordenen", which means that the target of the state of law is the creation of state activities, government, and society based on justice, peace, and meaningfulness.

At the empirical level, sometimes this makes the legal politics of a country place all aspects of its regulation in the legislation. The spirit of regulating everything in a legislation is not without a negative thing. Not a few later mentioned that Indonesia is basically no longer a country of law, but "a country of law". In 2018, the Minister of Home Affairs (Tjahjo Kumolo) called it a "Regulatory State", as there are at least 43,866 existing regulations in Indonesia, which of course this number is very likely to have increased by this time.³

The owner of the authority, including in this case the legislator, has several fundamental principles in the exercise of its authority, first, *jurisdictio est potestas de publico introducta, cum necessitate juris dicendi*,⁴ that jurisdiction is a power introduced in the public interest, out of the need to provide justice. Second, *potentia non est nisi ad bonum, power is not given, (but) for the good*

(public). Referring to Bentham's opinion,⁵ affirming the public good should be the main goal of the legislators in conducting the legislative process, where the general benefit is the basis of reasoning. Those general principles of usefulness or benefit, well or poorly understood, are usually the principles consulted in making laws.⁶

Legislation as part of a legal system, must have good substance and of course a good way of making too. According To Maria S.W. Sumardjono, there are several principles that must be considered in making a legislation: first, that a good goal, requires clarity in its formulation, which will be related to the purpose of the formulation itself. The ambiguity of a formula, will give rise to multi-interpretation opportunities. Second, with such logic, it is necessary to prepare legislation (especially legislation) based on academic texts that contain philosophical, juridical, and sociological foundations that underlie the preparation of a law.⁷ Third, the public good or public interest should be the goal of the legislator (legislator or legislator).

In the legal system, Fuller stated that there are at least 8 reasons why the legal system does not work well or even fails, especially related to the creation of legislation:⁸ first, every issue must be decided on an ad hoc basis (that every problem faced, solved by an approach or solution that is ad hoc/ temporary). Second, a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe. Third, the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect (abuse of laws or regulations enacted retroactively/apply backwards, so that in addition to being confusing in taking action, can also reduce the validity of the applicable

¹ Budiarjo, Mariam. *Dasar-Dasar Ilmu Politik*. Jakarta: Gramedia Pustaka Utama. 2001, pp. 45; Lihat pula Muthhar, Asy'ari. *The Ideal State: Perspektif Al-Farabi tentang Konsep Negara Ideal*. Yogyakarta: IRCISoD. 2018, pp. 57

² Wade, W.R.. *Administrative Law*, Third Edition. Oxford: Clarendon Press. 1971, pp. 6; dalam HR, Ridwan, *Hukum Administrasi Negara*, Cetakan ke-12, Jakarta: Rajagrafindo Persada. 2016), pp. 21; Bandingkan dengan H.W.R. Wade & C.F. Forsyth, *Administrative Law*, Edisi Ketujuh. New York: Oxford University Press. 1997, pp. 24.

³ <https://www.cnnindonesia.com/nasional/20181025230726-12-341526/tjahjo-sebut-ri-bukan-negara-hukum-tapi-negara-peraturan>, (diakses pada 22 Desember 2021).

⁴ Garner, Bryan A. *Black's Law Dictionary*. Ninth Edition. Texas: West Group, 2009. pp. 1841.

⁵ Bentham, Jeremy. *Teori Perundang-undangan, Prinsip-prinsip Legislasi, Hukum Perdata dan Hukum Pidana*, Cetakan Pertama. Bandung: Nuansa dan Nusamedia, 2010. pp. 25, diterjemahkan dari Bentham, Jeremy. *The Theory of Legislation*. Bombay: N. M. Tripathi Private Limited, 1979

⁶ Austin, John dalam Wilfrid E. Rumble (Ed.). *The Province of Jurisprudence Determined*. New York: Cambridge University Press, 2007, pp. 58.

⁷ Sumardjono, Maria S.W. *Pluralisme Hukum Dalam Pengaturan Sumberdaya Alam di Indonesia, Adaptasi, Harmonisasi dan Agenda ke Depan*, disampaikan Rapat Senat Terbuka dalam Rangka Dies Natalis ke-71 Fakultas Hukum Universitas Gadjah Mada, tanggal 17 Februari 2017, Yogyakarta, pp. 16.

⁸ Fuller, Lon L. *The Morality of Law*, Edisi Revisi. New Haven: Yale University Press.1969, pp. 39. Bandingkan dengan Hendry Julian Noor, *Kerugian Keuangan Negara dalam Pengelolaan Badan Usaha Milik Negara Berbentuk Perseroan Terbatas dalam Perspektif Hukum Bisnis dan Tindak Pidana Korupsi*. Doctoral Diss., Fakultas Hukum Universitas Gadjah Mada. 2018, pp. 255-256.

regulations). Fourth, a failure to make a rules understood (the makers of rules or regulations fail to make laws that can be understood).

Fifth, rules that require conduct beyond the powers of the affected party (the rules that make the affected party, can not do anything related to the existing legislation, because the rules contain something that is beyond the reach of the power or authority of the affected party). Sixth, introducing such frequent changes in the rules that the subject cannot orient his action by them. Seventh, a failure of congruence between the rules as announced and their actual administration. Eighth, the enactment of contradictory rules.⁹

Fuller's opinion can be said to be relevant to one of the problems that can be said to be a classic problem in Indonesia, namely the clash between laws or legislation with each other. The formation of several laws or regulations, according to the author, is one of the thoughts that then make the government to try to solve it with the omnibus law, which is often also called the "law/regulation sweep the universe". On the other hand, from the government's explanation, it can be understood that one of the concerns to be resolved using the omnibus law is closely related to economic problems. According to David C. Korten,¹⁰ that the task of the government in the economic sector, its main responsibility is to provide the necessary infrastructure to promote trade (economic life) and enforce laws relating to the right to property and contracts, including in the case of good "legal" arrangements in the economic sector of the state.

Omnibus Law, in Black's Law Dictionary calls it omnibus bill, which means:

- ✓ a single bill containing various distinct matters, usually drafted in this way to force the executive either to accept all the unrelated minor provisions or to veto the major provision;
- ✓ a bill that deals with all proposals relating to a particular subject, such as an "omnibus judgeship bill" covering all proposals for new judgeships or an "omnibus crime bill" dealing with different subjects such as new crimes and grants to states for crime control.

⁹ Everett, Bentham's Limits of Jurisprudence Defines, 1945, pp. 195-198, dalam Lon L. Fuller, Op. Cit., pp. 65; Lihat pula Hans Kelsen, General Theory of Law and State. Cambridge, Massachusetts: Harvard University Press, 1949, pp. 374-375.

¹⁰ Korten, David C. *When Corporations Rule the World (Bila Korporasi Menguasai Dunia)*, Jakarta: Professional Books. 1997, pp. 115.

It must be understood that the omnibus is not a law, nor is it a law. Omnibus is a way or method to assemble the implementation of a political policy in various activities, each of which has been regulated separately in many laws. Therefore, it can be understood that omnibus is not a law or act, and certainly not an instrument to chop things up. Uuck law politics according to the author can be read as the spirit of the state in synchronizing, harmonizing, and eliminating sectoral ego which is one of the classic problems in Indonesia.¹¹

In terms of public services, it can be understood that the spirit brought by the changes in these clusters is that public services can be better, effective and efficient, including in terms of bureaucracy to investment, given the data from the Global Competitiveness Report 2017-2018, the first and second place regarding barriers to investment are corruption (13.8 percent) and government bureaucracy (11.1 percent). It needs to be simplified by considering that however bureaucracy is a system of work with a hierarchical level to achieve the objectives of the institution, with the pathology of bureaucracy is dysfunctional bureaucratic behavior, among them shirking tasks.¹² UUCK get a lot of critical records (rejection) both against the form of manufacture let alone against the substance. Especially in substance, the difference in attitude can occur because there are differences in orientation or even differences in interpretation of the substance of the Omnibus law of "Cipta Kerja".

Hans Kelsen argues that in terms of interpreting laws, the main question to be answered is how to apply general norms (laws) to a fact of a concrete material nature, as well as how to obtain individual norms that correspond to the application of these general norms.¹³ In the perspective of positive law, no method can justify one understanding of the norm, every method of interpretation developed up to now, produces only possible results, and never produces a single result that can be considered the most appropriate, because trying to legitimize one possibility by negating another possibility is an attempt that can be said to be futile.

¹¹ Bambang Kesowo, *Jalan Tengah untuk RUU Cipta Kerja*, Kompas, <https://www.kompas.id/baca/opini/2020/03/06/jalan-tengah-untuk-ruu-cipta-kerja>, pp. 6. (diakses 22 Januari 2022)

¹² Nugraha, Safri. *et. al.*, dalam Sri Mamudji (Ed.) *Hukum Administrasi Negara*. Depok: Center for Law and Good Governance Studies (CLGS) Fakultas Hukum Universitas Indonesia. 2017, pp. 197.

¹³ Kelsen, Hans. *Pengantar Teori Hukum*. Bandung: Nusa Media, 2015, pp. 121-122.

UUCK has submitted his Test to the Constitutional Court (MK). The court then issued a verdict no. 91 / Puu-XVIII / 2020 dated November 25, 2021 on the uuck formal testing case. Among the important decisions of the Constitutional Court are: first, UUCK declared contrary to the Constitution of the Republic of Indonesia year 1945 (UUD 1945) and does not have the force of conditionally binding law as long as it is not interpreted "no improvement within 2 (two) years since this decision was pronounced". Second, UUCK will remain in effect until the establishment improvement is made in agreement with the grace period as specified in this decision.

Third, the legislator must make improvements within a maximum period of 2 (two) years from the moment this decision is pronounced and if within that grace period no improvement is made, the UUCK is permanently unconstitutional. Fourth, if within a grace period of 2 (two) years the legislator cannot complete the improvement of the UUCK, then the law or articles or content material of the law that has been repealed or amended by the UUCK shall be declared valid again. Fifth, suspend all actions / policies that are strategic and have a broad impact, and are not allowed to issue new implementing regulations related to UUCK. It can be read unequivocally that the Constitutional Court states that the UUCK must be improved on it, or in other words there are problems both in the manufacturing process (formality) and/or the substance of the UUCK it self.

In the author's view, the Constitutional Court's "mandate" in the decision of a quo against the formers of the act is including improvements to the substance of UUCK. This can be understood from the dissenting opinion as follows:

"That with the rejection of formal testing application, the examination of the constitutionality of material testing on other applications can continue. In our opinion, there are several content materials in the Ciptaker law that need to be granted, especially regarding labor law. ... Therefore, different legal opinions related to material testing, will be submitted to the decision of case number 103/PUU-XVIII/2020 which tests both formally and materially the A quo law."¹⁴

Based on the consideration of the two constitutional judges, it can be understood as follows: First, another petition in the form of material testing against UUCK can continue. Second, there are

"some" content material in the UUCK that needs to be granted, while the one mentioned by the two constitutional judges is only (cluster) Labor, which means there are still at least 10 other clusters that according to constitutional judges have problems with the content material. Strictly speaking, according to the author, it can be interpreted that the constitutional judge also felt the need for some improvements to the material content of UUCK.

In the context of government administration, this paper intends to provide a critical note and / or input for the improvement of UUCK's substance to the authority of TUN, especially in the cluster of Government Administration in Article 175 of UUCK (changes to Law No. 30 of 2014 on Government Administration (ADPEM law)). Provisions that should be maintained or should be abolished.

METHOD

The research method used in this paper is normative jurisi research method. Normative research requires the implementation of statutory approach and conceptual approach. Data collection techniques used are through the study of documents and literature on secondary data in the form of primary, secondary and tertiary legal materials. The analysis used is descriptive.

RESULTS AND DISCUSSION

A. Positive changes in the Omnibus Law "Cipta Kerja" (UUCK).

The provisions that according to the author should be maintained are changes to Article 24 of the ADPEM law, on the terms of discretion. In article a quo one of the conditions of discretion is "not contrary to the provisions of legislation". In order to assess these changes, it is important to first know about the discretion it self.

Etymologically, the concept of discretion comes from the latin root, discernere, which in English has the equivalent of the words discernment and judgment.¹⁵ In terms of language, freies ermesen (German) comes from the word frei, which means loose, Unbound, and free, while freies means one who is loose, Unbound, and free. Meanwhile, ermesen means to consider, Judge, suspect, and

¹⁴ *Dissenting opinion* dari Hakim Konstitusi Arief Hidayat dan Hakim Konstitusi Anwar Usman, dalam Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020, tertanggal 23 November 2021, pp. 431.

¹⁵ Fletcher, George P. "Some Unwise Reflections About Discretion". *Law and Contemporary Problems* 47 (1984), pp. 270; Lihat pula Krishna Djaya Darumurti, *Diskresi Kajian Teori Hukum Dengan Postscript dan Apendiks*. Yogyakarta: Genta Publishing. 2016, pp. 23; Bandingkan dengan Zainal Arifin Mochtar, *Pemerintahan dan RUU Cipta Kerja*, Media Indonesia, <https://mediaindonesia.com/kolom-pakar/295205/pemerintahan-dan-ruu-cipta-kerja>, pp. 6. (diakses 22 Januari 2022)

estimate.¹⁶ Thus, it can be understood that *freies ermesen* is a person who has the freedom to judge, consider something, which is then adopted in the field of government, defined as one of the means that provide moving space for officials or state administrative bodies to perform a government action without having to be fully bound to the law,¹⁷ with the intention of achieving what is the goal or target (*doelmatigheid*), or strictly expediency, rather than just to obey the applicable law (*rechtmatigheid*).¹⁸

Marbun and Mahfud give a definition of discretion as a legitimate authority to participate in social activities in order to carry out the tasks of organizing the public interest (*bestuurszorg*),¹⁹ included in it is to make regulations on matters that have no regulation (there is a legal vacuum) or in terms of implementing existing regulations in accordance with reality, which then Authority and/or power is called discretionary power.²⁰

Saputra defines discretion as the freedom given to the tools of State Administration to prioritize the achievement of an objective effectively (*doelmatigheid*) rather than just comply with the provisions of the applicable positive law.²¹ As for Marzuki, it defines as the freedom granted to the state administration/State Administration in the administration of government, which is basically in line with the increasing demands of public services that must be carried out by the state administration. Fockema Andreae defines discretion as the nature of discretion exercised on the basis of authority or

power, which is not or is not entirely bound by the provisions of law, or authority or power that is not expressly bound to regulation, instruction, or supervision, or can be said to be the free will of government.²²

From various definitions and definitions above, Sinaga concluded *diksresi* (*pouvoir discretionaire*) as follows:²³ First, is a form of power. Second, based on the provisions of legislation or legal regulations. Third, applied in and to achieve certain objectives in the administration of state administrative functions. Fourth, its implementation is based more on moral considerations than on applicable law. Fifth, actions and their consequences must be accountable, both morally and legally.

With this explanation, the basis of the nature of discretion is sometimes against the law and is not fully bound by the law, which is tied to two "provisions", which are coercive/urgent and are carried out in the wider public interest. So, in principle, the discretion has the spirit to get out of Rule 40, but with the aim of public benefit. Therefore, according to the authors of the uuck amendment to Article 24 of the ADPEM law which abolished the condition "does not contradict the provisions of the legislation is appropriate and ideal with the doctrine of discretion.

The author's argument is as follows: First, Indonesia is a country with a pattern as a welfare state.²⁴ Implicitly it can be seen from Paragraph IV of the opening of the 1945 Constitution: ".....The government of the state of Indonesia that protects the entire nation of Indonesia and all Indonesian bloodshed and to promote the general welfare, educate the life of the nation, and participate in implementing world order based on independence, lasting peace and social justice....". As the concept of welfare state, the concept gives the task to the government in order to provide welfare for its people. It will be very closely related to the basic tasks of the government narrowly, and broadly related to the objectives of the state.²⁵

A state that adheres to the welfare state will adopt a state administrative law that: (1) accepts the concept of *freies ermesen*, (2) allows

¹⁶ Marbun, S. F. *Hukum Administrasi Negara I*. Yogyakarta: FH UII Press. 2012, pp. 171-172; Bandingkan dengan Zainal Arifin Mochtar, *Ibid.*; Bandingkan pula dengan S.F. Marbun dan Moh Mahfud MD, *Pokok-pokok Hukum Administrasi Negara*. Yogyakarta: Liberty. 2006, pp. 46-47.

¹⁷ Hadjon, Philipus M. et. al., *Pengantar Hukum Administrasi Indonesia*, Cetakan Kesebelas. Yogyakarta: Gadjah Mada University Press. 2011) pp. 153-156; Bandingkan dengan Zainal Arifin Mochtar, *Ibid.*. Lihat pula Prajudi Atmosudirdjo, *Hukum Administrasi Negara*. Jakarta: Ghalia Indonesia 1988, pp. 77-78.

¹⁸ Koesoemahatmadja, Djenal Hoesen. *Pokok-pokok Hukum Tata Usaha Negara*. Bandung: Alumni. 1979), pp. 81

¹⁹ Marbun, S.F. dan Moh. Mahfud MD, *op. cit.*, pp. 46; Bandingkan dengan Bachsan Mustafa, *Pokok- Pokok Hukum Administrasi Negara*. Bandung: Penerbit Alumni. 1985, pp. 40.

²⁰ Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press. 1969 tanpa pp., dalam Michael Feldberg, dalam William G. Bailey (Ed.), *Ensiklopedia Ilmu Kepolisian (Edisi Bahasa Indonesia)*. Jakarta: YPKIK. 2005) pp. 245. Lihat juga A.Sitompul, , & Sitompul, M. N. (2020, February). The Combination Of Money Laundering Crime With The Origin Of Narcotics Crime To Islamic Law. In *Proceeding International Seminar of Islamic Studies* (Vol. 1, No. 1, pp. 669).

²¹ Saputra, M. Nata. *Hukum Administrasi Negara*. Jakarta: Rajawali, 1988, pp. 15; Lihat dalam Ridwan H.R., *Hukum Administrasi ...*, *op. cit.*, pp. 171.

²² Ridwan, *Diskresi & Tanggung Jawab Pemerintah*. Yogyakarta: FH UII Press. 2014, pp. 98.

²³ Sinaga, Patuan. Hubungan antara Kekuasaan dengan *Pouvoir Discretionaire* dalam Penyelenggaraan Pemerintahan, dalam S.F. Marbun, et. al., *op. cit.*, pp. 79.

²⁴ Kiswanto, Eddy. "Negara Kesejahteraan (*Welfare State*): Mengembalikan Peran Negara dalam Pembangunan Kesejahteraan Sosial di Indonesia", *Jurnal Kebijakan dan Administrasi Publik* 9, no. 2 (2005), pp. 100.

²⁵ Philipus M. Hadjon, et. al., *Hukum Administrasi dan Good Governance*. Jakarta: Penerbit Universitas Trisaksi. 2012, pp. 9.

staatsbemoeyenis (the inclusion of the state in the social life of its people), (3) prioritizes the public interest (bestuurszorg), and (4) legal reality supported by ethical awareness. In principle, the granting of power (diksresi) is intended agar so that the state administration can play a more active role to realize the ideals of the establishment of the state, as well as in order to organize various interests of society.²⁶

As a consequence of this elementary task, the government has discretionare,²⁷ which Lukman defined as one of the means for officials or administrative bodies of the state to carry out the necessary actions without having to be fully bound by law.⁴⁸ the concept of welfare state or social service state tends to give birth to a centralized government, considering that in the concept of a quo the government is required to ensure the availability of minimum standards of welfare for all citizens. Strictly speaking, the change in the discretionary requirements brought by UUCK to the ADPEM law is appropriate and in accordance with the context of Indonesia as a welfare state.

It must be recognized that it is not uncommon in a practical level to open the opportunity for a conflict of interest between the government and citizens. As Muchsan's opinion, that with the freedom of action, it is not uncommon for the act of administrative tools to deviate from the applicable legal regulations (positive law), which also increases the possibility of causing harm to the administrabele.²⁸

It should be borne in mind that discretion, can only be done by authorized government officials with the aim of: smooth governance, fill the legal vacuum, provide legal certainty, and overcome government stagnation in certain circumstances for the benefit and public interest. As for the doctrine, the use of said discretion must be based on the following: First, there are important or justifiable reasons that are the background to the actions of the administration of said state. Secondly, the act is still included in the scope of the duties assigned to it by law. Third, the state administration officials who do so can account for their actions.

²⁶ Simangunsong, Parlin M. *Pembatasan Kekuasaan Melalui Hukum Administrasi Negara*, dalam S.F. Marbun, *et al., op. cit.*, pp. 40.

²⁷ Philip M. Langbroek, 2014, *General Principles of Proper Administration and The General Administrative Law Act in The Netherlands*, Makalah Pada World Bank Workshop on Regulating Citizen- State Interactions: Administrative Law in the United Kingdom and the Netherlands, Washington, 23 Januari 2003, pp. 2.

²⁸ Muchsan. *Pengantar Hukum Administrasi Negara Indonesia*. Yogyakarta: Liberty, 1982. pp. 74.

Second, in the welfare state, this is in line with the principle of wisdom and the principle of public interest management as part of the general principles of Good Governance (aaupb). AAUPB can be said to be an unwritten rule of law for the government. However, there is basically no fundamental contradiction between the unwritten AAUPB and the written one, because its nature as a principle (which is the basic thing) cannot be released.

The function and significance of AAUPB is as a steering norm for government organs in carrying out their government. Even the conflict with the AUPB is one of the reasons for being able to file a lawsuit with the State Administrative Court. According to H.D. van Wijk / Willem Konijnenbelt, J.B.J.M. ten Berge, and Ridwan, the position of the aaupb in the legal system is as an unwritten law that must always be obeyed by the government in every action it does. In Hadjon's point of view, other than as an unwritten principle of law, certain circumstances may be drawn as applicable rules of law.

The two principles can be explained as follows: First, the principle of wisdom requires that in all actions the government should always be broad-minded, wise, and can relate the performance of its duties with the symptoms that arise in the society faced and served by the government, and can carefully consider the environment the consequences of government actions with visionary vision (far ahead). Meanwhile, Ridwan stated that this principle requires the government to carry out its duties and work freely and freely to apply wisdom without having to be glued to formal legislation. Second, the principle of Public Interest implementation, which requires that the government in carrying out its duties always give priority to the public interest, as a consequence of the adoption of the concept of a modern legal state (welfare state), which puts the government as the party responsible for realizing the bestuurszorg (general welfare) of its citizens.

Both principles can be said to be a solution to the weaknesses and / or shortcomings possessed by the principle of legality in the context of State Administrative Law (the government must always act in accordance with legislation), so that the government can act on the basis of policy for the realization of the public interest. It should be emphasized that the emphasis on discretion is the implementation of the public interest, not the interests of groups or individuals.

B. Critical note on the improvement of TUN's Authority in the substance of Omnibus Law "Cipta Kerja" (UUCK)

The provisions that according to should be abolished or not contained in the improvement of UUCK is a change to Article 53 of the ADPEM law, especially in the section "release" the authority of the Administrative Court in "testing" a government silence to be considered a positive fictitious decision. Before the decision of the Constitutional Court, Article 175 UUCK, one of which made changes to Article 53 of the ADPEM law, mandated the issuance of Presidential Regulation that regulates the silence of bodies and/or government officials.²⁹ The presidential regulation serves a very vital function to regulate the mechanisms of government bodies and/or officials who do not establish and/or make decisions and / or actions more than the time limit provided (silence), which is considered legally granted. Why should the loss of administrative authority in "testing" a government silence should be returned? It is necessary to first understand the following.

In the context of government attitudes, at least two kinds of fictitious state administration decisions (KTUN) are known, namely positive fictitious and negative fictitious, where both conceptually enter into a concept known as administrative silence. Such a concept in administrative law is *heersende leer* (influential teaching)³⁰ or a legal fiction (legal fiction) or a proposition that has been generally accepted in the context of State Administrative Law, where the silence of government administrative authority (administrative inaction) can be interpreted as approval (approval) or rejection (rejection).³¹

If the administration's silence is then equated with a written decision containing a refusal, then such a decision is referred to as a negative fictitious decision.³² It can be seen in Article 3 of Law No. 5 on the State Administrative Court (UU PTUN), that against an application from a person or a civil legal

entity to a state administrative agency or official If up to a period of 4 (four months) the state administrative agency or official does not issue a decision on such an application, then according to the law the state administrative agency or official is considered to have issued a decision of rejection, although in this case the state administrative agency or official does not do anything that is silent. On the contrary, if it is interpreted as an agreement, then the decision is a fictitious positive decision.³³

Briefly, the positive fictitious principle is the opposite of the legal principle previously known in Indonesian administrative law, namely the "fictitious-negative" principle. The term "fictitious" means that it does not issue a written decision but is considered to have issued a written decision, while "negative" means because the content of the decision is equated with "rejection" of a request. It is not clear who first used the term positive fictitious although this term is now becoming commonly known and used, it is likely that the term positive fictitious is used because the term negative fictitious is more commonly known in administrative law literature as well as in judicial practice. In foreign literature, the term positive fictitious is called *lex silencio positivo*, terminologically derived from a combination of Latin (*lex*) and Spanish (*silencio positivo*), or in English legal terminology from mainland Europe is generally equated with the term silent consent, fictitious approval or tacit authorization, while in the common law tradition can be identified with the more general concept of administration inaction, although it does not specifically distinguish the meaning between administration omission and administrative silence. The term positive fictitious is etymologically rooted from the term *lex silencio positivo* or also called administrative silence (English), *positieve beschikking bij niet tijdig beslissen* (Dutch, interpreted as a decision through time), *silence de l'administration vaut acceptance* (French), *genehmigungs fiktion* (German), and fictitious approval, tacit authorization, silent consent, or implicit decision (English). The official's silence as a consent is identical to one of the maxims of the Roman era: the *qui tacet consentire videtur* (silence implies consent).

Referring to Batalli's opinion, both kinds of fictitious decisions (fictitious negative and fictitious positive) have different priorities or interests. In the context of positive fictitious decisions, more emphasis on the protection of individual rights to obtain KTUN

²⁹ Batalli, Mirlinda. "Consequences of Administrative Silence in Public Administration", *SEER: Journal for Labour and Social Affairs in Eastern Europe* 20, no. 1 (2017), pp.145

³⁰ Wicaksono, Dian Agung, Bimo Fajar Hantoro, dan Dedy Kurniawan, "Quo Vadis Pengaturan Kewenangan Regulasi Dalam Undang-undang Cipta Kerja", *Jurnal Rechtsvinding* 10, no. 2 (2021), pp. 326

³¹ Simanjuntak, Enrico. "Prospek Prinsip Fiktif Positif Dalam Menunjang Kemudahan Berusaha Di Indonesia", *Jurnal Rechtsvinding* 7, no. 2 (2018), pp. 302. Bandingkan dengan Enrico Simanjuntak, *Hukum Acara Peradilan Tata Usaha Negara: Transformasi & Refleksi*. Jakarta: Sinar Grafika, 2018.

³² Indroharto, *Usaha Memahami Undang-Undang Peradilan Tata Usaha Negara (Buku II)*, Cetakan Keempat. Jakarta: Pustaka Sinar Harapan. 1993, pp. 184.

³³ Rusjana, Muhammad. *Penyelesaian Sengketa Tata Usaha Negara Terhadap Keputusan Tata Usaha Negara Fiktif Positif Melalui Peradilan Tata Usaha Negara*. Master Thesis, Fakultas Hukum Universitas Gadjah Mada. 2017, pp. 3.

within a reasonable period and benefit the community as a "consumer" of public services by government administration, with the main objective is the protection of individual rights in government administration. The *A quo* decision is often referred to by another term, *lex silentio positivo*, which, according to Simanjuntak, can be used as a way to help simplify licensing procedures and fit in with existing initiatives to facilitate the free movement of business services between countries, with the main goal also being economic development for both the state and society.³⁴

The regulation of positive fictitious decisions in the ADPEM Act shows a paradigm shift in the administration of government towards public services that are more responsive to public requests, where it is the basic desire and direction of legal politics in the ADPEM act to improve the quality of governance.³⁵ The type of decision *a quo* (fictitious positive) is seen as able to force the agency or Tun officials to always respond to all matters handled and/or require the decision of the agency or Tun officials.³⁶

The changes brought by UUCK there are at least 2 important things according to the author: first, the change in the deadline for the obligation to establish and/or make decisions and/or actions that were originally 10 (ten) days to 5 (five) days. It can be said that the change in the duration of time that becomes more appropriate to be qualified as a positive fictitious decision provides an affirmation of the commitment to provide ease of doing business as one of the principles in UUCK.

It should be understood that the problems to be solved from the beginning one of them with UUCK is economic problems, especially investment, namely the formation of good "laws" in the economic sector of the country. In the context of government administration, it is important to create regulations that can facilitate investment affairs in order to be carried out effectively and efficiently, but still be accountable. In terms of public services itself, it can be understood that the spirit of improvement

brought is that public services can be faster, effective and efficient, including bureaucracy to investment. The change in the deadline "demands" the state administration to work faster, but it must be precise.³⁷

Second, the removal of the application mechanism to the Administrative Court to obtain a decision on acceptance of the application and provide delegat^{ie} provisio to form a Presidential Regulation. This change has an impact on the authority of the Administrative Court in deciding the acceptance of positive fictitious requests and creating a legal vacuum related to the form of determination of decisions and/or actions that are considered legally granted because as long as the Presidential Regulation has not been established, then during that period there is no mechanism to declare the validity of positive fictitious decisions.

The second change mentioned above which according to the authors need to get further thought and it can be concluded that the provisions of a *quo* should be done elimination or at least improvement against it on the basis of arguments: First, the existence of the State Administration decision (KTUN) becomes a vital aspect in the absolute competence of the administrative court, because it can be said that the Tun dispute was born because of the existence of a KTUN. If the KTUN born with a positive fictitious construction is only given legal fiction is considered to have been legally granted as stipulated in Article 175 uuck jo. Article 53 paragraph (4) and (5) ADPEM law without going through the decision of acceptance of positive fictitious application by the administrative court, then what is the justification for the existence of KTUN with the positive fictitious construction? So it can be said that fiction is considered to have been legally granted to KTUN with a positive fictitious construction without the decision of the Administrative Court brought by the UUCK raises legal uncertainty.

A KTUN born with positive fictitious construction is needed a mechanism to justify its existence. With the abolition of the Administrative Court's authority to terminate the application for positive fictitious acceptance, *mutatis mutandis* ktun justification mechanism with positive fictitious construction has been lost. It should be suspected that the changes brought by UUCK are actually counterproductive to the underlying principle of UUCK, namely legal certainty, where the regulation on the authority of receiving positive fictitious applications in UUCK

³⁴ Simanjuntak, Enrico. "Perkara Fiktif Positif Dan Permasalahan Hukumnya (*Fictious Proceedings And Its Legal Problem*)", *Jurnal Hukum dan Peradilan* 6, no. 3, (2017), pp.380. Lihat juga Ariman Sitompul, dkk. (2021). *The Morality Of Law Enforcement Agencies (Police, Prosecutor's Office, KPK) In Money Laundering With The Origin Of The Corruption*. *European Science Review* 9 (10), pp.55-63.

³⁵ Lihat Ketentuan didalam Undang-Undang Nomor 40 tahun 2014 Tentang Adminisrasi Pemerintahan, Konsideran Menimbang

³⁶ Muhammad Yasin, et. al. *Anotasi Undang-Undang No. 30 Tahun 2014 Tentang Administrasi Pemerintahan*, Depok: Universitas Indonesia Center for Study of Governance and Administrative Reform (UI-CSGAR). 2017, pp. 229.

³⁷ Tobrani, Rahmad. "Pengujian Keputusan Oleh Pengadilan Tata Usaha Negara Terhadap Diskresi yang Dilakukan Oleh Pejabat Pemerintah". *Jurnal Samudera Keadilan*, No 1 (2018), pp. 102

actually encourages the creation of legal uncertainty in the field of government administrative law.

Keep in mind, one of the characteristics of the perpetrators of corruption is to want a firm decision, but they can influence it. Although it may have been anticipated by the recognition of an electronic decision (Article 38 of the ADPEM law) that makes the state administration have no reason not to perform public services optimally, although with a very limited time limit.³⁸ Therefore, according to the author of the previous arrangement in which the receipt of a fictitious application is positive by the administrative court, it is good. Dikalikannya administrative authority to test the government's silence is considered granted is important and vital, because it can provide careful and careful arrangements not to provide loopholes (moral hazard) which can actually be counterproductive.

The importance of the Administrative Court is in order to maintain the main purpose of administrative law, which is to keep the authority of the government used within the limits of its power (intra vires), so that citizens are not violated for all "actions" carried out by the government and maintained their rights. In principle, State Administrative Law is the law relating to public administration, which is the way or effort of the government to be able to do what is its duty, including about the nature of power, tasks, and how the power is controlled.³⁹

As green light theory:⁴⁰ administrative law is also about the control of the administration and the protection of individual liberty, with the focus of attention being the case law of judicial review of administrative action, the author understands that administrative law is also about administrative control and protection of individual liberty, focusing on the existence of a "review" by law (court) of the administrative actions of the government. Harlow and Rawlings argue that in the context of red light theory, administrative law is an instrument for the control of power and protection of individual freedoms, its emphasis on the courts and not on government, is indisputable.

³⁸ Alatas, Syed Husein, *Sosologi Korupsi: Sebuah Penjelajahan Data Kontemporer*. Jakarta: LP3ES, 1983, pp. 12-14. lihat juga A.Sitompul, (2020). The Criminal Replacement Of Fine In Law Of Money Laundering Number 8 Of 2010 (Case Study In North Sumatera). International Journal Of Creative Research Thoughts, 8 (11).

³⁹ Asshiddiqie, Jimly. *Pengantar Ilmu Hukum Tata Negara*, Cetakan Ke-11. Depok: PT Rajagrafindo Persada. 2019, pp. 67.

⁴⁰ Harlow, C. dan R. Rawlings. *Law and Administration*, 3rd edition. New York: Cambridge University Press. 1997, pp. 31.

Based on the two theories, red light theory and green light theory, the government is basically given the freedom and authority to be able to carry out the duties it carries out through its administrative actions, but there will be administrative law that serves as the control and protection (freedom) of individuals through the "review" by law (court) of the government's administrative actions. Strictly speaking, the government's silence translated to the concept of positive fictitious KTUN in saving the author must remain in the supervision of the Administrative Court.

CONCLUSION

First, UUCK's legal politics can be read as the spirit of the state in synchronizing, harmonizing, and eliminating sectoral egos. Court decision no. 91/PUU-XVIII / 2020 dated November 25, 2021, one of them contains "trust" to the Constitution to include making improvements to the substance of UUCK. Second, the provisions of the uuck that should be maintained is a change to Article 24 of the ADPEM law, on the terms of discretion, which abolishes the condition "not contrary to the provisions of legislation" is appropriate and ideal with the doctrine of discretion. Third, the amendment to Article 53 of the ADPEM law, especially in the "release "section of the Administrative Court's authority in" testing" a government silence to be considered a positive fictitious decision is not necessary, because the Administrative Court's authority to test the government silence that is considered granted is important and vital, to be able to provide careful and careful arrangements not to provide loopholes (moral hazard) in the silence.

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