# On The Special Administrative Disputes in Indonesia: Legal Certainty or Legal Uncertainty

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***Abstract***

*As more laws and rules are put into effect that guide the State Administrative Court, the State Administrative Court Procedure Law changes very quickly. It used to be that rule No. 5 of 1986 was always mentioned in the TUN Court's procedural rule when it came to Law Nos. 9 of 2004 and 51 of 2009. The State Administrative Court's procedure law, on the other hand, has grown and changed. Additionally, there are already other sector-specific rules in place to govern the resolution of certain administrative court problems. Disputes in administrative court that aren't Ordinary Events, Quick Events, or Short Events are usually called Special Administrative Court Disputes. It's important to know if this particular administrative court conflict gives legal certainty under the procedural law at the administrative Court, which includes how to settle these kinds of disputes. The research method used is normative juridical, and it uses both a legislative and a conceptual technique. In the Special TUN dispute category, you can find requests for tests to see if someone is abusing their power, positive fake requests, disputes over public information, disputes over land acquisition for public interest development, and general problems with the election process. The Positive Fictitious Petition is one of the cases that the Special State Administrative Court is not sure how to handle. The reason for this is that procedural law is set by a Presidential Regulation that doesn't follow the 1945 Constitution of the Republic of Indonesia, which says that laws should control judicial power.*

## I. Introduction

Ever since its establishment in 1986 under Law Number 5 of 1986, known as Law No. 5/1986, the State Administrative Court (referred to as TUN) has gained significant importance. The state administrative judiciary is a formal and legalistic option for resolving legal problems between the public vs the government, particularly those pertaining to State Administrative Decrees. Based on the preamble to Law No. 5/1986, it is evident that the establishment of the state administrative Court aims to promote a harmonious and balanced relationship between state administrative officials and community members, along with other desirable objectives. Hence, the establishment of the State Administrative Court serves as the initial step for citizens to exercise judicial oversight over the government's actions, ensuring they align with their duty to achieve the utmost welfare for the populace.

In response to this ever-changing environment, the state administrative Court underwent two revisions to the legal framework during its formation. Specifically, Law Number 9 of 2004 and Law Number 51 of 2009. These two modifications are solely to the court management system within the State Administrative Court and do not affect the authority to adjudicate.

As an integral component of the judicial power, the State Administrative Court applies both formal law, which pertains to legal procedures, and material law, which concerns the substance of the case. Material law, also known as substantive law, refers to the body of laws that prescribe specific punishments for various offences. On the other hand, formal law, sometimes referred to as procedural law, outlines the specific procedures and processes for enforcing material law. Material law is a type of law that establishes the rights and responsibilities of individuals under the law. Formal law refers to the legal framework that outlines the procedures and methods for implementing and protecting substantive law (Januar et al., 2021; Purbacaraka & Soekanto, 1978). It includes strategies for addressing any breaches of rights and obligations. Mertokusumo S. (2009) explained that material law serves as a set of principles that instructs individuals on how to behave in society, whereas formal law, also known as procedural law, is a legal framework that governs the process of enforcing material law through the involvement of a judge. It specifically outlines the procedures for initiating a lawsuit, conducting examinations, making decisions, and enforcing those decisions. Procedural law holds a significant role in the implementation and enforcement of material law, rather than merely being a supplementary component (Sasmito, 2018; Wahyudi, 2021).

Indroharto distinguishes between material administrative law and formal state administrative law within the framework of the State Administrative Court. The Material State Administrative Law is a set of regulations that State Administrative

Bodies/Officials must consider when interacting with citizens while performing their governmental responsibilities. It establishes the requirements, permissions, and prohibitions imposed on Administrative Bodies or Officials. The state in fulfilling its responsibilities. Formal Law pertains to matters of jurisdiction and procedural law (Aritonang & Erliyana, 2023; Bedner, 2001; Hum, n.d.; Sujatmoko et al., 2016). Rozali Abdullah defines State Administrative judicial procedural law as a set of laws that govern the actions of individuals in implementing state administrative law. Generally, the regulation of formal law can be divided into two categories: a) Procedural procedures are either regulated alongside substantive law or in conjunction with the jurisdiction of the judicial body through legislation or other regulations. b) Litigation proceedings are individually regulated through legislation or other regulatory measures (Muhammad et al., 2021; Setiawan & Abustan, 2023; Suhartono & Salam, 2021)

According to the aforementioned categorization of formal law, the state Administrative Judicial Law is classified within the first group due to its inclusion of both material law and formal law. With the implementation of Law Number 30 of 2014 on Judicial Administration (referred to as the AP Law), the significance of the State Administrative Judicial Law has changed. This is because the AP Law also includes certain rules related to procedural law, albeit in a limited manner. Furthermore, due to conceptual revisions, the AP Law has also been included into the state administrative Justice system as substantive law. For instance, modifications to the notion of State Administrative Decree. The creation of positive fictitiousness, and instances of misuse of authority by Government Officials (Patittingi et al., 2021; Veronika & Rafianti, 2023)

The AP Law's existence is the conclusion of statutory restrictions that have significant consequences for procedural law in the state administrative Courts. The state administrative dispute process law consists of two distinct sorts of terminology. Prior to the reform, the state administrative Courts exclusively employed Ordinary Procedures, Quick Procedures, and Short Procedures, collectively referred to as General State Administrative Court Disputes. After the reform, there are multiple sector-specific legislation that explicitly govern the assessment of particular state administrative issues. Checks that are not categorized as Ordinary Events, Quick Events, or Short Events are frequently referred to as Special state administrative Disputes. The Special State Administrative Court Disputes category encompasses petitions for abuse of authority tests, positive fake requests, public information disputes, property acquisition disputes for development in the public interest, and general election process disputes.

Several distinct State Administrative conflicts exhibit unique features of procedural law throughout their resolution in the state administrative Court, distinct from common state administrative disputes. Procedural law, as a component of public law, possesses a coercive nature, meaning it is obligatory and has *dual-end recht*. While

material law allows for interpretation, procedural law is obligatory and must be strictly adhered to without any room for choice or interpretation. This presents possibilities for the application of justice and legal certainty in the context of formal law enforcement within State Administrative Courts. What are the mandatory provisions of procedural law and what are the legal consequences? The point at hand is whether the presence of this specific state administrative disagreement ensures legal clarity in resolving state administrative disputes.

## 2. Research Method

Methods play a critical role in legal research. This method becomes a path or guide to scientific truth in the legal field in relation to the legal issues under investigation. The legal research approach employed is the normative juridical legal research method (Johnny Ibrahim, 2005; Syahrum, 2022). The statutory approach and the conceptual approach were utilized to answer the legal difficulties raised above. The legislative approach is implemented by reviewing all statutory regulations that are directly relevant to the legal concerns addressed in this paper. Meanwhile, the conceptual method is carried out by researching, identifying, and analyzing legal science perspectives and theories. There are two types of legal resources used: primary legal materials and secondary legal materials. Taking an inventory of positive law and research relating to the subject being researched is the strategy utilized in gathering primary and secondary legal documents. This inventory is then organized and classed based on the problem formulation. The next step is to analyze and/or interpret the data in the hope of solving or answering the legal research questions.

## 3. Results and Discussion

### 3.1. Goals of Law: Justice and Certainty

In legal practice, there is often a tension between certainty and justice. Justice and certainty are the main targets that humans want to achieve through implementing the law. These two things are values that are used as guidelines to legitimize the operation of the law. However, if one of these values is ignored, it could give rise to conflicts that threaten law enforcement itself. In fact, the existence of these two basic legal values should ideally complement each other and not exclude each other.

Historically, these two values have often been debated between adherents of the natural law school (*lex naturalis)* and the legal positivism school *(lex humama).* Natural law was born because of humanity's failure to seek absolute justice. Justice is a set of rules that do not change according to time and place, apply eternally and are the same everywhere (Boucher, 2009)

However, it must be realized that this search for justice is considered abstract and too

idealistic, and this makes it difficult to draw conclusions that are normative and at the same time non-operational. On this basis, it is necessary to further develop values that are not abstract, which can be accepted by the human mind rationally. From this situation, a consensus was born that laws were formed in accordance with rational principles of justice.

The existence of laws is a characteristic of the birth of the school of legal positivism (*rechtspositivism),* whose concept completely denies the existence of legal rules (justice) beyond the limits of positive law. Law according to this school of thought is no longer conceptualized as a moral norm that exists outside of human control as required by natural law, but is conceptualized and theorized as a norm created by the power of humans themselves, through a positive agreement and will bind every citizen, without exception. in inclusive unity.

This is what differentiates the teachings of natural law from Plato's idealism and legal positivism. The teachings of natural law are dualistic in implying norms of justice, namely norms of justice whose source is transcendental and norms of justice which have their source in reason. Meanwhile, the teachings of legal positivism are monistic, because they only recognize one kind of justice, namely justice that arises from positive laws established by humans.

The school of legal positivism asserts that law is synonymous with legislation, and hence, the defining feature of law is legal certainty (rechtszekerheid). The presence of laws guarantees that individuals can definitively discern what constitutes law and what does not. It is important to note that once the law is officially announced, its provisions will immediately become enforceable and carry legal penalties. Legal certainty is ensured when all instances of breaching established legal regulations are consistently addressed and not prosecuted unless they contravene the applicable legislation.

Positive law does not concern itself with questions of what should be (das sollen), but rather deals with the actual conditions (das sein, werkelijkheid). From a positivist standpoint, the only law that exists is the decree of the ruler (law is the directive of those who create laws). Even within the faction of the positive law school that instructs on legal positivism, there is a stronger conviction that the sole origin of law is the law itself (Harun, 2019; Pastor Muñoz, 2023).

In order to address this issue, a new ideology emerged in legal teachings, which focuses on the truth of the social context rather than the reality of normative texts based on positivism. This theory aims to establish principles of justice within society. However, engaging in a debate about the two values will not effectively resolve the situation. Indeed, these two principles should not rely exclusively on rationality, but should also be complemented by conscience and responsibility in order to establish equitable legislation. Under such circumstances, it is important to acknowledge that the law functions as a normative system that provides assurances in the form of certainty.

Legal certainty can be ensured by utilizing positive law as the governing norms. However, mere certainty is insufficient; the law must also be accurate, namely, it must be just. In the absence of justice, the existence of law becomes void. Hence, the legislation that is enacted must align with the tenets of fairness.

The principles of justice in this context do not rely on a subjective, personal perception of justice. Instead, they are derived from the process of transforming an individual's feeling of justice into a universally accepted and perceived notion of fairness. Thus, the concepts of justice in this context refer to widely acknowledged notions of judicial justice. What if, in actuality, the substance of the statute are unjust or cease to be just? Thomas Aquinas argued that society should persist in obeying unjust laws, as resistance against them often leads to disorder and anarchy. In order to effectively address this matter, it is crucial to have a flexible approach that takes into account not only logical considerations, but also safeguards the interests of individuals and others. This is necessary to ensure the realization of collective or community interests.

The concept of common interests, or the interests of society, can be understood as aligning with the interests of the legal system. The desire in legal order is a prerequisite for the establishment of a shared existence. The interest in legal order refers to a universally agreed framework that is deemed essential for maintaining peaceful coexistence.

### 3.2. The Characteristic of Particular State Administrative Disputes

Several state administrative issues specifically pertain to multiple statutory rules. Thus, the matters under discussion in this particular state administrative dispute are exclusively to the examination of abuse of authority claims, the consideration of fabricated requests with positive implications, disputes about the disclosure of public information, and conflicts arising from land acquisition for public development purposes.

**a) Request for a test to determine if there has been an abuse of authority.**

The regulation for testing abuse of authority is specifically outlined in Article 53, paragraph (2), letter b of the State Administrative Court Law. This regulation serves as the foundation or justification for a lawsuit filed by an individual or a civil legal body against a state administration official due to the issuance of a state administration decision that has caused them injury. Nevertheless, notwithstanding the exclusion of abuse of authority from the State Administrative Court Law through Law No. 9 of 2004, judges within the State Administrative Court continue to employ this misconduct in their practice (Nurianti et al., 2020; Sudjati & Cahyandari, 2022).

Since the implementation of the AP Law, there has been a resurgence of regulations pertaining to the testing of misuse of authority. The regulation of this clause is outlined in Chapter V, Part Seven, namely in Articles 17, 18, and 19. The

Supreme Court enacted Supreme Court Regulation Number 4 of 2015, also known as PERMA No. 4/2015, to provide guidelines for assessing elements of abuse of authority in order to implement the article mentioned. Article 10 of the AP Law establishes the requirement as one of the elements in the General elements of Good Government (AUPB).

The state administrative Court is empowered to conduct an evaluation of the components of Abuse of Authority as stipulated in Article 21 of the AP Law (Merrill, 2011). Under this provision, Government Agencies and/or Officials have the ability to petition the Court to evaluate whether the Decision and/or Action involves any form of authority misuse. Under what circumstances does the State Administrative Court possess the jurisdiction to receive, scrutinize, and render decisions on petitions concerning abuse of authority? The jurisdiction of the STATE administrative Court is contingent upon the findings of the government's own supervisory machinery. The ongoing investigation conducted by APIP has determined that there was an abuse of authority resulting in financial damages to the state. As a result, the case will be transferred to the criminal jurisdiction. There are two qualifications for this application: firstly, the existence of a criminal process, and secondly, the outcomes of supervision by the government's internal supervision apparatus.

In essence, when examining instances of authority abuse, this can be succinctly characterized as:

| No | Elements | Explanation |
|---|---|---|
| 1 | Subject | The applicant is a government entity and/or official responsible for executing governmental tasks, both inside the government and among other state administrators.<br>The Respondent is an entity known as the Government Internal Audit Apparatus (APIP), which is responsible for overseeing and evaluating the outcomes of internal government operations. |
| 2 | Object | The object of the application is the result of supervision by the government's internal supervision apparatus<br>(APIP). |
| 3 | Main Application | The primary concerns of the petition are as follows: first, in the case where the petitioner is a government body, it asserts that the decisions and/or actions of government officials constitute an abuse of authority and declares such officials |

| | | |
|---|---|---|
| | | decisions and/or actions null and void. Furthermore, in the case where the applicant is a government official, affirm that the official's decision and/or action do not constitute an abuse of authority. |
| 4 | Elements of Abuse of Authority | The elements of abuse of authority consist of: exceeding authority, mixing authority, and acting arbitrarily. |

What are the consequences of this for procedural law? The following have implications for the examination of elements of abuse of authority in the domain of state administrative procedural law: (1) the trial examination process bypasses the dismissal and preparatory examination processes; (2) the time limitation is exclusive to the initial level of the State Administrative Court and becomes final at the appeal level; and (3) the absolute authority of the STATE administrative Court is expanded.

**b) The Fictitious of Positive Application**

Positive fiction emerged as a result of shifts in the paradigm of public service, which now demand that officials be more receptive to public requests. Positive fiction is a strategy implemented to facilitate licensing and guarantee the free movement of trade and economic cooperation in accordance with European Union Parliament Directive No. 123 of 2006 (Directive 2006/123/EC). Society benefits from the transformation of a negative fictitious notion into a positive fictitious notion because it increases the likelihood that the request will be granted subsequent to the submission of the application to the government agency and/or official.

The AP Law regulates this positive fictitious provision in Article 53. By virtue of this, the AP Law serves as a cornerstone of sound governance and reform. The AP Law caused a significant upheaval in the State Administrative Court's procedural law framework. In part, the regulation of the principle "silence signifies agreement" contributed to the detonation. Prior to its adoption of the Negative Fictitious Principle (also known as "silence means refusal"), the State Administrative Court Law maintained the opposite principle, lex silencio positive (Dragos et al., 2020).

The deadline specified in Article 53 of the AP Law for a Government Agency or Official to render a decision is ten (ten) days subsequent to the receipt of the fully completed application submitted by the public. If no response is received within this specified time frame, it will be assumed that a decision approving the submitted application has been issued. Furthermore, this is underscored in order to facilitate its implementation via Supreme Court Regulation No. 8 of 2017 (PERMA No. 8/2017),

which pertains to Procedure Guidelines for Obtaining Decisions on Acceptance of Applications by Government Agencies or Officials to Obtain Decisions and/or Actions.

Clearly, positive fictitious is a quicker, simpler, and less expensive mechanism than negative fictitious. This distinction arises from the fact that negative fiction is presented in the form of a litigation, whereas positive fiction is presented as a petition. This application is distinctive in that it documents a disagreement between a member of the public and a government agency or official. The application typically takes the form of a letter containing the essential elements of a civil claim; however, it lacks a dispute; therefore, the ongoing trial is deemed to be a non-actual proceeding. Technically, since the examination of a litigation requires more time than the submission of an application, the notion of positive fiction accelerates the transformation of community services.

Since the enactment of the Job Creation Law, this fictitious positive provision has been modified. This provision is located in point 6 of Article 175, which pertains to substantive adjustments concerning the timeframe within which government agencies and officials are obligated to provide decisions in response to public requests, as well as the manner in which decisions are rendered by the state administrative court. In a prior iteration of the AP Law, the time limit for Government Agencies and/or Officials to submit their applications was established at ten (10) working days subsequent to the application being considered final. In contrast, the Job Creation Law reduces the deadline to five (5) business days from the date the complete application is submitted.

Equally significant is the modification to the State Administrative Court's jurisdiction regarding the evaluation of applicant-submitted applications. The Job Creation Law eliminates the authority of the state administrative to render a decision regarding the application of the applicant. As stipulated in point 6 of article 175 of the Law on Job Creation. At the outset, the jurisdiction over positive fictitious cases was governed by Article 53 paragraphs (4) and (5) of the AP Law. Under these provisions, the state administrative court was obligated to render a decision within twenty-one (21) days of the application being submitted. This undoubtedly significantly affects the legal certainty of the applicant's submitted application.

The Job Creation Law's reduction in norms pertaining to the state administrative court 's authority to issue decisions on requests to accept a decision will lead to a murky application of the positive fictitious principle, which was initially regulated by the AP Law but whose regime has since been modified from negative fictitious under the state administrative Judicial Law. When examined through the lens of the theory of legal certainty, legislators' delegation of the authority to create positive fiction serves to reassure the public that the court is

involved in issuing warnings to government bodies or officials regarding the structure of the request that serves as evidence that a decision has been rendered. It is presumed that the request has been lawfully approved.

Despite modifications to the regulations governing the application of positive fictitious petitions in the Administrative Court Law and the AP Law, both continue to delegate authority to the state administrative court. Following the implementation of the Job Creation Law, State administrative court was no longer authorized to rule on positive fictitious applications. The following modifications are made to the provisions of the Omnibus Law concerning the state administrative court's authority to adjudicate positive fictitious applications:

Even though the state administrative court has lost its basis in adjudicating Positive Fictitious Petitions in the AP Law, this does not mean that the state administrative court's authority is automatically lost. The Job Creation Law changes the means of positive fictitious applications from the authority of state administrative court to be "further regulated in the form of a Presidential Regulation". This Presidential Decree will further regulate the technicalities of Positive Fictitious Applications, which can be done in other ways, or can be returned to the state administrative court.

**c) The Disputes Over Public Information.**

The jurisdiction of the State Administrative Court to adjudicate disputes pertaining to public information is established by Article 47 paragraph (1) of the KIP Law. This provision stipulates that in the case of a State Public Body being sued, the petition must be submitted through the state administrative court.

Supreme Court Regulation Number 2 of 2011 on Procedures for Resolving Public Information Disputes in Court (henceforth referred to as PERMA No. 2/2011) reinforces this provision by stating: "Disputes submitted by State Public Agencies and/or Information Applicants who request information from State Public Agencies may be adjudicated by the State Administrative Court."

In cases where public information disputes have been previously resolved by the Information Commission through non-litigation adjudication, the state administrative court possesses the jurisdiction to enforce the decision. Furthermore, this is affirmed in paragraph (1) of Article 4 of PERMA no. 2/2011.

Based on the aforementioned provisions, state administrative court's authority (competence) in resolving disputes involving public information is as follows:

1) Disputes involving public information have been resolved by the Information Commission through non-litigation adjudication in the past.
2) The State Public Agency and/or the Information Applicant, who requests information from the State Public Agency, may file objections to the Information Commission's decision if both the Information Applicant and

the State Public Agency were previously involved in a public information dispute before the Information Commission.

The manner in which public information disputes are resolved in the state administrative court differs in several ways from the administrative court law's examination of state administrative disputes. First, the distinctions concern the object of the objection, the subject of the dispute, and the submission deadline for the objection. As per the provisions outlined in Article 48 paragraph (1) of the KIP Law Jo. Article 1 number 10 PERMA No. 2/2011, the parties involved in a dispute as resolved by the state administrative court are the same parties who initially engaged in a dispute before the Information Commission (as per non-litigation adjudication). As a result, it is not possible to classify the Information Commission as a party to the dispute. The resolution of public information disputes at the state administrative court involves referencing the provisions outlined in Article 48 paragraph (1) UU KIP jo. Article 1 number 10 and Article 3 letter a Perma No. 2 of 211. The subjects in dispute are as follows:

1) In cases where the Information Applicant is the Objection Petitioner, the Objection Respondent is the State Public Body.
2) The information Applicants may serve as Objection Respondents while State Public Bodies may function as Objection Petitioners. Furthermore, the examination procedure does not involve mediation and is limited to the following: written responses from the parties, Information Commission decisions, case files, and requests. Similarly, the evaluation of evidence is limited to matters that are refuted by one or both parties, as well as any additional evidence that the Panel of Judges deems necessary.

**d) Land Acquisition Disputes Regarding Public Interest Development**

The state administrative Court is authorized to hear disputes pertaining to the Determination of Development Locations for the Public Interest, as stipulated in Article 23 of Law No. 2 of 2012 concerning Land Acquisition for Development in the Public Interest.

In accordance with this provision, it is distinguished from other state Administrative Disputes by the following significant elements:

1) Location determination is a direct consequence of the state administrative Court's absolute authority to examine, determine, and resolve land acquisition disputes for development in the public interest.
2) A lawsuit must be filed within thirty (30) days of the date the Location Determination is issued.
3) A case must be resolved within thirty (30) working days from the date the lawsuit was received.

4) Those who disagree with the decision of the state administrative Court have the option of filing a cassation petition; state administrative high court does not accept appeals.
5) Appeals must be submitted within a maximum of fourteen business days. When should the fourteen-day grace period be calculated, whether it commences at the moment the decision is pronounced, subsequent to its proclamation, or subsequent to the notification of the decision's contents?

In accordance with the aforementioned provisions, the Supreme Court issued PERMA Number 2 of 2016, henceforth denoted as PERMA No 2/2016, which pertains to Procedure Guidelines in Disputes concerning the Determination of Development Locations for Public Interest in State Administrative Courts.

The entitling party in this litigation is the plaintiff, which comprises government agencies, legal entities, social bodies, and religious organizations that possess or exercise authority over land acquisition objects in compliance with statutory regulations. Such entities and organizations are as follows: (a) proprietors of land rights; (b) management holder; (c) nadzir for waqf land; (d) proprietors of former customary land; (e) communities governed by customary law; (f) parties who unlawfully control state land; (g) holder In contrast, the Regent/Mayor who received a delegation from the governor to issue the location determination or the Governor who issued the location determination constitute the Defendant. As a result, procedural law in the State Administrative Court is altered to permit the examination of disputes concerning the identification of public interest development sites without requiring a preparatory examination and dissent procedure.

A complaint is a written objection to a court-submitted location determination by the plaintiff. Location determination refers to the process by which development locations are established in the public interest. This determination is carried out by a governor or regent/mayor appointed by the governor in consultation with a delegation from the governor. The decision serves as a permit for land acquisition, land use changes, and the transfer of land rights in the context of land acquisition for development.

## 4. Conclusion

Based on the aforementioned research study, it can be concluded that issues regarding Positive Fictitious Applications, among various other problems being addressed at the State Administrative Court, still lack legal certainty. Furthermore, following the implementation of the Job Creation Law, the presence of Positive Fiction still awaits the issuance of a Presidential Regulation that has not yet been released. From a legislative theory standpoint, enacting fictional regulations by a Presidential Decree is not suitable. This poses challenges in terms of the establishment of legal norms, as Article 24

paragraph (3) of the 1945 Constitution of the Republic of Indonesia mandates that the authority of other entities pertaining to judicial power must be governed by legislation.

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