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Beyond Refusal or Acceptance: Reformulating Administrative Silence in Indonesia from a Comparative French Model

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Abstract: The administrative silence is constructed as a legal fiction that originated as a negative (silence as refusal) and has since developed into a positive (silence as acceptance). In European administrative law, no system operates exclusively based on one legal fiction. Both negative and positive fictions are employed with defined limitations, as in France. Conversely, in Indonesia, these fictions are considered conflicting and override each other due to complex regulations and undefined limitations, leading to ambiguity. Therefore, this article aims to reformulate the concept of administrative silence in Indonesia through a comparative doctrinal legal research approach. The findings proved that both fictions have distinct conceptual origins and should be applied in their respective contexts. Although as fiction, their implementation, particularly in cases of positive fiction, should reflect the principle of administrative law that a decision is an expression of "will." Consequently, Indonesia should reformulate its approach by applying both fictions simultaneously with defined limitations, based on the decision type: declarative or constitutive, rather than treating them as a dichotomy. Ultimately, this article contributes to comparative administrative law by examining administrative silence in Indonesia through the relationship between negative fiction, positive fiction, and decision typology based on comparison with the French model.

Keywords: Administrative Law; Administrative Silence; *Les Decisions Implicites*; Negative Fiction; Positive Fiction

1. Introduction

Administrative silence occurs when public administration fails to respond to requests within the legally prescribed timeframe,[1] creating a legal fiction where a decision is deemed to exist without actually being made.[2] It is a complex phenomenon that lacks a universal definition because of different interpretations of legal regulation.[3] However, its concept is grounded in the right to petition the authorities or the right to demand an express administrative decision. If the authorities do not respond within a reasonable timeframe, administrative silence occurs,[4] and the request is considered either negative (the submitted application is defined by law as rejection, also known as a negative fiction)

[1] Polonca Kovač, Hanna D. Tolsma, and Dacian C. Dragos, "In Search of an Effective Model: A Comparative Outlook on Administrative Silence in Europe," in *The Sound of Silence in European Administrative Law,* ed. Polonca Kovač, Hanna D. Tolsma, and Dacian C. Dragos (Switzerland: Palgrave Macmillan, 2020), 4.

[2] Aurelien Desgree, "Le silence de l'administration. Recherche sur la décision implicite" (PhD diss., Universite De Nantes, 2021), 82.

[3] Agata Jurkowska-Gomułka, Kamilla Kurczewska, and Katarzyna Kurzępa-Dedo, "Understanding administrative silence: A View of Public Officers from The Subcarpathia," *Public Administration Issues,* no. 2 (2020): 99.

[4] Pedro Aberastury and Oscar Aguilar Valdez, "General Report: Administrative Silence," in *Administrative Silence - Le silence de l'administration*, ed. Pedro Aberastury (Brussels: Intersentia, 2023), 4.

or negative fiction or positive (the submitted application is defined by law as approval, also known as a positive fiction or positive administrative silence).[5]

For centuries, administrative silence or fictitious decision had been defined as negative; however, it has evolved to be understood as positive. The discussion of administrative silence within the administrative law system is an intriguing topic that deserves to be examined through the lens of comparative law.[6] In Indonesia, there is no clarity regarding the concept and the norm of administrative silence. The regulations are constantly evolving and highly complex, creating confusion, ambiguity, and the perception that only one fiction (a positive one) should apply.[7] Meanwhile, in European administrative law, no legal system operates solely based on one of the legal fictions. Both negative and positive are employed, with different legal consequences,[8] as applied in the French administrative law system.[9]

The concept of fictitious or implicit decisions in France provides a broader illustration of how administrative law addresses these two legal fictions, where there is no one-size-fits-all approach, as in Indonesia. This article focuses on France because it was the first European Union member state to introduce administrative silence,[10] which has been in effect since 2 November 1864 as stipulated by the *décret relatif aux recours et pourvois devant le Conseil d'Etat*.[11] Additionally, this is due to its similarity to Indonesia's civil-law tradition.[12] Both countries ensure the separation of powers and strict judicial oversight of administrative actions to ensure that government decisions comply with the rule of law.[13]

Numerous prior studies have examined administrative silence in Indonesia. However, these studies primarily explore the conflict between negative and positive fiction in Indonesia,[14] and focus on the legal vacuum regarding the Administrative Court's authority to adjudicate both negative and positive fictions, and conclude that only one fiction,

[5] Luis Alfredo Mora Maridueña, *Positive Administrative Silence and Its Non-application in Ecuador* (Chișinău: Sciencia Scripts, 2021), 10.

[6] Pedro Aberastury, ed., *Administrative Silence - Le silence de l'administration,* (Brussels: Intersentia, 2023), v.

[7] Azza Azka Norra, "Conflicting Norms Between Tacit Refusal and Tacit Authorization and Its Contextualization In The Light of Government Administration Law," *Jurnal Hukum Peratun* 3, no. 2 (2020): 152; Supreme Court Circular Letter Number 1 Year 2017 Concerning The Implementation of the Formulation of the Results of the Supreme Court Chamber Plenary Meeting in 2017 as the Guideline for the Implementation of Duties for the Court; Supreme Court Decision Number 265 K/TUN/2022 (April 2022).

[8] Polonca Kovač, Hanna D. Tolsma, and Dacian C. Dragos, eds., *The Sound of Silence in European Administrative Law* (Switzerland: Palgrave Macmillan, 2020), v.

[9] "Code Des Relations Entre Le Public et l'administration," Le service public de la diffusion du droit-Légifrance, accessed April 12, 2025, at https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000031366350/, articles L.231-1 and L.231-4.

[10] Kovač, Tolsma, and Dragos, "In Search of an Effective Model: A Comparative Outlook on Administrative Silence in Europe," 10.

[11] Bonaparte Louis-Napoléon, Rouher Eugène, "Décret relatif aux recours et pourvois devant le Conseil d'État," *Bulletin administratif de l'instruction publique* 2, no. 45, (1864): 484.

[12] Ahmad Imam Mawardi, "Islamic Law and Imperialism: Tracing on The Development of Islamic Law In Indonesia and Malaysia," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 1 (2018): 1.

[13] Wigati Pujiningrum, Rosa Agustina, and Harsanto Nursadi, "Civil Disputes Between Government and Individuals: A Comparative Study of Indonesia and French Legal System," *Jurnal Hukum Unissula* 40, no. 2 (2024): 111.

[14] See Makhtum Yandi Abrory, "Implikasi Yuridis Pengaturan KTUN Fiktif Positif dan Fiktif Negatif," *Jurnal Kajian Hukum Dan Sosial* 1, no. 1 (2019); Fajri Kurniawan, Shally Mahdayatul Hasanah, and M. Naufal Al-Hadi Kasuma, "Paradigma Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja Terhadap Keputusan Tata Usaha Negara (KTUN) Bersifat Fiktif Positif," *Jurnal Hukum PERATUN* 6 (2023); Norra, "Conflicting Norms Between Tacit Refusal and Tacit Authorization and Its Contextualization In The Light of Government Administration Law"; 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).

namely positive fiction, should prevail.[15] Since the establishment of positive fiction, prior studies tend to overrule negative fiction.[16] This article, however, has a different focus: it aims to reformulate the concept of negative and positive fiction in Indonesia into a concept that should be applied simultaneously, with defined limitations. As seen in France, these concepts are not mutually exclusive; rather, they are implemented alongside their respective models of restriction.

Both models of administrative silence have advantages and disadvantages.[17] Applying a single fictitious decision for all applications is problematic, and applying both concurrently requires clear criteria. Therefore, it is essential to re-analyse the concept of negative and positive fiction. It should also be linked to the main principle in the theory of decision, as a statement of the government's will, because positive fiction raises a significant question about how the government's "will" will be fulfilled in a fictitious decision, as an approval that was issued due to the silence of the administration.

2. Method

This study is doctrinal legal research.[18] The aim of legal research should indicate what should be done from a legal perspective within a particular legal system.[19] Therefore, this study aims to provide a prescription for establishing an optimal framework for administrative silence (negative and positive fiction) in Indonesia. It uses primary legal materials such as statutes and circular letters to assess administrative silence regulations and to provide a critical analysis of their complexity. Secondary legal materials, such as law books, dissertations, and journals relevant to administrative silence, are also used.[20] This study employs a comparative law approach to address legal issues[21] and integrates a conceptual approach. The comparative study was conducted specifically in France because France introduced negative fiction since 1864 and recognised positive fiction alongside negative fiction in 2013.[22] Thus, the evolution of this concept in France can serve as a highly appropriate reference.

[15] See Umar Dani, "Irregularity Protection of Citizens' Constitutional Rights to the Administrative Silence," *Jurnal Konstitusi* 20, no. 3 (2023); 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 (2023); Bita Gadsia Spaltani, "Rekonsepsi Keputusan Fiktif Positif Pasca Undang-Undang Cipta Kerja," *Jurnal Hukum dan Administrasi Publik* 2, no. 2 (2024).

[16] See Norra, "Conflicting Norms Between Tacit Refusal and Tacit Authorization and Its Contextualization In The Light of Government Administration Law," 152.

[17] Bojan Blagojević, "Legal Protection Against Administrative Silence," *Facta Universitatis - Series: Law and Politics* 19, no. 2 (2021): 154.

[18] Typically, the scope of legal research involves the systematic study of legal rules, principles, concepts, theories, doctrines, decided cases, legal institutions, and legal problems or questions, or a combination of these. See Anwarul Yaqin, Legal Research and Writing (Kelana Jaya: Malayan Law Journal SDN BHD, 2007), 3.

[19] John Bell, "Legal Research and the Distinctiveness of Comparative Law," in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?,* ed. Mark Van Hoecke (Oxford: Hart Publishing Ltd, 2011), 175.

[20] Doctrinal legal research employs both primary and secondary legal materials. See Terry Hutscinson, *Researching and Writing in Law* (Pyrmont: Thomson Reuters (Professional) Australia Limited, 2018), 7.

[21] Maurice Adams John Griffiths, "Against 'Comparative Method': Explaining Similiarities and Differences," in *Practice and Theory in Comparative Law,* ed. Maurice Adams Jacob Bomhoff (New York: Cambridge University Press, 2012), 279.

[22] Emilie Chevalier, "Silence in the French Administrative System: A Failed Revolution?," in *The Sound of Silence in European Administrative Law*, ed. Dacian C. Dragos, Polonca Kovač, and Hanna D. Tolsma (Switzerland: Palgrave Macmillan, 2020), 120.

3. Negative and Positive Administrative Silence as a Fiction: Distinct Conceptual Roots

Lon L. Fuller defines fiction as either (1) a statement made with awareness of its falsity or (2) a false statement considered useful.[23] The first focuses on knowing it's false, the second on its usefulness. Formulations (1) and (2), though presented as alternatives, are not mutually exclusive. Both are two elements, dimensions, or aspects that express the same definition in different ways. If a fiction is accepted as truth, it becomes harmful and loses its value as a fiction.[24] Legal fictions are intentionally false statements or rules used by the legal system for specific purposes, without intent to deceive (lies). They differ from truths and unintentional errors.[25]

In administrative law, a fiction also exists when addressing administrative silence. In administrative law, silence has a formal existence through a mechanism created from scratch by the legislature, known as a fictitious decision or an implicit decision. Through this process, silence is never an uncertainty but rather has meaning.[26] The rules governing administrative silence have given silence a decisive character and have transferred silence from juridical reality to legal reality as an implicit decision of rejection (or, subsequently, an implicit decision of acceptance). Therefore, both rejection and acceptance are fiction, i.e., silence given meaning.[27]

Various literature, including this article, agree that the fictitious decision or implicit decision system was initially designed to link litigation in cases where there is no explicit decision.[28] To challenge a government that has not responded to citizen applications outside of the designated period, it is necessary to create the fiction that the government has issued a decision in the form of a refusal. Thus, the concept of administrative silence was primarily established for procedural purposes, aiming to guarantee the rights of regulated parties.[29] Therefore, the rule on silence is procedural rather than substantive.[30] Negative fiction is even initially recognised as a general legal principle in administrative law.

A new paradigm has been introduced, i.e. positive fiction. In 2006, the European Union (EU) Parliament issued Directive 2006/123/EC, which requires EU member states to simplify service licensing to improve access, especially for small and medium-sized enterprises. It addresses issues such as the complexity of administrative procedures, lengthy timeframes, and legal uncertainty by promoting the principles of "tacit approval" or positive fiction after set periods have elapsed.[31] In recent years, this concept has been

[23] Lon L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967), 9.
[24] John W.F. Allison, "Current Legal Fictions in Public Law," *Current Legal Problems* 77, no. 1 (2024): 419.
[25] Kenneth Campbell, "Fuller on Legal Fictions," *Law and Philosophy* 2, no. 3 (1983): 350–65.
[26] Desgree, "Le silence de l'administration. Recherche sur la décision implicite," 2.
[27] Desgree, 8.
[28] Chevalier, "Silence in the French Administrative System: A Failed Revolution?," 110; Maryse Deguergue, "Le silence de l'administration en droit administratif français," *Les Cahiers de droit* 56, no. 3–4 (2015): 396; Desgree, "Le silence de l'administration. Recherche sur la décision implicite," 31; Armand Desprairies, "La décision implicite d'acceptation en droit administratif français" (PhD diss., Université Panthéon-Sorbonne - Paris I, 2019), 475.
[29] Libardo Rodríguez Rodríguez and Jorge Enrique Santos Rodríguez, "Administrative Silence in Colombian Law," in *Administrative Silence - Le silence de l'administration*, ed. Pedro Aberastury (Brussels: Intersentia Ltd, 2023), 110.
[30] Desgree, "Le silence de l'administration. Recherche sur la décision implicite," 43.
[31] Directive 2006/123/EC of The European Parliament and of The Council, number 43.

implemented in the national legislation of member states and has certainly influenced the development of national administrative law relating to positive fiction.[32]

The concept of positive fiction is applied to accelerate procedures, simplify processes, and reduce administrative costs.[33] It should be interpreted without further judicial process, as there is no longer any distinction between negative fiction, if determined by the court. Thus, after a specified period, the request is approved, and the right is granted. The next step is to obtain confirmation from the relevant authority. This practice is also evident in the laws of other states, such as Argentina,[34] Brazil,[35] Chile,[36] Colombia,[37] France,[38] Italy,[39] Mexico,[40] the Netherlands,[41] and Portugal,[42] among others. A comparative analysis across several countries shows that positive fiction is generally treated as approval, thereby directly granting rights and ensuring a timely decision for applicants. Follow-up methods exist, such as requiring certificates, [43] public deeds, [44] or declaratory decisions[45] to provide evidence of this approval. It falls within the scope of administrative (executive) power, rather than judicial power. The courts can intervene in the event of disputes.

Consequently, positive fiction has changed significantly from its original roots in administrative silence, where the fiction was initially merely to link litigation; later, it became the fiction that could grant rights immediately simply by virtue of silence. It has evolved into a substantive rule rather than a procedural rule. However, it is important to question the extent to which legal fiction can override the fundamental principle of "decisions" in administrative law, as the unilateral will of the government. This issue will be elaborated further in the following discussion.

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[32] Kars J De Graaf and Nicole G. Hoogstra, "Silence is Golden? Tacit Authorizations in the Netherlands, Germany and France," *Review of European Administrative Law* 6, no. 2 (2013): 14.

[33] 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 (2023): 178; Anna Haladyj and Katarzyna Kutak-Krzysiak, "Positive Silence to The Removal of Trees - An Analysis of A Legal Institution," *Review of Comparative Law* 36 (2019): 23.

[34] Héctor M. Pozo Gowland, "Administrative Silence in Argentina," in *Administrative Silence - Le silence de l'administration*, ed. Pedro Aberastury (Brussels: Intersentia Ltd, 2023), 27, 29, 36.

[35] Ricardo Perlingeiro, Luciana F. Portal Gadelha, and Patrícia Fernandes Marques, "The Current Scene of Administrative Silence in Brazilian Law," in *Administrative Silence - Le silence de l'administration*, ed. Pedro Aberastury (Brussels: Intersentia Ltd, 2023), 47, 51.

[36] Jorge A. Femenías S. and Gustavo Alarcón Del Pino, "Administrative Silence and Its Regulation in Chile: Critical Approximation to Law No 19.880," in *Administrative Silence - Le silence de l'administration*, (Brussles: Intersentia , 2023), 84, 91.

[37] Rodríguez and Rodríguez, "Administrative Silence in Colombian Law," 106–7.

[38] Chevalier, "Silence in the French Administrative System: A Failed Revolution?," 133.

[39] Roberto Caranta, "Silence and Beyond in Italian Administrative Law," in *Administrative Silence - Le silence de l'administration,* ed. Pedro Aberastury (Brussels: Intersentia Ltd, 2023), 250–53.

[40] Carla Hurta and Rogelio Robles López, "Administrative Silence in Mexico," in *Administrative Silence - Le silence de l'administration,* ed. Pedro Aberastury (Brussels: Intersentia Ltd, 2023), 262, 276.

[41] Tom Barkhuysen and Michiel L. Van Emmerik, "Dealing with Slow And Silent Administrative Bodies: Lessons From The Netherlands," in *Administrative Silence - Le silence de l'administration,* ed. Pedro Aberastury (Brussels: Intersentia Ltd, 2023), 287.

[42] Dulce Lopes, "Administrative Silence in Portugal," in *Administrative Silence - Le silence de l'administration,* ed. Pedro Aberastury (Brussels: Intersentia Ltd, 2023), 341, 348, 356, 358.

[43] Desprairies, "La décision implicite d'acceptation en droit administratif français," 389.

[44] Rodríguez and Rodríguez, "Administrative Silence in Colombian Law," 107–8.

[45] Đerda Dario, "Administrative Silence in the Republic of Croatia," in *Administrative Silence - Le silence de l'administration*, ed. Pedro Aberastury (Brussels: Intersentia Ltd, 2023), 123.

4. The Comparison of Administrative Silence in Indonesia and France

4.1. Administrative Silence in Indonesia

In Indonesia, negative fiction (regulated in Article 3 of Law No. 5/1986 concerning Administrative Court) and positive fiction (regulated by Article 53 of Law No. 30/2014 concerning Administrative Government) are considered a conflict of norms[46] because they are applied simultaneously with different legal consequences under different laws (without any revocation). Negative and positive fiction under those provisions applies to the settlement process by resolving it through Administrative Court.[47]

The applicant must submit a request for a positive fiction decision, and if granted, the administration is obliged to issue the relevant decision, similar to the settlement of a negative fiction case. This is the point of normative conflict, as it is unclear which norms Administrative Court should apply to adjudicate administrative silence, whether negative or positive. The Supreme Court resolved this conflict of norms by applying the *lex posterior derogat legi priori* principle. Consequently, negative fiction is overridden by positive fiction, as evident in Circular Letter No. 1/2017, which allows positive fiction to apply without any limitations.

However, the regulation of positive fiction has become more complex following changes from Law No. 11/2020 to Law No. 6/2023 on Job Creation, which removed the Administrative Court's authority over positive fiction cases and called for a Presidential Regulation to determine the form of positive fiction, which has yet to be issued. The Supreme Court responded to the Job Creation Law by issuing Circular Letter No. 5/2021, limiting Administrative Court's role in positive fiction cases, which indicates that there is a vacuum regarding the authority of the Administrative Court to adjudicate administrative silence (negative and positive). However, in 2024, the Supreme Court issued Circular Letter No. 2/2024, stating that the silence of State Administrative Agency/Officials regarding the Plaintiff's application in the Minerba One Data Indonesia (MODI) list should be seen as a refusal to issue a State Administrative Decision under Article 3 of Law Number 5 of 1986 rather than a factual act of omission. This provision has the potential for misinterpretation, as it may be understood to either limit the provision to MODI disputes because it specifically addresses MODI, or to apply to all applications due to its amendment of the previous circular letter (Circular Letter No. 1/2007), which stated that negative fiction is not enforceable.

[46] Wairocana et al., "Kendala dan Cara Hakim Peradilan Tata Usaha Negara Pasca UU Administrasi Pemerintahan: Suatu Pendekatan Atas Penanganan Perkara Fiktif Positif," 563–85; Norra, "Conflicting Norms Between Tacit Refusal and Tacit Authorization and Its Contextualization In The Light of Government Administration Law," 141–54; Abrory, "Implikasi Yuridis Pengaturan KTUN Fiktif Positif dan Fiktif Negatif," 70; Supreme Court Decision Number 265 K/TUN/2022, 4–5; Makassar Administrative Court Decision Number 33/G/2021/PTUN.Mks (2021); Supreme Court Circular Letter Number 1 Year 2017 Concerning The Implementation of the Formulation of the Results of the Supreme Court Chamber Plenary Meeting in 2017 as the Guideline for the Implementation of Duties for the Court.

[47] Law Number 5 Year 1986 concerning Administrative Courts, as most recently amended by Law Number 51 Year 2009 concerning the Second Amendment to the Law Number 5 Year 1986 concerning Administrative Court" (1986); Supreme Court Regulation Number 8 of 2017 on the Procedural Guideline for Obtaining Decisions on the Acceptance of Applications to Obtain Decisions and/or Actions of Government Agencies or Officials.

Even more complex, the Supreme Court released Circular Letter No. 1/2025 at the end of December 2025. One provision, as stated in the subheading, addresses the right to file in the Administrative Court under the Government Administration Law and Job Creation Law. However, the substantive provisions state that individuals who believe their interests are harmed due to officials not responding to requests, whether through decisions or actions, may file a lawsuit in the Administrative Court under Article 53 of the Administrative Court Law, which applies if the content of the decision or action is determined solely by government officials or if it is vertical in nature. This rule, despite leading to legal debates about its substance, introduces confusion regarding the existing legal framework in Indonesia, as it does not determine whether the right to file for administrative silence is deemed approval (positive fiction) or rejection (negative fiction).

Based on the subheading, it might be a positive fiction since it is associated with Government Administration Law and the Job Creation Law. However, the substance does not clarify whether this right is granted or denied, so it cannot be definitively classified as a positive fiction as well. Consequently, without clarity, this provision may result in Indonesia no longer recognising the concept of fictitious decisions, negative or positive. Instead, it may position the Administrative Court as a protector for citizens, enabling them to challenge harmful actions from the government, as is the general function of the Administrative Court, regardless of the construction of fictitious decisions. Therefore, this recent regulation introduces ambiguity and further confusion regarding administrative silence in Indonesia, creating uncertainty about the regime currently in force.

4.2. Administrative Silence in France

The general principle applied in France for over a century was negative fiction *(la décision implicite de rejet* or *silence valant rejet).*[48] It is stipulated by the *décret relatif aux recours et pourvois devant le Conseil d'Etat,* 1864. This principle was extended to all administrative bodies by law on 17 July 1900, which allowed administrative silence to be challenged in the administrative court.[49]

Furthermore, Article 51 of *L'ordonnance n° 45-1708 (31 July 1945)* regarding *Conseil d'Etat* regulates negative fiction, which is also addressed in article 3 of *décret n° 53-334 (30 Septembre 1953)* regarding *réforme du contentieux administrative*; if no decision is made within four months, silence is presumed negative. This period was reduced to two months per article 1 of *décret n° 65-29 (11 Janvier 1965)* regarding *aux délais de recours contentieux en matière administrative.* The regime was reaffirmed in *loi n° 2000-321 (12 April 2000)* regarding *relative aux droits des citoyens dans leurs relations avec les administrations,* specifically in articles 21 and 22. This law started to recognise positive fiction, which aims to improve and accelerate the processing of applications by requiring

[48] Armand Desprairies, "Le silence de l'administration en France," in *Administrative Silence - Le Silence de L'Administration,* ed. Pedro Aberastury (Brussels: Intersentia Ltd, 2023), 138–39.

[49] Pierre Tifine, *"Quarante-deux décrets définissent 1 686 exceptions au principe selon lequel le silence de l'administration vaut acceptation à l'expiration d'un délai de deux mois: Où la recherche de la simplification contribue à l'illisibilité du droit,"* accessed March 20, 2025, at https://www.lexbase.fr/revues-juridiques/22773944-textes-quarante-deux-decrets-definissent-1-686-exceptions-au-principe-selon-lequel-le-silence-de-l#:~:text=La loi du 17 juillet,une décision attaquable devant lui.

administrations to identify cases where silence indicates tacit consent,[50] but only for the cases provided for by decrees of the *Conseil d'Etat.*

A review of the drafting documents of *Loi n° 2000-321* discusses the weaknesses of positive fiction, in particular that beneficiaries can claim a kind of approval from public authorities whose responsibility is too great. Therefore, limitations are imposed to reduce potential negative impacts, including when they conflict with international obligations, public policy, freedoms, or constitutional principles. Importantly, financial requests, apart from those related to social security, do not imply acceptance.[51]

However, reformation began in 2013, when the President's proposal on May 16, 2013, stated that administrative silence after a set period is now deemed acceptance rather than rejection.[52] This legal shift aims to strengthen the citizen-administration relationship.[53] Parliamentary documents indicate that both the *Assemblée Nationale* and the *Sénat* generally support the President's notion, although some raise concerns about reversing the silence principle and call for restrictions.[54] Consequently, *loi no 2013-1005* regarding *habilitant le gouvernement à simplifier les relations entre l'administration et les citoyens* was enacted on 12 November 2013, amending previous laws to define non-responses as implicit acceptance. This shift changes the perception of silence from rejection to acceptance.

Article 3 of *loi n° 2013-1005* also mandated the codification of non-contentious administrative procedures to improve dialogue, simplicity, and transparency between the public and the administration.[55] Subsequently, the *Code des relations entre le public et l'administration (CRPA)* was established in 2015, adopting implicit decisions (acceptance and rejection). Article L.231-1 CRPA states that if the administration does not respond to a request within two months, the request is considered accepted. Aside from implicit decision, which means consent, this CRPA also governs some exceptions regarding implicit decisions. Article L231-4 states that rejection silence prevails for a request in certain cases: when the request seeks no individual decision, does not follow a prescribed

[50] Assemblée nationale, "Projet de loi: relatif aux droits des citoyens dans leurs relations avec les administrations, ministre de la fonction publique de la réforme de l'état et de la décentralisation (enregistré à la présidence de l'assemblée nationale le 13 mai 1998)," 5, accessed March 21, 2025, at https://www.assemblee-nationale.fr/11/projets/pl0900.asp.

[51] Assemblée nationale, "Rapport sur le projet de loi relatif aux droits des citoyens dans leurs relations avec les administrations, la commission des lois constitutionnelles de la législation et de l'administration générale de la république, adopté par le sénat (enregistré à la présidence de l'assemblée nationale le 19 mai 1999)," 56, accessed March 21, 2025, at https://www.assemblee-nationale.fr/11/rapports/r1613.asp.

[52] Sénat, "Compte Rendu Intégral des Débats du Séance du 16 juillet 2013," accessed March 21, 2025, at https://www.senat.fr/seances/s201307/s20130716/s20130716_mono.html#Niv1_SOM3.

[53] Ariane Amado and Armand Desprairies, "La décision implicite d'acceptation à l'épreuve de la matière pénitentiaire," *Revue de science criminelle et de droit pénal comparé* 4, no. 4 (2018): 829.

[54] Assemblée nationale, "Petite loi: Projet de loi relatif habilitant le gouvernement à simplifier les relations entre l'administration et les citoyens, texte définitif (session ordinaire de 2012-2013, le 30 octobre 2013)," 7, accessed March 21, 2025, at https://www.assemblee-nationale.fr/14/ta/ta0225.asp; Sénat, "Projet de loi relatif habilitant le Gouvernement à simplifier les relations entre l'administration et les citoyens, adopté par le sénat après engagement de la procédure accélérée (Session extraordinaire de 2012-2013, adopté le 16 juillet 2013)," 2–3, accessed March 21, 2025, at https://www.senat.fr/petite-loi-ameli/2012-2013/743.html; Sénat, "Compte Rendu Intégral des Débats du Séance du 16 juillet 2013"; Assemblée nationale, "Petite loi: Projet de loi relatif habilitant le gouvernement à simplifier les relations entre l'administration et les citoyens, modifie par l'assemblée nationale en première lecture (troisème session extraordinaire de 2012-2013, le 16 septembre 2013)", 2–3, accessed March 21, 2025, at https://www.assemblee-nationale.fr/14/ta/ta0206.asp.

[55] Marzia De Donno, "The French Code 'des relations entre le public et l'administration'. A New European Era for Administrative Procedure?," *Italian Journal of Public Law* 9, no. 2 (2017): 223.

legislative or regulatory procedure, is financial (except in social security cases specified by decree), conflicts with France's international commitments or national security, and in matters between the administration and its agents. Additionally, Article L231-5 provides that the Council of State and the Council of Ministers may, by decree, make another exception for certain decisions or for reasons of good administration. To provide legal protection for the public interest, an implicit acceptance decision can be overturned, whether by the applicant's request, the administration's initiative or at the request of another person (third parties).[56]

All of the legislation mentioned above highlights that the shift from a negative to a positive regime in France occurs gradually and does not apply to all applications. While limitations are vital for positive fiction, the issue of administrative silence was addressed early in administrative law and is central to the evolution of administrative litigation.

However, at the beginning of the 2013 reform, the main issue with implicit decisions is the many exceptions to the silence is acceptance principle. Under the CRPA, implicit acceptance is listed on the government website along with 1,200 procedures that follow this principle. However, for another 2,400 procedures, silence signifies rejection in 45 decrees implementing the *Loi n° 2013-1005 du 12 novembre 2013.* These procedures include 1,800 legislative exceptions due to security concerns (e.g. arms dealer approvals) and 600 regulatory exceptions for reasons of good administration (e.g. boat registration).[57] Furthermore, data from 2020 show that over 2,400 exceptions were regulated by more than 50 decrees and laws.[58] In specific sectors, such as prison, 36 procedures follow silence as acceptance, and 65 procedures use silence as rejection. While this 36:65 ratio doesn't cover every prison procedure or legislative exception, it provides a sample of administrative procedures in prisons.[59] The broad scope of the implicit rejection decision initially drew significant criticism in France.[60] The French systems that established lists of procedures concerning acceptance imply that the list is vast, and its sources are diverse.[61] This practice almost obscures the main principle: silence is acceptance.[62]

Therefore, efforts to simplify the process may become complex and unreadable to understand if updates to its list are not implemented. Accordingly, the implicit acceptance decision is updated through the website service-public.fr. This procedure aligns with the stipulation in Article D231-3 of CRPA, which specifies that the list referred to in article D. 231-2 is published on the "service-public.fr" website. Consequently, applicants can verify whether their application type is included in the positive silence by using the search function on the service-public.fr website. This online service includes only those procedures for which a lack of response to a request equals an acceptance decision. This information is meant solely for informational purposes. If the keyword search produces no results or the procedure is not among the suggested outcomes, the

[56] "Code des relations entre le public et l'administration", articles L.242-1 to L.242-2.
[57] Desprairies, "La décision implicite d'acceptation en droit administratif français," 223.
[58] Chevalier, "Silence in the French Administrative System: A Failed Revolution?," 121.
[59] Amado and Desprairies, "La décision implicite d'acceptation à l'épreuve de la matière pénitentiaire," 829–30.
[60] Desprairies, "La décision implicite d'acceptation en droit administratif français," 478–79.
[61] Valentin Lamy, "Le silence de l'administration vaut acceptation: La simplification n'aura pas lieu," Les Cahiers Portalis 1, no. 2 (2015): 111.
[62] Chevalier, "Silence in the French Administrative System: A Failed Revolution?," 121.

administration's silence may be considered a refusal decision.[63] Through this mechanism implemented in France, the concept of positive silence became significantly applicable and coherent. However, despite administrative reform in France that has transformed the concept into a positive form of administrative silence, it remains clear that negative fiction continues to exist.

5. A Reformulation of the Concept of Administrative Silence in Indonesia

Both Indonesia and France understand administrative silence through the lens of regime change, reframing it from negative to positive fiction. The most significant difference is that France practices both forms of administrative silence simultaneously. Their application is closely regulated, with notable exceptions that limit the impact of positive fiction. This contrasts with Indonesia, which has historically applied a single concept (positive fiction) across all applications without restriction and, even now, continues to create ambiguity about the regime of fiction that applies in Indonesia.

The implementation of administrative silence in France leads to the conclusion that the notion of simultaneously enforcing both negative and positive fiction in Indonesia is more than just an unreasonable thought. Thus, Indonesia needs to re-address this, as negative fiction is often overlooked despite the potential harm of positive fiction. Administrative silence is a complex institution aimed at ensuring legal certainty, but it can present challenges.[64] Applying positive fiction across all applications, as in Indonesia, is imprudent. Drastic changes from negative to positive fiction, without proper understanding and confirmation, may lead to contradictions and legal uncertainty.[65]

Doctrinal debates often centre on prioritising administrative interests versus individual rights. Administrative law seeks minimal constraints on officials, allowing them to create or revoke policies within legal limits. This promotes efficient administration and benefits the public through careful decision-making. Consequently, administrative silence is viewed negatively, implying rejection due to lack of response.[66] However, the principle of positive fiction highlights the primacy of individual subjective rights in response to administrative silence.[67] Although it can facilitate approvals, it also poses risks to third parties,[68] creates corruption risks, and makes enforcement more difficult.[69] It could also be counterproductive for public authorities aiming to streamline administration-public

[63] Le site officiel de l'administration Française, "Procédures pour lesquelles « silence vaut accord »," accessed May 31, 2025, at https://www.service-public.fr/demarches-silence-vaut-accord.

[64] Jorge A. Femenías S. and Gustavo Alarcón Del Pino, "Administrative Silence and Its Regulation in Chile: Critical Approximation to Law No 19.880," 91.

[65] Enrico Simanjuntak, *Rekonseptualisasi Kewenangan Pengadilan Tata Usaha Negara dalam Mengadili Perkara Fiktif Positif* (Depok: PT RajaGrafindo Persada, 2021), 525.

[66] Gordon Anthony, "Administrative Silence and UK Public Law," *The Juridical Current* 34 (2008): 40.

[67] Armand Desprairies, "Le silence positif de l'administration en droit français: Étude sous le pris- me de la réforme du 12 novembre 2013," *Administración & Cidadanía (A&C)* 11, no. 1 (2016): 102.

[68] Denis S. Andreev, "Implicit Administrative Acts. Part One," *Vestnik Saint Petersburg UL* 2023, no. 2 (2023): 323.

[69] Dragos, Kovač, and Tolsma, Sound Silenc. Eur. Adm. Law, 14.

interactions.[70] Additionally, positive fiction in electronic decision systems must be considered, as these systems are vulnerable to sabotage and cybersecurity threats.[71]

The application of positive fiction in European law often sparks debate among politicians, experts, and scientists, and is generally mistrusted by courts, including the highest courts. Criticism focuses on the issuance of permits, rights, or benefits outside established procedures, without proper review of relevant information, thereby potentially conflicting with the public interest, violating third-party rights, and encouraging corruption.[72] An unfortunate example of positive fiction's application is proved in several cases where a land certificate was granted through a petition of positive silence in the Administrative Court. This led to a third party losing their land rights, as they were unable to intervene in the case of positive fiction.[73] Thus, while positive legal fiction seeks to reactivate administration,[74] its implementation risks harming third-party or public interests.

Therefore, this article believes that the concepts of negative and positive fiction have their own contexts. The comparative study conducted by Jowanka Jakubek-Lalik on administrative silence in Spain, the Netherlands, Germany, Croatia, and Slovenia also reaches the same conclusion, i.e., there is no "one size fits all" solution to the failure or silence (or unwillingness) of a government to make decisions.[75] Therefore, Indonesia should implement both negative and positive fiction simultaneously without being dichotomised. This notion is widely accepted internationally, albeit with specific restrictions to prevent misuse and overlap. However, to define the limitations, Indonesia should consider a fully developed system that suits its needs. Therefore, the discussion should move forward by defining the criteria or principles for limiting the application of negative and positive fiction in Indonesia.

It is recognised that the essence of the concept of positive silence is the conferring of a right directly on an individual after a specified duration. Therefore, the settlement of positive fiction in Indonesia should not be approached as a judicial process or trial. Instead, it should shift from court-based adjudication to executive authority, enabling the government to address it through measures such as issuing a certificate of positive fiction determination.

However, if the positive fiction is granting rights directly, then a critical examination of positive silence may concentrate on the extent to which it can give rise to a right upon an individual without the government's consent or "will". This is indeed a fiction, but the fiction resides in the "administrative silence" that is regarded as a decision. However, positive legal fiction, which implies the emergence of rights, no longer deviates from the

[70] Frédéric Colin, "Les risques de la simplification administrative en matière d'accès aux droits," *DPCE Online* 47, no. 2 (2021): 2020.

[71] Zaka Firma Aditya and Sholahuddin Al-Fatih, "Redesign of Positive Fictitious Efforts After the Job Creation Law," *Jurnal Konstitusi* 20, no. 2 (2023): 355.

[72] Denis S. Andreev, "Implicit administrative acts. Part two," *Vestnik of Saint Petersburg University. Law* 15, no. 1 (2024): 106.

[73] Denpasar Administrative Court Decision Number 01/P/FP2016/PTUN.DPS (2016); Supreme Court Review Decision Number 84PK/TUN/2017.

[74] Chevalier, "Silence in the French Administrative System: A Failed Revolution?," 111.

[75] 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,'" 180.

framework of administrative silence previously established based on the construction of negative legal fiction. When negative legal fiction, intended for legal protection and acting as a procedural rule, is replaced by positive legal fiction designed to establish rights for efficient administrative processes, it raises concerns about the acceptance of this positive legal fiction. This is particularly the case when it clashes with the core principles of administrative law, especially concerning the government's authority to make decisions with legal consequences. At the same time, it should be noted that efforts to simplify administrative procedures must consider the crucial structural limitation that such simplification must not erode the fundamental functions of law (such as the protection of rights and legal certainty) or undermine the foundations of the legal order.[76]

On the other hand, this article acknowledges the perspective that in the implicit decision, there exists an objectification of the manifestation of will through the method of implication, as previously explained by Anne Jannequin.[77] It is explained that legal fiction takes over the administrative will, suggesting that an implicit act arises if there is no externalised will within a given timeframe. This legal fiction leads to a logic of objectified consent, though it does not entirely negate the administration's role in forming the implied act.[78] However, this positive silence should be approached with caution and thoroughness, as Indonesia must consider another factor when adopting this concept (apart from the element of fulfilment of the real "will" in administrative decisions), since the Ombudsman's evaluation indicates that public services continue to fall short due to several issues, particularly those related to human resources.[79]

Therefore, based on the elaboration of legal fiction, the role of the will, as well as considering the basic concepts of negative and positive fiction, the results of this article show that the principle of limitation between negative and positive fiction leads to the difference in the types of decisions, namely constitutive and declarative decisions. Maurice Hauriou explain that an administrative act is a decision, i.e. an expression of positive will.[80] An administrative decision is a unilateral action by an administrative body based on state authority that establishes, cancels, or refuses to create a legal relationship.[81] Therefore, a decision represents a statement of will by a government official.[82] This definition aligns with the doctrine that a decision reflects the government's will regarding citizens' applications or needs.[83]

[76] Jakubek-Lalik, 7.

[77] Anne Jennequin, "L'implicite en droit administratif" (PhD diss., Université de Lille, 2007), 210–11.

[78] Armand Desprairies, "L'expression du consentement de l'administration par le silence," in *Consentement et droit public,* ed. L. Fort dan J.-B. Guyonnet (L'Harmattan, 2021), 102.

[79] Asisten Ombudsman RI and Alumni Pascasarjana Ilmu Sejarah USU, "Pelayanan Publik Kita Masih Buruk," accessed March 18, 2023, at https://ombudsman.go.id/artikel/r/pwkinternal--pelayanan-publik-kita-masih-buruk?lang=en.

[80] Maurice Hauriou, *Précis de droit administratif contenant le droit public et le droit administratif,* 2 ed. (Paris: L. Larose & Forcel, 1893), 185.

[81] Prof. Mr. H. D. van Wijk, *Hoofdstukken van Administratief Recht,* ed. Mr.W. Koninjinenbelt (Den Haag: VUGA bv, 's-Gravenhage, 1979), 51.

[82] E. Utrecht, *Pengantar Hukum Administrasi Negara Indonesia* (Bandung: Fakultas Hukum dan Pengetahuan Masyarakat Universitas Negeri Pajajaran, 1960), 183.

[83] Grace Sharon, "Teori Wewenang dalam Perizinan," *Jurnal Justiciabelen* 3, no. 1 (2020): 10.

The nature of administrative decisions can be classified further into declaratory and constitutive. W. F. Prins explains that constitutive decisions are those that create rights, whereas declaratory decisions are intended to recognise existing rights.[84] R.W.J. Severijns explains that administrative law has different types of decisions and, therefore, different decision-making processes. One of them is a decision that establishes law (declarative decisions), and the other is a decision that creates law (constitutive decisions). These are decisions that do not produce new legal effects, but in fact establish what is already legally valid. However, most decisions are not declaratory, but rather create law, i.e. constitutive decisions. Constitutive decisions bring about changes to the rights and obligations of citizens.[85] Many other jurists have also proposed similar definitions.[86]

However, as decisions, both constitutive and declaratory decisions have legal consequences for individuals. The distinction lies in when a right can be exercised. It illustrates that some decisions exist and directly create rights—these are constitutive decisions. Others require a prior constitutive decision followed by a subsequent declarative decision, as required by law. The right created by the constitutive decision can only be exercised after this declaration. This notion aligns well with the explanation in Article 54 paragraph (1) of the Government Administration Law, which defines constitutive decisions as those made independently by government officials (independent determination), and declaratory decisions refer to decisions that have an approving or declaration nature after going through a discussion process at the government level that made the constitutive decision. However, it does not imply that a declarative decision does not also give rise to legal consequences. This is because the declarative nature has merged within the context of a decision, meaning that every decision must result in legal consequences.

Therefore, a connection can be made between the type of decision and administrative silence. First, in applications where the applicant seeks constitutive decisions, the negative fiction should prevail because constitutive decisions require the government's genuine will to create a legal relationship. Secondly, in applications where the applicant seeks declarative decisions, the positive fiction should prevail because it merely states an existing legal relationship and does not necessitate the government's genuine will. Rather, in a declaratory decision, the government is obliged to make the decision as outlined in its constitutive decision. Consequently, it is not permitted to express anything other than what is stipulated in its constitutive decree. It thus becomes clear that the declaratory decision is simply an administrative process. Thus, for applications that lead to a declarative decision, simplifying and accelerating administrative procedures is appropriate. At this point, positive fiction should focus on the procedural aspects of the administrative process rather than on the substance. Since its original concept has led to

[84] Wr. W. F. Prins and R. Kosim Adisapoetra, *Pengantar Ilmu Hukum Administrasi Negara* (Jakarta: PT. Pradnya Paramita, 1987), 63.

[85] R.W.J. Severijns, "Zoeken naar zekerheid (Staat en Recht nr. 46)," accessed March 18, 2025, at https://www.inview.nl/document/id29ef801fc5a64eed8ff8d5863098e9bd/zoeken-naar-zekerheid-staat-en-recht-nr-46-4-1-2-besluitvorming-door-het-bestuur?ctx=WKNL_CSL_2757&tab=tekst.

[86] H. M. Galang Asmara et al., *Hukum Administrasi Negara,* ed. Oce Madril, Tedi Sudrajat, and Muhamad Sadi Is (Depok: Rajawali Pers, 2025), 196; Philipus M. Hadjon et al., *Pengantar Hukum Administrasi Indonesia* (Yogyakarta: Gadjah Mada University Pers, 2001), 141; Diana Halim and Koentjoro, *Hukum Administrasi Negara* (Bogor Selatan: Ghalia Indonesia, 2004), 65; Utrecht, *Pengantar Hukum Administrasi Negara Indonesia,* 112–13.

a simplified procedure, the outcome must simplify the procedure rather than the creation of a new right from a constitutive decision form. Therefore, positive fiction suits a decision with a declarative nature. Furthermore, the intentions of the authorised body have been fulfilled because the constitutive decision precedes the declaratory decision. This is in line with W.F. Prins's acknowledgement that "in the case of declaratory decisions the state administration has no freedom of movement at all."[87] Consequently, the government's intentions are already evident in the constitutive decisions; however, due to the procedure, the rights created can only be exercised following a declaration. Therefore, positive fictions function only within the procedures for issuing declaratory decisions.

In addition to the restrictions outlined above, the principle of positive fiction should not apply to applications involving discretionary powers. This principle connects to the search for the meaning of will, as discretionary authority requires an official's judgment or consideration; therefore, applying positive silence could be problematic.[88] On the other hand, each application has unique characteristics that require the legislature and government to assess whether simplification is necessary, which must be clearly regulated by law. Therefore, the limitations regarding decision types and discretionary powers can be overridden only if positive silence is specifically regulated in legislation. All of these constraints are intended to balance the use of administrative silence.

6. Conclusion

Understanding the basic concept of administrative silence in France has led to the development of both types of fiction, which should be applied simultaneously, with certain limitations. However, this article argues that the principles to limit negative and administrative silence in Indonesia should differ from those in France. This is because the concept of positive fiction must correspond with the fulfilment of the "will" element in administrative decisions. This article finds that the basic concept of negative fiction is treated as a procedural rule, primarily for litigation purposes and legal protection. Meanwhile, the basic concept of positive fiction aims to simplify and speed up administrative procedures, thereby directly creating rights. Therefore, this article's analysis indicates that the concepts of negative and positive fiction have their own contexts. Therefore, Indonesia should implement both negative and positive fiction simultaneously, without needing to establish a dichotomy. Thus, the principle of limitation regarding negative and positive fiction in Indonesia is articulated to ensure both can be applied simultaneously without overlap. By elaborating on legal fiction and considering the fundamental concepts of negative and positive fiction, the findings of this study suggest that the principle of limitation between them can be grounded in the type of decision, namely, constitutive and declarative decisions. Furthermore, a key limitation is that positive fiction does not extend to applications arising from discretionary

[87] Prins and Adisapoetra, *Pengantar Ilmu Hukum Administrasi Negara,* 63.

[88] Artur S. Ghambaryan, "Silence and Tacit Consent in Armenian Public Law: Legal Fiction, Presumption or Substitution?," *Vestnik of Saint Petersburg University* 12, no. 3 (2021): 732–34; Anne-Laure Girard, "La formation historique de la théorie de l'acte administratif unilatéral" (PhD diss., Université Panthéon-Assas – Paris II, 2011), 208; Gaston Jèze, "Section II Jurisprudence Administrative: Essai d'une théorie générale de l'abstention en droit public," *Revue du Droit Public et de la Science Politique en France et à l'Étranger* 21 (1904): 766–68.

authority. It also should be noted that positive fiction may only apply when expressly stipulated in statutory regulations. Consequently, the previously mentioned principle of limitation may be overridden exclusively if positive fiction is explicitly set forth in the law for a specific application. Therefore, it is expected that a balanced approach can be achieved in applying negative and positive fiction simultaneously. The applicant's rights can be recognised while considering the fulfilment of the will in the administrative decision.

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