

The Concept and Legal Protection Regarding Government Administrative Actions in the Form of Not Performing Concrete Actions (Omission)

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Abstract

After the enactment of Law No. 30 of 2014 on Government Administration (Government Administration Law or abbreviated as UU AP in Indonesian) and Supreme Court Regulation (Perma) No. 2 of 2019, the authority of the Administrative Judiciary has expanded. The Administrative Judiciary adjudicates disputes related to administrative decisions and handles disputes related to government administrative actions (Factual Conduct). Actions that can be sued include active (performing concrete/Factual Conduct - commission) and passive (not performing concrete/Factual Conduct-omission) actions. Although Government Administration Law and Supreme Court Regulation do not provide detailed explanations regarding the meaning and criteria of passive government actions, based on studies, several criteria can be used to assess whether passive government actions can be considered unlawful. These criteria include the existence of a legal obligation that must be performed by an administrative official. The action is within the scope of their authority, the official intentionally does not fulfill the obligation, the action violates legislation and legal obligations, or the plaintiff's subjective rights, and the existence of a permissible claim for actual damages. In terms of legal protection, citizens can file a lawsuit in the Administrative Court against the failure of a government body or official to perform a concrete action. However, in practice, various problems still arise, such as the time limit for filing lawsuits, the obligation to pursue administrative remedies first, and issues related to the tacit authorization concept.

Keywords : Concrete Actions; Government Administrative Actions; Factual Conduct; Legal Protection; Passive Actions.

1. INTRODUCTION

In a state governed by law, every action taken by the Government can be challenged, including acts of *omission*, neglect, or failure to respond. The government, in carrying out its actions, is obliged to uphold the dignity and honor of the society at large, as well as the fundamental rights and duties of its citizens in particular. As a realization of the rule of law, legal protection for the society must be ensured. Without legal protection for the society, a state will increasingly diverge from the principles of the rule of law.

One of the essential elements of a rule of law state is the existence of a judicial body that adjudicates disputes between the government and its citizens. Therefore, the Administrative Court was established. The objective is to safeguard the public from government actions that infringe upon citizens' rights. It also serves to oversee the government's use of power, ensuring its decisions

are always grounded in law and a spirit of public service. This protection is expected to become more effective with the shift of jurisdiction over acts of government wrongdoing from the General Courts to the Administrative Courts.¹

Within the framework of Indonesian law, the Administrative Court was originally empowered exclusively to examine written rulings (*beschikking*) issued by administrative authorities or officials that adversely affected citizens. The revisions to the Law on Administrative Judiciary in 2004 and 2009 upheld the court's exclusive jurisdiction over *beschikking*s, although subject to various limitations. However, following the enactment of Law No. 30 of 2014 on Government Administration (UU AP), the jurisdiction of the Administrative Court was expanded to include the adjudication of material actions or government real acts.² This expansion of the Administrative Court's competence/authority in overseeing government actions underscores the importance of the Administrative Court in realizing a state based on law (*rechtmatigheid van bestuur*).

The actions taken by the government are often not carried out properly, resulting in violations of citizens' rights, and thus these rights must be protected. Some opinions state that administrative courts recognize the principle of dual protection. This principle asserts that the process of dispute resolution in administrative courts not only provides legal protection for plaintiffs against actions taken by the government but also, on the other hand, offers protection to the officials carrying out those actions.

One type of government action that can be subject to review in the Administrative Court is an Administrative Action of Government in the Form of *Omission* (not performing a concrete act). In practice, the Administrative Court has handled numerous disputes involving government actions, including cases of *omission* that protect citizens' rights. This research will emphasize the protection of the public harmed by actions taken by officials, particularly regarding Administrative Actions in the form of Not Performing Concrete Actions (*omission*). The issue of *omission* as a new object of dispute in the Administrative Court is a highly interesting topic. What is the scope of Administrative Actions in the form of Not Performing Concrete Actions, what cases have been resolved in administrative courts, and how do judges interpret Administrative Actions in the form of Not Performing Concrete Actions?

This paper seeks to discuss the concept, regulation, and practice of Administrative Actions in the form of Not Performing Concrete Actions, aiming to address the following two issues:

1. What is the scope of Administrative Actions in the form of Not Performing Concrete Actions?
2. What legal protection provided for citizens regarding Administrative Actions in the form of Not Performing Concrete Actions?

2. ANALYSIS AND DISCUSSION

2.1. Scope of Government Administrative Actions

¹ Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia; Sebuah Studi Tentang Prinsip-prinsipnya, Penerapannya oleh Pengadilan di Lingkungan Peradilan Umum and Pembentukan Peradilan Administrasi Negara*, (Surabaya: Bina Ilmu, 1987): 211-215.

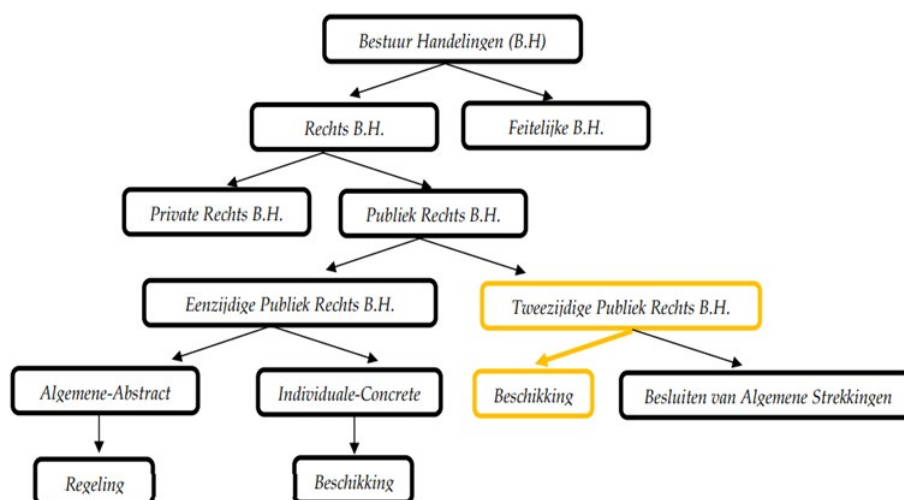
² Sonyendah Retnaningsih, *et.al.*, "Expansion of the Objects of Administrative Disputes after the Enactment of Law Number 30 of 2014 Concerning Government Administration and Supreme Court Regulation Number 2 of 2019 Concerning Guidelines for the Resolution and Authority to Adjudicate Unlawful Conducts by Government Agencies or Officials (*Onrechtmatige Overheidsdaad / OOD*)", *International Journal of Multicultural and Multireligious Understanding* vol. 8, no. 1 (2021): 391.

2.1.1. Government Administrative Actions in the Government Administration Law

Government action refers to measures taken by state officials on behalf of the government, which by their very nature can only be executed by the state itself.³ Under the Government Administration Law, the Administrative Court is vested with the authority to adjudicate Government Administrative Actions (hereinafter referred to as “Actions”). According to Article 1 point 8 of the Government Administration Law, in conjunction with Article 1 point 3 of Supreme Court Regulation No. 2/2019, Actions are defined as “acts of government officials or other administrators to perform and/or refrain from performing concrete actions within the sphere of government administration.” Such actions may be undertaken cumulatively or alternatively, depending on the use of the conjunction ‘and/or.’ This formulation implies that in managing governmental affairs, an administrative body or official may also opt not to perform any concrete action at all.

Based on the formulation, there are two forms of government action: (1) performing concrete acts or taking active measures, which can be understood as actions carried out in the name of one’s office and having certain impacts or consequences; and (2) not performing concrete acts or being passive, which means that the concerned officeholder does nothing despite the fact that their inaction or silence has adverse effects or consequences for the public.

Picture 1. Classification of Administrative Actions in the Government Administration Law.



Source: Primary Legal Materials (processed)

The exercise of governmental authority must conform to statutory provisions and the general principles of good governance (AUPB), while avoiding any form of abuse of power.⁴ The prohibition against such abuse includes exceeding authority, overlapping or conflating authorities, and engaging in arbitrary conduct. Delegation

³ Lucyna Staniszevska, “Models of liability for the administrative tort sanctioned with financial penalties on the example of selected European countries”, *Studia Prawa Publicznego* vol. 1 no. 13 (2019): 67–83.

⁴ Nikolas Bowie & Daphna Renan “The Separation-Of-Powers Counterrevolution”, *The Yale Law Journal* vol. 131 (2020): 2039.

of authority, for instance, must be conferred explicitly and without ambiguity.⁵ Within administrative law, governmental acts are generally classified into two categories: legal acts (*rechtshandelingen*) and factual acts (*feitelijke handelingen*). Factual acts are those that bear no direct legal relevance and, consequently, do not give rise to legal consequences.⁶ Examples of such concrete or factual acts include the inauguration of public facilities such as buildings or bridges, the issuance of earthquake announcements, the seizure or destruction of goods, the demolition of structures, the disbursement of salaries, and the construction of public works. These also extend to actions undertaken in anticipation of climate change.⁷

Legal actions are actions which, by their nature, can give rise to specific legal consequences. The legal consequences arising from legal actions are those that have relevance to the law, such as creating new legal relationships, altering existing legal relationships, or terminating legal relationships. Government legal actions are divided into two types: public legal actions (*publiekrechtshandelingen*) and private legal actions (*privaatrechtshandelingen*). Public legal actions are those conducted based on public law, whereas private legal actions are those conducted based on civil law provisions.

The authority of the Administrative Court, both in concept and in its regulation, has undergone a transformation due to the implementation of the Government Administration Law. Under Article 87 of this law, an Administrative Decision is interpreted to be a written ruling that encompasses Factual Conducts. Factual Conducts, which according to the theory of administrative law are government actions without legal consequences, are then incorporated as part of Administrative Decisions that have legal consequences.⁸ The regulation of this article has disrupted (intertwined) with the existing concept, as Factual Conducts in the Government Administration Law become an extension of the concept of administrative decisions. The Government Administration Law does not provide further explanation about the meaning of Factual Conducts and only mentions it once in Article 87.

From a normative perspective, the concept of governmental legal actions is formulated in the elucidation of Article 1 point 3 of Law No. 5 of 1986 on Administrative Judiciary, as amended by Law No. 9 of 2004 and subsequently by Law No. 51 of 2009 (hereinafter referred to as the 'Administrative Judiciary Act'). The provision clarifies that "administrative legal actions constitute legal acts undertaken by administrative bodies or officials on the basis of administrative law, which may give rise to rights or obligations for other parties".

After the enactment of the Government Administration Law, the dichotomy between Factual Conducts and legal actions of the government has become blurred. Some research even suggests that debating this distinction is no longer important because both have been integrated into Article 87 of the Government Administration Law. Despite ongoing debates about the clarity of meaning and concepts, evidence from the Administrative Court shows that cases involving Factual Conducts have also been

⁵ Beau J. Baumann, "Americana Administrative Law" *The Georgetown Law Journal* vol. 111 (2023): 467.

⁶ Muhammad Adiguna Bimasakti, "Penjelasan Hukum (Restatement) Konsep Tindakan Administrasi Pemerintahan Menurut Undang-Undang No. 30 Tahun 2014 tentang Administrasi Pemerintahan", *Jurnal Hukum and Peradilan*, vol. 11, no. 1 (2022): 73.

⁷ Wendy Bonython, "Tort Law and Climate Change", *University of Queensland Law Journal* vol. 40 no. 3 (2021): 424.

⁸ Muhammad Adiguna Bimasakti, *Perbuatan Melawan Hukum (PMH) oleh Pemerintah / Onrechtmatige Overheidsdaad (OOD) dari Sudut Pandang Undang-Undang Administrasi Pemerintahan* (Yogyakarta: Deepublish, 2018): 4.

widely examined and adjudicated in the Administrative Court. Furthermore, cases involving Factual Conducts have become one of the classifications of case types with the code “TF” following the issuance of Supreme Court Regulation Number 2/2019 on Guidelines for Resolving Disputes Over Government Administrative Actions and the Authority to Adjudicate Administrative Tort by Government Bodies and/or Officials (*Onrechtmatige Overheidsdaad*).⁹

2.1.2. The Government Administrative Action of Not Performing Concrete Actions

One of the essential elements of Government Administrative Actions, as set out in Article 1 point 8 of the Administrative Procedure Law (UU AP) and Article 1 point 1 of Supreme Court Regulation No. 2 of 2019, is the notion of Concrete Action. Within the context of the Administrative Procedure Law, Concrete Action is understood as a Factual Conduct (*Feitelijke Handelingen*). This interpretation arises because the term Concrete Action in Article 1 point 8 of the Administrative Procedure Law corresponds to the concept of Factual Conduct under Article 87 letter a of the same Law, in the same way that the term Written Determination in Article 1 point 7 aligns with the notion of a Written Decision in Article 87 letter a. Accordingly, the Concrete Action referred to in Article 1 point 8 of the Administrative Procedure Law is, in substance, equivalent to the Factual Conduct described in Article 87. Below is an illustration of the parallel relationship between Article 1 and Article 87 of the Administrative Procedure Law in a table:

Table 1. Parallel Conjunction of Article 1 and 87 of the Administrative Procedure Law

Definition of Decision and Action in Article 1	Article 87 point a
Article 1 point 7: Decision (<i>Keputusan</i>).... .. Written Decision (<i>Ketetapan Tertulis</i>)	Article 87 point a: Written Decision (<i>Penetapan Tertulis</i>)
Article 1 point 8: Action (<i>Tindakan</i>)... .. Concrete Action (<i>Perbuatan Konkret</i>)	Article 87 point a: Factual Conduct (<i>Factual Conduct</i>)

Source: Law Number 30 of 2014 concerning Government Administration (processed)

Concrete Action as Factual Conduct of Government in Administrative Law refers to various actions taken by the government in its capacity as an implementer of public policy and administration. This concept has several important aspects that need to be understood in order to comprehend how the government exercises its authority and how these actions can be analyzed from a legal perspective. Government Concrete Action or Government Factual Conduct refers to actions carried out by the government or government bodies that are not legal in nature but are more tangible or physical acts. These actions are not based on a specific legal norm but rather are reactive to a particular situation or condition.

Concrete actions of the government are generally tangible, measurable, and directly related to specific cases or situations. Unlike legal actions, which are based on clear

⁹ Aan Puji Kistanto, *et.al.*, “Actions of Infringement by Government Officers / Onrechtmatige Overheidsdaad in Government Administration Actions”, *International Journal of Multicultural and Multireligious Understanding* Vol 9, No 3 (2022): 521.

legal rules and are abstract in nature, factual conduct is more concrete. Legal actions have definite legal consequences, whereas the legal effects of factual conduct are not always clear and can lead to debate. Government factual conduct refers to activities carried out by government officials in performing administrative tasks and public policies that are not formal or official like decisions. These actions include various practical and operational activities that directly affect individuals, groups, or society, but are not always documented as formal legal products.

Factual Conduct in government often includes activities such as inspections, supervision, and the execution of day-to-day operations. For example, when a government official conducts a field inspection to ensure compliance with safety or health standards, that action is an example of Factual Conduct. Although it may not always be followed by a formal decision, these actions have a direct impact on the parties being inspected.

Factual Conduct/Concrete Action aims to implement policies or regulations that have been established into real-world situations. In other words, they are means to translate public policy into tangible and observable actions. Although Factual Conduct is not based on a specific legal norm, such actions must still be carried out in accordance with the applicable laws and regulations. The legal basis for Factual Conduct is usually found in regulations governing government authority. The general purpose of Factual Conduct is to maintain public order, enforce the law, and protect public interests. These actions can also be taken to prevent detrimental events from occurring. In the context of administrative law, Concrete Action is considered legitimate as long as it complies with the applicable laws and regulations and does not violate the General Principles of Good Governance (AUPB).

The supervision of Factual Conduct is necessary to prevent abuse of authority. Oversight can be carried out by various parties. Government Concrete Action or Government Factual Conduct is an inseparable part of governance. Although these actions are not always based on strict legal norms, they must still be carried out legally and responsibly. Supervision of Factual Conduct is crucial to prevent abuse of authority and protect the rights of the public, one way being through review in administrative courts/Administrative courts.

Neither the Government Administration Law nor the Supreme Court Regulation provides a further explanation regarding the meaning of the government action in the form of “not performing a concrete act” (*omission*). The basic concept or principle is that every administrative body/official is obliged to serve or respond to every request from the public that it receives, provided that the matter requested falls under its duties and responsibilities according to the regulations. An official who does not respond while it is their duty to do so has violated rules and responsibilities and can be sued in court as explained above. The Government Administration Law emphasizes that the administration of government should become more aligned with the expectations and needs of the public (citizen friendly).

The concept of Administrative Silence is not clearly constructed, making it difficult in some situations to distinguish between the category of Government Administrative Actions in the Form of Not Performing Concrete Actions (*omission*) and Administrative Silence as well as tacit authorization (or in French Law concept it is called *Decision implicite*¹⁰ as regulated in *Code des relations entre le public et l'administration* (CRPA) or

¹⁰ E. Chevalier and M. Eliantonio, “Standing before French administrative courts: too restrictive to effectively enforce environmental rights?” *Montesquieu Law Review* vol. 5 no. 1 (2017): 65-74.

the Law on Public and Government Administration Relations¹¹). The term *omission* is a legal fiction neologism used to facilitate the legal construction regulated in Article 1 point 8 of the Government Administration Law. Some opinions state that not performing concrete actions is interpreted as the passive action or Administrative Silence of the government. The passive actions of the government that contain administrative torts are actions that neglect legal obligations, to carry out something or the failure of government authorities to take the desired action, or in short: malice action.¹² This concept originally developed within criminal and civil law, and to facilitate understanding, one can relate the explanation of passive government actions to the notion of *omission* offenses in criminal and civil law.

In criminal law, an *omission* offense refers to the act of neglecting something that is mandated by law or intentionally failing to perform an act required by law. The element of intention in an *omission* offense lies in the refusal to carry out the mandated action. According to Eddy O.S. Hiariej, an *omission* offense refers to the not performing an act that is prohibited by law. An *omission* offense is a crime that occurs due to the not performing or fulfill a legal command or obligation.¹³

The concept of *omission* is also present in civil law, as evidenced by the decision/ruling of the Siak Sri Indrapura District Court Number 24/Pdt.G/2018/PN.Siak. In this case, the Plaintiff alleged that the Ministry of Environment and Forestry, as one of the defendants, had committed an *omission* delict by seriously neglecting to address the actions of the Air Kehidupan Cooperative (Defendant I) in establishing an oil palm plantation without permission within a permanent production forest area. However, the Forestry Law and its implementing regulations grant authority and obligations to the Minister to manage production forests. Article 28, letters g and h, of Law Number 18 of 2013 on the Prevention and Eradication of Forest Destruction stipulates that any official is prohibited from willfully neglecting their duties and/or being negligent in performing their responsibilities.

Passive government actions that violate the law may be contested before the Administrative Court as disputes concerning administrative torts by government bodies or officials, abbreviated as PMHP (*onrechtmatige overheidsdaad*/OOD).¹⁴ The Supreme Court Regulation defines disputes related to administrative appeals as conflicts between citizens and the Government that seek a declaration that government actions are null and/or invalid, and may be accompanied by claims for damages in accordance with prevailing laws and regulations.

Throughout the years 2020 and 2022, there were numerous disputes concerning government actions, specifically those involving the failure to act (*omission*) by the government. Some examples of dispute objects related to administrative actions by the government that involve non-performance of concrete actions are:

- Ruling No. 28/G/TF/2022/PTUN.JKT and No. 184/K/TUN/2023: The Government Administrative Action of Not Performing Concrete Actions (*omission*) by the Head of

¹¹ Marzia De Donno, "The French Code "Des Relations Entre Le Public Et L'administration", *Italian Journal of Public Law*, vol. 9 no. 2 (2017): 223.

¹² Marc O. DeGirolami, "Reconstructing Malice in the Law of Punitive Damages", *Journal of Tort Law* vol. 14 no. 1 (2021): 195.

¹³ Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana*, Edisi Revisi (Yogyakarta: Cahaya Atma Pustaka, 2015): 137.

¹⁴ Yustus Pondayar, "Disobedience of Administrative Officers in Implementing Administrative Court Decisions (Study of Decisions of the Jayapura Administrative Court)", *International Journal of Multicultural and Multireligious Understanding* Vol 10, No 6 (2023): 454.

the National Land Agency in failing to execute compensation payments in accordance with the Decree of the Minister of Agrarian Affairs No. SK/19/Depag/64 dated August 26, 1964;

- Ruling of the Supreme Court No. 82 PK/TUN/TF/2023 and Ruling No. 28/G/TF/2021/PTUN.BDG *juncto* 264/B/TF/2021/PT.TUN.JKT *juncto* 361 K/TUN/TF/2022: The actions of the Tirta Kahuripan Drinking Water Company in Bogor Regency, which fail to undertake concrete measures to implement the Comprehensive Drinking Water Supply System (SPAM) in the Sentul City area of Bogor Regency.
- Ruling of Administrative Court of Banjarmasin Case No. 6/G/TF/2021/PTUN.BJM: The Government's failure to provide information in the form of an Early Warning System regarding the flood risks in South Kalimantan around January 2021.
- Ruling of Administrative Court of Samarinda Case No. 27/TF/2021/PTUN.SMD: The action of the Head of the Samarinda Land Office, in failing to deliver the certificate belonging to the Plaintiff.
- Ruling of Administrative Court of Banda Aceh Case No. 30/G/TF/2020/PTUN.BNA: The action of not appointing the Plaintiff as the duly elected Village Head in the election for the Village Head of Birem Rayeuk, East Aceh Regency.
- Ruling of Administrative Court of Yogyakarta Case No. 8/G/TF/2022/PTUN.YK: The action of the head of the Pratama Wates Tax Service Office (KPP) in failing to conduct the examination and administrative investigation procedures for the Certificate of Taxable Entrepreneur (PKP) dated March 7, 2022.
- Ruling of Administrative Court of Case No. 10/G/TF/2022/PTUN.PLG.: The failure to implement the Spatial Planning Plan, including the lack of provision of Green Open Spaces, the non-restoration of Conservation Swamp functions, the absence of retention ponds, and the inadequacy of drainage channels, resulted in flooding in the city of Palembang on December 25-26, 2021.

If there is a conflict of norms between substantive law as regulated in the Administrative Procedure Law (UU AP) and procedural law as regulated in the Administrative Judiciary Law (UU Peradilan TUN), or with other sectoral regulations, the resolution can be made using legal principles such as *lex superior derogat legi inferiori* (higher law overrides lower law)¹⁵, *lex specialis derogat legi generalis* (special law overrides general law)¹⁶, and *lex posterior derogat legi priori* (newer law overrides older law).¹⁷

Based on the concept of *omission* in criminal and civil law outlined above, when applied to the context of administrative law, a passive action by the government (*omission*) is only considered unlawful if:

- a. Legislation mandates that administrative officials perform certain actions;
- b. These specific actions fall within the scope of their authority to manage government affairs;
- c. The government agency or official deliberately neglects or intentionally fails to carry out the mandated duties.

¹⁵ Angga Yonar Kesuma dan Siti Mahmudah, "Violation of the Principle of Lex Superior Derogate Legi Inferiori in the Formation of Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 2023", *International Journal of Multicultural and Multireligious Understanding* Vol. 11 No. 5 (2024): 4.

¹⁶ Pery Rehendra Sucipta *et.al.*, "Lex Specialis Derogatic General Leges as a Preference Principle in the Accidents of Public Maritime Transportation", *Jurnal IUS* Vol. 8 No. 1 (2020): 143.

¹⁷ Sinta Devi Ambarwati, *et.al.*, "Dualism of Authority to Review Regional Regulations for Regional Taxes and Levies in Indonesia", *International Journal of Social Science Research and Review* Vol. 5 No. 7 (2022): 324.

2.1.3. The Correlation Between Government Administrative Actions in the Form of Not Performing Concrete Actions and Administrative Silence (administrative silence) and Tacit Authorization

Administrative Law in Indonesia has not yet established a consistent concept of Administrative Silence related to tacit authorization and *omission*. The Government Administration Law provides no explicit clarification regarding the concept of Administrative Silence, nor does it delineate the theoretical similarities and distinctions between implicit decisions or actions regulated under the Law and governmental omissions. This overlap has sparked debate, prompting some parties to pursue legal action in lawsuits against Factual Conducts, specifically targeting the *omission* of officials in tacit authorization cases. This legal recourse has emerged following the removal of such jurisdiction from the Administrative Court by the Omnibus Law to provide legal protection to the public.

Administrative Silence refers to the stance taken by administrative officials who do not respond to an application within the legally stipulated time or fail to take action when such action is legally mandated. In the context of judicial practice in Indonesia, Administrative Silence is termed as a fictitious decision or action. An implicit decision is an instance of Administrative Silence by an Administrative body or official, where they take no action and do not issue any decision on an application submitted to them, even though the application falls within their scope of authority and duty. The term implicit indicates that the administrative decision being contested is essentially non-existent. An implicit decision merely represents Administrative Silence from the Administrative body or official, which is then considered equivalent to an administrative decision containing a rejection, as stipulated in the Administrative Judiciary Law.¹⁸

The Government Administration Law further governs the concept of Administrative Silence, which is treated as equivalent to a governmental decision and/or action. However, the notion of Administrative Silence under this statute differs from that formulated in the Administrative Judiciary Law. In the Administrative Judiciary Law, government Administrative Silence is limited to the context of administrative decisions and adheres to the concept of deemed refusal.¹⁹ This adheres to the concept of tacit decision in French Administrative Judiciary Law (*Code de Justice Administratif*).²⁰ In contrast, Administrative Silence under the Government Administration Law is not limited to decisions but also includes government actions, even Factual Conducts, and adheres to the concept of tacit authorization (approval).

In the context of government actions where the object of the dispute is the act of “not performing a concrete action,” the Supreme Court, in its judicial considerations, has stated that a request for the annulment of a decision that has not been responded to (*omission*) cannot be contested as a dispute over the action but must still be contested as a dispute over an Administrative Decision. Therefore, a distinction must be made between a Decision dispute and a Government action dispute. In several cases, Factual

¹⁸ Mirlinda Batalli, “Consequences of administrative silence in public administration”, *SEER: Journal for Labour and Social Affairs in Eastern Europe* vol. 20, no. 1 (2017): 141.

¹⁹ Oswald Jansen, “*Silence of the Administration*”, Maastricht Faculty of Law Working Paper, no. 03 (2015): 2.

²⁰ Maryse Deguerge, “Le silence de l’Administration en droit administratif français”, *Les Cahiers de Droit*, vol. 56 no. 3-4, (2015): 402-407.

Conducts in the form of not performing concrete actions (*omission*) are often intertwined (conflated) with unwritten public legal actions (*ongeschreven publiekrechtshandelingen*), such as the *omission* of appointing an official as an *omission* action.

An Administrative Act of Government in the Form of not performing Concrete Action an *Omission* can be categorized as an administrative tort if such action involves neglecting the legal obligations of the defendant, failing to perform concrete actions, or if the government fails to take the desired action.²¹ According to Enrico Simanjuntak, *omission* in the context of administrative law is the government's Administrative Silence, meaning intentionally not acting at all. This is different from tacit authorization/deemed refusal, which represents the government's passive attitude of either acting late or exceeding the designated time limit to act. This means there is no intentionality from the government to neglect its obligations, but rather an inability to act due to insufficient time to execute it.

A tacit or negative decision is understood as a form of implicit decision that lacks concrete characteristics.²² Such a decision originates from a legal principle expressly provided in legislation, arising from the government's administrative failure to process or issue a decision on a citizen's application within a prescribed timeframe. Government omission, on the other hand, refers to any act, whether active or passive, that is not carried out in accordance with legal obligations or administrative functions, thereby causing harm to individuals or legal entities. Accordingly, in cases of government omission, claims for damages may be pursued. Conversely, in cases of tacit decisions, the plaintiff's primary demand is for the court to affirm the validity of the tacit decision and to oblige the defendant to issue a decision that, by legal fiction, is deemed to already exist.²³

This concept is acknowledged also in business agreements as tacit agreements.²⁴ The majority of laws refer to: (i) the timeframe for issuing an administrative decision, (ii) the legal consequences arising therefrom, and (iii) the available legal remedies if such timeframe is exceeded.²⁵ In order to give rise to legal consequences, particularly in relation to implicit decisions (*praesumptio iuris et de iure*), several minimum requirements must be fulfilled, namely: (a) the matter must pertain to a specific administrative issue, such as decision-making in an administrative case, (b) the timeframe for decision-making must be explicitly prescribed, and (c) explicit legal protection must be available in the event that an administrative decision is not issued in accordance with the law.²⁶ If

²¹ Nadia N. Sawicki, "Defining the Known Risk: Context-Sensitivity In Tort Law Defenses" *Journal of Tort Law* vol. 12 no. 1 (2019): 12.

²² K. J. de Graaf, and N. G. Hoogstra, "Silence is Golden? Tacit authorizations in the Netherlands, Germany and France", *Review of European Administrative Law*, vol. 6 no. 2, (2013): 9.

²³ Catalin S. Rusu, "Eturas: Of Concerted Practices, Tacit Approval, and the Presumption of Innocence", *Journal of European Competition Law and Practice*, vol. 7, no. 6, (2016): 396–398.

²⁴ Wentong Zheng, "A Knowledge Theory of Tacit Agreement", *Harvard Business Law Review* vol. 9 no. 1 (2019): 406.

²⁵ William H. Page, "Tacit Agreement Under Section 1 of the Sherman Act", *Antitrust Law Journal* vol. 81 no. 2 (2017): 596.

²⁶ Flavia Ghencea, "Success and Failure for Public Administration by Implementing Rules on Tacit Approval. Romanian Case", *International Journal of Education and Research* vol. 1 no. 3 (2013): 3.

these or similar conditions are not satisfied, tacit action cannot be deemed to exist and no legal consequences will arise.²⁷

Table 2. Comparison Between Tacit authorization/deemed refusal and Not Performing Concrete Action / Omission

	Administrative Silence VS Omission	
	Tacit authorization/deemed refusal	Not Performing Concrete Action / Omission
Definition	If, within the specified time limit, the Government Official does not issue or take a decision and/or action, the request is deemed to be legally approved/rejected.	The actions of government officials or other administrators in the form of not taking concrete actions
Concept	The government is failed to respond	The Government's Negligence in Fulfilling Its Obligations
	The government is deemed to have taken the requested action (granted by law).	The government failed to fulfill its legal obligations and caused harm.
Object	Written Decision	Factual Conduct
Legal Proceedings	Request	Lawsuit
Regulation	Article 3 of Law No. 5/1986 and Article 175 point 7 Law No. 6/2023	Article 1 point 8 Government Administration Law
Authority/Jurisdiction	Deemed refusal is still included in the Administrative Judiciary Law, but in practice, deemed refusal is no longer applied. Meanwhile, the Tacit Approval Request is no longer under the jurisdiction of the Administrative Court.	Jurisdiction of the Administrative Court

Source: Bojan Blagojević Faculty of Law, University of Niš, Serbia (processed)

The Government Administration Law ambiguously distinguishes between passive actions (*omissions*) and government Administrative Silence. The Supreme Court Regulation (PERMA) establishes different procedures for resolving these two types of disputes. Disputes concerning government actions are resolved in accordance with Supreme Court Regulation No. 2/2019, while disputes related to tacit authorization decisions are regulated by Supreme Court Regulation No. 8/2017 concerning Guidelines for Proceedings to Obtain Decisions on the Acceptance of Requests to Acquire Decisions and/or Actions of Government Agencies or Officials. Nevertheless, the Job Creation

²⁷ Ingrid Opdebeek and Stéphanie De Somer, "The Duty to Give Reasons in the European Legal Area: a Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law", *Rocznik Administracji Publicznej* vol. 2 no. 1 (2016): 112.

Law has removed the authority of the Administrative Court and the Supreme Court to adjudicate disputes involving tacit authorization.

Based on the explanations and case examples provided, the authority of the Administrative Court to adjudicate administrative actions in the form of government *omissions* (not performing a concrete action) is effective in providing legal protection to justice seekers.²⁸ Moreover, it encourages officials to perform their duties more diligently. This aligns with the adage “Law exists for society, not society for the law (*ubi societas ibi ius*).” However, there remain issues that need to be addressed through regulation and human resource development to resolve differences of opinion among judges and all related personnel, particularly regarding the time frame for filing lawsuits and compensation.

The second issue that needs to be addressed is the difficulty experienced by both judges and the public in distinguishing between disputes concerning passive government actions (*omission*) and government Administrative Silence (tacit authorization/deemed refusal). Misclassification of such cases can be detrimental to those seeking justice; therefore, a guideline is necessary to clearly delineate the difference between passive actions and Administrative Silence by the government.

2.2. Legal Protection by Administrative Courts Against Government Actions in the Form of Not Performing Concrete Actions (*Omission*)

Several characteristics of judicial review of government actions involving *omissions* in the Administrative Court are as follows:

2.2.1. No Need of Administrative Proceedings

In 2021, the Supreme Court issued a Circular Letter No. 5/2021 regulating that in disputes involving administrative actions of government bodies characterized by not performing a Concrete Action (*omission*), it is not necessary to pursue administrative remedies. In relation to such government actions, which often require swift resolution—such as bridge collapses, road damage, flooding, and numerous other issues—it is appropriate to forego administrative remedies.²⁹

In administrative proceedings concerning government inaction (*omission*), there is a challenge for judges and parties involved to distinguish between Administrative Silence (*omission*) requested by the public for action and subsequent non-execution or continued inaction by government officials. This highlights the ineffectiveness of pursuing administrative remedies for Administrative Government Actions involving Non-Performance of Concrete Acts.

2.2.2. Specified Time Limit

The calculation of the time limit for filing lawsuits regarding administrative actions has become a significant issue frequently debated during the transfer of jurisdiction over Administrative Tort cases from the General Court to the Administrative Court. This is due to the fact that the time limit for filing Administrative Tort claims in the Administrative Court is very narrow, set at 90 days from the occurrence of the damage.

²⁸ James Bernard Murphy, “*The Lawyer and the Layman: Two Perspectives on the Rule of Law*”, The Review of Politics No. 68 (2016): 113.

²⁹ 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): 165.

In contrast, the General Court stipulates a filing period for Administrative Tort claims of 30 years.³⁰

A lawsuit regarding a Government Administrative Action involving the Commission of a Concrete Action is easier to calculate, which is within 90 days from the date the action was taken. However, a lawsuit concerning a Government Administrative Action involving the Omission of a Concrete Action is more difficult to determine—whether it is from the date the action was not taken by the official, from the date of the request for the action, from the date the official's obligation to act arose, or from the date the plaintiff felt harmed.³¹

There are four variations of the time limit for filing a lawsuit in cases of Administrative Tort due to the Government's *Omission* (not performing concrete acts): 90 days from the date the Defendant fails to fulfill their obligations, from the date the Plaintiff feels harmed, from the date a request to act is made, and from the date the government is obligated to act. However, the calculation that best aligns with a sense of justice will develop through court practice. The time limit for filing a lawsuit in cases of Government Administrative Actions in the form of Not performing Concrete Actions (*omission*) is calculated as 90 (ninety) working days after the lapse of a 5 (five) working day period, unless specifically regulated in the basic regulations.

2.2.3. Compensation or Rehabilitation

The provisions on compensation following the issuance of SEMA No. 2 of 2019 affirm that the amount of compensation claims is no longer subject to a ceiling, as previously regulated under Government Regulation No. 43 of 1991 concerning Compensation and Procedures for Its Implementation in the Administrative Court. Instead, compensation claims must be based on the actual losses suffered by the plaintiff, which are required to be explicitly detailed and clearly formulated in the *posita* of the lawsuit, including a precise specification of both the amount and form of compensation sought. The final determination of the compensation amount falls within the authority of the judge, exercised through judicial discretion in resolving the dispute.

Compensation, in principle, is aimed at restoring the victim or the citizen harmed by government actions to their original condition, as it was before the occurrence of the tort.³² Claims for compensation in the resolution of disputes concerning government actions in the Administrative Court constitute supplementary claims; therefore, their existence is contingent upon the approval or disapproval of the principal claim.

As an example, in the case at the Administrative Court of Ambon (PTUN) No. 29/G/PF/2020/PTUN.ABN between Dwi Silvany Putri and the Regent of Morotai, the object of the dispute was the Defendant's action of not implementing the Decision of the State Personnel Consideration Agency (BAPEK), which was considered an

³⁰ Muhamad Raziv Barokah and Anna Erliana, "Pergeseran Kompetensi Absolut Dari Peradilan Umum ke Peradilan Tata Usaha Negara: Gugatan Perbuatan Melawan Hukum oleh Penguasa (*Onrechtmatige Overheidsdaad*)" *Jurnal Hukum and Pembangunan*, Vol 51 No. 4: 826.

³¹ Dewi Asimah et.al., *Perluasan Kewenangan Peradilan Administrasi in Mengadili Perbuatan Melanggar Hukum oleh Pemerintah (Onrechtmatige Overheidsdaad-OOD)*, (Jakarta: Kencana, 2021): 69-70

³² 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): 165.

administrative tort by a government body/official. In its decision, the panel of judges ordered the payment of compensation amounting to IDR 30,917,740.00 to the Plaintiff. This compensation represents the material loss suffered by the Plaintiff since being dismissed from her position as a Civil Servant.

2.3. Interesting Rulings Related to Government Administrative Actions in the Form of Not Performing Concrete Act.

2.3.1. Case No. 28/G/TF/2022/PTUN.JKT (Administrative Court of Jakarta) and No. 184/K/TUN/2023 (Supreme Court)

The interpretation of the term “inability” can be observed in Supreme Court Decision No. 184 K/TUN/TF/2023 in the case between the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia (ATR/BPN) as the Petitioner for Cassation against Rahmawati Salam as the Respondent. The core dispute concerns the action of the Minister of ATR/Head of BPN, who failed to undertake a Concrete Action (in the form of inability) by not executing the payment of monetary compensation to the former private landowner (the Respondent). The panel of judges held that the Defendant, namely the Minister of ATR/Head of BPN, by not fulfilling the obligation to pay compensation, acted contrary to statutory regulations, neglected his own legal duty (proximate omission), and infringed upon the Plaintiff's subjective rights. Therefore, the act of not paying compensation in the form of money is included in and qualifies as an administrative tort by the Agency and/or Government Official.

According to the considerations of the panel of judges, the characteristic of omission disputes (*omission*) in the *a quo* case lies in the principle that the filing of a lawsuit concerning an omission is not subject to any time limitation. This is consistent with the provisions of Article 1365 of the Indonesian Civil Code, which does not recognize the statute of limitations for filing such claims. In this regard, the panel emphasized that the jurisdiction of the Administrative Court, as regulated under Law Number 30 of 2014 on Government Administration and Supreme Court Regulation Number 2 of 2019, to examine cases of administrative torts committed by Government Agencies and/or Officials (*onrechtmatige overheidsdaad*),³³ particularly those involving omissions, was originally within the competence of the civil courts with Article 1365 of the Civil Code serving as the legal benchmark. Since civil court proceedings do not impose time limits for filing lawsuits, the transfer of jurisdiction from the civil courts to the Administrative Court must not impair or restrict citizens' rights to access justice that had previously existed, including restrictions on the time limit for filing lawsuits regarding acts of *omission*.³⁴

Based on the above case decision, there are three characteristics in disputes concerning administrative actions by the government involving not performing concrete actions, namely:

- a. An administrative action in the form of not performing a Concrete Action (*omission*) is qualified as an administrative tort if the *omission* violates statutory regulations,

³³ Elias Hence Thesia, “Double Certificate Cases in Indonesia: Absolute Jurisdiction of the Administrative Court or General Court?”, *International Journal of Multicultural and Multireligious Understanding* Vol. 10, No. 12, (2023): 204.

³⁴ Nika D. Sabastianski, “Administrable Omissions Liability in Public Law” *New York University Law Review* vol. 98 no. 1 (2023): 1021.

contradicts the legal obligations of the relevant administrative body or official, or infringes upon the subjective rights of the plaintiff;

- b. The filing of a lawsuit is not subject to any time limit;
- c. There is a demand for compensation, and there is no maximum limit on the amount of compensation.

2.3.2. Case No. 28/G/TF/2021/PTUN.BDG (Administrative Court of Bandung) and No. 82 PK/TUN/TF/2023 (Supreme Court)

Another interesting case involving the government's *omission* can be seen in case number 28/G/TF/2021/PTUN.BDG, where the Plaintiffs and the Intervening Plaintiffs II are residents of the Sentul City housing complex, and the Defendant is the Regional Public Drinking Water Company Tirta Kahuripan, Bogor Regency. In this case, the Panel of Judges opined that there was an administrative action not undertaken by the Defendant in implementing the Drinking Water Supply System (SPAM) for the Plaintiffs and the Intervening Plaintiffs II residing in the Sentul City housing complex, Bogor Regency. This *omission* was deemed by the Panel of Judges to violate both the procedural and substantive regulations and the General Principles of Good Governance (AUPB). Therefore, it is categorized as fail to perform concrete actions (*omission*) in the administration of governance.

In the Judicial Review stage, it was affirmed that the implementation of the Drinking Water Supply System (SPAM) constitutes part of the people's right to water, which must be prioritized by the state. Accordingly, the state, in this case as the Defendant, has the obligation to prioritize the fulfillment of SPAM since the right to water is guaranteed by law, as stipulated in Article 1 point 29 and Article 8 paragraph (1) of Law Number 17 of 2019 concerning Water Resources. Failure to fulfill such obligation is also deemed to be in contradiction with the provisions of Government Regulation Number 122 of 2015 concerning the Drinking Water Supply System, particularly Articles 45 and 53. Furthermore, in 2016, the Sentul City case, which was registered at the Cibinong District Court and has obtained permanent legal force, established that the imposition of Environmental Maintenance and Repair Fees (BPPL) by the developer, namely PT Sentul City, Tbk, constitutes an administrative tort.

In relation to the dictum of this case, it is declared that the *omission* in not implementing the drinking water system is an administrative action that violates regulations and General Principles of Good Governance (AAUPB). The Defendant is also ordered to implement the drinking water system and to connect the drinking water network to the homes of the Plaintiffs and Intervening Plaintiffs. Furthermore, the Defendant is instructed to set the water tariff for the Plaintiffs and Intervening Plaintiffs residing in the Sentul City area in accordance with the water tariff set by the Bogor Regency Government and to eliminate the requirement of resolving civil issues with other parties as a condition for becoming consumers, particularly for the Plaintiffs and Intervening Plaintiffs.

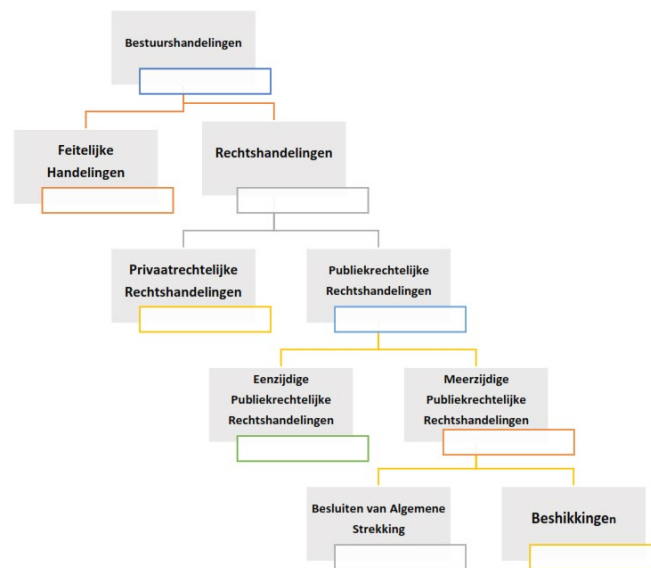
2.3.3. Case No. 6/G/TF/2021/PTUN.BJM (Administrative Court of Banjarmasin)

Another compelling case involves environmental dimensions, specifically the major flooding in the city of Banjarmasin, which has adversely affected the local residents. The plaintiffs, consisting of 53 aggrieved citizens, filed the lawsuit against the Governor of South Kalimantan. The disputed administrative action, which was upheld by the Judicial Panel, involved an act of government *omission*, specifically the failure

to provide early warning system (EWS) flood alerts in South Kalimantan in January. However, other aspects of the lawsuit, such as the delay in flood mitigation efforts and the failure to enact a gubernatorial regulation on flood management, were not granted.

According to Rene Seerden and F.A.M Stroink, providing information to the public falls within the scope of Factual Conducts. In German administrative law, Factual Conducts can be divided into two categories: “explanatory acts” (*Willenserklärungen*), such as the provision of information and public warnings, and actions in the form of “factual functions” (*Verrichtungen*), such as the disbursement of funds and police patrols.

Picture 2. Diagram of Factual/Real Action/Factual Conduct



Source: State Administration Law Textbook (processed)

The panel of judges employed the *argumentum a contrario* approach³⁵, which posits that if a regulation mandates the Defendant to undertake a government action, but the Defendant fails to carry out the government action within their authority and obligation, it constitutes a legally flawed action. The panel of judges asserted that the Defendant must apply the precautionary principle in environmental management. The purpose of the precautionary principle is to ensure early prevention to avoid significant adverse impacts on the environment. Consequently, it is necessary to take anticipatory steps to prevent flooding through the dissemination of early flood warning information.

3. CONCLUSION

After the enactment of the Government Administration Law and Supreme Court Regulation No. 2/2019, there has been an expansion of the jurisdiction of the Administrative Court. The Administrative Court now has the authority not only to examine and adjudicate disputes related to administrative decisions but also to handle disputes concerning government actions or administrative torts by the government. The disputed government actions can include both acts of commission and *omission*.

³⁵ Abdulqawi A. Yusuf & Daniel Peat, “A Contrario Interpretation in the Jurisprudence of the International Court of Justice”, *Canadian Journal of Comparative and Contemporary Law* vol. 3 no. 1 (2017): 6.

The Government Administration Law and Supreme Court Regulation do not elaborate in detail on the meaning or criteria of government *omissions*. However, based on the author's study, several criteria can determine whether a government *omission* can be considered an administrative tort: the existence of a legal obligation that must be performed by the administrative official, the action falls within the scope of their authority, the official intentionally fails to perform the obligation, the action violates regulations, legal obligations, or the subjective rights of the plaintiff, and there is a demand for actual compensation.

Regarding legal protection, citizens can file lawsuits in administrative courts for the *omission* of concrete actions by government bodies or officials. There are several notable cases that elucidate the concept of actions and provide protection to citizens. However, in practice, there are still issues, including those related to the intersection with tacit authorization. Handling cases of administrative actions, particularly *omissions* by the Administrative Court (PTUN), is crucial to protect citizens from arbitrary actions by government bodies/officials. The PTUN has handled numerous *omission* cases and has proven effective in providing legal protection to the public. However, there are significant issues that need to be addressed through regulatory changes and training to develop human resources, including:

- Legislators should revise the Administrative Judiciary Law to clarify the timeframe for filing lawsuits against government inaction, as there is still a practice-based opinion that lawsuits against government inaction are not bound by the 90-day period. On the other hand, there is also an opinion that the lawsuit period is 90 working days;
- Legislators should revise the Administrative Judiciary Law to clarify the amount of compensation. Lawsuits regarding government inaction previously handled by district courts did not recognize a maximum limit on the amount of compensation, while the PTUN has a maximum compensation limit;
- Legislators should revise the Administrative Judiciary Law or the Government Administration Law to clearly differentiate between government inactions (*omissions*) and tacit decisions.

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