

Legal Certainty of The Positive Fictive Policy In Business Licensing Through The Online Single Submission Risk-Based Approach System In Indonesia

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Abstract

This study aims to analyze the positive fictitious licensing policy under the Job Creation Law and assess its legal certainty using Gustav Radbruch's philosophical framework. The background of this research arises from Indonesia's legal reform agenda to streamline licensing through the OSS-RBA system. However, this reform raises concerns regarding legal certainty and institutional accountability. The urgency of this study lies in the regulatory ambiguity, lack of procedural safeguards, and removal of judicial oversight. Using a normative juridical method with statutory and conceptual approaches, the study finds that the current policy does not fully meet Radbruch's four standards of legal certainty. Specifically, it suffers from unclear legal norms, insufficient factual grounding, unstable legal framework, and weak institutional implementation—such as the absence of a Presidential Regulation, undefined verifier responsibilities, and lack of integration between central and local systems. The study concludes that the positive fictitious mechanism needs substantial normative refinement to ensure fairness, transparency, and predictability. The novelty of this research lies in its philosophical approach to evaluating administrative legal reform, offering a deeper lens beyond procedural analysis. As a policy implication, the government should urgently issue implementing regulations, reestablish judicial review, and develop integrated technical guidelines to strengthen OSS-RBA's legal reliability and effectiveness.

Keywords: Business Licensing; Legal Certainty; Positive Fictive

1. INTRODUCTION

Hans Kelsen, as cited by Asshiddiqie (2006), states that any entity established by a legal order and functioning as a driving force within it can be referred to as an organ. In the context of a state, such entities are called state organs. More generally, any position established by law may be considered an organ if it possesses norm-creating or norm-applying functions.¹ This concept is significant in a democratic country like Indonesia, where the rule of law serves as the foundation of all government actions, as enshrined in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia: "The State of Indonesia shall be a state based on law."

Public administration in Indonesia is governed by administrative law, which differs from constitutional law. While constitutional law determines the distribution of power among state organs, administrative law regulates policy implementation and defines the legal status of

¹ Jimly Asshiddiqie, *Perkembangan Dan Konsolidasi Lembaga Negara Pasca Reformasi* (Jakarta: Konstitusi Press, 2006).

individuals.² The success of government administration relies heavily on principles of good governance, which include transparency, legal certainty, the balance of rights and obligations, and protection against arbitrariness. These principles aim to ensure that public services are delivered effectively, efficiently, and justly.³

All state actions must be based on legal authority. Any act beyond this authority lacks legal effect and constitutes a violation of the law.⁴ In the context of technological development and digital transformation, the state is required to adapt through regulatory innovation without deviating from the General Principles of Good Governance. One major innovation is the introduction of the positive fictive licensing mechanism—a legal construct whereby a business license is deemed granted if no decision is issued within a specific timeframe.

The politics of business licensing in Indonesia has undergone major shifts, particularly following the enactment of Law Number 11 of 2020 concerning Job Creation, further revised by Law Number 6 of 2023.⁵ These laws introduced the concept of *positive fictive licensing*, which stipulates that licensing is deemed granted if no decision is issued by the government within a stipulated time. Prior to being replaced by Law Number 6 of 2023, Law Number 11 of 2020 on Job Creation was declared conditionally unconstitutional by the Constitutional Court through Decision Number 91/PUU-XVIII/2020. As a follow-up to the decision, the government enacted Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation.⁶ This Perpu was subsequently ratified into law through Law Number 6 of 2023 concerning the Enactment of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation into Law (Job Creation Law).

The positive fictive licensing policy represents a major transformation in administrative law. Nevertheless, it raises a fundamental legal question: does this mechanism fulfill the requirements of legal certainty as theorized by Gustav Radbruch? His theory emphasizes that legal certainty is achieved when laws are clear, consistent, based on facts, and not frequently changed. This theory serves as the philosophical framework for this study.

The urgency of this research is underscored by the continuing implementation issues surrounding the OSS-RBA (Online Single Submission – Risk-Based Approach) system. Despite fulfilling all requirements, many business actors report that licenses remain stagnant in the system due to bureaucratic ambiguity and the absence of clear implementing regulations. Article 53 of Law

² Philipus M Hadjon et al., *Pengantar Hukum Administrasi Indonesia*, 10th ed. (Yogyakarta: Gadjah Mada university Press, 2008).

³ Ipan Nurhidayat, “Prinsip-Prinsip Good Governance Di Indonesia,” *Journal E-Gov Wiyata : Education and Government* 1, no. 1 (2023): 40–52.

⁴ Iswanto, Nunik Nurhayati, and Galang Taufani, *Hukum Tata Negara Indonesia: Sketsa Asas Dan Kelembagaan Negara Berdasar UUD NRI Tahun 1945* (Surakarta: UMS Press, 2017).

⁵ Nunik Nurhayati et al., “Politics of Business Licensing in Indonesia: Involvement of Community Consent in Building Approval,” *Pena Justisia: Media Komunikasi Dan Kajian Hukum* 23, no. 3 (2024): 3392–3407.

⁶ Riska Purbasari and Mohammad Jamin, “The Job Creation Act: Implication of National Strategic Project on Regional Spatial Planning (Study in Madiun City, East Java Province),” *Jurnal Jurisprudence* 11, no. 2 (2021): 297–309.

Number 30 of 2014 in conjunction with Article 175 of Law Number 6 of 2023 mandates that positive fictive procedures be governed by Presidential Regulations, which to date have not been issued. This regulatory vacuum has resulted in administrative uncertainty and undermined trust in the licensing system.⁷

Additionally, several practical challenges have been reported in both academic and media discourse. These include delays between the issuance of regulations and their technical implementation, slow transmission of Job Creation Law provisions to regional governments, unpreparedness of bureaucratic apparatus to operate OSS-RBA, inadequate digital infrastructure, poor inter-agency coordination, and technical difficulties in business name submissions at the Ministry of Law and Human Rights. These implementation gaps have led to confusion and frustration among entrepreneurs.⁸

Such maladministration in licensing services directly impacts Indonesia's investment climate. Prolonged uncertainty, administrative inefficiencies, and inconsistent service delivery erode public trust in the regulatory system and deter potential investors, ultimately weakening the country's economic competitiveness.⁹

Three recent studies have explored the fictive licensing mechanism. Yuniza (2021) highlights how the Job Creation Law accelerates bureaucracy and simplifies procedures but notes that the removal of the coercive power of the Administrative Court weakens legal certainty, especially when claims are not supported by complete documents.¹⁰ Simanjuntak (2019) provides a comparative approach, indicating that the fictive mechanism reduces maladministration and accelerates licensing, though he argues that vague normative definitions cause confusion in implementation.¹¹ Novira (2022) points out regulatory gaps after the Constitutional Court's decision and cautions that a lack of procedural safeguards may lead to government arbitrariness and harm to citizens.¹²

While these studies contribute meaningfully to the discourse, they do not evaluate the mechanism using a fundamental legal-philosophical lens. This study fills that gap by applying Gustav Radbruch's legal certainty theory, offering a normative and conceptual analysis that goes beyond efficiency and regulation. Unlike previous research, this study positions fictive licensing

⁷ Maulana Reza Alfaris, "Penerapan Fiktif Positif Gagal? Pengusaha Harus Gigit Jari?," <https://prolegal.id/penerapan-fiktif-positif-gagal>, accessed January 13, 2022, <https://prolegal.id/penerapan-fiktif-positif-gagal>.

⁸ Handoyo, "OSS Dinilai Mempersulit Perizinan, Begini Keluhan Pelaku Usaha," September 2021, <https://nasional.kontan.co.id/news/oss-dinilai-mempersulit-perizinan-begini-keluhan-pelaku-usaha?page=all>.

⁹ Widhoroso, "Ketidaksiapan Penerapan OSS Berbasis Risiko Jadi Perhatian Ombudsman," September 2021, <https://mediaindonesia.com/ekonomi/435218/ketidaksiapan-penerapan-oss-berbasis-risiko-jadi-perhatian-ombudsman>.

¹⁰ Mailinda Eka Yuniza and Melodia Puji Inggawati, "Peluang Dan Tantangan Penerapan Keputusan Fiktif Positif Setelah Undang-Undang Cipta Kerja Diundangkan," *Jurnal de Jure* 13, no. 2 (2021): 114–29, <https://doi.org/10.36277/jurnaldejure.v13i2.539>.

¹¹ Enrico Simanjuntak, "Prospek Prinsip Fiktif Positif Dalam Menunjang Kemudahan Berusaha Di Indonesia," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 7, no. 2 (2018): 301–20, <https://doi.org/10.33331/rechtsvinding.v7i2.250>.

¹² Rahmadian Novira and I Gusti Ayu Putri Kartika, "Upaya Atas Keputusan Fiktif Positif Pejabat Tata Usaha Negara Pasca Judicial Review Undang-Undang Cipta Kerja," *Kertha Semaya: Journal Ilmu Hukum* 10, no. 9 (2022): 2077–96, <https://doi.org/10.33751/palar.v5i1.1185>.

not only as an administrative innovation but also as a legal construct that must align with the rule of law.

Based on the above background, this study seeks to fill that gap by providing a conceptual and normative analysis based on Gustav Radbruch's legal theory to assess the legal certainty of the positive fictive licensing mechanism. To that end, this study aims to: (1) analyze the positive fictive policy in Indonesia following the enactment of the Job Creation Law; and (2) assess the legal certainty of the positive fictive licensing mechanism within the OSS-RBA system using Gustav Radbruch's legal theory.

2. METHOD

The research method employed in this study is normative juridical, which is an approach aimed at discovering the truth of a particular issue through coherence analysis—namely, examining whether the applicable rules are consistent with legal norms, and whether those norms, in the form of prohibitions and mandates, align with the fundamental principles of law.¹³ It involves a logical examination of the structure, consistency, and relevance of legal provisions, particularly in the context of administrative and business licensing law in Indonesia.

In coherence analysis, the research tests the congruity between the established legal norms—especially those taking the form of authoritative rules, such as prohibitions and mandates—and the general principles of law, including the principle of legal certainty, justice, and utility. This approach is particularly appropriate for examining the normative implications of the positive fictitious policy as outlined in the Job Creation Law (Law No. 6 of 2023) and its relation to the provisions of Law No. 30 of 2014 on Government Administration.

Furthermore, the research employs a statutory approach, which involves a comprehensive examination of relevant laws and regulations governing business licensing through the Online Single Submission Risk-Based Approach (OSS-RBA) system. This approach allows the researcher to critically analyze the legislative and regulatory frameworks that serve as the legal basis for implementing fictitious approval mechanisms in administrative practices. Key statutory instruments analyzed include the Job Creation Law, the Government Administration Law, and Government Regulation No. 5 of 2021 concerning Risk-Based Business Licensing.

The research is also supplemented by a conceptual approach, drawing upon legal doctrines and jurisprudential theories—particularly Gustav Radbruch's theory of legal certainty—to assess whether the implementation of positive fictitious decisions through electronic systems reflects the values of certainty, clarity, and justice within the legal system.

¹³ Peter Mahmud Marzuki, *Penelitian Hukum*, 17th ed. (Jakarta: Kencana, 2022), 47.

3. RESULTS & DISCUSSION

3.1 Positive Fictitious Policy in Indonesia Post Job Creation Law

3.1.1 The Concept of Positive Fictitious in Indonesia

The principle and concept of *positive fictitious* can be simply defined as a legal provision that obligates administrative officials to respond to and issue actions or decisions upon applications submitted to them within a predetermined time frame. If this time limit is not met, the official is automatically deemed to have approved the application. This concept is referred to as *lex silencio positivo*, a term derived from the Latin word *lex* and the Spanish phrase *Silencio Positivo*, which in English terminology corresponds to tacit authorization or fictitious approval.¹⁴

The concept of positive fictitious approval began to be recognized and adopted in Indonesia following the enactment of Law No. 30 of 2014 on Government Administration. The introduction of this law had a significant impact by establishing a new legal concept regarding decisions or actions taken by government officials in Indonesia, namely, the positive fictitious concept. Previously, a similar concept had already existed and was regulated under Article 3 of Law No. 5 of 1986 on the State Administrative Court. However, the concept introduced therein was one of negative fictitious approval.

Nonetheless, with the progression of time and the promulgation of the Government Administration Law, a new paradigm emerged, bringing a shift in the application of fictitious approvals in administrative decisions or actions by government officials, from the former negative fictitious model to the positive fictitious one.¹⁵

The dynamic shift in the concept of fictitious approval in Indonesia cannot be separated from the enactment of the Government Administration Law. In brief, the urgency behind the establishment of this law lies in the fact that, prior to its existence, the State Administrative Court Law was more heavily influenced by the role of the government as a ruling authority. As a result, the exercise of governmental authority tended to be driven more by discretionary power (*Freies Ermessen*) rooted in the will of the ruling power.¹⁶

Under the positive fictitious mechanism regulated in the Government Administration Law before it was amended by the Job Creation Law, the silence or inaction of an official, as stipulated in the relevant provisions, does not automatically or immediately result in the approval of the application. It is important to emphasize that the term positive—referring to the legal acceptance of the application—must still be legally confirmed through a judicial process. This is done by submitting a petition to the court with the aim of obtaining a declaratory judgment of acceptance, as stipulated in Article 53, paragraph (4). In this context, since positive fictitious approval

¹⁴ Oswald Jansen, *Comparative Inventory of Silencio Positivo* (Utrecht: Utrecht School of Law, 2008), 4.

¹⁵ Rini Wulandari, "Implikasi Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan Terhadap Upaya Hukum Luar Biasa Dalam Sengketa Pertanahan," *Dharmasiswa: Jurnal Program Magister Hukum FH UI 1*, no. 2 (2021): 1033–46.

¹⁶ Harun, Nuria Siwi Enggarani, and Galang Taufani, *Hukum Administrasi Negara Di Era Citizen Friendly* (Surakarta: UMS Press, 2018), 13.

pertains to administrative decisions or decrees, the court with jurisdiction—based on the principle of relative competence (*distributie van rechtsmacht*)—is the Administrative Court.¹⁷

However, in practice—particularly after the revision through the Job Creation Law—there has been considerable debate regarding the consistency and effectiveness of this mechanism. The requirement to submit a petition to the Administrative Court for a declaratory judgment is viewed by some as an additional procedural burden that may potentially restrict access to justiciable rights. Rather than simplifying the licensing process, this step introduces another layer of bureaucracy that may delay the certainty expected from a fictive approval system.¹⁸

Moreover, the doctrine of fictive approval is conceptually at odds with the administrative law principle of *vorsichtprinzip* (principle of caution). While fictive approval emphasizes legal certainty through silence, the caution principle urges a thorough and responsible decision-making process by public officials to prevent legal errors and abuse of power. This doctrinal tension raises the critical question: Does the positive fictive system truly enhance administrative efficiency, or does it create new risks of maladministration and potential abuse?

Therefore, a more nuanced reflection is needed. While the system intends to reduce bureaucratic inertia and offer certainty to business actors, its implementation must be accompanied by institutional safeguards to prevent misapplication. The lack of clear implementation guidelines and judicial capacity may hinder the system's intended benefits and lead to further legal complications rather than resolving them.

3.1.2 Issuance of Business Licenses Through Positive Fictitious Mechanism Post Job Creation Law

In response to globalization, efforts to improve public welfare, and global economic competition, legal reform in Indonesia has become imperative. One such reform is the enactment of the Job Creation Law, which was drafted and enacted in a relatively short period of time. The provision regarding positive fictive decisions in Article 53 of the Government Administration Law underwent significant changes in the Job Creation Law. These changes cover three aspects: the time limit for granting positive fictive decisions, applications for decisions in electronic form, and the removal of the State Administrative Court as the institution authorized to examine and rule on positive fictive cases.¹⁹

One significant development regarding the positive fictitious mechanism can be observed in the change to the decision-making timeframe by State Administrative Bodies or Officials, as stipulated in Article 53 of Law No. 30 of 2014 in conjunction with Article 175 of Law No. 6 of

¹⁷ Ni Komang Ayu Arniti, Anak Agung Sagung Laksmi Dewi, and Luh Putu Suryani, "Penyelesaian Permohonan Fiktif Positif Untuk Mendapatkan Keputusan Di Pengadilan Tata Usaha Negara," *Jurnal Analogi Hukum* 1, no. 2 (2019): 265–70.

¹⁸ Wahidur Roychan, "Konsep Dan Penyelesaian Asas Fiktif Positif Menurut Ketentuan Hukum Positif Di Indonesia," *Dekrit: Jurnal Magister Ilmu Hukum* 13, no. 1 (2023): 69–90, <https://doi.org/10.56943/dekrit.v13n1.140>.

¹⁹ Andika Risqi Irvansyah, "Kedudukan Hukum Keputusan Fiktif Positif Sejak Pengundangan Undang-Undang Cipta Kerja," *JAPHTN-HAN* 1, no. 2 (2022): 209–26, <https://doi.org/https://doi.org/10.55292/japhtnhan.v1i2.31>.

2023. Paragraph (2) of this provision modifies the previous time limit for issuing actions and/or decisions. A decision will be deemed valid automatically if the official fails to respond within 5 days, which is shorter compared to the previous 10-day time limit. While this change may seem more efficient in terms of time acceleration, the policy has the potential to violate the General Principles of Good Governance, particularly the principle of carefulness, which demands a more thorough and careful examination process.²⁰

A new provision is introduced in Article 53, paragraph (3), which regulates applications submitted through an electronic system. It states that if all application requirements have been fulfilled through the electronic system, the system itself shall determine the action or decision of the competent government body or official regarding the application. However, the automatic issuance of business licenses through the OSS-RBA System may lead to legal issues if the application submitted by the business actor does not fully meet the required standards or conditions, yet the license is issued because the verifier fails to provide notification within the specified time frame. For example, in several reported cases involving food and beverage businesses in urban centers, licenses were granted automatically by the OSS system, only for it to be discovered later that the businesses had not met health certification or zoning requirements. Such incidents raise serious concerns about public safety and administrative accountability.²¹

This situation creates legal uncertainty regarding the validity of the issued license, especially if it results from system malfunctions, negligence, or even potential intentional inaction by the verifier. Therefore, further regulation is necessary to ensure legal certainty, both for business actors and for verifiers, who are responsible for reviewing applications.²²

Significantly, the provision regarding the mechanism for submitting a request to the court and the court's authority, as previously stipulated in Article 53 paragraph (4) of the Government Administration Law, has been repealed. This provision formerly required applicants—whose applications were deemed approved due to positive fictitious mechanisms—to submit a request to the Administrative Court to obtain a declaratory ruling affirming the legal approval of their application due to the official's inaction. The removal of this provision potentially undermines access to justice for business actors, particularly in cases of disputed licenses or when legal clarification is needed. Without judicial affirmation, business actors may be left in legal limbo

²⁰ Tri Nurrohmah, “Keputusan Fiktif Positif Pada Pasal 175 Poin 6 Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja Perspektif Siyāṣah” (Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2020).

²¹ Delfi Farosa, Badaruddin Badaruddin, and Tengku Irmayani, “The Influence of Implementing Risk-Based Business Licensing (OSS RBA) on Investment Growth in the Food and Beverage Services Subsector in Medan City,” *Perspektif* 13, no. 1 (2024): 200–211, <https://doi.org/10.31289/perspektif.v13i1.10777>.

²² Nova Herlangga Masrie, “Implikasi Hukum Perubahan Pasal 53 Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan Terhadap Penerbitan Perizinan Berusaha Secara Otomatis Melalui Sistem Elektronik,” *Jurnal Nalar Keadilan* 1, no. 2 (2021): 60–81, 60.

regarding the validity of their licenses, especially if challenged by third parties or regulatory agencies.²³

Furthermore, Article 53 paragraph (5) provides clarification regarding the positive fictitious determination. It explains that such a determination, referring to an action or decision deemed legally granted due to the lack of response to an electronically submitted application within the prescribed timeframe, shall be further regulated through a Presidential Regulation in order to provide legal certainty.

3.1.3 The Impact of Positive Fictitious Mechanism in OSS-RBA Licensing

On the other hand, the provision stipulating that applications must be responded to by the competent authority or government agency within a maximum of 5 days also has negative implications that affect its practical implementation.²⁴ The issue lies in the fact that the limited timeframe—only five days—may result in decisions being issued without thorough examination or assessment by the competent agency and/or official. The time constraint may lead to substantive flaws in the decisions rendered.

Furthermore, the new provision in Article 53 paragraph (3) of Law No. 30 of 2014 in conjunction with Article 175 of Law No. 6 of 2023 regulates that a decision granted through an electronic system—where the application is deemed approved but no decision is issued by the State Administrative Body and/or Official within the specified time—shall be considered valid. This provision implies that a decision produced under the positive fictitious mechanism through an electronic system holds the same legal force as a written decision, as stipulated in Article 38 of the Government Administration Law. The revocation of Article 53 paragraph (4) of the Government Administration Law also has legal consequences, namely the removal of the jurisdiction of the State Administrative Court to adjudicate applications related to positive fictitious approval.

The regulation of positive fictitious acceptance under the Job Creation Law carries at least two significant implications: (a) the elimination of the legal basis for the authority of the State Administrative Court to adjudicate applications for positive fictitious acceptance; and (b) the legal fiction that a State Administrative Decision with a positive fictitious construction is deemed granted by law without a decision from the State Administrative Court, which gives rise to legal uncertainty.²⁵

²³ Nur Eka Fatimatuz Zahro and Achmad Hasan Basri, “Konsep Permohonan Keputusan Fiktif Positif Pasca Berlakunya Pasal 175 Angka 7 Undang-Undang Nomor 6 Tahun 2023 Tentang Penetapan Peraturan Pengganti Undang-Undang Nomor 2 Tahun 2022 Tentang Cipta Kerja,” *Panitera: Jurnal Hukum Dan Hukum Islam* 1, no. 1 (2023): 1–23.

²⁴ Devi Elora, “Problematika Hukum Perusahaan Dalam Implementasi UU Cipta Kerja Terkait Pendirian PT UMK,” *Wacana Paramarta: Jurnal Ilmu Hukum* 20, no. 3 (2021): 45–54, 46.

²⁵ Dian Agung Wicaksono, Bimo Fajar Hantoro, and Dedy Kurniawan, “Quo Vadis Pengaturan Kewenangan Pengadilan Tata Usaha Negara Dalam Penerimaan Permohonan Fiktif Positif Pasca Penataan Regulasi Dalam Undang-Undang Cipta Kerja (Quo Vadis of the State Administrative Court’s Authority Provision on Deciding Fictitious Posit),” *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 10, no. 2 (2021): 323–37, 323, <https://doi.org/http://dx.doi.org/10.33331/rechtsvinding.v10i2.715>.

As further noted by Zahro and Basri, the regulation of positive fictitious applications under the Job Creation Law also fails to meet the element of legal certainty, as it gives rise to multiple interpretations. In addition, the removal of the State Administrative Court's authority is inconsistent with the principle of checks and balances that underpins the governance system in Indonesia.²⁶

The comparative experience of the Netherlands, which also applies the *lex silencio positivo* (LSP) principle, offers valuable insights into the regulatory framework for administrative licensing. In the Dutch administrative law system, this principle is referred to as a legal fiction (*rechtsvermoeden*) and is governed by Section 4.1.3.3 of the *Algemene wet bestuursrecht* (Awb) or the General Administrative Law Act. Article 4:20b of the Awb stipulates that an application is deemed legally approved if no decision is issued within the prescribed timeframe—provided that such approval is explicitly stated in statutory provisions, as required by Article 4:20a. However, the application of LSP is not absolute. In the Netherlands, LSP only applies where explicitly provided by law, and it is embedded within a framework of procedural safeguards and legal accountability mechanisms. Applications must be complete and legally valid; the legal consequences of tacit approval must be clearly communicated in the relevant legislation; and authorities are obligated to document and formally register any non-response. Additionally, both applicants and third parties retain the right to file objections or appeals to the administrative court, thus ensuring access to justice and institutional accountability. In specific contexts—such as environmental licensing—the LSP is deliberately excluded due to overriding public interest concerns requiring substantive assessment. As outlined in the Explanatory Memorandum to the Dutch Environment Act, permits for activities such as land-use deviations, mining, or Natura 2000 areas are not subject to LSP due to the risk of irreversible harm to the physical environment.²⁷

In contrast, Indonesia's removal of Article 53(4) of the Government Administration Law through the enactment of the Job Creation Law eliminated the judicial verification mechanism for fictitious approvals. Unlike the Dutch system, the OSS-RBA framework no longer provides for judicial review of positive fictitious decisions. This absence of formal judicial oversight significantly weakens legal certainty and protection for applicants and affected third parties. Without judicial checks, the likelihood of flawed or improper administrative decisions increases, and the absence of corrective mechanisms undermines legal safeguards. Thus, eliminating the role of the courts in confirming the legal validity of fictitious approvals under Indonesia's OSS-RBA system represents a regressive step, eroding fundamental principles of the rule of law, particularly transparency, accountability, and the protection of individual and business rights.

²⁶ Nur Eka, Fatimatuz Zahro, and Achmad Hasan Basri, "Konsep Permohonan Keputusan Fiktif Positif Pasca Berlakunya Pasal 175 Angka 7 Undang-Undang Nomor 6 Tahun 2023 Tentang Penetapan Peraturan Pengganti Undang-Undang Nomor 2 Tahun 2022 Tentang Cipta Kerja," *Panitera: Jurnal Hukum Dan Hukum Islam* 1, no. 1 (2023): 1–23, 2.

²⁷ Lucia Tellegen, "The Lex Silencio Positivo, Environment Act and the Services Directive," 2024, <https://www.wieringa-advocaten.nl/en/weblog/2024/12/20/the-lex-silencio-positivo-environment-act-and-the-services-directive/>.

3.2 Legal Certainty of the Positive Fictitious Mechanism in the Issuance of Business Licenses Through the OSS-RBA System in Indonesia According to Gustav Radbruch's Theory

According to Radbruch, good law must contain the element of legal certainty, which provides protection against arbitrary actions and ensures the clarity of everyone's rights and obligations.²⁸ To realize legal certainty, several key elements must be fulfilled within a system of positive law. Legal certainty serves to ensure that the law can be effectively implemented and does not create confusion in its application. Radbruch's concept of legal certainty identifies four fundamental conditions that must be fulfilled for a legal system to be regarded as certain: 1) The law must be positive (*gesetzliches Recht*); 2) The law must be based on facts (*Tatsachen*); 3) The legal facts must be clear; and 4) Positive law must not change frequently. These four elements serve as a framework for evaluating the legal certainty of the positive fictitious policy in the issuance of business licenses through the OSS-RBA system in Indonesia.²⁹

3.2.1 Law Must Be Positive

Gustav Radbruch argued that the concept of statute is different from that of law. In legal philosophy, a distinction is made based on the ontological understanding of the concept of law. Etymologically, in Latin, law is referred to as *ius*, while statute or legislation is referred to as *lex*. A statute is a manifestation of a source of law and serves as a starting point in the legal system by authoritatively establishing prohibitions and commands for legal subjects. However, under the influence of legal positivism, this distinction has gradually faded, leading to a form of disorientation in legal understanding. As a result, legal research has increasingly adopted the view that "law is identical to legislation."³⁰

Radbruch's formula and his conception of law are grounded in the idea that a legal system may not always guarantee uniform justice, but there remains an expectation of at least a minimum standard of justice embedded within legality. This perspective is reflected in the part of what is known as Radbruch's Formula, which asserts that for a rule to be considered valid or recognized as positive law, there must be at least an effort to realize justice.³¹

The principle of legal certainty is a fundamental principle of law, according to Gustav Radbruch. This principle essentially expects and obliges the law to be formulated clearly and in writing. The existence of this principle is crucial as it ensures the clarity of a positive legal product that exists.³²

²⁸ Kania Dewi Andhika Putri and Ridwan Arifin, "Tinjauan Teoritis Keadilan Dan Kepastian Dalam Hukum Di Indonesia," *Mimbar Yustitia* 2, no. 2 (2018): 142–58, 145. <https://doi.org/10.52166/mimbar.v2i2.1344>.

²⁹ Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban* (Jakarta: UKI Press, 2006), 136.

³⁰ Marijan Pavčnik, *Encyclopedia of the Philosophy of Law and Social Philosophy* (Dordrecht: Springer, 2023), 2924.

³¹ Brian H. Bix, "Radbruch's Formula and Conceptual Analysis," *The American Journal of Jurisprudence* 56 (2011): 50.

³² Mario Julyano and Aditya Yuli Sulistyawan, "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum," *Jurnal Crepido* 1, no. 1 (2019): 13–22, 13, <https://doi.org/10.23920/jbmh.v6i1.324>.

Viewed from the perspective that law must be positive, the Job Creation Law is a legal product in the form of legislation, which contains provisions regulating the concept of positive fictitious approval, including its application in business licensing through the OSS-RBA system. Accordingly, the regulation of positive fictitious approval in Indonesia as stipulated in the Job Creation Law constitutes positive law, and serves as the legal foundation for regulating fictitious approval mechanisms—particularly in the issuance of business licenses through the electronic OSS-RBA system. This is because the law was enacted and formalized by competent and legitimate authorities.³³

However, in light of Radbruch’s philosophical framework, a critical reflection is needed: can the Job Creation Law, which was drafted in a relatively short time and ratified through a Government Regulation in Lieu of Law (Perppu), be regarded as a “good legal product” that embodies minimum justice? Critics argue that the hasty legislative process lacked public participation and transparency, which potentially undermines the legitimacy of the law and the realization of justice.³⁴ From Radbruch’s standpoint, legality alone is not sufficient; the law must also strive toward justice. If a law, although formally valid, fails to meet basic standards of justice, its moral and legal authority may be questioned.

Furthermore, in practice, many business actors have expressed concerns regarding the implementation of the positive fictitious mechanism under the OSS-RBA system. Reports indicate that licenses are sometimes granted without adequate verification, leading to administrative confusion, legal disputes, or invalid permits.³⁵ These experiences raise questions about whether the Job Creation Law, despite being a positive legal norm, truly fulfills its purpose of ensuring fairness and legal certainty in administrative processes.

Positive legislative decisions have a significant impact on the development of positive law in Indonesia. This is because such decisions are subsequently transformed into a legal source that is binding on the President and Parliament in the formation of laws.³⁶ Furthermore, the law is a valid and currently recognized legal regulation that governs the provisions related to positive fictitious approval. Therefore, Article 53 of Law No. 30 of 2014 in conjunction with Article 175 of Law No. 6 of 2023 represents a positive legal norm in Indonesia—but whether it also satisfies Radbruch’s demand for justice within the law remains a point of critical inquiry.

³³ Adinda Putri Pertiwi, Adrian E. Rompis, and R. Adi Nurzaman, “The Elimination of State Administrative Court’s Authority To Decide Positive Fictitious Decisions After the Amendment To Law Number 30 of 2014 Connected With the General Principles of Good Governance,” *Jurnal Poros Hukum Padjadjaran* 5, no. 1 (2023): 107–24, <https://doi.org/10.23920/jphp.v5i1.1390>.

³⁴ Adnan Hamid and Hasbullah, “Legal Hermeneutics of the Omnibus Law on Jobs Creation: A Case Study in Indonesia,” *Beijing Law Review* 13, no. 03 (2022): 449–76, <https://doi.org/10.4236/blr.2022.133028>.

³⁵ Fitri Rafianti et al., “The Challenges of Implementing the Online Single Submission (OSS) System in Business Licensing (NIB) and Halal Certification Processes,” *Pena Justisia: Media Komunikasi Dan Kajian Hukum* 23, no. 3 (2024): 586–99.

³⁶ Labib Muttaqin et al., “Examining the Constitutional Court’s Positive Legislature Decisions in Indonesia’s Hierarchy of Legal Norms,” *Jurnal Jurisprudence* 14, no. 2 (2024): 227–39.

3.2.2 Law Must Be Based on Facts

Gustav Radbruch, as quoted by Robert Alexy, stated that “*Law is the reality whose sense is to serve the value of law, the idea of law*”. Based on this quote, Radbruch connects three key elements: reality, the idea of law, and reason. His concept of *reality* or *fact* refers to the positivity of law, meaning that the enactment and effectiveness of law must be grounded in actual, empirical conditions. This notion implies that the law should not be confined solely to the value of justice, but must also embrace the principle of utility and the conformity of law with factual reality as essential components of legal certainty.³⁷ Thus, the requirement for law to be based on facts means that the formulation of positive law must consider real conditions in society. Positive law must be grounded in practical reality and benefit the community. The Job Creation Law, guided by the principle of simplifying the licensing process, aims to reduce the procedural complexity historically found in business licensing, promote efficiency, and facilitate investment. The OSS-RBA system is a central instrument in this reform. However, while the goal is simplification, field evaluations reveal significant discrepancies between policy and practice.

For example, based on a survey of 97 respondents who use the OSS service in Magelang City, it was found that the OSS system generally produced positive results, with system quality influencing usage by 56.7% and user satisfaction by 46.7%. However, information quality emerged as a significant challenge, with 25.1% of respondents giving negative assessments due to inadequate and insufficiently informative content. The main complaints included difficulty accessing the OSS website, limited understanding of system updates, technical disruptions such as frequent server downtime, and outdated information. Additionally, the OSS system's lack of full integration has made coordination with local governments difficult. This is compounded by slow responses from relevant agencies due to a limited number of personnel, and lengthy technical recommendation processes that are not yet fully integrated. These conditions indicate that the implementation of the positive fictitious principle within OSS still faces considerable operational obstacles, thus reducing the system's effectiveness in supporting business licensing simplification.³⁸

Based on a study of OSS-RBA implementation in Madiun Regency, approximately 81% of business actors using this system were small and medium enterprises (SMEs), with a significant increase in the issuance of Business Identification Numbers (NIB), from 3,009 in 2021 to 7,162 in 2022. This reflects a positive impact on investment realization in the region. However, the implementation of OSS-RBA also faces various challenges and user complaints, particularly related to the unclear derivative regulations from the central government, incomplete integration

³⁷ Robert Alexy, “Gustav Radbruch’s Concept of Law,” in *Law’s Ideal Dimension*, online edn (Oxford: Oxford Academic, 2021), <https://doi.org/https://doi.org/10.1093/oso/9780198796831.003.0008>.

³⁸ Jayanti Arvi Setiani and Priyanto Susiloadi, “Analisis Kesuksesan Pelayanan Perizinan Berbasis Online Single Submission Pada Dinas Penanaman Modal Dan Pelayanan Terpadu Satu Pintu Kota Magelang,” *Jurnal Mahasiswa Wacana Publik* 3, no. 1 (2023): 166–81.

of the system with the Detailed Spatial Plan (RDTR), and the continued need for manual verification. Furthermore, uncertainties persist due to ambiguous licensing requirements for certain types of businesses not explicitly outlined in the regulations, resulting in unclear application of the positive fictitious principle of OSS-RBA in practice.³⁹

Therefore, while the positive fictive provisions in the Job Creation Law aim to reflect legal reality and facilitate ease of doing business, implementation challenges at the technical and bureaucratic levels hinder the realization of these ideals. This demonstrates that although the legal norm aspires to meet Radbruch's element of factual alignment (*Tatsachen*), the practical gap underscores the need for reinforcing legal mechanisms that ensure clarity, accountability, and trust in digital licensing.

3.2.3 Legal Facts Must Be Clear

Gustav Radbruch emphasized that positivity in law is a matter of fact; therefore, legal facts must be clearly formulated, with a strong emphasis on clarity and precision in legal drafting. The validity of a law is not determined solely by the authority that enacts it, but also requires that its content be factually sound so that the law can be applied with certainty and effectively implemented.⁴⁰

The concept of positive fictitious approval as regulated in the Job Creation Law contains elements of ambiguity, particularly in Article 53 paragraph (4) of Law No. 30 of 2014 as amended by Article 175 of Law No. 6 of 2023. The wording of this provision lacks clarity, especially regarding the form of the decision or determination that confirms the acceptance of an application under the positive fictitious mechanism. It is not explained how such approval is to be issued or to whom the request for such determination must be submitted.

Moreover, in the same article, paragraph (5) states that the provisions regarding the determination of decisions and/or actions deemed legally granted under paragraph (3) shall be further regulated by a Presidential Regulation. However, to date, no such Presidential Regulation has been issued to provide the necessary implementation rules concerning applications granted electronically through positive fictitious mechanisms. This has resulted in legal uncertainty and a regulatory vacuum.

When viewed through the lens of Radbruch's theory of legal certainty, it is evident that the current regulation of positive fictitious approval in the Job Creation Law does not fully satisfy the requirement that legal facts must be clear. The law contains vague phrasing and lacks the necessary implementing regulation—in this case, a Presidential Regulation—regarding the form and process of electronic approval under positive fictitious provisions, including in business

³⁹ Triambodo Andi Kristantiya, Sudarmo Sudarmo, and Desiderius Priyo Sudibyo, "Online System Adaptation Single Submission Risk Based Approach (OSS-RBA)," *International Journal of Multidisciplinary: Applied Business and Education Research* 4, no. 8 (2023): 2757–68, <https://doi.org/10.11594/ijmaber.04.08.09>.

⁴⁰ Torben Spaak, "Meta-Ethics and Legal Theory: The Case of Gustav Radbruch," *Law and Philosophy* 28, no. 3 (2008): 261–90.

licensing through the OSS-RBA system. This absence creates difficulties in the effective implementation of the policy in practice.⁴¹ Furthermore, with the removal of the State Administrative Court's authority to review positive fictitious applications, there is increasing confusion and legal uncertainty, particularly among business actors whose applications are deemed legally approved under this mechanism.⁴²

Furthermore, the ambiguity in legal provisions has practical implications, particularly in terms of administrative accountability. When a license is automatically granted by the OSS-RBA system due to the silence or inaction of a verifier, the question arises as to who bears responsibility if the issued license is later found to be flawed. Business actors may face legal consequences despite having followed all procedures, while verifiers often avoid accountability due to the absence of clear guidelines. This legal uncertainty creates a disproportionate burden on applicants, while institutional mechanisms for controlling and correcting administrative errors remain weak.

Such an imbalance in responsibility between applicants and OSS-RBA verifiers undermines the principle of legal protection and good governance. Without a clear legal basis for determining who is liable in the event of maladministration, the system risks eroding trust from entrepreneurs and weakening the reliability of electronic licensing mechanisms.

3.2.4 Positive Law Must Not Be Easily Changed

Gustav Radbruch, as cited by Bateman, stated that “*The conflict between justice and legal certainty may well be resolved in this way: The positive law secured by legislation and power, takes precedence even when its content unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute as flawed law, must yield to justice*”.⁴³ From this view, Radbruch interpreted *positive law* as rigid—not in the sense that it is absolutely immutable, but rather that it may only be changed under certain conditions. Specifically, if there is a conflict between legal certainty and justice, then the element of justice must take precedence. According to Radbruch, positive law is ultimately addressed to all people and must be guided by justice and utility in order to realize the ideals of the law and its philosophical aspirations.

The enactment of the Job Creation Law was fundamentally aimed at increasing investment by simplifying the business licensing process. The licensing system was transformed into a risk-based approach through the OSS-RBA. Through this law, the government sought to ease the flow of investment and accelerate economic recovery following the global impact of the Covid-19 pandemic in 2020.

⁴¹ Surya Mukti Pratama, “Pengaturan Baru Keputusan Fiktif Positif Dalam Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja Dan Kaitannya Dengan Kompetensi PTUN,” *Jurnal Rechtsvinding*, no. November (2020): 1–4.

⁴² Wicaksono, Hantoro, and Kurniawan, “Quo Vadis Pengaturan Kewenangan Pengadilan Tata Usaha Negara Dalam Penerimaan Permohonan Fiktif Positif Pasca Penataan Regulasi Dalam Undang-Undang Cipta Kerja (Quo Vadis of the State Administrative Court’s Authority Provision on Deciding Fictitious Posit.”

⁴³ C.G. Bateman, “There Ought to Be a Law: Gustav Radbruch, Lon L. Fuller, and H.L.A. Hart on the Choice Between Natural Law and Legal Positivism,” *The Journal Jurisprudence* 40, No. 2 (2019): 303. 40, no. 2 (2019): 271–329.

The positive fictitious provision within the Job Creation Law is intended to expedite the processing of applications, requiring the competent bodies or officials to promptly take action or issue decisions without undue delay. This is in line with the basic principles of public service, which emphasize friendly and equal treatment for all members of society. The reform of positive law regarding positive fictitious approval under the Job Creation Law is a change intended to realize justice and utility, particularly by streamlining and simplifying administrative licensing procedures. Therefore, the modification of positive law concerning positive fictitious mechanisms under the Job Creation Law aligns with one of Radbruch's elements of legal certainty: that positive law should not be changed easily. What Radbruch meant is that law must not change arbitrarily or without sound justification, particularly in the pursuit of justice and public benefit.

However, it is important to critically evaluate whether the rapid changes made through the issuance of a Government Regulation in Lieu of Law (Perppu), followed by its transformation into Law No. 6 of 2023, were truly driven by urgent conditions or merely political motives. The absence of transparent and measurable emergency indicators raises questions about the legitimacy of this legislative acceleration. Such rapid and top-down legal changes, without adequate public participation and deliberation, can erode legal certainty and give rise to a legal trust deficit among stakeholders, particularly among business actors who rely on regulatory stability in planning and investment. This raises concerns regarding the extent to which the principles of a democratic and participatory legislative process have been upheld.⁴⁴

4. CONCLUSION

This study aimed to analyze the positive fictitious licensing policy following the enactment of the Job Creation Law and to assess the legal certainty of its implementation through the OSS-RBA system based on Gustav Radbruch's legal theory. The findings indicate that while the policy constitutes positive law enacted by legitimate authorities and aims to streamline licensing procedures, it falls short in fulfilling the essential elements of legal certainty as articulated by Radbruch, particularly in the clarity of legal facts, alignment with empirical conditions, and regulatory stability. The novelty of this research lies in its philosophical approach, employing Radbruch's four-element theory of legal certainty to evaluate an administrative law reform, rather than limiting the assessment to technical or procedural analysis. To enhance legal certainty and administrative accountability, the study recommends several normative steps: (1) the immediate issuance of a Presidential Regulation as mandated by Article 53(5) of Law No. 30/2014 as amended by Law No. 6/2023 to operationalize the positive fictitious mechanism; (2) reinstating or designing alternative judicial review mechanisms for fictitious approvals to preserve the principle of checks and balances; (3) developing integrated technical guidelines for OSS-RBA implementation that harmonize central and regional verification systems, particularly

⁴⁴ Pratama, "Pengaturan Baru Keputusan Fiktif Positif Dalam Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja Dan Kaitannya Dengan Kompetensi PTUN."

with spatial planning regulations; and (4) instituting a periodic regulatory review based on empirical data to evaluate the real-world performance and legal impacts of the positive fictitious mechanism. These recommendations are essential to ensure that administrative innovation remains consistent with the rule of law and the foundational principles of good governance.

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