LEGAL PROTECTION OF THIRD PARTY IN DISPUTE POSITIVE FICTITIOUS DECISIONS

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ABSTRACT

Article 3 section (1) juncto section (2) of the act number 5 of 1986 regarding administrative court regulates when body or officials administrative not issued a decision that was requested within the period prescribed then considered decision administrative in the form of rejection have been issued, which in practice judicial known as the object a lawsuit of decision negative fictitious. Article 53 section (2) juncto section (3) of the act number 30 of 2014 regarding administration government regulates when body or government officials not issued a decision or not take action in a specified period of time (when the time not regulated, a maximum ten day work), so considered accept the request who in practice judicial known as an object request positive fictitious. The act number 30 of 2014 does not remove the act number 5 of 1986 especially arrangement on negative fictitious, so in the same one regime decision fictitious (there is no decision published), there is a contradiction the law, where the negative fictitious considered refusal while in positive fictitious considered accepted. Different with an ordinary dispute of administrative, which is in dispute of the positive fictitious request not regulated presence of third party (intervention) and dispute resolution is limited during 21 (twenty one) working days. If there are still registration of lawsuit negative fictitious, how the legal certainty and legal protection for a third party in dispute of the positive fictitious request that reflects justice will be analyzed in this study.

Key words: positive fictitious, legal protection, third party

A. BACKGROUND

Consideration of the act number 30 of 2014 regarding Government Administration (UUAP) one of them is to solve the problems in governance, the administrative arrangements are expected to be solutions in providing legal protection, for both citizens and government officials. Citizens include persons or legal entities related to the decisions and/ or actions of government bodies and/ or officials government. In accordance with the nature of the *erga omnes*, verdict of the administrative court (PTUN) is binding not only to the litigant party but also to the related parties (third parties) and should also to provide legal protection.

The problem submitted to the Administrative Court is the difference of views in the application of the law at least between the Plaintiff and the Defendant so that it is called a dispute of state administration (TUN). Muchsan declares a dispute or conflict is a difference of opinion about a rights or obligations regarding specific problems at the time and in the same circumstances, if the problem is a legal matter, there is a legal dispute[1].

In addition to the plaintiffs and the Defendants sometimes there are a third parties involved in the adminsitrative dispute, however not necessarily to be intervention parties , may simply entrust their rights and importance performed by the Defendants or just as a witness in dispute are examined by PTUN. The goal is that third parties are not harmed and have legal protection and fulfill the legal principle audi et alteram partem[2].

Third party law protection is important, because Law no. 9 of 2004 revoked Article 118 of Law no. 5 of 1986 concerning a third party lawsuit who is concerned that his interests may be disadvantaged by the execution of a PTUN verdict which has permanent legal power.

Legal protection must be organised in such a way considering PTUN is to keep a balance between the rights of individuals with the right of community or public interest, so that created the balance, harmony and concord between the Government and the people[3].

UUAP expand several the authority of the administrative court, of them testing the misuse of authority, testing of discretion and request to get decision and / or action by body or government officials, as well as broaden the definition of state administrative decisions (KTUN). The expansion of the authority intended to increase public services. A change of paradigm public service requires body or government officials more responsive to the community requirement. Increasing the quality of government administration as one of desire basic and the direction political of law UUAP [4].

One of the extension of authority of the Administrative Court according to UUAP is as regulated by article 53 paragraph (4) namely testing of request to get decision and / or action by body or government officials. The authority was born because the public who submitted a request and has been received by the body or government official, but the request was not responded, not answered, but also not granted. The silent attitude of the body or government official is thus counter-productive with the public service, so UUAP assume legally the body / or government official has issued a decision in the form of granting the request of the community (positive fictitious). The presumption that the request has been granted, UUAP provide authority to the administrative court to testing and decide whether request to get decision and / or action by body or government officials based on law or not to be reinforced by verdict.

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[1] Muchsan, 1997, *Sistem Pengawasan Terhadap Perbuatan Aparat Pemerintah dan Peradilan Tata Usaha Negara di Indonesia*, Liberty, Yogyakarta, P. 47, 58

[2] Zairin, Harahap, 2008, *Hukum Peradilan Tata Usaha Negara*, Revisi VI, Raja Grafindo Persada, Jakarta, P. 23-27

[3] S.F., 2003, Marbun, *Peradilan Tata Usaha Negara*, Liberty, Yogyakarta, P. 19

[4] Zudan Arif Fakrulloh, 26 Maret 2015, *Tindakan Hukum Bagi Aparatur Penyelenggara Pemerintahan*, Seminar Nasional IKAHI ke 62, Jakarta, P. 6

In order to further regulate its procedural law, the Supreme Court has issued the Supreme Court Regulation (PERMA) No. 5 of 2015 about the procedural law for obtaining a verdict on the receipt of an application in order to obtain a decision and / or action of an body or government official. Although finally PERMA is revoked by PERMA No. 8 of 2017, but with a substance that is not much different.

Article 53 Paragraph (2) of the UUAP determines, if the law does not regulate, then 10 (ten) working days after receipt of the complete application, the body or government official must be issued decisions and / or perform the action requested by the community. If no decision is also made or action taken, person has the right to apply to the Administrative Court to get a verdict. The Administrative Court shall be obliged to decide upon the application for a maximum of 21 (twenty one) work days. In this positive fictitious mechanism, UUAP does not regulate related third parties (intervention).

Implementation of positive fictitious handling in PTUN is not as simple as its *constitutum* norm. There are disputes that are formally registered with a positive fictitious case, but substantially requests for information (public information disputes), for example in the case of a positive fictitious application number 002/P/FP/2017/PTUN-SMG. There are also listed as a positive fictitious case, but in it related to the interests of third parties, such as case number 003/P/FP/2017/PTUN-SMG and case number 1/P/FP/2017/PTUN-DPS or even there are also disputes listed as positive fictitious request, but is actually a denial of a dispute object associated with a third party and requests that the disputed object be revoked, such as case number 12/P/FP/2016/PTUN-SMG and case number 07/P/ FP/2017/PTUN-SMG and also a case number 2/P/FP/2017/PTUN-PDG.

Considering that in judicial practice, positive fictitious requests are not always in harmony with the purpose of positive fictitious appeals and are sometimes tangent to the rights and interests of third parties, whereas in UUAP is not regulated on third parties, in order to avoid the rights and interests of third parties neglected, in this study the problem that can be formulated is :

1. Does the handling of positive fictitious applications in the State Administrative Court provide legal protection for third parties ?
2. How to handle a positive fictional application that also provides legal protection for third parties?

B. DISCUSSION

B.1 NEGATIVE FICTITIOUS AND POSITIVE FICTITIOUS IN THE PERSPECTIVE OF THE LEGAL SYSTEM AND COURT JURISDICTION

Lawrence M. Friedman puts forward the theory that the effectiveness and success of law depends on three elements of the legal system: the legal structure, *legal substance* and *legal culture*[5].

In line with Lawrence M. Friedman, according to Soerjono Soekanto, there are five factors that influence law enforcement, namely: the legal factor itself, law enforcement factors that form and apply the law, the factors supporting the enforcement of law, the community factor that is the environment where the law applies, and cultural factors, namely the work, creations and flavors based on human initiative in the association of life[6].

In the dispute of a positive fictitious , the legal structure includes the following administrative court personnel according to their respective duties and functions, namely the bailiff, clerks, the court, the judge, and even the Chairman of the Administrative Court. legal substance covers the whole set of rules, norms, as well as specific patterns of conduct (*lex specialis*) and binding and used as a guideline for legal structure include the rule of law in the form UUAP and PERMA No. 5 of 2015 and PERMA No. 8 of 2017. Legal culture is covers the attitude of man or society in general including the legal culture of law enforcement officers.

Law enforcement will work effectively when all three elements of the legal system work well. Lilik Mulyadi describes the three elements of the legal system is like an engine where the legal culture as a fuel that determines the life or death of machine, the consequences of the legal culture is so urgent, without legal culture the legal system becomes powerless, such as dead fish lying in a basket[7].

Jawahir Thontowi quoted Lawrence M. Friedman stated to see the reality of the legal culture of Indonesian society, it must first be understood that the culture of law is categorized into two namely the internal legal culture and eksetrnal. The culture of internal law refers to the general attitude and legal perceptions of law enforcement officials, While culture external legal referring to the attitude of society to the law and order general who come into being in perception, hope and habits of the community in law [8]. The legal culture also includes living laws of a society [9].

Referring to Article 3 of Law no. 5 Year 1986 concerning the PTUN, a negative fictitious decision is that if the body / official of TUN after a certain period of time according to legislation (if not regulated, maximum of four months) does not issue decisions (silence), but is their obligations, and the act of silence likened ktun in the form of rejection. This rejection can be filed a negative fictitious lawsuit to the Administrative Court. If the lawsuit is granted and the object of the lawsuit is annulled, the TUN (Defendant) body / official is ordered to issue the TUN decision petitioned for. According to Philipus Hadjon the main issue in testing a negative fictitious decision on the matter of the receipt or non-acceptance of a request is the authority of the official concerned [10].

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[5] Lawrence M. Friedman, 1975, *The Legal Sistem : A Social Science Perspective*, New York : Russel Sage Fondation,– translation by M. Khozim, 2009, *Sistem Hukum : Perspektif Ilmu Sosial*, Nusamedia, Bandung, P. 15

[6] Soerjono, Soekanto, 1983, *Faktor-faktor Yang Mempengaruhi Penegakan Hukum*, Rajawali Press, Jakarta, P. 4-5, at Ridwan, 2009, *Hukum Administrasi Di Daerah*, FH UII Press, Yogyakarta, P.143

[7] Lilik, Mulyadi, 2007, *Pembalikan Beban Pembuktian*, Alumni, Bandung, P. 65

[8] Jawahir, Thontowi, 2016, *Negara Hukum Kontemporer – Eksploitasi Tambang Untuk Kesejahteraan Rakyat Indonesia*, Madyan-Ind Press, Jakarta, P. 112-113

[9] Zenhadianto, Teori Sistem Hukum Lawrence M. Friedman, www.zenhadianto.blogspot.com/2014 /01/teori-sistem-hukum-lawrence-m-friedman.html?m=1., accessed 25 Maret 2017, 07:53 PM

[10] Philipus, Hadjon, et. all., 1992, *Pengantar Ilmu Hukum Administrasi Negara*, Gajah Mada University Press, Yogyakarta, P. 322

Positive fictitious decisions can be interpreted from the provisions of Article 53 of the UUAP, namely within a certain period (if not regulated by law and regulation within ten days) after the application with the complete condition is submitted, but the body and / or government officials are silent not answer, or perform the requested action, while it becomes the authority and obligation, then the petition shall be deemed granted. This granted opinion may be requested by a judgment to the Administrative Court to be tested whether to the governmental body / officer (the Respondent) may be ordered to issue a decision or take the action petitioned for. PTUN will check whether the application is unacceptable, granted, rejected or terminated [11].

Based on the negative fictitious and positive fictitious decisions, both are about fictitious decisions in which actually no actual written decree issued, even the body or government officials are silent, not responding/ not answering either refuses or grants a request which has been completely received, then it is legally considered a written decision. The difference is that fictitiously negative decisions are considered to reject the request (negative), while positive fictitious is considered to grant the request (positive). Another difference, the attempt to the negative fictitious decision is to file a lawsuit and register as a usual lawsuit with the code of case G. Effort to a positive fictitious decision are to apply for acceptance of a decision or action to administrative court, and registered as a case with a FP case code.

The filing of a lawsuit or application to the Administrative Court is closely linked to the jurisdiction of judicial power exercised by the Judicial Bodies and regulated by law, with the primary duty of accepting, examining and adjudicating and resolving any matter submitted to it.

Elucidation of Article 2 paragraph (1) of Law no. 14 of 1970 on the Basic Provisions of Judicial Power states: "the settlement of any matter submitted to the Judicial Bodies encompasses the settlement concerned with the voluntary jurisdiction". The rule provides the basis for the jurisdiction of judicial bodies (including the Administrative Court) to receive, examine and adjudicate lawsuits as well as cases with voluntary jurisdiction (petition).

In the doctrine of jurisprudence, the lawsuit generally is contentiosa jurisdiction whereas the petition is a voluntary jurisdiction. Contentiosa jurisdiction is the jurisdiction of the Court in examining, deciding and resolving disputes with a verdict or commonly referred to as actual court. The litigants are at least between the Plaintiff and the Defendant, although there are occasional interventions. In this jurisdiction there are disputes to be decided by *condemnatoir* verdict (punish)[12].

The settlement of cases containing disputes is called contentiosa jurisdiction or contentius jurisdiction, namely the authority of the court to examine cases concerning the dispute (jurisdiction of court that is concerned with contested matters) between the contending parties[13]. The *contentiosa* lawsuit is more of a theoretical study to differentiate with the voluntary lawsuit [14]. The characteristics of a *contentiosa* lawsuit are: 1. There is a party acting as the Plaintiff and there are also parties acting as Defendant, 2. The subject matter of the disputed law contains a dispute between the parties [15].

On the basis of the distinction of jurisdiction of cases which may be brought to court, the case of a negative fictitious lawsuit is contentiosa jurisdiction whereas a positive fictitious petition case is a voluntary jurisdiction. The voluntary petition case is usually a case consisting only of the Petitioners and the Respondent, where the authority of the Court is an administrative activity that examines whether the petition is granted or not, the nature of the application is *ex parte*[16].

On that basis, it can be concluded that voluntary cases including positive fictitious request should have characteristics in the form of 1. the proposed matter only contains the interests of the parties alone, 2. the issues petitioned for settlement in the Court of principle do not contain any dispute (not related to the rights and interests of third parties other), 3. no other party or third party (intervention) withdrawn as opposed. 4. the product is in the form of stipulation.

B.2 THIRD PARTY EXISTENCE (INTERVENTION) IN NEGATIVE FICTITIOUS LAWSUIT AND POSITIVE FICTITIOUS REQUEST

Based on classification of court jurisdiction, third party (intervention) is only at contentious lawsuit case such as a general administrative dispute, which in theory includes a negative fictitious lawsuit. A third party of interest either on its own initiative or on the initiative of a judge may enter into a TUN dispute under trial. In practice, it is always a court (read: judge) who calls and notifies a third party of any dispute being examined by the Administrative Court and related to such third party. Third parties hardly ever know that a disputed object relating to itself is disputed if it is not notified by the Court or the Defendant.

Summons to third parties are based on a third party's name on the object of the lawsuit. Calls may be made from the preparatory screening. When a third party is present at the PTUN, it is explained that there is a dispute under trial and related to him as well as the provisions of Article 83 of the Administrative Court Law. In essence, when a third party feels an interest in the dispute being examined by the Administrative Court, the applicant may submit an application accompanied by reasons and grounds of interest to enter the dispute being examined, namely to defend his rights or join one of the parties to the dispute (intervention).

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[11] Article 17 PERMA No. 8 of 2017, the verdict can be: a. is unacceptable in case the application does not meet the formal requirements, and if the court is not authorized, the applicant does not have legal standing; b. granted; c. Rejected in the event of unwarranted legal application; d. aborted in the event that the applicant is not present twice in a row at the first and second hearing for no legitimate reason or the applicant is not serious;

[12] Suparto Wijoyo, 1995, *Karakteristik Hukum Acara Peradilan Administrasi*, Airlangga University Press, Surabaya, P. 57

[13] Henry, 1978, *Campbell, Black's Law Dictionary,*West Publishing, St. Paul Minn, Fifth Edition, P. 289

[14] https://khaeruman.wordpress.com/2013/11/14/*ruang-lingkup-permasalahan-gugatan-contentiosa*/, accessed on March 28, 2017, at 10:22 AM

[15] Zain, Al Ahmad, *Mengenal Prinsip-prinsip Pemeriksaan Gugatan Voluntair dan Gugatan Contentiosa*, extracted from M. Yahnya Harahap, SH., 2005, *Hukum Acara Perdata* (*Gugatan, Persidangan, Penyitaan, Pembuktian Dan Putusan Pengadilan*), Sinar Grafika, Jakarta, loaded *ini catatansangpengadil*.blogspot.co.id/2010/10/*mengenal-prinsip-prinsip-pemeriksaan*.html?m=1, accessed on March 28, 2017, at 11:09 AM

[16] Roy, Sanjaya, *Permohonan/ Voluntair*, at Roysanjaya.blogspot.com/2008/09/*permohonan-voluntair*.html?m=1, accessed on March 28, 2017, at 10:57 AM

Usually a third party will choose the option to be an intervening party, but there are also those who do not want to be bothered not to become an intervention and surrender their interests managed by the Defendant. If a third party chooses the option of not entering as an intervention, at the time of the evidentiary event, administrative court shall seek his testimony as a witness to discover the material truth.

The reasons of the interests of third parties which are accompanied by the initial evidence in the petition as an intervention will be used as a benchmark by the Administrative Court to grant or to refuse with a verdict which is read out at a public hearing even if an intervention request has been made during a closed preparatory examination for public. To place a third party in what capacity, judging from the purpose of filing the petition and referring to the elucidation of Article 83 of the Administrative Court Law. If his interests defend his own rights will be seated as a Plaintiff Intervention. It is different if the interest is to maintain the validity of the disputed object so as not to be declared invalid or canceled by the court so that there will be parallel to the Defendant, to be placed as the Intervening Defendant II.

Although Article 83 provides a third party opportunity to file an application during the examination, but in practice PTUNs tend to guide Juklak MARI No. : 52/Td. TUN/III/1992 which limits third parties join into the case only until the "*duplik*". The aim is to have a simple, fast and low cost judicial process for the parties, and not repeat the process of answering the answer that takes a long time.

This is an arrangement for the existence of a third party with an interest in ordinary TUN disputes including the case of a negative fictitious lawsuit according to general law (*lex generali*) based on the Administrative Court Act.

The problem is, special legal arrangements (*lex specialis*) in UUAP or PERMA No. 5 Year 2015 in the case of positive fictitious app is not regulated the existence of related third parties (intervention), so that the opinion arises whether the third party arrangements in the PTUN Law are valid and can be accommodated in the case of a positive fictitious application and has implications for the problem of whether a positive fictitious regime is *mutatis mutandis* eliminate the negative fictitious regime or each of them continues to run as an optional form for justice seekers (*justiciabelen*).

Various juridical arguments were put forward, one opinion stated that the UUAP did not explicitly revoke the negative fictitious regime, so the two fictive regimes are still valid, as a legal option for *justiciabelen*. Argumentation of other opinions, even though the UUAP does not explicitly remove / revoke the negative fictitious regime in the Administrative Court Act, automatically a positive fictitious regime eliminates a negative fictitious regime, since it is impossible in the same regime (the "fictitious regime" / no published decision) applies two opposite mechanisms which are positive (granting) and negative (rejecting) at once.

For the sake of legal certainty it is necessary to determine which regimes / mechanisms are accepted to register in the Administrative Court. The principle of *lex specialis derogat legi generali* dictates that a special rule (*lex specialis*) overrides general rules (*lex generalis*), but there are several principles that must be considered, namely[17] :

1. The provisions of the rule of law shall remain in force, except as specifically provided in the special law;
2. The provisions of *lex specialis* shall be equal to the terms of *lex generali* (law by law);
3. The *lex specialis* provisions must be in the same legal environment (regime) as *lex generali.*

There is also a principle *lex posterior derogat legi priori,* that the most recent rules override old rules.

Following the principles in both the a quo principles, the general and old rules are the regulation of the Administrative Court Law, in relation to this article is the negative fictitious arrangement in Article 3 and the arrangement of third parties concerned in Article 83. While the specific and the latest rules are the regulation in the Law concerning positive fictitious in Article 53 and the regulation in PERMA No. 5 of 2015 and PERMA No. 8 of 2017, but in it is not regulated regarding third parties concerned. For the sake of legal certainty and referring to these two principles, what is applied is a positive fictitious regime according to the Law and PERMA, but because the existence of a third party with no interest (intervention) in it will potentially not provide legal protection. The potential for not protecting third parties in cases of positive fictitious requests, at least based on the following descriptions;

Firstly, in ordinary TUN disputes including negative fictitious lawsuit, the formal conditions for registering the suit and obtaining the number of cases are those set forth in Article 53, Article 55, Article 56 and Article 59 of the PTUN Law, namely the existence of a lawsuit containing the interests of the aggrieved Plaintiff, the basis and reason of the lawsuit, the grace period of filing the lawsuit, the identity of the Plaintiff, the Defendant and / or his / her proxy if represented, also pays the court fee. As long as formal conditions are met, then the lawsuit can be registered, and because the lawsuit is a *contentiosa* jurisdiction that allows for disputes/ related to interested third parties, then the legal protection for third parties can be accommodated by reference to the regulation in Article 83 of the Administrative Court Law.

Whereas in the case of positive fictitious petition, the formal requirement that the petition can be registered and obtain the case number of the petition and given the receiving deed of case file is regulated in Article 2, Article 3 and Article 4 of the PERMA. The requirement is a request containing the identity of the applicant accompanied by the basic description of the petition, letter or written proof relating to the application which has been received completely by the Respondent, list of prospective witnesses and / or experts (if any), list of other evidence in the form of electronic information or documents (if any) and pay the down fee of the case. Positive fictitious appeals include voluntary jurisdiction, hence no possibility of disputes related to the interested third parties.

The problem is if the application has fulfilled the formal requirements, of course, the file acceptance deed will be given and registered as a case of a positive fictitious application, but if it turns out that at the time of the new trial is known to contain a dispute / related to the interested third parties, because in the AP Law as well as in PERMA its existence is not regulated it will potentially not provide legal protection to him.

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[17] Bagir, Manan, 2004, *Hukum Positif Indonesia*, Yogyakarta, P. 56 - at A.A., Oka, Mahendra, *Harmonisasi Peraturan Perundang-undangan*, https://dukunhukum.wordpress.com/2012/06/29/ harmonisasi-peraturan-perundang-undangan/ accessed on July 24, 2018, at 07:57 PM

Second, the time for settlement of ordinary TUN lawsuit cases includes negative fictitious claims according to Supreme Court Circular Letter no. 2 Year 2014 is the maximum of 5 (five) months since the lawsuit is registered, is a relatively long time to examine, decide and resolve the lawsuit, including accommodating interested third parties (if any) with the mechanism of Article 83 of the Administrative Court Law.

While the period for deciding upon a positive fictitious application for a maximum of 21 (twenty-one) working days since the application is filed, is a relatively short time to examine, decide and complete the application. Consequently, if refers to the principle of *lex specialis derogat legi generali*, because it is difficult to accommodate general arrangements regarding third parties concerned in Article 83 of the Administrative Court Law, so that it will potentially not provide legal protection to third parties.

Thirdly, in the case of the ordinary TUN lawsuit, it consists of the Plaintiff, the Defendant and when it is associated with and there is a third party whose interest is likely to be placed as the Intervening Plaintiff or Intervening Defendant II depending on the interests and parallels of his legal standing with whom.

In the case of a positive fictitious, it is composed of the Petitioner and the Respondent, and since the petition is a voluntary jurisdiction, there should be no dispute or relation to any interested third party. However, if a positive fictitious application complies with the provisions of Article 2, Article 3 and Article 4 of PERMA and has been registered / registered as a positive fictitious appeal case, then when the trial is found to be related to the interests of third parties, there is a difficulty to place the third party because the mention of it is unknown and what is unusual, for example whether it will be called the Intervention Applicant or the Respondent II Intervention, because the mention is unknown in Article 83 of the Administrative Court Law. Therefore, the possibility of a third party is not accommodated so that it will potentially not provide legal protection to him.

Fourth, against ordinary TUN lawsuit cases including negative fictitious lawsuit, if not satisfied with the first level verdict, legal remedies are available, namely Appeal, Cassation and Judicial Review according to Article 122, Article 131 and Article 132 of the Administrative Court Act, by paying attention to the limitation of cassation Article 45 A Law No. 5 of 2004 concerning Amendment to Law No. 14 of 1985 concerning the Supreme Court.

The case for a fictitious application is positive, according to Article 53 paragraph (6) of the AP Law : government bodies and / or officials are obliged to make a decision to implement a court decision as referred to in paragraph (5) no later than 5 (five) working days after the Court's decision is determined. Next according to Article 18 PERMA No. 8 of 2017 : a court verdict on the receipt of an application to obtain a decision and / or action by a government agency or official is final and binding. This means that a positive fictitious decision cannot be appeal. The problem is, if in a positive fictitious application there is a third party with an interest that is not accommodated in its case, he will not be able to appeal so that it has the potential to not provide legal protection to him, especially Article 118 of the Administrative Court Law concerning third party resistance has been revoked. As an alternative solution to keep getting legal protection, can use extraordinary legal remedies, namely Judicial Review.

Based on some a quo analysis, the antinomy between the negative fictitious arrangements in Article 3 of the Administrative Court Act and the positive fictitious arrangement in Article 53 of the AP Law, as well as the non-existence of third parties with an interest in positive fictitious regimes, refers to the principle of lex specialis derogat legi generali and the principle of lex posterior derogat legi priori for the sake of legal certainty, it is necessary to prioritize the following:

1. The use of a positive fictitious application regime / mechanism is preferred to be registered / registered with PTUN with consideration:
    a. referring to the spirit of public service, there are no published decisions (fictitious decisions), the assumption of a request granted (positive) is more beneficial for the Petitioner than the presumption of the application is rejected (negative);
    b. refer to the time frame for submission, if the legislation does not regulate, a fictitious negative can be submitted four months after the Respondent receives the complete application, while the positive fictitious is only ten working days.

    The application if justice seekers (*justiciabelen*) want to register a negative fictitious suit, should be directed to change into positive fictitious requests.
2. The use of a positive fictitious application regime / mechanism that still accommodates the interests of third parties (intervention) by asking for their testimony as a witness, considering that the settlement of a positive fictitious application case is limited to a maximum of 21 (twenty one) very short working days and the name of Applicant II Intervention or Respondent II Interventions to locate third parties with unknown interests and not regulated in a positive fictitious regime.
3. Following the flow of the *constitutum* based on the rules and principles of law as described only legal certainty will be achieved but it is difficult to realize and has the potential to not provide legal protection to third parties.

B.3 IDEAL HANDLING OF POSITIVE FICTITIOUS REQUESTS RELATED TO THIRD PARTY

In practice, not all disputes are registered as cases of positive fictional requests, do not contain disputes / are not related to other interested parties. For example cases number : 2/P/FP/2017/PTUN-PDG, the request for revocation of mining business licenses was not granted "*Non Clear and Clean"* in west sumatera, because it is related and there are decisions regarding business licenses related to other third parties, namely 26 (twenty six) companies. Such a dispute, may meet the qualifications and criteria of Article 53 of the AP Law and PERMA No. 8 of 2017 to be registered as an application case, but from the point of view of the court's jurisdiction, it is not properly examined as a matter of *voluntary* jurisdiction, because in it is related to the rights / interests

of other parties that should be settled according to the *contentiosa* jurisdiction. Whereas disputes that can be tried by PTUN are disputes regarding whether or not a state administrative decision is valid, not a dispute regarding the interests of rights [18].

If there is a request to be registered as a positive fictional case known to be related to the interests of a third party, it certainly can be addressed from the start, for example by advising the Applicant to register as an ordinary lawsuit. However, it could be that the existence of a related third party is only seen or known at the time the case has been tried by the Court. If so, because the PTUN clerk has already registered as a case of positive fictitious, it is necessary to analyze how steps need to be taken so that legal protection against third parties is not ignored, remembering normatively, the theory and doctrine of court jurisdiction in a positive fictitious application including voluntary jurisdiction which is not possible in relation to the interests of third parties other than the Petitioner and the Respondent.

Referring to the theory that the application case is a voluntary jurisdiction that does not contain a dispute, it is certainly not permissible to submit an application relating to the rights / interests of other parties, meaning that it only related to the applicant's rights/ interests. If there is a request concerning the rights / interests of another party, this is a *contentiosa* jurisdiction of an ordinary lawsuit case.

The rule of PERMA No. 5 of 2015 is not relevant to the theory and doctrine of legal science regarding the jurisdiction of the court, because there are no restrictions on what disputes can be registered as cases of positive fictitious requests. If there is a request that has met the formal requirements as stipulated in Article 2, Article 3 and Article 4 PERMA No. 5 of 2015 can be registered as a case for positive fictitious applications, the case management of a positive fictitious application like that puts forward legal certainty. But keep in mind that the PTUN verdict is *erga omnes*, binding not only to litigants but also all parties involved. Therefore the legal objective of realizing justice is to provide legal protection to all parties not only to the petitioners and responden but also to third parties not allow to be ignored.

Remember the head of the verdict "*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*" then the objective of substantive justice law must also be pursued, namely a judicial process that guarantees and protects the rights and interests of both the parties to the dispute and other related third parties proportionally. Moreover, PTUN judges are obliged to find substansial truth,

Including in connection with legal protection of third parties concerned.

Hans Kelsen once stated: "...*justice must be imagined as a different part of positive law, placed far beyond experience as laying a platonic idea beyond the natural reality, and laying something out of the transcendent experience beyond sight*"[19].

The theory of legal goals according to Gustav Radburch, historically initially put legal certainty in the top rank among other legal objectives. Next Radbrurch saw the reality of Germans under Nazi rule legalizing inhumane practices during World War II by making laws that justified the atrocities of war at that time, then finally he corrected his theory by placing the purpose of justice in a position above the other legal objectives [20].

Based on the study of theory, concepts and matters that need to be considered in examining the request of positive fictitious above, then in this study proposed several alternatives settlement provides legal protection for third parties so that substantive justice is realized.

First, based on the principle of preference *lex posterior derogat legi priori* and *lex spesialis derogat legi generali*, PTUN is expected to be firm with attitude when there is a negative fictitious lawsuit so that it is directed to use positive fictitious requests that are faster to solve and encourage the realization of measurable, accountable and responsive public services.

Secondly, PTUN's clerk is more selective and strict in applying the provisions of Article 2, Article 3 and Article 4 PERMA to be able to register positive fictitious applications and examine whether the application relates to the rights / interests of the applicant himself or concerns the rights / interests of third parties. If a request is made relating a third party, the applicant should be directed to register as an ordinary lawsuit to be resolved according to the *contentiosa* jurisdiction. In addition, additional criteria need to be made in the AP or PERMA Law that positive fictitious applications are only permitted when it comes to the applicant's own rights / interests. Fortunately PERMA No. 8 of 2017 in Article 3 paragraph (2) letter d regulate: the application for the interests of the Applicant directly as the criteria for the application, so that it must be interpreted that there must be no application concerning the interests of third parties. If there is a request related to a third party, it should not be registered by the Administrative Court, because it is not for the interests of the Applicant in a straightforward manner, and there is actually a third party decision that must be sued with an ordinary lawsuit not with a positive fictitious request to guarantee the protection of the interests of the third party decision holder.

Third, considering the settlement of application cases which are limited to only 21 (twenty one) working days so that it is technically difficult and there is no juridical basis to accommodate third parties, therefore to provide legal protection to third parties, at the time of checking evidence, the interested third party is examined as a witness.

Fourth, if an application is already registered as a case of a positive fictious application, then at the trial it is just known that the case is related to the third party, it should be decided without entering into the subject matter of the request.

Fifth, in order to be consistent with the theory and jurisdiction of the court, the judicial process in the form of an application such as a positive fictitious output is in the form of a decision not a verdict.

Sixth, although cases of positive fictitious requests are regulated as not available legal remedies, should be made possible if there are extraordinary legal remedies to corrective justice as a case number: 25/P/FP/2016/PTUN-JBI juncto case number : 106 PK/TUN/2017.

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[18] Rozali Abdullah, 2002, *Hukum Acara Peradilan Tata Usaha Negara*, eight editions, Jakarta, Rajawali Pers, P.4

[19] Hans, Kelsen, Januari 2009, *Pengantar Teori Hukum*, Translated by Siwi Purwandari, Nusa Media, Bandung, P. 49

[20] Afner, Juwono, *Keadilan, Kepastian dan Kemanfaatan*, at http://afnerjuwono.blogspot.com/2013/07*keadilan-kepastian-dan-kemanfaatan*.html?m=1, accessed on March 27 2017, at 9: 51 AM

C. CONCLUSION:

1. The dispute of a positive fictitious request is basically a voluntary jurisdiction, which is an administrative test of not being granted / unanswered / no response from the request of the applicant itself that is not related to the rights / interests of other parties.
2. UUAP and Perma No. 5 of 2015 as a special rule does not regulate third parties, so that referring to the principle of lex specialis derogat legi generali, general law in Administrative Court Law is applied to regulate third parties, but third parties are difficult to be accommodated in the event of a positive fictitious request because of the time of dispute resolution, the relevance of the mention as to what party, and the legal standing if they wish to file a legal remedy, so that a positive fictitious handling based solely on PERMA Number 5 of 2015 does not provide legal protection for third parties.But in PERMA No. 8 of 2017 there are arrangements that can be used as basic entry points to provide legal protection to third parties, namely in Article 3 paragraph (2) letter d.
3. Criteria for positive fictitious request that can be registered and their ideal solutions in order to provide legal protection for third parties as follows :
   a. the application is only related to the interests of the Petitioner himself and is not related to a third party, if it is related to the interests of a third party, it is the domain and directed to the registration of an ordinary lawsuit.
   b. because it is a voluntary jurisdiction, if a request has been registered as a case of a request positive fictitious and at a hearing it is known to be related to an interested third party, the examination does not enter the main of the request or at least put the third party as a witness during the proving session at the hearing.

D. RECOMENDATION:

1. To provide protection for third parties in disputes that are registered as cases of positive fictitious requests, so that the following are carried out :
   a. At the time of administrative research, the Registrar directed that disputes containing disputes or related to third parties were not registered as cases of positive fictitious requests (optimization of registration administration research in positive fictitious cases)
   b. To assert the authority of the Registrar in administrative research directs that the Petitioner does not allowed to register a positive fictitious application related to the third party essentially is Article 3 paragraph (2) letter d PERMA No. 8 of 2017 which essentially criteria for positive fictitious applications may not be related to the interests of third parties.
   c. If a request has been registered as a case of a request positive fictitious and at a hearing it is known to be related to an interested third party, the examination does not enter the main of the request or at least put the third party as a witness during the proving session at the hearing.
2. The product of the voluntary jurisdiction court examination is "stipulation" not "verdict", so that the editorial in the AP Laws and PERMA needs to be adjusted.
3. In the AP Law and PERMA , it is necessary to emphasize that the criteria for applications that can be registered as positive fictitious case only involve the applicant's own rights / interests, meaning that they are not related to the interests of third parties in an effort to protect the interests of third parties.

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