The Needed But Unwanted Independent Regulatory Agencies: Questioning Their Legitimacy And Control In Indonesia

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Abstract--Along with the wave of democracy in 20th century, one of the most dominant trends of public institution in OECD countries is the shift from a centralized bureaucracy to a decentralized and autonomous institution. Such are the so called "Independent Regulatory Agencies" (IRAs). The same trend happened in Indonesia especially after the amendment of 1945 Constitution. With its regulatory power and independency from the elected officials like president and legislative, it is not uncommon for these agencies to cause controversy and triggering conflicts. As a normative legal studies, this research try to analyze and explain how IRAs can fit to the Indonesia's government system and determine the extent to which control and supervision can be carried out correctly. Both by using statute and conceptual approach based on best practice in US and Western Europe, which then analyzed qualitatively. The results show that compared to those countries, IRAs in Indonesia are not well designed, thus raises constitutional debate in classical trias politica perspective. The discussion offers a "New separation of power" approach as a solution. Some cases also show that the government made various efforts to delegitimize the IRAs, even practice excessive control over those agencies. Therefore, the Input-Output model of control should be applied in the future.

Keywords-Independent Regulatory Agencies; Legitimacy; Control

I. INTRODUCTION

The institutional reform in the state level has become necessity due to the increasing public demands and agenda.[1] As reported by OECD, public institutions with independent and self-regulatory authorities have become a common features in most countries throughout the world,[2] especially in the beginning of 1980s.[3] These new kind of institutions was later known as Independent Regulatory Agencies (IRAs), independent commission, or semi-autonomous agencies.[4] In some countries with an established democracy such as United States and Western Europe, IRAs have grown significantly in the last three decades of the 20th century. This trend then spreads widely to Asian and African countries.[5] Some examples of IRAs in the world are the Federal Trade Commission in the United States, Commission des Operations de Bourse in Italy, or The Commissions for Racial Equality in England.[6]

Many scholars see IRAs as the logical consequence of global political and economic change after the wave of democratization that is sweeping across the globe.[7] In the context of political economy, free market with the doctrine of "laissez faire" meaning least government is the best government has caused the role of the state to be more minimalist. As stated by Eric Lane, there was a massive economic decentralization in Latin American countries and Asia, including Indonesia.[8] But over time, it began to be realized that the more free and complex the market mechanism, the more rules and policies are required.[9] Therefore, slowly but surely, the role of the State in economic and public affairs is getting bigger and wider. Giving rise to a speculation that there has been a shift from a minimalist state to a regulatory state.[10]

The main characteristic of a regulatory state is the growing of state's role in public affairs, which is marked by the increasing number of institutions and regulations made. According to Faur, this was carried out in the form of extending the role of government which included the formulation of various regulations, supervision, including the establishment of specific institutions to carry out the regulations and supervisory functions.[11] According to Alder, who refers to the phenomenon in the UK, the government tends to hiving of the executive departments to become independent agencies with their respective organizational

structures and heads.[12] The same thing was stated by Vibert that the formation of IRAs in the UK was carried out by splitting the functions of the central government to independent institutions specifically formed to carry out these functions.[13] This kind of institutional restructuring aims to make the performance more effective, efficient, and service oriented.

In Lay's point of view, the massive creation of institutions was generally conducted through constitutional reform in each country.[7] In the context of Indonesia, institutional reform appeared in the 1945 Constitution after undergoing four sequential amendment by the People Consultative Assembly (MPR) from 1999 to 2002.[14] One of the trends in the political transition period and after the amendment is the birth of many non structural agencies in the form of commissions, councils, bodies and etc.[15] This kind of institutional reform is a result of the correction to the old government system and public demands for a political reform, as well as an effort to encourage the ideals of a more democratic State, defending human rights, and to establish a clean and accountable government.[16]

This led to the creation of IRAs such as the General Election Commission, the Corruption Eradication Commission, the National Human Rights Commission and so forth.[17] However, the presence of IRAs was felt to be unclear regarding its legitimacy in the constitutional system. There are still different in views about IRAs, especially in terms of their constitutional positions and relationships within the government.

Until the present day, IRAs are often considered as an auxiliary state organ in addition to the main State organ.[18] This raises the perception that the role of IRAs is not so strategic and still subordinate to other branches of power such as legislative and executive. As a result, the existence of institutions classified as IRAs in Indonesia often faces conflicts and resistance from various parties, including the government itself.[19] This was indicated, for example, in the case of the People representative Council of Indonesia (DPR) which took an inquiry right into the Corruption Eradication Commission (KPK). The case raises constitutional debate on whether the KPK is considered as an independent agency which is not the subject of such right, or an executive agency which is legally subject of the inquiry right according to Article 79 paragraph (3) of Law Number 17 of 2014 concerning MPR, DPR, DPD and DPRD. The dispute was ended in the hand of Constitutional Court which later decides KPK as an executive branch agency, which are actually against to four of its previous decision. Another example is the judicial review process in the constitutional court which ended in removal of Judicial Commission (KY) authorities to select the court judge.[20]

The legitimacy problem of IRAs eventually spread to the supervisory relations issue. In the context of the KPK, beside the DPR intervention in the form of inquiry rights, the latest revision of the KPK Law (Law Number 19 of 2019) also providing KPK a new organ, namely Supervisory Council which are responsible to the president. This resulted to a great public controversy. Especially considering the council's authority in terms of authorizing wiretapping, search and seizure which previously become the privilege of KPK commissioners.

II. PROBLEMS

Based on the description above, this study aims to analyze two main problems: First, how to correctly perceive IRAs within the government system? Second, what is the suitable form of control that should be carried out on IRAs?

III. RESEARCH METHOD

The study in this paper uses secondary data from literature studies, so it is included as normative legal research. This research is a descriptive-prescriptive analysis, which is intended to present arguments about the juridical facts and what is ideal according to the law and relevant theories. To get information from various aspects, this study uses statutory and conceptual approach, which moves from the views and doctrines that correspond to the research issues. The data is then analyzed qualitatively.

IV. DISCUSSION

Some scholars conducting studies on law and government in the United States and Western Europe have tried to draw clear definitions of IRAs. Funk and Seamon said that there is one category of institution that is often considered to be outside the

executive branch of power called "Independent regulatory agencies". They further explained the meaning of the term;[21]

> "They are called "independent" because they generally share certain characteristics that insulate them from control by the president that normal, executive agencies are subject to."

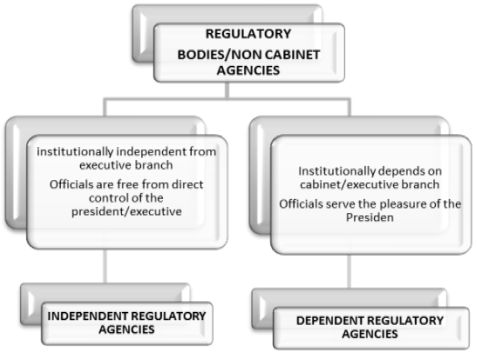
Other scholars such as Knapp and Meny define IRAs as an independent body that has a regulatory and supervisory function.[22] This aspect of independence and regulatory authority is also emphasized by Gillardi who states that IRAs are a public organization with regulatory powers that are neither elected by the people, nor directly managed by elected officials.[23] In Indonesian context, the enthusiasm for creating these new institutions is unfortunately not matched by the sufficient formulation and design, there was even a rushed impression.[24] This actually can be seen from the diversification of the nomenclature used. Generally, state institutions that are often categorized as IRAs use the name "commissions" such as the Corruption Eradication Commission and the General Election Commission. But there are also those who are named "board" such as the Audit Board Of Indonesia and also "Council" such as the "Press Council" even with other terms such as" Financial Services Authority".

Asshiddiqie wrote in his book that IRAs in Indonesia are institutions that are always idealized to be independent and often have mixed functions, namely semi-legislative, and regulative, semi-administrative, and even semi-judicial.[25] A similar thing was stated by Giraudi, who identified IRAs in France. In general, IRAs have "fully regulatory" authority which includes rulemaking, supervision and supervision, even prosecution and sanction and which are similar to judicial functions.[26] In response to Asshiddiqie, Nurtjahyo used the term independent state auxiliaries or derivative organs, which were not co-opted by the executive or legislative powers. [27]

The concept of "Independent" itself does not yet have a specific juridical interpretation in the laws and regulations in Indonesia.The constitution normally uses the term "independent and free". The word "free" is commonly used for judicial institutions as regulated in Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia concerning judicial authority. While the word "independent" can be found, among others, in the regulation of election organizers, namely Article 22E paragraph (5) which states "Elections are held by a national, permanent and independent election commission. It was also found in the provisions concerning the Supreme Audit Board (Article 23E paragraph (1)) and the Judicial Commission (Article 24B paragraph (1)). Article 3 of Law Number 30 Year 2002 also mentions the Corruption Eradication Commission as a "independent" State institution, but there is no provision or further explanation regarding the intended independent phrase. Likewise in Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the KPK, the concept is even more blurred.

A clearer and more specific concept regarding the independent aspects in IRAs might refer to the division of Milakovich and Gordon which uses regulatory bodies as a starting point. They explained that a self regulatory body can be categorized as dependent regulatory bodies and independent regulatory bodies.[28] It is said to be an independent regulatory body if the institution has independence both institutionally and functionally. Whereas dependent regulatory bodies refer to institutions that are structurally still part of the executive body or if the 'fate' of the commissioner depends on the the president. The same division was stated by Curtis W. Copeland in his research report entitled "Economic Analysis and Independent Regulatory Agencies". Copeland clearly distinguishes between IRAs that are independent from the president's influence and control, with independent agencies that are functionally independent but politically working in the interests of the President.[29] The concept of division can be seen in the following chart:

Figure 1. Milakovich and Copeland Division Model



Based on the figure above, it can be concluded that the independent concept of IRAs can be interpreted structurally and politically. In a structural sense, the independence of IRAs is marked by the position of the institution which is not included in the executive branch/department. In Indonesian context, this is similar to non-structural institutions. In a political sense, IRAs independence is interpreted as freedom from intervention by the president and other powers. As stated by Devins, basically an institution is designed independently with the sole purpose of limiting the control and influence of the president and other political powers.[30]

A. **IRAs As Additional Branch of Government?**

During the early formulation of the 1945 Constitution, IRAs had not yet found a place to discuss in the Indonesian constitutional format. The absence of a blueprint or institutional standard for IRAs in Indonesia makes it difficult to identify their classification and position in the government system. The opposite are found in the context of US, where institutions classified as IRAs are mentioned explicitly in the provisions of The Paperwork Reduction Act 44 (U.S.C. § 3502) which in point (5).[31] Based on the provision, it can be straightly known that there are at least nineteen state institutions which are mentioned as IRAs. In fact, according to Asshiddiqie, there are now around thirties of such agencies in US.[32]

Until the present day, the exact number of IRAs in Indonesia is still remain undetermined. Based on data from the Kompas daily in 2006, a total of 45 non-structural agencies were recorded in Indonesia. About 70 percent of them are created based on presidential decrees, 23 percent are formed based on passed law and 7 percent based on government/executive regulations.[33] Mariana wrote a higher number, namely 73 State agencies.[34] In 2011, Kompas recorded an increase that was almost double the previous number, which was 88 agencies.[35] Among the dozens of those agencies use a variety of nomenclature. Almost all of them are also regulated in their respective sectoral institutional regulations. The level of such regulation also varies. Some agencies are created based on orders in the Constitution, such as the Judicial Commission (Article 24B paragraph (1)). Some other are passed through the laws such as the Corruption Eradication Commission (Law No. 19 of 2019). There are also those whose creation is only by Presidential Regulations such as the National Police Commission (Presidential Regulation No. 17 of 2011).

Reflecting on the description above, the existence of IRAs can only be identified by matching some of these non-structural agencies with the characteristics of IRAs. Some serious research on IRAs in Indonesia have been conducted by Mochtar. Referring to the study of Ackerman, Mochtar included 7 State agencies as IRAs.[36] Whereas Tauda in his article entitled "Position of the Independent State Commission in the Indonesian Administrative Structure" states that there are 12 institutions that match the characteristics of IRAs.[37] Using IRAs institutional concept in US and western Europe as indicators, Ramadani in his rese arch concluded that there were 10 agencies that were aligned with the IRAs design.[38] Data Comparison from these studies as shown in the following table.

Table 1. Independent Agencies Research Comparison

Mochtar (2012)	Tauda (2011)	Ramadani (2020)
1. Komisi Nasional Hak Asasi Manusia	1. Komisi Nasional Hak Asasi Manusia	1. Komisi Nasional Hak Asasi Manusia
2. Dewan Pers	2. Dewan Pers	2. Komisi Pmberantasan Korupsi
3. Komisi Pmberantasan Korupsi	3. Komisi Pemberantasan Korupsi	3. Komisi Penyiaran Indonesia
4. Komisi Penyiaran Indonesia	4. Komisi Penyiaran Indonesia	4. Komisi Yudisial
5. Komisi Yudisial	5. Komisi Yudisial	5. Komisi Pemilihan Umum
6. Komisi Pemilihan Umum	6. Komisi Pemilihan Umum	6. Ombudsman RI
7. Ombudsman RI	7. Komnas Perempuan	7. Otoritas Jasa Keuangan
	8. Komisi Perlindungan Anak	8. Bank Indonesia
	9. Dewan Pendidikan	9. Badan Pemeriksa Keuangan
	10. Komisi Informasi	
	11. Badan Pengawas Pemilu	
	12. Lembaga Perlindungan Saksi dan Korban	

Source: Processed by Author, 2020

If sum up by the type of agencies, there are 17 agencies that are classified as IRAs. These agencies come from various sectors ranging from law enforcement, election administrators, financial and economic oversight institutions, to human rights enforcement agencies. Nowadays, the existence and policies of IRAs dominate the course of government and public services. Some of them are even progressive and have caused controversy, such as the General Election Commission (KPU) Regulation No.10 of 2018 which prohibits ex-convicts in the Corruption case from running in legislative elections.

The creation of IRAs had represented a great change and it is unimaginable if it had to be correlated with the trias politica paradigm of Monstesquieu from the eighteenth century.[39] Similar conditions occur in the United States, this is as recognized by Donald S. Dobkin in his article entitled "The Rise of the Administrative State: A Prescription for Lawlessness". The emergence of IRAs has influenced the public's view of government power.[40]

In contrast to Montesquieu's theory of separation of power which introduces three original branches of power, the existence of IRAs has led to speculation about the birth of new powers outside the three conventional branches of power. In an article in The Washington Times, entitled "Bureucracy: The Fourth Branch of Government", Fedewa stated that a strong possibilities that the real government of the United States is not the Congress, the president or the courts, but the federal bureaucracy.[41] Since 2001, there have been thousands of regulatory changes issued by these institutions, which have implications for the escalation of the of laws and regulations in the US. The idea of IRAs as an additional branch in government system has been widely mentioned as a new constitutional analysis in the modern era.[42]

B. Towards The New Separation of Power

Another reason to categorize IRAs as the fourth branch of government is the fact that they carry out more than one type of function, even all three (quasi executive, legislative and judicial branches) at the same time. For example, in one IRAs has the legislative authority to issue regulations, on the other hand has the authority to implement these regulations that characterize executive functions, it also interpret and apply them in real cases the same as the judicial authority.

This makes it difficult to identify the position of IRAs in the existing three branches of power paradigm, so a separate classification is needed by adding a new axis of power. This idea, for example, was put forward by Peter L. Strauss who suggested that the doctrine of separation of powers be re-conceptualized in a more flexible interpretation.[43] Peter Strauss then put forward the importance of functional interpretation apart from the formalistic interpretation of the doctrine of separation of powers. Formalistic interpretation emphasizes textual reading of the constitutional on the distribution of power to three main organs namely the executive, legislative and judiciary.[44] In short, this view holds to the dictum "All power designated to a branch should be exercised or controlled by that branch." Consequently, every administrative agency including IRAs tends to be placed under the executive branch of power.[45]

On the contrary, functional interpretation postulates that the exercise of functions or powers outside the three main branches is permissible, as long as it does not intend to damage the balance of power between the three existing branches of power.[46] Functional interpretation place more emphasis on achieving the objectives of government rather than consistency in the old doctrine of trias politica. Bruce Ackerman then initiated a new concept of separation of powers to accommodate the presence of IRAs as a new branch of power in the United States government. Referring to the development of American constitutional practices, he stated that The American system contains at least five branches; House, Senate, President, Court, and independent agencies such as the federal reserve board.[47]

Based on the description above, the change and complexity of the current state institutions is inevitable, therefore it needs to be responded to with a more open and flexible thinking. In Indonesian context, the separation of power within the three branches alone is no longer sufficient,[48] in fact it is no longer relevant.[49] The institutional system in the new separation of power as long adopted in US and Western Europe can be an alternative to legitimize the existence of IRAs in the government system.

C. The Needed But Unwanted Agencies?

Following the ideas presented by Ackerman, the new separation of powers in Indonesia should consist of the President, DPR, DPD, the Judiciary, and IRAs. With such format, the IRAs can better perform checks and balances on other branches of power. But hoping for a consensus of such views from elected officials such as the President and the Parliament and other branches of power is not easy, even be sure to reap the pros and cons.

Reflecting on the case of the Judicial Commission (KY), we can see how IRAs reaped considerable resistance from other branches of power (judiciary). Since before the reform era, public distrust to judicial authority caused by weak internal oversight, poor quality of decisions, and recruitment of judges who are politically biased, has led to the idea of establishing a judicial commission.[50] Article 24b of the 1945 Constitution further emphasizes that Judicial Commission is independent in authority to propose the appointment of a Supreme Court judge and other authorities in maintaining the honor and nobleness of the judge's behavior. This provision was then institutionalized in Law Number 22 Year 2004 concerning the Judicial Commission.

Instead of working together in reforming justice, the presence of Judicial Commission actually makes the Supreme Court feel "rivaled" and “disturbed”. There were several times the Supreme Court ignored the recommendations from Judicial Commission, a number of Supreme Court Justices also rejected the summons from the Judicial Commission related to the alleged bribery case. Even reported the commissioners to the police for alleged defamation.[51] The climax, 31 Supreme Court Justices filed a Judicial review of Law No. 22 of 2004. Through Decision Number 005/PUU-IV/2006, the Constitutional Court then cut down some of the authorities of the Judicial Commission to supervise judges, including removing constitutional Court judges as the subject of supervision. The Law was later revised and become Law No. 18 of 2011. As if not satisfied, the judicial organization group has again filed a lawsuit against the articles which give authority to Judicial Commission to conduct a selection of judges. Through Decision Number 43/PUU-XIII/2015, the Constitutional Court also canceled its role in the selection process for judges candidate in three judicial sector.[52]

The series of cases that hit the Corruption Eradication Commission also shows how the purpose of creating IRAs is often contradictory with actual response. Basically, the Corruption Eradication Commission (KPK) is created due to the high practice of corruption in Indonesia coupled with the corrupted of law enforcement institutions ranging from the prosecutor's office, the police, to the judiciary at various levels.[53]

At first, KPK seems to bring new hope for a reform in anti corruption law enforcement in Indonesia[54] Sadly, the presence of KPK is marked by many critics and resistance from various parties that intersect with its authority. Various problems have swept through the KPK. Starting from the attempt to criminalizing the commissioners, bribery, staffing and budget delegitimation, to conflicts between the law enforcement agencies.[55] Indonesia Corruption Watch (ICW) even mentions that there have been at least 11 (eleven) attempts to

weaken the KPK, since its establishment in 2003.[56]

One that caught the public's attention was when the Parliament forced an inquiry right into the KPK in the middle of 2017. Provisions of Law Number 17 of 2014 concerning the MPR, DPR, DPD and DPRD (MD3 Law) formulated the inquiry right as the parliament's right to conduct an investigation of the implementation a law and/or "Government" policy that is allegedly contrary to statutory regulations. This then led to debate over the KPK's position as "Government". Although the explanation of the Law specifies which government can be the object of questionnaire rights, in which the KPK is not included, the parliament still maintains its decision. This polemic led to a judicial review in Constitutional Court. Through Decision Number 36/PUU-XV/2017 the Constitutional Court stated that the KPK is a state agencies within the executive branch. This is quite surprising, considering that in the four previous decisions, the Court declared KPK as an IRAs which originated outside the executive, legislative and judicial branch.[57]

The revision of the KPK Law also leaves some obstacles in the latest KPK design. For example, the existence of the Supervisory Council mentioned in Article 6 paragraph (1), and Chapter VA starting from Articles 37A to 37G in Law No. 19 of 2019. It should act as an ethical board that is generally owned by other institutions such as the internal Ethics Council in the Constitutional Court. However, such organ is not uncommon in the case of IRAs. The authority granted to the council also way too broad, even to authorize wiretapping, search and seizure licenses. This provision has indirectly co-opted the authorization authority which previously owned by the Commissioner, so that more or less will affect the independence in decision making.

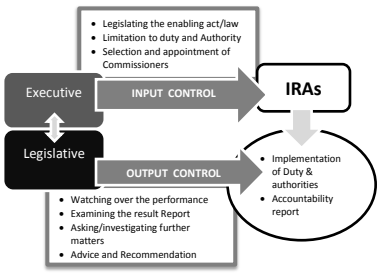
D. Intiating The right control on IRAs

IRAs are basically the result of the tension between the functional demands of regulatory capitalism and the need of politicians to control policies.[58] It is realized that IRAs have strategic authority with great independence. The independence itself does not imply that IRAs are free from control. However, the control system needs to be formulated in such a way as not to overdo it and instead lead to institutional delegitimation. The idea of an oversight model of IRAs for example, can be traced in the doctrine of The New Public Management (NPM). As propagated by the OECD, and other International bodies, the NPM doctrine believes that the more autonomy the institution has, the more it will optimize the performance and implementation of its functions. [59]

In the NPM doctrine which has become reference in establishment of IRAs in the UK, there is a concept called the result control mechanism. NPM emphasizes the paradigm shift from ex ante (input and procedure based) supervision to results or output based supervision. This aspect of result control is based on two principles namely "let public managers manage" and "make public managers manage". In the first principle, the aspect of independence at work will produce efficient results, but does not automatically make officials act efficiently. here is where the results-based control plays a crucial role in providing this encouragement. Thus the result control is used in creating the condition "make public managers manage".[60]

In the United States, the supervisory relationship between IRAs and Congress is carried out through input (initial) and output (final) control mechanisms based on the principal-agent perspective. Not through intervention in the middle of duty. As a Principal (supervisor), input control is carried out by the congress at the beginning of the preparation of institutional Law. Such as what authority should and should not be given to a specific agencies. Whereas output control is carried out with results orientation. IRAs as agents are required to make periodic accountability reports which are then evaluated by the congress. The report will be taken into consideration for the congress to assess the performance of IRAs, whether it is in accordance with the Law and public interest, including the matter of the budget. So that transparency and accountability can be guaranteed.

Figure 2. The Input-Output Model of Control



Basically, the monitoring model is sufficient to limit IRAs from abusing their authority and independence. The system in Europe and US absolutely does not allow any form of intervention on the performance of IRAs by congress or executives. Thus, the supervisory relationship between the legislature and IRAs should reflect the principles of check and balance and good governance, not on the basis of suspicion, let alone the intention to intervene and delegitimize each other. Thus the monitoring model by forcing an inquiry right while IRAs are still working on a case is clearly not appropriate. So as the tendency for judicial review and creating additional supervisory organ which potentially deligitimate IRAs.

V. CONCLUSION

The formal and classical interpretation of separation of powers which divided power within the three branches only, has proved to be no longer relevant to legitimize the existence of IRAs. For this very reason, the Indonesian constitutional system needs to adopt the new separation of Power paradigm by placing IRAs as an additional branch of government besides executive, legislative and judicative. The new separation of power concept will make an equal check and balance system within IRAs and other branches of power. For this reason the monitoring model that is in contrary to the sole purpose of creating IRAs needs to be changed. The input output model of control based on the New Public Management (NPM) and principal-agent doctrine should be used as an alternative in the future.

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