

## THE POLITICS OF LAW CONCERNING THE TENURE OF VILLAGE HEAD REVIEWED FROM THE CONSTITUTIONALISM PERSPECTIVE

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### Abstract

The constitution is a foundation rule for law-making (the politics of law), and in its development, the modern state constitution must be constitutionalism. Constitutionalism is an idea that the constitution must limit the power to hinder the abuse due to unrestricted power. The politics of constitutional law can be seen in the first amendment, namely, Article 7 of the 1945 Constitution: the tenure of a president is five years and limited to two periods, the 1945 constitution is, therefore, constitutionalism. The power limitation of high state institutions is constitutional, but in Law No. 6 of 2014 concerning Villages, some norms are contrary to the constitution: Article 39 related to the tenure of the village head. The tenure of village head in this article is relatively longer than the executive position in supra-village government, that is six years and can be re-elected for three periods, meaning that the village head can occupy the position for a maximum of 18 years. This tenure is eight years longer than the tenure of the president, governor, regent and mayor, thus, it is likely for the village head to conduct the "abuse of power" and the tenure is against the constitutionalism.

**Keywords: The Political of Law, Tenure of Village Head, Constitutionalism**

### INTRODUCTION

In Indonesia, some laws, whether in the form of legal legislation or unwritten traditions.<sup>1</sup> The Indonesian Constitution states that Indonesia is a constitutional state (article 1 paragraph 2 of the 1945 Constitution), and according to Muhammad Sigit Gunawan, the definition of the rule of law refers to the "*rechtsstaat*" of Europe Continental, and countries adhering to the Anglo Saxon legal system known as the the "rule of law" or Common Law, initiated by British legal philosophers.<sup>2</sup> The state of law recognizes that law is autonomous; that is, the law cannot be influenced by factors outside the law. Khuzaiifa Dimiyati in Achmad Hariri stated that autonomous law is based on; first, the emphasis on the rule of law as an instrument to monitor the authorities. Second, an independent court cannot be intervened by the economy or even the authorities. However, this autonomous law also has some shortcomings in its operation, including fanaticism to the rules or laws, prioritising procedural over substantive justice, and emphasizing legal compliance; hence making the epistemology law tends to be conservative.<sup>3</sup> In contrast, Mahfud MD conveyed that the law is not sterile from the social subsystem and politics often intervenes the emergence of law.<sup>4</sup>

Furthermore, Mahfud MD argued that the politics of law itself could simply be interpreted as a state policy concerning the law to be or not to be enforced in a state that can be in the form of establishing new laws or revoking and replacing laws. Thus, the

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<sup>1</sup> Al Khanif, 'WOMEN, ISLAM, AND MODERN FAMILY CONSTRUCTION IN THE PERSPECTIVES OF LEGAL PLURALISM IN INDONESIA', *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah*, 53.9 (2019), 1689–99 <<https://doi.org/10.1017/CBO9781107415324.004>>.

<sup>2</sup> Achmad Hariri, 'Dekonstruksi Ideologi Pancasila Sebagai Bentuk Sistem Hukum Di Indonesia', *Ajudikasi : Jurnal Ilmu Hukum*, 3.1 (2019), 1 <<https://doi.org/10.30656/ajudikasi.v3i1.1055>>.

<sup>3</sup> Hariri, 'Dekonstruksi Ideologi Pancasila Sebagai Bentuk Sistem Hukum Di Indonesia'.

<sup>4</sup> Moh. Mahfud MD, *POLITIK HUKUM DI INDONESIA*, 7th edn (Jakarta: Rajawali Perss, 2017). Hal. 9

emergence of the crossroad between *ius constituendum* and *ius constitutum* can be explained by the study of the politics of law.<sup>5</sup>

The politics of law in Indonesia is constitutionalism, that is, the idea that emphasised on the power limitation because unrestricted power will tend to be abused, as Lord Acton argued. The theory is critical. In other words, the power is not absolute, but limited, especially the power authorised by the people to the President. In the constitution, the power of the president, as head of state and the head of government, is limited by restricted his tenure as stipulated in article 7 of 1945 constitution: "*The President and Vice President hold the tenure of five years, and can be re-elected in the same position for one term only*".

This means that the president can occupy his position for a maximum of ten years, and this is the politics of constitutional law concerning government power, especially the executive. All executive political positions under the president should be in line with the direction of the politics of constitutional law: a tenure of ten years, including the governor, regent or mayor. Interestingly, the tenure of the village head is in contrast to the tenure of the supra-village government. Article 39 of the Law concerning villages stipulates the tenure of a village head, that is six years and can be re-elected for two periods. It means that the village head can serve a maximum of 18 years, eight years longer than the tenure of the president, governor, regent and mayor.

Therefore, Is the politics of law concerning the law of village government related to the tenure of the village head is in contrary to the politics of constitutional law, namely constitutionalism, in term of the limitation of government power by limiting the tenure?. The tenure of the village head is even longer with the presidential term stipulated in the 1945 Constitution. Sociologically, the longer the tenure of the village head, the fewer opportunities for other village head candidates to be elected<sup>6</sup>. Is the village head different from the supra village position above it so that the tenure is longer?. This question should be discussed so that the government system, especially in the village, can run following the principles and legal objectives of the law-making No. 6 of 2014.

## DISCUSSION

### THE POLITICS OF LAW

According to Moh. Mahfud MD, cited by Riskyana, the politics of law is a policy of state management, starting from the making, application and enforcement of the law. Meanwhile, Padmo Wahjono argued that the politics of law and legislation is a basic policy determining the direction, form and content of the law to make.<sup>7</sup> Mochtar Kusumaadmadja defined the politics of law as the policy of laws and legislation in legal reform using the instruments of the politics of law. Furthermore, the politics of law, according to Satjipto Rahardjo, is the activity of selecting and method to be used to achieve certain social and legal objectives in

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<sup>5</sup> Moh Mahfud, 'Politik Hukum Dalam Perda Berbasis Syari'ah', 14.1 (2007), 1–21.

<sup>6</sup> Retno Saraswati, 'ARAH POLITIK HUKUM PENGATURAN DESA KE DEPAN (IUS CONSTITUENDUM)', *Masalah-Masalah Hukum*, 1.1 (2014), 313–21.

<sup>7</sup> Rizkyana Zaffrindra Putri and Lita Tyesta A L W, 'KAJIAN POLITIK HUKUM TENTANG PERUBAHAN KEWENANGAN PEMBERIAN IZIN USAHA PERTAMBANGAN MINERAL DAN BATUBARA', *Jurnal Law Reform*, 11.2 (2015), 199–206.

society.<sup>8</sup> both constitutionalism and political expediency call for effective constitutional review. Political expediency also needs a respected.<sup>9</sup>

Based on the above opinion above, it can be concluded that the politics of law is the reason or driving force behind the law-making. It can also be the direction of the development of national law so that the law can be in line with the ideals and objectives of the country. This is in agreement with Sunaryadi Hartono, 1991, who argued that politics of law serves as a legal system to achieve the ideals of the law *ius constituendum*.<sup>10</sup> Mahfud MD further revealed that the law is interpreted as a "tool" to achieve the aspirations and goals of the nation and state; the politics of law is defined as the direction that must be taken in law-making and law-enforcement to achieve the ideals and objectives of the nation and state.

The study of politics of law covers, at least, three aspects: first, the state policy on the law that will be enforced as the efforts to achieve the ideals of the state, the political background; second, the socio-economic culture that becomes the background of law-making, known as the material source of law; and third, law enforcement in the society.<sup>11</sup>

From several opinions about politics of law, there are at least two paradigms about politics of law. The first paradigm is interpreting politics of law as the supremacy of the law; some figures who agreed with this argument are Sri Soematri, Padmo Whjono, Teuku Muhammad Radhi, Sudarto. The second paradigm argues that politics of law is to associate law as a political product; Mahfud MD Satjipto Raharjo, Abdul Hakim, and Benny K. Harma agree on this paradigm.<sup>12</sup>

## CONSTITUTION AND CONSTITUTIONALISM

Constitution is a fundamental concept required by a country. It is one of the elements must be existed in a state, in addition to the people, the region and the authorities. The constitution can be narrowly interpreted as fundamental laws or principles, and it regulates the basic matters related to a country, the form of the state, the government system, the form of government institutions, the relationship between state institutions, etc. In the western perspective, K.C. Wheare argued that the constitution a resultant that is influenced by politics, economics, and social.<sup>13</sup> The term 'constitution' originates from the French constituter, which means to form. Wirjono Projodikoro argued that the term 'constitution' is used to form a country.<sup>14</sup> Hence, there will be no state unless a constitution is formed.

The constitution has arisen since the time of Greek history in 624-404 BC. Athens, at that time, already had 11 constitutions and even a collection of Aristoteles collecting 158 constitutions from several countries. Brian Thompson believed that generally, the state as an organizational entity would have a text called a constitution, that is the basis for the

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<sup>8</sup> Anna Triningsih, 'Politik Hukum Pendidikan Nasional: Analisis Politik Hukum Dalam Masa Reformasi', *Jurnal Konstitusi*, 14.2 (2017), 332 <<https://doi.org/10.31078/jk1425>>.

<sup>9</sup> Alexei Trochev and Peter H. Solomon, 'Authoritarian Constitutionalism in Putin's Russia: A Pragmatic Constitutional Court in a Dual State', *Communist and Post-Communist Studies*, 51.3 (2018), 201–14 <<https://doi.org/10.1016/j.postcomstud.2018.06.002>>.

<sup>10</sup> Ateng Syafrudin and Suprin Na'a, *REPUBLIK DESA Pergulatan Hukum Tradisional Dan Hukum Modern Dalam Desain Otonomi Desa*, 1st edn (Bandung: PT. Alumni, 2010). Hal. 87

<sup>11</sup> MD. Hal. 4

<sup>12</sup> Syafrudin and Na'a. HAL. 85-86

<sup>13</sup> MD. Hal. 6

<sup>14</sup> Firman Freaddy Busroh and Fitria Khoiro, *MEMAHAMI HUKUM KONSTITUSI*, 1st edn (Depok: Rajawali Press, 2018). Hal. 5

formation of the state and consists of fundamental rules regarding the state. The constitution can be written and unwritten; to date, Britain and Israel are known to not have a written text called the constitution, both countries, however, have a Constitution.<sup>15</sup>

The legitimacy of the constitution is based on the principle of sovereignty adopted in a country, whether the people sovereignty or even king sovereignty.<sup>16</sup> The Constitution of the United States of America, signed by 39 delegates on September 17, 1787, in Philadelphia, Pennsylvania, where the Constitutional Convention was held, encouraged the birth of constitutional states in several regions of the world, including monarchies, known as a constitutional monarch.<sup>17</sup> The development of the constitutional state realizes that the intended constitution of the state has not accommodated the regulation concerning the restriction of the authorities and the recognition of the civil rights of people.<sup>18</sup> The 1945 constitution was the first written constitution in the modern history of Indonesian constitutionality.<sup>19</sup>

Hence, the next development paid attention to the power limitation of the authorities (constitutionalism). What is the relationship between constitution and constitutionalism?, not all constitutions are constitutionalism even though the constitution always correlates to constitutionalism. Adnan Buyung Nasution argued that the democracy and nationalism view led to the emergence of modern constitutionalism.<sup>20</sup> Furthermore Harjono in Didik Sukriono explained the difference between the constitution and constitutionalism, he argued that the constitution is a product of constitutionalism and constitutionalism is a theory of the constitution.<sup>21</sup>

Margarito Thursday (2014: 23) asserted that today's, constitutionalism is a necessary concept for every modern country. The period from 1164 to before the establishment of the United States Constitution was inadequate to make the constitution an *Ism*. The *Ism* about the constitution emerged after the United States constitution. This *Ism*, later, is known as constitutionalism. However, the emergence of *Ism* did not necessarily clarify the exact year the *Ism* arose. Similarly, it is unclear who established this *Ism* that attracted major attention, especially after the 20th century.<sup>22</sup>

The politics of constitutional law in Indonesia have been amended four times, indicating that it is vital to achieving the ideals and goals of the state. Amending the constitution is not easy because it requires political power and contents that becomes the common sense and public interest. There are, at least, three aspects of the politics of constitutional law constituting the amendment paradigm: (1) strengthening the Republic of Indonesia; (2) limiting the state power, in this case, the administration of governance; and (3) strengthening the law on human rights.

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<sup>15</sup> Jimly Asshiddiqie, 'Ideologi, Pancasila, Dan Konstitusi', *Jaringan Informasi Hukum*, 1, 2006, 1–23 <[jdih.ristekdikti.go.id/?q=system/files/perundangan/1927202140.pdf%0A](http://jdih.ristekdikti.go.id/?q=system/files/perundangan/1927202140.pdf%0A)>.

<sup>16</sup> Asshiddiqie.

<sup>17</sup> M. Laica Marzuki, 'Konstitusi Dan Konstitusionalisme Indonesia', *Wacana Hukum Dan Konstitusi*, 7.4 (2010), 1–7.

<sup>18</sup> M. Laica Marzuki.

<sup>19</sup> A.Ahsin Thohari, 'The Manifestation of the Rechtsidee of Pancasila in Regulating the Constitutional Rights in Indonesia', *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah*, 4.2 (2019), 149–62 <<https://doi.org/10.22373/petita.v4i2.23>>.

<sup>20</sup> Busroh and Khoiro. Hal. 2

<sup>21</sup> Didik Sukriono, *HUKUM, KONSTITUSI DAN KONSEP OTONOMI*, 1st edn (Malang: Setara Press, 2013). Hal. 49

<sup>22</sup> Jamaludin Ghofur and M. Yasin al Arif, 'Suksesi Kepemimpinan Dalam Partai Politik: (Studi Atas Partai Golkar Dan Partai Persatuan Pembangunan)', *Jurnal Hukum Ius Quia Iustum*, 24.4 (2017), 577–600 <<https://doi.org/10.20885/iustum.vol24.iss4.art4>>.

The second aspect can be seen from the first amendment to article 7 that the president has a maximum of two terms or ten years. The amendment to the 1945 constitution emphasizes that the presidential system in Indonesia does not necessarily make the president absolute, although the president serves as the head of state and government to avoid absolute power. As Lord Acton stated that "power tends to corrupt, absolute power corrupt absolutely". According to Margarito Kamis, (2014: 30), the politics of constitutional law concerning the power limitation can be seen in the transfer of KNIP from the president's auxiliary body to the legislative body, that highly agrees with the fundamental idea of constitutionalism to limit the presidential power. It aims to avoid the power evolving into unlimited power.<sup>23</sup>

The 1945 constitution (the old text), ratified at the PPKI meeting on August 18, 1945, barely heeded the constitutionalism, even though it had imposed a distribution of power between the fields of state power. The explanation of the 1945 constitution, entitled the *Sistem Pemerintahan Negara*, Number II, clearly stated the nomenclature: the Constitutional System. Item (2) stated that "Government is based on a constitutional system (fundamental law), not absolutism (unlimited power). The 1945 constitution before the amendment did not accommodate the constitutionalism.<sup>24</sup> One of the tyrannical constitutional articles was Article 7 of the 1945 constitution (old text), stating that "The President and Vice President hold their tenure of five years and maybe re-elected afterwards.<sup>25</sup> Later, the article was amended, and the presidential term was limited.

## THE POLITICS OF LAW OF THE VILLAGE HEAD TENURE

The politics of law of village governance has been existed before Indonesian independence, meaning that village governance was recognized before the state existed. It is in line with von vallonhoven, who argued that the village governance in Indonesia is a native government with different characteristics from the western legal system (*rechstaat* and the rule of law ). The explanation of van Vollenhoven further implied that the village governance in the Republic of Indonesia had existed before the Dutch entered *Nusantara*.<sup>26</sup>

During the Dutch East Indies government, the village governance had the flexibility in regulating the village governance based on customary law, as seen in article 128, paragraph 3 of the *Indische Staatsregeling* (IS) on 2 September 1854, *Staadblad* Year 1854 No. 2.<sup>27</sup> Meanwhile, Surianingrat (1985: 189-190) argued that during Japanese governance, the regulation of the village was regulated in *Osamu Seirei* No. 7. The provisions of *Osamu Seirei* confirmed that *Kucool* (*Kepala Ku* or Village Head) was appointed through an election. The committee in charge of the village head (*Kucool*) election was *Guncool*. The tenure of *Kucool* was four years, and *Kucool* can be fired by *Syuucool*.<sup>28</sup>

The village governance during the Japanese occupation consisted of nine officials: *Lurah* (village head), *Carik* (secretary), five *mandor* (overseers), village police and *amir* (working on religious affairs). The village head was the sole ruler in the village, but in the presence of supra-village, the village head only acted as an extension of the power who

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<sup>23</sup> Ghofur and al Arif.

<sup>24</sup> M. Laica Marzuki.

<sup>25</sup> M. Laica Marzuki.

<sup>26</sup> Ni'matul Huda, *HUKUM PEMERINTAHAN DESA*, 1st edn (Malang: Setara Press, 2015). Hal. 3

<sup>27</sup> Huda. Hal. 3

<sup>28</sup> M.Si. Elke RappIr. Diah Y. Rahardjo Drs. E.B. Sitorus, M.Si. 2. Drs. Anselmus Tan, M.Pd.Suprayitno, SH., MH.Eko Prasetyanto PP., S.Si., M.Si., M.A.Christiani R. Tarigan, S.Sos., M.A.Sutoro Eko, S.IP., M.Si.AA GN. Ari Dwipayana, S.IP. and others, 'Naskah Akademik Rancangan Undang-Undang Tentang Desa', in *Naskah Akademik* (DIREKTORAT PEMERINTAHAN DESA DAN KELURAHAN DIREKTORAT JENDERAL PEMBERDAYAAN MASYARAKAT DAN DESA DEPARTEMEN DALAM NEGERI JAKARTA, 2007) <[www.forumdesa.org](http://www.forumdesa.org)>.

must submit to and be responsible to the supra village. Historically, the feudalism characteristic of the village governance was a colonial product that inclined to be more oriented to the interests of their employers rather than the community. Such conditions often trapped the village governance into the oblivion leading to the oligarchies, nepotism, and even the authoritarianism of the village governance. Such symptoms began in the Raffles era (1811-1816).<sup>29</sup>

According to Law No. 5 of 1979 concerning Village Governance, the village head has the tenure of eight years, and can be re-elected for one more term, as seen in Article 7 "The tenure of the village head is eight years from the date of his/her appointment, and can be appointed return for one more term". This means that the tenure of the village head was a maximum of 16 years. The village head organized his own household and was the main organizer and the person in charge of the governance, development and community affairs in administering village governance affairs.<sup>30</sup>

After the resign of the New Order regime, the power of the village head was reduced by the post-reform laws: Law No. 22/1999, Law No. 32/2004, and Law No. 6/2014. Among the efforts of reducing the village head power was by confirming the limit of the village head's tenure. It does not mean that the previous laws and regulation did not regulate the tenure of the village head. The provisions concerning how long a person can hold the position of village head had been regulated in the legislation product. However, in practice, this provision is often violated.<sup>31</sup>

Article 96 of Law No. 22 of 1999 concerning Regional Governance, the tenure is five years, and can be re-elected for one more period, ""The tenure of the village head is no more than ten years or two terms from the date of stipulation". It means that village head can serve a maximum of ten years and the tenure of village head in the law is equal to the president's term stipulated in the 1945 Constitution. On the other hand, article 204 of Law 32 of 2004 states that the village head's tenure is six years and can be re-elected once in the next period. This article confirms that tenure of the village head is 12 years, two years longer compared to the president's tenure. The norm is stated in article 204 of Law 32 of 2004 "The tenure of a village head is six years and can be re-elected only for one subsequent term".

However, Law No. 23 of 2014 concerning Regional Governance does not specifically regulate the tenure of a village head. The relevant regulation is article 39, Law No.6 of 2014, concerning village stipulates that the village head serves for six years and can serve a maximum of three terms. The systemic corruption is likely to occur because of the chances of a village head serving for three periods. The relatively long tenure that is possibly served by the same officials may be misused, to easily perpetuate power through the use of financial resources and broad authority.<sup>32</sup> The corruption began from the central government to local government at the province or District/City. It was also done by members of *Dewan Perwakilan Rakyat*-DPR (House of Representative), regional House of Representatives at the Province or District/City, to the village government.<sup>33</sup>

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<sup>29</sup> Sutrisno Purwohadi Mulyono, 'Sinergitas Penyelenggaraan Pemerintahan Desa Pasca Pemberlakuan Uu No. 6 Tahun 2014 Tentang Desa', *Masalah-Masalah Hukum*, 43.3 (2014), 438–44 <<https://doi.org/10.14710/mmh.43.3.2014.438-444>>.

<sup>30</sup> Drs. E.B. Sitorus, M.Si. 2. Drs. Anselmus Tan, M.Pd.Suprayitno, SH., MH.Eko Prasetyanto PP., S.Si., M.Si., M.A.Christiani R. Tarigan, S.Sos., M.A.Sutoro Eko, S.IP., M.Si.AA GN. Ari Dwipayana, S.IP. and others.

<sup>31</sup> Riza Multazam Luthfy, 'Masa Jabatan Kepala Desa Dalam Perspektif Konstitusi', *Masalah-Masalah Hukum*, 48.4 (2019), 319–30.

<sup>32</sup> Mulyono.

<sup>33</sup> Satria Unggul Wicaksana Prakasa, 'ANTI-CORRUPTION SURVIVOR , ACADEMIC FREEDOM , AND THE', *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah*, 4.2 (2019), 163–73.

The debate about the tenure the village head has been the attention of the members of the House of Representatives, but finally, the formulation agreed is of Article 39.<sup>34</sup> The dynamics of the tenure of the village head can be seen from the debate between the team drafting the bill of villages, Jacob Jack Ospara, representative of DPD (regional representative council) stated that a village must be strong and independent. He mentioned that "Strong village government does not mean an autocratic form of governance (for example, a long tenure), but the village government with democratic governance that controlled (check and balance) by local institutions, such as the Village Representative Body/ Consultative Body and the element of the local community."<sup>35</sup>

In the bill concerning villages, the tenure of the village head is six years and can be re-elected for only one more term. It triggered the debate among the factions. The party factions of FPDIP, FPAN, and Gerindra agreed, while FPD and FPG proposed that an additional tenure of the village head, that is ten years and can be re-elected for one more term. The rationale of the FPD and FPG proposing ten-years tenure is to simplify the process at the planning level, especially in the preparation of the RPJM (five years), and to provide adequate time to the elected Village Head to realize his/her programs. FPG argued that the proposal for more than ten years is to maintain the sustainability of people's lives.

The PPP faction proposed that the tenure of village head should be eight years and can be re-elected for one term only. In contrast, the Hanura Party faction proposed that the tenure of the village head to refer to the tenure of the regional political leaders, from the president to the Regent and mayor, that is five years. This proposal is in line with the politics of constitutional law, namely the limitation of government power based on the above tenure.

Meanwhile, the PKS Faction, on December 11, 2011, conveyed that the tenure of the village head should be eight years and could be re-elected once in the subsequent period.<sup>36</sup> Finally, the tenure of the village head was decided at the DPR plenary meeting, on December 18, 2013, to be six years, and it could be re-elected for three consecutive or non-consecutive terms, as stated by Akhmad Muqowam:

*" . . . the village head serves for six years from the date of inauguration; the village head may serve for three consecutive or non-consecutive terms". Meanwhile, the PKB Faction, in their plenary meeting, through their spokesman, Abdul Kadir Karding noted that the PKB proposed the tenure of eight years for the village head. " . . . We, 148 agreed (ratified), with the hope that prosperity would be achieved soon. However, the PKB Faction should note that PKB proposed that the village head's tenure is twice of eight years. That is, every term is eight years, "*

Table 1: The Proposal of Faction Concerning the Tenure of the Village Head

No	Faction/ the bill	duration	Period	Number
1	The bill	6 Years	2	12 Years
2	FPDIP	6 Years	2	12 Years
3	FPAN	6 Years	2	12 Years
4	Gerindra	6 Years	2	12 Years
5	FPD	10 Years	2	20 Years

<sup>34</sup> Muhammad Yasin and others, *ANOTASI UNDANG-UNDANG NO . 6 TA HUN 2014 TENTANG DESA*, ed. by Ahmad Alamsyah Saragih and others, *PATTIRO* (Jakarta: Pusat Telaah dan Informasi Regional (PATTIRO), 2015). Hal 142

<sup>35</sup> Yasin and others. Hal 144

<sup>36</sup> Yasin and others. Hal 147

6	FPKB	8 Years	2	16 Years
7	FHanura	5 Years	2	10 Years
8	FPG	10 Years	2	20 Years
9	FPPP	8 Years	2	16 Years

Source: Analysed from *Buku Anotasi UU Desa*

Article 39, paragraph (2), stated that the village head could hold a maximum of three consecutive or non-consecutive terms, while the direction of politics of law in the constitution concludes that the tenure of the president, vice president, DPR members, DPD members and member of other institutions, is limited to two periods. Thus, it is clear that the village head who can serve for three terms is not consistent with the direction of politics of law concerning the tenure in the constitution. Theoretically, prolonged power will tend to damage or will potentially lead to corruption.

The tenure of the village head is relatively longer than that of other executive positions, indicating that article 39 regulating it is contrary to the constitution or can be said as unconstitutional. This is because the rule does not agree with the spirit of the constitution that must limit the authority of government officials to avoid the abuse of power.

In article 204 of Law No.32 2004, the tenure of the village head is 6 six years and can be re-elected for one period only in the next term. It can be said that the tenure of the village head is a maximum of 12 years. It is relatively short compared to the village law but remains unconstitutional because it exceeds the tenure of the president. The long power may lead to a tendency for damage or the potential for corruption; the state gives a large fund to the village; this case is vulnerable to the potential for corruption, the village head's tenure should only be two periods.<sup>37</sup>

Law No. 6 of 2014, concerning the village, stipulates that the village head is granted with broad authority and even autonomy; the village government also receives fiscal decentralization from the state budget and the regional budget. Mardiasmo argued that the concept of village autonomy in which the village is authorised with the discretion to regulate and determine the use of funds in conducting its affairs.<sup>38</sup> It means that the position of village head equals to a state official and it should be adjusted to the constitution adopting constitutionalism.

## CONCLUSION

Village government, based on Law no. 6 of 2014, is granted with relatively large authority. The village is entitled to the rights to regulate its own government using the autonomy principle. The village, thus, is no longer merely administrative governance but is authorised to manage village governance. The source of village income, as a consequence of the implementation of village governance, is from the state budget (APBD), known as village fund. Another source of village income is from the regional state budget (APBD), known as the village fund budget, and the village is also authorised to manage village-owned enterprises or BUMDes. Hence, the responsibilities of village head are very strategic and become a public interest.

The politics of law concerning the tenure of village head does not refer to constitutionalism because it is longer than the tenure of its superior (president, governor, regent, mayor). The limitation of government power can be seen in the amendment to the

<sup>37</sup> Retno Saraswati, 'ARAH POLITIK HUKUM PENGATURAN DESA KE DEPAN (IUS CONSTITUENDUM)', *Masalah-Masalah Hukum*, 1.1 (2014), 313–21.

<sup>38</sup> Achmad Hariri, 'Eksistensi Pemerintahan Desa Ditinjau Dari Perspektif Asas Subsidiaritas Dalam Undang-Undang Nomor 6 Tahun 2014 Tentang Desa', *Legality*, 26.6 (2019), 253–66.



1945 constitution, that limit of tenure of president. Unlimited power will lead to corrupted power. In a nutshell, the tenure of the village head is unconstitutional as it is not in line with the constitutionalism adopted by the state constitution.

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