Law and Post-Truth: Critical Constructivism as an Ideal Legal Reasoning Method on Indonesia's Post-Truth Era Society

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Abstract

This article aims to look at the current reality, which is marked by the proliferation of post-truth phenomena in the community, marking the many developments in the views and perspectives of each individual who considers something as an absolute truth by shifting the existence of facts, data. , and reality. This is the reality of challenges in the current era, so that in responding to the challenges posed by the post-truth era, scientific frameworks, including law as one of the main components that interact directly with society must try to avoid the formation of analyzes that lead to absolute truth. This article is the result of legal research using secondary legal materials. The results show that, critical constructivism as a method of reasoning that determines the process of legal reasoning, is able to prove its never-ending thought process by placing a gap between materialism and idealism, and its epistemological aspects provide a simultaneous relationship between empiricism and rationalism. The results of legal interpretation through the pattern of critical constructivism will continue to be criticized as long as the results of the interpretation cannot show the truth, this process will obtain an analysis result that will never lead to the absolute truth inherent in post-truth. world.

Keywords: *legal reasoning, post-truth, critical constructivism*

Abstark

Artikel ini bertujuan untuk melihat realitas pada saat ini, dimana ditandai dengan maraknya fenomena *post-truth* di tengah masyarakat menandai banyak berkembangnya pandangan-pandangan maupun perspektif masing-masing pribadi-pribadi yang menganggap sesuatu hasil pandangan tersebut sebagai kebenaran mutlak dengan menggeser keberadaan fakta, data, dan realitas. Hal ini merupakan realitas tantangan di era saat ini, sehingga dalam menjawab tantangan yang diajukan oleh era pasca-kebenaran, kerangka ilmiah, memasukkan hukum sebagai salah satu komponen utama yang berinteraksi langsung dengan masyarakat harus berusaha menghindari terbentuknya analisis yang mengarah pada kebenaran mutlak. Artikel ini adalah hasil penelitian hukum dengan menggunakan bahan hukum sekunder. Hasil penelitian menunjukan bahwa, konstruktivisme kritis sebagai metode penalaran yang menentukan proses penalaran hukum, mampu membuktikan proses pemikirannya yang tiada henti dengan menempatkan gap antara materialisme dan idealisme, serta aspek epistemologisnya memberikan hubungan simultan antara empirisme dan rasionalisme. Hasil tafsir hukum melalui pola konstruktivisme kritis akan terus menerus dikritisi sepanjang hasil tafsir tersebut tidak dapat menunjukkan kebenaran, proses ini yang akan memperoleh suatu hasil analisis yang tidak akan pernah mengarah pada kebenaran mutlak yang melekat pada post-truth. dunia.

Kata kunci: *penalaran hukum, post-truth, konstruktivisme kritis*

INTRODUCTION

Clashover political domination, the rise of social media, spread of cognitive bias to the outbreak of science denialism are some of the main factors that are lead the global community towards the post-truth phenomenon.[1]

The term of "post-truth" is not a new word that first appeared in the 21st century. It has been used at the end of the 20th century in an essay on The Nation magazine written by a Serb-American playwright named Steve Tesich.[2] In his writings, Tesich tried to describe a trend that emerged in the midst of American society who tried to avoid and deny the controversial facts that circulated after various national-global scandals involving the United States government.

In 2016, the Oxford Dictionary made "post-truth" the "Oxford Dictionaries Word of the Year 2016" after the phrase was ranked first in terms of frequency of use in 2016 especially in the months of the political season in the United States.The Oxford Dictionary also provides a broad definition of "post-truth" as "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief"[3]

Experts describe the post truth era as a time of the emergence of the thought that the reaction or response given by the masses is capable and can change facts related to lies. These responses can come from deceiver, indifferent, cynical, or delusional thoughts that threaten and are harmful to the concept of true truth in society.[4]

A narrower definition is explained by Biesecker where he states that post-truth is a concept that describes the consequences of misuse or understanding of facts, knowledge, opinions, beliefs, and alt-facts of truth.[5]

On a national scope, the post-truth phenomenon can already be seen in the form of hoax news as one of the simplest forms of post-truth era products. In 2017, there were at least 800,000 sites that spread hoax news. At the general election on the following year, the number increased and had a more varied form of disinformation in order to influence the political choices of Indonesian's society.

The movement of society towards post-truth realm has a multidimensional impact not only limited to the socio-political dimension but also has an impact on the legal dimension as part of an essential element in society which also requires the community as a "center of gravity" in developing and developing the law itself.[6]

Disinformation delivery events by law enforcement, the use of fictitious data in decision making to the formation of regulations that are formed on the basis of personal views and feelings show that the law is not immune from the post-truth pandemic that has plagued global society. So that the situation must be immediately responded by the law through its institutions, practitioners and scientists.

[1]   Lee McIntyre, *Post-Truth* (Massachusetts: MIT Press, 2018), 2 & 172. 2 & 172

[2]   Matthew D'Ancona, *Post-Truth : The New War on Truth and How to Fight Back* (London: Ebury Publishing., 2018), 2.

[3]   (https://languages.oup.com/word-of-the-year/2016/, accessed on Sunday, January 3rd **2020).**

[4]   McIntyre, *Post-Truth*, 6.

[5]   Biesecker, Barbara A., Toward an Archaeogenealogy of Post-truth, Philosophy & Rhetoric, Vol. 51, No.4, 2018. 329.

[6]   Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Massasuchest: Harvard University Press, 1936), 14.

One of the responses that can be given by law is through legal reasoning as a component that is able to find and resolve problems between existing law and morals.[7]

Legal reasoning which also plays a role in linking reality with the construction of legal analysis will be challenged by the outbreak of post-truth phenomena. This challenge particularly for legal scientists whose task is to construct legal reasoning through various existing reasoning methods so that they are free from post-truth elements and not become a product of the post-truth phenomenon itself.

Based on that, this paper seeks to see the relationship between the formation of the configuration of post-truth phenomena with the legal realm, especially related to the role and function of the critical constructivism method in the activities of legal reasoning in the post truth era.

The research in this paper uses the doctrinal legal research method, namely research on the law which is conceptualized and developed on the basis of the doctrine adhered to by the conceptor and / or the developer. The doctrinal method used as part of a concept that has moral and philosophical pattern. Sources of information in this paper were obtained using the method of library research studies (library research) where the search for research sources through searching data, information and knowledge in literature.[8]

DISCUSSION

Between law of Reasoning and Legal Reasoning

The concepts of legal reasoning and law of reason are two things that are classified differently. As written by Sidharta in his book "Hukum Penalaran dan Penalaran Hukum", he clearly separates the concept of law of reason from legal reasoning where legal reasoning is placed in the work of science groups that have the connotation and scientific denotation character so that it can be identified as part of science while law of reason has interacted with one of these science groups namely legal science.[9]

Another insight related to the concept of "law of reason" describes it as a form of philosophical metadiscipline relating to methods of interpretation in general that correlates with scientific theory. This explanation seeks to emphasize the guidelines for interpretation that are appropriate in the realm of philosophy of science and are universally accepted by the nature of existing science groups.

The earliest explanation of "law of reason" can be found in "Lectures on Metaphysics and Logic, Vol. II" by William Hamilton in which he explains "law of reason" as the fourth order the other three laws at the beginning, in which he describes the three earlier laws as traditional law which is part of the law of thought,[10] yet because this thought process contains positive and negative values, the law of reason needs its own space regardless of the law of thought.

The reasoning process carried out in accordance with the legal reasoning guidelines helps classify the scientific groups based on how the sciences use the arguments of reasoning law in their scientific activities so that the process then produces reasoning that has the characteristics of a scientific discipline

7   Larry & Emily Sherwin Alexander, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Durham: Duke University Press, 2001), 9–10.

8   Soetandyo Wignjosoebroto, "Hukum: Paradigma, Metode Dan Dinamika Masalahnya, Jakarta," in *Lembaga Studi Dan Advokasi Masyarakat (ELSAM* (dan Perkumpulan untuk Pembaruan Hukum Berbasis Masyarakat dan Ekologi (HUMA, n.d.), 141–47.

9   B.Arief Sidharta, "Refleksi Tentang Struktur Ilmu Hukum: Sebuah Penelitian Tentang Fondasi Kefilsafatan Dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia" (Bandung: Mandar Maju, 2000), 33–34.

10   Sir William Hamilton, "Lectures on Metaphysics and Logic," in *Two*, vol. II (Logic, Boston: Gould and Lincoln, 1860), 53.

and helps the classifying process between formal science with empirical science or natural science/*naturwissenschaften* with humanities science/*geisteswissenschaften.*[11]

Philosophy with its disciplines that includes ontological, eptymological and axiological aspects contributes to the development of various patterns of reasoning such as logical positivism, critical rationalism, analytical empiricism, hermeneutics and critical constructivism. The character of "law of reason" that was built from those concepts makes it as the main arguments in the process of reasoning in all scientific activities. These guidelines then contribute to the formation of a scientific reasoning framework that has the specific characteristics of existing scientific disciplines, including legal science with its reasoning known as legal reasoning.

Understanding legal reasoning as a derivative of the law of reason has the consequence that there is no conflict between the arguments of reasoning (law of reason) with the reasoning that is owned by each discipline of its derivatives, including legal reasoning. Comprehending law of reason as the main concept, gives birth to various relationships with the reasoning of the group of sciences including legal science (legal reasoning) can be seen as a vertical/top-down relationship. However, those relationship is not a one-way relationship.

The emergence of various new phenomenon that encourage scientific development and the proposed counter-hypotheses of derivative reasoning to rise to the top shows that the relationship is not one-way but two-way and reciprocal. Such as statistics, with its statistical syllogism contributing to the development of inductive reasoning through the possibilities created by the percentage of numbers in the premises,[12] or the objection of Karl R. Popper

to the formal form of inductive reasoning produces patterns of critical rationalism that encourage the use of deductive reasoning.

The existence of this two-way relationship is also a cause for the connection of critical constructivism in the realm of law of reason with legal reasoning, those two objects have a relationship that is not only reciprocal but also interdependent in developing their scientific disciplines.

Post-truth, Law and Legal Reasoning

The influence of socio-political phenomena such as post-truth on the activities of legal reasoning is an unavoidable necessity. As described by Satjipto Rahardjo in reconstructing cybernetic relations stated by Talcott Parsons, shows the existence of a relationship between systems in the physical organic world that consist of cultural, social (including legal), and interdetermination of politics.[13] In this case, the post-truth phenomenon can be seen as the part of the information flow that plays a role in developing and enriching aspects of the values of other components in the series.

In its process, post-truth is not a single series that stands alone and only makes a falsity as the end result. The delivery of information or facts that are not true can be caused due to unintentional mistakes (not intended to lie), do not want to find out the truth in advance related to the truth that will be delivered (willful ignorance) and most recent cases is because it aims to straight just lie. The main components of disinformation are then supported by various post-truth factors such as:[14]

1. Concern about the existence of a fact that gave birth to a trend of denialism science

2. Cognitive bias as an inherent part in humans facilitates the manipulation and

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[11]   C Verhak and Haryono Iman, *Filsafat Ilmu Pengetahuan: Telaah Atas Cara Kerja Ilmu-Ilmu* (Jakarta: Gramedia Pustaka Utama, 1991), 8–9.

[12]   D V Hinkley and Cox DR, *Theoretical Statistics*

(Chicago: Chapman & Hall, 1974), 49 & 209.

[13]   Satjipto Rahardjo, "Beberapa Pemikiran Tentang Rancangan Antardisiplin Dalam Pembinaan Hukum Nasional" (Bandung: Sinar Baru, 1985), 21–23.

[14]   McIntyre, *Post-Truth*, 170–72.

exploitation of certain groups or parties who have an interest in data, information or facts.

3. The end of traditional media and the rise of social media as information agents.

These factors are then manifested in a concept which forms the basis of the post-truth phenomenon itself, which is an absolute truth. From this basic concept, post-truth then develops into various forms that are more concrete and technical, i.e:[15]

1. Decontextualizing or releasing a statement from its context so as to produce an understanding that easily triggers the emotions or anger of community groups.

2. Extrapolate or draw conclusions on the basis of minimal data but has sensational conclusions.

3. Hyperreality that is used to hide certain goals because of the difficulty of distinguishing between the real and the virtual.

4. Weaponization of information is a method of rhetoric that does not need to refute a statement but slightly changes it so that the audience becomes sceptical.

5. Schematization or attempts to simplify ideas so that they are easily understood but in extreme way so that they are reduced to become more provocative.

6. The use of phatique techniques, namely the use of language not only to convey messages but maintain contact between the speaker and the audience (attention).

7. Myths building related to an object.

8. The use of the ad infinitum or ad nauseum (repetition) argument, the activity of repeating a statement so that people believe.

Legal reasoning is a process that really depends on data basis, information and facts that exist in compiling and building what is called by B. Arief Sidharta as a "systematized problematic thinking" or *gesystematiseerd probleemdenken*. The thinking is expected to provide benefits to the law both theoretically and practically through its characteristics, i.e:[16]

1. Legal reasoning seeks to achieve consistency in the rule of law and legal decisions.

2. Legal reasoning seeks to maintain continuity in time or historical consistency.

3. In legal reasoning there is dialectical reasoning, weighing opposing claims in the debate on legal formation, the process of considering the views and facts put forward by the parties in the judicial process and the negotiation process.

Based on these characteristics, facts and information are one of the essential steps in each step of forming legal reasoning in both the theoretical and practical domains. Sidharta explained that there are 6 main steps in legal reasoning, i.e:

1. Identify facts to produce a structure of cases that the judge really believes is the real case.

2. Connecting (subsidizing) the structure of the case with relevant legal sources, so that he can determine legal actions in juridical terminology (legal term).

3. Selecting relevant legal sources and rules to find out the policies contained in the rules (the policies underlying those rules), so that a coherent rule structure (map) is produced.

4. Linking the structural rule to the case structure.

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[15] Haryatmoko, "Mencari Kebijakan Di Era Post-Truth: Menghadapi Hoaks, Emosi Sosial Dan Populisme Agama," *Majalah Basis*, February 2020, 31–32.

[16] Sidharta, "Refleksi Tentang Struktur Ilmu Hukum: Sebuah Penelitian Tentang Fondasi Kefilsafatan Dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia," 35.

5. Seeking alternative possible solutions.
6. Determining another alternative to be formulating as the final decision.

By looking at the series of legal reasoning processes, position of the facts is at the earliest stage where fact needs to be identified and treated in order to be processed in the next stage. In the concept of other legal reasoning frameworks as explained by Kenneth J. Vandevelde, research of the available facts is one of the five main components of legal reasoning and the results will be applied to determine the use of existing legal rules.[17]

Aside from its position in the reasoning process, processing facts by comparing its similarities and differences between facts, is a form of precedent analogy where the analogy is the core of legal reasoning itself. Then the importance of facts as a component in legal reasoning can be seen in one form of legal reasoning namely legal logic. In building the legal logic, the existence of facts is something that is needed, especially in the formation of a minor premises from the logic of law itself. Existing facts are not only qualified but must also be interpreted based on legal categories.[18]

Looking at the subject matter of legal reasoning actors, it can be determined that there are two main actors, first is judges as a legal decision makers for concrete cases in the judiciary, and the second is the role of lawmakers (legal bearers in legislative institutions), especially countries which are in the ranks of civil law systems such as Indonesia, these two main actors are the vital organthat play a role in interpreting the facts into legal qualifications by using legal reasoning.

From the epistemological aspect, the legal reasoningprocess have two extreme points that will determine the whole next process, its intuition and empiric or the observation of facts. In this case, the results of observations of the facts that will be arranged in legal reasoning will depend on intuition and empirical analysis of legal scientists who will make observations.

These condition shows the importance of the position of facts and the process of processing facts in legal reasoning activities. This matter then becomes the susceptive breaching point for post-truth in legal reasoning activities. Post-Truth relies on the role of opinion, feeling and intuition in interfering the process of understanding both truth and fact, and in that process the observer will risk being sequestered from the reality itself.[19]

Pattern 1. Interrelation between Law of Reasoning and Legal Reasoning

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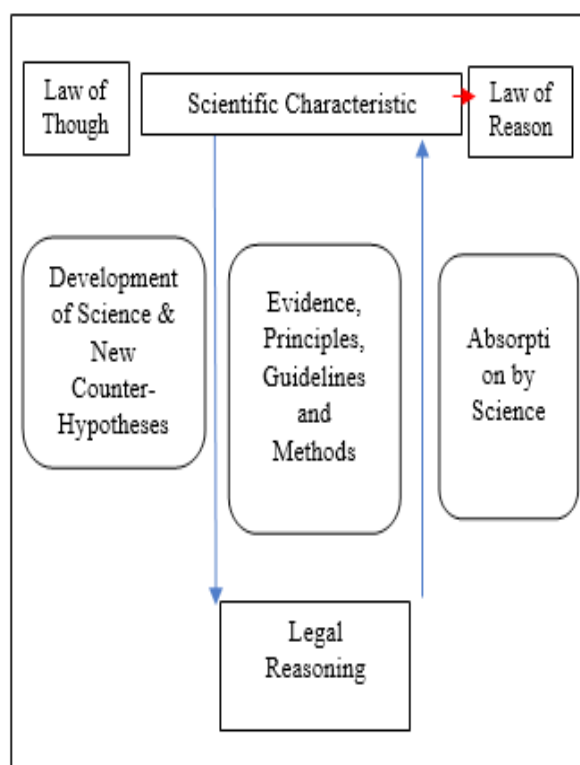
[17] Kenneth J Vandevelde, *Thinking Like a Lawyer: An Introduction to Legal Reasoning* (Colorado: Westview Press, 1996), 1.

[18] Sidharta, "Refleksi Tentang Struktur Ilmu Hukum: Sebuah Penelitian Tentang Fondasi Kefilsafatan Dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia," 45.

[19] McIntyre, *Post-Truth*, 172.

Constructing Critical Legal Reasoning

Considering that post-truth techniques and forms prioritize emotion over rationality and objectivity of data, what is needed is self-criticism.[20] Based on this, the legal reasoning must reflect the process of the existence of the reasoning activity itself, which if seen from the epistemological aspects of science comes from the law of reason.

Apart from the reasons that legal reasoning is the subject of the law of reason, the nature of the two-way relationship between legal reasoning and law of reason can be a source of self-criticism by looking at the critical patterns provided by reasoning law, one of them is critical constructivism.

Critical constructivism is a reasoning pattern that will never end its research process, in order to achieve the goals of scientific development, the results of interpretations in this reasoning pattern will continue to be criticized. As long as the results of these interpretations cannot (or have not) been shown to be true, they are tentatively accepted as scientific knowledge.

The ontological aspect of this reasoning is related to the understanding on how the dynamics of various aspects influence and shape the object of observation. Then the epistemological aspect of critical constructivism seeks to explore the foundations of knowledge from various context that surrounding the object of research.[21]

Critical constructivism departs from a number of assumptions, including;[22]

1. There is no direct relationship between theory (scientific knowledge) and empirical reality

2. The theory cannot be proven just like that inductively or empirically

3. The so-called theory and empirical exist only in a "reality" which can only be "constructed" in the mind which is then referred to as "conceptual reality"

4. For the purpose of developing scientific knowledge, theories and empiricism are contested in a conceptual reality through a formal logical form of interpretation method (hermeneutical circle)

5. the interpretation is criticized, so if it can't be demonstrated its untruth, it will be accepted as scientific knowledge

Critical constructivism is explained as part of the derivation of critical theory (the Frankfurt School) which encourages critical thinking of the research process.[23] Then critical constructivism is built to answer the gap between ideas or ideas that are in the minds of researchers with the facts and empirical information obtained.

Pattern 2. The Formal Logic Model of Critical Constructivism (Wuisman, 1996)

The process of critical constructivism as a reasoning pattern consists of 6 stages[24]:

1. Problem limitation. In this stage, legal scientists will begin their research from the discovery of a problem in the form of a conflict or a deviations between ideas (in the mind) and empirical information obtained.

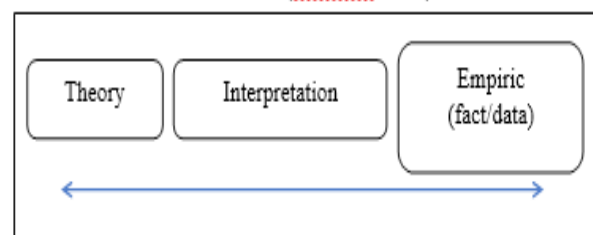20 Haryatmoko, "Mencari Kebijakan Di Era Post-Truth: Menghadapi Hoaks, Emosi Sosial Dan Populisme Agama," 35.
21 Kincheloe J.L, *Critical Constructivism Primer* (New York: P. Lang, 2005), 7.
22 J J J Wuisman, *Penelitian Ilmu-Ilmu Sosial Jilid I: Asas-Asas*, I (Jakarta: Lembaga Penerbit Universitas Indonesia, 1996), 86–90.

23 J.L, *Critical Constructivism Primer*, 3.
24 Wuisman, *Penelitian Ilmu-Ilmu Sosial Jilid I: Asas-Asas*, 72.

2. Theory Making. After the problem is successfully confirmed (the limitation is made), then the idea will be tested and described in detail and presented in the form of a theory (general statement). It was explained that the testing of ideas was not possible without making the theory first.

3. Test Design. At this stage the operationalization is set for the testing of ideas as they are developed and explained in theoretical form.

4. Data collection. After operationalization is completed and a work plan is made for practical implementation, scientists "connect" themselves directly to what is designated as a "test basis" with the intention of collecting data (empirical information).

5. Data processing. After the data is collected, it arrives at the processing stage. The purpose of data processing and analysis is to enable the determination of the validity of ideas (theories) developed at the beginning of the scientific research process by trying to rearrange them based on the empirical information (data) collected

6. Assessment. Through the process of rearranging theories, it can be assessed whether the ideas at the beginning of the research process are correct or not. If through a clear interpretation the original idea was not successfully demonstrated untruthfulness (uselessness), and also no reason was found to suspect that the results of the research were caused by errors in the application of the test method itself, then what was stated by the idea was temporarily accepted as scientific findings. If the idea is not right because it cannot be rearranged based on the data obtained, then the problem of new knowledge is found which requires the creation of new ideas as a solution.

Based on this process, identification of facts will not stop at the collection stage. Facts can still be doubt and verified even when they are able to produce a legal argument. Legal reasoning that using a pattern of critical constructivism will focus on the gap between ideas or concepts in the minds of legal scientists with empirical realities that are observed or obtained. The results of interpretations of these gaps will not be the final results of the study. The truth of the results of research comparing legal theories or ideas to facts, data and legal realities will not be absolute truths with final qualities but will continue to be tested in order to measure the level of truth and usefulness so that they conflict with the essence of post-truth which will always lead to absolute truth.

Pattern 3. Legal Reasoning on Post-Truth Society

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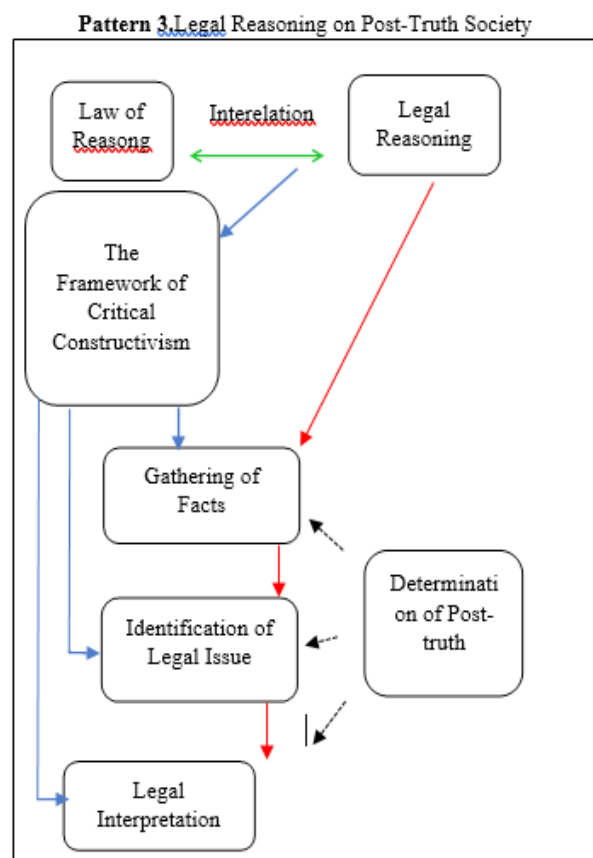
CONCLUSION

Legal reasoning as part of the legal discipline that plays a role in providing the construction of analysis and research for legal scientists is threatened by the influence of post-truth phenomena that engulf the social-political space with multidisciplinary dimensions. Post-truth phenomena can affect vital processes in legal reasoning, especially the collection and identification (assessment) of legal and non-legal facts. This threat can be avoided by creating a critical legal reasoning process by looking at the patterns of critical reasoning provided by the law of reason realm through its two-way interrelation with legal reasoning. One such pattern is critical constructivism as one of the reasoning patterns that in it's process of analysis and research never leads to a final result, but will continue to be built and criticized again by looking at the truth and usefulness of the results of the research.

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