

**LEGAL IDENTITY AS SOCIAL IDENTITY:
SOME CONCEPTUAL REMARKS**

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Abstract

Anarchism has always been understood as a condition of society in the absence of government or a supreme institution whose main objective is to manifest the core value of human freedom and equality in their society. The absence of supreme institution alone could be challenging, especially on determining whether the public order can be achieved within its society or not. The purpose of this essay is to further research about Rousseau's social contract theory, its applicability in anarchistic societies, and how it might be utilized to establish public order in the absence of a legislative body. In this article, the literature review method is employed as the data collection technique, together with philosophical and conceptual approach methods. Through this research, it is accepted that the anarchistic society's usage of the concept of law is somewhat related to Jean-Jacques Rousseau's social contract, which is predicated on the collective will of the populace. The practice of international law, a law without an institution of law enforcement, demonstrates the nature of the general will be utilized as a tool to establish public order. Hence, Rousseau social contract can be seen as a base for the anarchistic society to achieve public order.

Keywords: *Anarchism, Anarchist Law, Social Order, Social Contract, Anarchistic Society*

IDENTITAS HUKUM SEBAGAI IDENTITAS SOSIAL: BEBERAPA TINJAUAN KONSEPTUAL

Intisari

Anarkisme dipahami sebagai suatu kondisi masyarakat yang tidak mengenal adanya pemerintah atau kekuasaan yang diciptakan dengan tujuan untuk memanifestasikan nilai kebebasan dan kesederajatan dalam kehidupan masyarakat. Ketiadaan penguasa itu sendiri dapat menjadi suatu permasalahan, khususnya dalam menentukan apakah ketertiban umum dapat dicapai oleh masyarakat yang ada di dalamnya atau tidak. Tulisan ini bertujuan untuk memahami teori kontrak sosial dan relevansinya dengan masyarakat anarkisme dan bagaimana teori tersebut dapat digunakan sebagai suatu instrumen untuk mencapai ketertiban umum dalam hal ketiadaan suatu institusi pembentuk hukum. Metode pendekatan yang digunakan dalam tulisan ini adalah metode pendekatan filsafat dan pendekatan konseptual dengan menggunakan metode studi pustaka dalam mengumpulkan data. Melalui tulisan ini didapatkan bahwa konsep anarkisme yang diadopsi merupakan anarkisme kontraktarian yang dilandaskan oleh *general will* sebagaimana teori kontrak sosial yang digagas oleh Jean-Jacques Rousseau. Bahwa *general will* tersebut menjadi landasan bagi masyarakat dalam menjalankan kehidupan sosialnya. Implementasi dari anarkisme kontraktarian dapat dilihat dalam penerapan hukum internasional sebab dalam sistem hukum internasional tidak dikenal adanya lembaga yang dapat memaksakan dipatuhinya hukum tersebut oleh negara.

Kata Kunci: Anarkisme; Hukum Anarkis; Ketertiban Umum; Kontrak Sosial; Masyarakat Anarkis

A. Introduction

As an administrative and political term, legal identity requires attention in academic reflections that are scientific in nature, similar to the term social identity. Legal identity, which cannot be separated from social identity, is also a concept that refers to a specific system of knowledge and a particular sociopolitical context. Legal identity, as a social identity, constructs the meaning of the individual as a citizen. Legal identity also indicates the individual's response to the presentation of identity constructed by the State upon them. It also implies a response that is very personal to limited choices. For instance, for Indonesian citizens, their options are to adhere to a religion (one of the six recognized religions) or to hold a belief; being an atheist is not permitted. Legal identity suggests the construction of identity carried out by the State in relation to the identities that may be publicly expressed within the State's domain.

Departing from this thought, this paper will examine legal identity in its broader and more profound conceptual meaning. This paper will reflect on the meaning of legal identity from various legal identity terms that have been used in scientific writings and also in activities that have been conducted by international organizations. After that, the Author will conclude by outlining several characteristics and elements of legal identity. These characteristics and elements facilitate a sign used to identify individuals or groups of individuals as legal identities.

B. Apprehending the Notion of Legal Identity

The term legal identity became widely recognized when the World Bank, Asian Development Bank, and United Nations Development Programme (UNDP) used it in their reports and activities in 2007 and 2008. In the World Development Report 2007 (WDR 2007) published by the World Bank, legal identity is discussed in the context of citizenship. The report views legal identity as a legal document issued by the state that indicates an individual's identity and status. In this context of WDR 2007, legal identity refers to a passport or other identification documents. The World Bank states that once an individual becomes a citizen, they have the right to possess legal identity.¹

1 The World Bank, *World Development Report 2007: Development and the Next Generation*

The Asian Development Bank, in its activity report regarding Law and Policy Reform in 2007 titled “Legal Identity for Inclusive Development,” views legal identity as a legal document used to prove an individual’s existence to access services provided by the state. This report sees legal identity as a base for an individual to enjoy the facilities and services provided by the government. Proof takes the form of official identity documents issued by the government. Thus, legal identity is simply understood as mere official identity documentation from the state.²

In 2008, the Commission on Legal Empowerment of the Poor (CLEP), organized by UNDP, released a report titled Making the Law Work for Everyone. In the report, legal identity is seen as a legal document that can serve as legitimacy for individuals to access the protections provided by the state’s legal system. The Commission emphasizes that legal identity, which is part of the first pillar of the Legal Empowerment of the Poor program—namely, the pillar of “Access to Justice and the Rule of Law”—must be possessed by every individual who is the subject of empowerment. In the context of possessing legal identity, the Commission also advocates for birth registration for every individual. A birth certificate is also part of legal identity. For the Commission, this serves as a benchmark for the successful implementation of legal empowerment for the poor.³

The three donor institutions view legal identity in the same way. They see legal identity as an identification document provided by the state in official documents. Usually, these documents describe the name, gender, age or status, and/or legal relationship of an individual. For example, a passport or an identification card. They see legal identity as an authentic document that can be used by the holder of the legal identification document to access services provided by the state. Legal identity is closely related to the benefits or living guarantees that the holder may receive.⁴

(Washington, DC: World Bank, 2006), 160 – 161, <https://openknowledge.worldbank.org/entities/publication/8bc09fdb-00c1-5ef7-b76f-4988c8922362>.

2 Caroline Vandenabeele and Christine V. Lao, eds., *Law and Policy Reform at the Asian Development Bank 2007: Legal Identity for Inclusive Development* (Asian Development Bank, 2007), vii, <https://www.adb.org/sites/default/files/publication/29046/legal-identity.pdf>.

3 Commission on Legal Empowerment of the Poor (CLEP), *Making the Law Work for Everyone Volume One: Report of the Commission on Legal Empowerment of the Poor* (New York: UNDP, 2008), 5.

4 World Bank, *World Development Report 2007*, 16; Vandenabeele and Lao, *Law and Policy*

Understanding legal identity as access to services and economic benefits from the state (and also from other formal institutions, such as banking) is similar to the ideas of the three international institutions with Hernando De Soto's concept of formalization. In his books *The Other Path*, *The Economic Answer to Terrorism*,⁵ and *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*,⁶ De Soto presents his ideas about formalization and his belief in the economic advantages that can be gained through formalization.

In both of his works, De Soto observed that the key to the success of development programs implemented in most of the third world does not lie in achieving economic variables as believed by classical economic thought; but in ways to enable people to access and turn the capital they previously possessed into potential capital for production.⁷ For De Soto, what the poor lack or do not possess at all is access to ownership mechanisms that can legally or legitimately give economic value to the assets they hold, allowing them to use it in production and secure a greater economic value in a wider market.⁸

Thus, De Soto wants to express that a legal regime is necessary to enable the economic potential of poor people as subjects of development to be utilized as their capital. Legal formalization of their ownership of assets allows these subjects of development to access existing ownership mechanisms. Consequently, their capital is recognized as legitimate and lawful. De Soto strongly believes in a legal regime that can maximize the capital that these subjects of development already possess.⁹ The formalization proposed by De Soto seeks to ensure that the property rights of development subjects are recognized within the legal framework so that these property rights can

Reform, viii; CLEP, *Making the Law Work for Everyone*, 26.

5 Hernando de Soto, *The Other Path: The Economic Answer to Terrorism* (New York: Basic Books, 1989).

6 Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

7 Jonathan Manders, "Sequencing Property Rights in the Context of Development: A Critique of the Writings of Hernando de Soto," *Cornell International Law Journal* 37 (2004): 177-198.

8 De Soto, *The Mystery of Capital*, 48.

9 See the work of Ray Bromley, "A New Path to Development? The Significance and Impact of Hernando de Soto's Ideas on Underdevelopment," *Economic Geography* 66, no. 4 (October 1990): 328-48, accessed September 15, 2012, via JSTOR; Jonathan Manders, "Sequencing Property Rights in the Context of Development: A Critique of the Writings of Hernando de Soto," *Cornell International Law Journal* 37 (2004): 177-98.

maximize their economic potential for the development subjects. For example, the property rights that have been equipped with proof of ownership due to formalization. Thus, it can serve as collateral to banks for obtaining capital loans.

The idea of “being legal” in this formalization can be found in the understanding of legal identity used by the three aforementioned international institutions. We can even observe that the formalization articulated by De Soto assumes the existence of a legal identity that legitimizes the presence of the subjects of development within the legal system of the State.

Therefore, legal identity as an authentic legal document that provides basic information about the identity card holder becomes an integral part of formalizing the ownership of the poor. The formalization of assets becomes possible because of the legal identity of the asset holder in question. Furthermore, the Commission on Legal Empowerment for the Poor, one of whose chairpersons is De Soto, states that the state must ensure the fulfillment of the right to legal identity.¹⁰ Thus, there is a close relationship between the idea of formalization proposed by De Soto and legal identity in the form of authentic documents and the State. The State serves as an institution that guarantees the availability, fulfillment, and protection of legal identity because legal identity is a right of the citizens. Furthermore, this legal identity can be used to meet the requirements for the formalization of assets or individual ownership of the citizens mentioned above.

The concept of legal identity defined by the three donor institutions and the formalization idea proposed by De Soto tends to focus on the formal aspects of legal identity. Legal identity is perceived more as an authentic document that is neutral, so the information contained in the legal identity as an identity document is seen as something administrative and apolitical, or unrelated to political matters. The three international donors and De Soto do not question the information contained in a legal identity document. The information is considered merely an administrative prerequisite that must be fulfilled as a condition for recognizing an individual’s existence within a specific legal and economic system.

Is legal identity only formal, administrative, and neutral? Or is legal

¹⁰ CLEP, 5.

identity also a political product that encompasses various interests and reflects the interests of certain dominant groups? The Author will explore the concept of legal identity in the academic works used by scholars and then present the concept of legal identity.

C. Critics Towards Formal Legal Identity

The concept of legal identity put forth by the three international donor institutions and De Soto is characterized by a formal and administrative approach, heavily influenced by capitalistic perspectives. In the eyes of these donors and De Soto, legal identity documents are regarded as capital or assets that can be “monetized” and assigned monetary value. Moreover, they believe that such legal identity documents grant individuals access to justice and various benefits—most notably financial advantages—that is an obligation to be provided by the State.

Legal identity encompasses documents arising from population registration records and the documentation of significant life events (civil registration). It should be understood as more than a mere administrative function; it represents the existence of the State, which bears moral obligations to its citizens. The State is also a public entity that fosters the shared lives of individuals as social beings. Crucially, since legal identity is manifested through legal documents, it carries an inherent responsibility aligned with the rule of law. Much like the law itself, legal identity must serve to limit power in order to protect human dignity. It should not serve as an instrument of power—whether wielded by the State or the market, including the global market—that dehumanizes individuals. Therefore, in essence, legal identity embodies the law in a way that humanizes individuals rather than compromising their humanity. It is not a tool of power.

The experiences of Rwandans who have endured violent conflict rooted in ethnic divisions offer significant lessons, particularly regarding the importance of legal identity documents. Timothy Longman highlights that the issuance of these documents, which included ethnic identifiers, led many Rwandans to perceive this information as objective and accurate, resulting in these distinctions being used to evaluate individuals. Consequently, ethnic stereotypes and assumptions gained substantial influence, with people often

judging others based on the ethnicity specified on their ID cards. Longman describes the ID card as representing “a fixed trait of individuals.” However, it is crucial to recognize that individuals are more than what their legal identity documents convey. In a society deeply divided by ethnic issues, this emphasis on ethnic identity intensifies segmentation within the community. While there are parallels to be drawn with Indonesia, the Author aims to explore more about Longman’s insights regarding the implications of ID cards.

Longman noted that identity cards issued by authorities in public spaces significantly impact the development of individual personal identity in public settings. This influence persists regardless of whether that identity has genuine historical foundations, can be scientifically substantiated, or if it exists solely as an ideological construct.

Claudette’s case, a girl whose identification card identifies her as Hutu while her grandfather is actually Tutsi, deeply inspired Longman. Although Claudette is classified as Hutu on her ID card because her father settled in a Hutu community from a young age, this designation did not protect her and her family when the conflict erupted in 1994. Despite being listed as Hutu, her father was murdered by members of the Hutu community. It became clear that those responsible for his death had investigated her family’s ethnicity and uncovered that Claudette’s family was, in fact, Tutsi. Tragically, the same fate befell Claudette’s grandfather, who was also killed by Hutu individuals.

When the Rwandan Patriotic Front (RPF), comprised of Tutsi rebels, launched a counteroffensive and regained control of Rwanda, Claudette’s situation became secure once more. Subsequently, she identified herself as a Tutsi. However, Longman, who conducted a private interview with her, noted that Claudette did not fully comprehend her identity. She lacked a complete understanding of what it truly meant to be a Tutsi, having been raised with a formal identity as a Hutu.

In Claudette’s situation, we observed the established legal identity that defines her as a Hutu. Having experienced life as a Hutu since childhood, this identity has significantly shaped her sense of self. Although Claudette is genealogically a Tutsi, she identifies more strongly as a Hutu. Her legal identity exerts a profound influence on her life, underscoring Longman’s assertion that ethnicity becomes a fixed trait within an individual—an inherent

aspect of identity that cannot be erased.

Prior to legalization, ethnicity for most Rwandans was largely viewed as folklore, serving to distinguish individuals based on specific characteristics and cultural narratives that were unwritten. Numerous studies on ethnic conflict in Rwanda have identified the root causes stemming from the policies of the Belgian colonial government, which imposed definitions of group identity, established a hierarchical social structure, and fostered animosity and mistrust among different groups. The pass law, along with its associated policies regarding identity documentation, were the legal instruments that created these divisions. Initially enacted to control slave labor on the farms of Dutch settlers, this policy was carried on by subsequent colonial governments, including Britain. As a result, ethnic differences became more formally recognized and acquired a significant hierarchical meaning.

In Indonesia, religious issues are notably sensitive. Around the same period as the Rwandan conflict, Indonesia faced religious strifes in regions such as Maluku and Poso. The identity card (Kartu Tanda Penduduk or KTP) that Indonesians carry includes a declaration of their religious affiliation, with only six religions listed. Previously, under the New Order regime, only five religions were officially recognized. Other belief systems, including ancestral religions, were not acknowledged until a Constitutional Court ruling in 2017 mandated that all beliefs be recorded administratively in the same manner as recognized religions.

The experiences of faith practitioners concerning their identity recognition by the State, as reflected in their ID cards, provide valuable insights regarding the inclusion of sensitive social identities in the public sphere. This specifically pertains to religious and faith identities. My field research involving two faith communities suggests that adding a religion column to ID cards is a contentious issue. The integration of beliefs into this column following the 2017 Constitutional Court Decision, which recognized the names of officially acknowledged world religions, presents several challenges. On one hand, it signifies the State's formal acknowledgment of faith practitioners. On the other hand, while followers of world religions can be readily identified through established labels such as Islam, Protestant, Catholic, Buddhist, Hindu, and Confucian, the community of faith practitioners

is notably diverse. For instance, the Directorate of Trust in the One Supreme God and Indigenous People (KMA) under the Ministry of Culture currently recognizes 178 distinct groups of faith practitioners across Indonesia.

The Author found it problematic that the inclusion of belief systems in identity cards is implemented in such varied ways. During my encounters with the adherents of Sapta Darma in Brebes, the Author learned that their identification is limited to the term “Belief” or “Belief in the Almighty” (referring to God the Almighty), rather than specifying the name of their local belief, which is “Sapta Darma.” In contrast, in some regions, such as those with adherents of the Sunda Wiwitan belief, individuals can have their faith recorded as “Sunda Wiwitan” in the religion column of their identity cards. While some adherents are pleased with the recognition granted by the State following the Constitutional Court’s ruling in 2017, which acknowledged their belief by name, others still await similar recognition.

In the experience of individuals practicing their faith, the inclusion of religion on identity cards began during the New Order regime and was further solidified by subsequent policies. In 1975, the Ministry of Home Affairs issued Circular Letter No. 477/74054, which accompanied Minister of Home Affairs Decree No. 221a of 1975. This letter stated that belief systems are distinct from recognized religions. The religions acknowledged by the government include Islam, Catholicism, Protestantism, Hinduism, and Buddhism. Consequently, this Circular Letter served as the basis for all Civil Registration Offices in Indonesia to deny the registration of marriages conducted by adherents of belief systems.

The impact during that period extended beyond the psychological burden of practitioners feeling unrecognized; they were also excluded due to suspicions of being non-religious, which could easily lead to being labeled as atheist communists. During the New Order era, such labels carried significant fear. These individuals faced challenges in securing decent employment, as the New Order government regarded them as “not environmentally clean.” As a result, they often struggled to obtain formal positions or work as civil servants. An elder of the Sundanese Wiwitan from Cigugur noted that he was able to become a government employee because he identified as Catholic, while others who were not religious—whether Catholic, Protestant, or Muslim—

were barred from civil service. During the New Order era, the absence of a religious affiliation on an identity card could pose serious complications.¹¹ This illustrates the experiences of followers of various belief systems.

Legal identity transcends mere formalities and administrative processes; it is deeply intertwined with the dynamics of power and authority within cultural and societal contexts. This awareness likely dates back to the recognition that law is invariably connected to politics and power. Yet, this connection is frequently overlooked or perceived as a given, resulting in a lack of the scrutiny it rightfully deserves.

The Author strives to approach legal identity with the seriousness it deserves by analyzing it conceptually. The premise is that legal identity is not merely formal and administrative; it represents something more significant. In fact, the Author views legal identity as the most visible manifestation of the law's role in restricting power, as articulated by Montesquieu. It serves as the frontline in legal endeavors aimed at limiting authority in order to uphold human dignity.

D. Defining legal identity: the character of legal identity

The Author tries to define the meaning of legal identity by reviewing several sources, both books and articles in international journals, that use legal identity as the title of their work or discuss legal identity in their writings. Several other authors have long used the term or concept of legal identity to indicate the legal status and relationship of an individual under the law. They also indicate that legal identity is inseparable from the social and cultural identities inherent to the individual.

Joseph Vining, a lawyer and academic, explains in his book “Legal Identity, the Coming of Age of Public Law” that legal identity is not something that an individual inherently possesses. It is the law that creates the legal identity for an individual. Similar to “legal standing” in a legal case, legal identity within a legal system explains an individual's legal status, including the rights they may have.¹²

¹¹ Interview on mid of October 2024, in Cigugur, Kuningan, West Java.

¹² Joseph Vining, *Legal identity: The Coming of Age of Public Law* (New Haven, CT: Yale University Press, 1979): 145.

Vining also normatively describes that the identity created by law (legal identity) should take into account the collective identity that makes an individual a person.¹³ The legal identity constructed by law must also ensure that individuals with a legal identity are recognized as unique persons who are not merely the same before the law. Vining observes that equality before the law does not imply equivalency. Each individual has a unique identity that is distinct and different from one another. Therefore, having equality means being equally guaranteed to be different and unique individuals.¹⁴

For Vining, legal identity is not merely an identity established by the positive law of the state, but one that also considers the social identity encompassing various collective identities of an individual. Legal identity is not solely administrative and neutral, which could make a person the same as others without individual uniqueness before the law. Having a legal identity does not mean eliminating the uniqueness of each individual. Being equal before the law means that whatever collective identity an individual has, that individual receives equivalent treatment under the law.

Some scholars after Vining examined legal identity in a more concrete (or casuistic) manner in relation to the cases they studied. Saito conducted a historical legal study on legal identity in the United States concerning the presence of Asian individuals. He found that the legal identity distinguishing Asians as foreigners from white individuals reflected a social reality in the United States in the 19th century. Such legal identities are found in the Naturalization Act and the Act to Protect Free White Labor Against Competition with Chinese Coolie Labor in the 19th century, or in the case of *Plessy v. Ferguson*, 1896. In this paper, Saito views legal identity more as a sociocultural product that was subsequently adopted by state law, including the registration of identity in official state documents.¹⁵

Scott, Tehranian, and Mathias conducted a study on the practice of identification or “state naming practice” in the United States. The legal identity referred to by them consists of a name and other details that can explain a person’s existence because it is recorded in a state registry. This

13 Ibid, 147.

14 Ibid, 168.

15 Natsu Taylor Saito, “Model Minority, Yellow Peril: Function of Foreignness in the Construction of Asian American Legal Identity,” *Asian Law Journal* 4, No. 1 (1997): 71.

registration is carried out with a uniform standard of administrative techniques across various regions of the relevant country. For them, legal identity cannot be separated from the effort of registration within state administration. In their study, legal identity is related to the state's objective of localizing an individual.¹⁶

In another study, Sharafi attempts to examine the role of advocates and judges (legal professionals) in shaping the identities of colonized individuals in the context of colonial law.¹⁷ Thus, legal identity is not an identity formed or constructed by state law, but rather how judges and advocates perceive the identities of the colonized, and how these perceptions contribute to shaping the identities of those under colonial rule. These legal professionals, referred to by Sharafi as "intellectuals," play a role in shaping the identities of the colonized individuals.¹⁸

In line with Saito, Scott-Tehrani-Mathias, and Sharafi, Gad Barzilai also sees legal identity as one shaped by law. However, Barzilai goes on to explain more broadly about legal identity that cannot be separated from the identity politics that develop within a State. Barzilai's exposition on legal identity is found in his socio-legal work, a book that received an award from the Association of Israel Studies. The book titled *Communities and Law, Politics and Cultures of Legal Identity* is the result of Barzilai's research on legal identity in Israel.¹⁹

Barzilai does not specifically discuss or reflect on the definition of legal identity like Vining, who elaborates on the normative meaning of legal identity. However, he extensively explains political culture, political dominance, and the legal system, which are closely related to the formation of identity in the public space of the state. This discussion serves as the backdrop for Barzilai to reflect on the legal identity present in the state of Israel. He reflects on the tension among various groups in the country with different identities, such as

16 James C. Scott, John Tehrani, and Jeremy Mathias, "The Production of Legal Identities Proper to States: The Case of Permanent Family Surname," *Comparative Studies in Society and History* 44, No. 1 (January 2002): 4-44.

17 We are reminded of how during the Dutch East Indies period, society was divided into Europeans, Foreign Orientals, and Indigenous people by the laws that were in effect at that time.

18 Mitra Sharafi, "A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire," *Law & Social Inquiry* 32, No. 4 (Fall 2007): 1059-1094.

19 Gad Barzilai, *Communities and Law: Politics and Cultures of Legal Identities* (Ann Arbor: University of Michigan Press, 2005).

the Orthodox Jewish community and the Arab-Palestinian community, which have distinct legal identities due to the existing political culture and are also affirmed by the legal construction of their identities carried out by the state of Israel.

According to Barzilai, the legal identity that differentiates one group from another within the state of Israel begins when the state operationalizes the political dictum by defining who the citizens of Israel are.²⁰ Two Laws define citizenship i.e. the Law of Return year 1950 and the Citizenship Law year 1952 and the Security Service Law year 1986²¹ which also serves as the operationalization of the Israeli state's dictum, giving ultra-Orthodox Jewish groups a better position compared to Arab-Palestinians.²²

The legal identity cannot be separated from the identity politics practiced by a state. The dominance of the political and cultural politics of a nation is reflected in the formation of its citizens' identities. Thus, by examining the experience of Israel, Barzilai observes that legal identity is not merely a neutral administrative issue, but it also reflects a political culture and the dominance of certain groups.²³

From the presentation by Vining, Saito, Scott-Tehrani-Mathias, Gad Barzilai, and Sharafi, several characteristics of legal identity can be identified. The first is the normative character. There are two meanings of the normative character that legal identity possesses. The first is that legal identity is constructed or shaped by the positive law of the State (Vining, Saito, Scott-Tehrani-Mathias, Gad Barzilai, and Sharafi). Therefore, legal identity has a legal basis within positive law. The positive law the Author found always refers to the law of the State or entities of state authority (sovereignty), such as law enforcement officials, including jurists or lawyers who are also part of law enforcement.

²⁰ Ibid., 60.

²¹ With these two laws, people from Jewish group, even if born outside of Israel and without relatives there, automatically become citizens, while Arab-Palestinians cannot return to the Green Line, which has been territory since 1948, and citizenship status for Arab-Palestinians can only be granted to those who lived there until the end of the 1948 war.

²² Barzilai, *Communities and Law*, 62.

²³ The inclusion of nationality on Israeli ID cards, which has been amended since April 2002 because the Ministry of Interior established that the nationality field should remain blank, indicates that filling out this field on identity cards is not merely an administrative issue, but also an ideological one, as it enables the distinction between Jewish people and Palestinian Arabs.

The second is that this normative character also expresses “the ought” or the ideal (expectation) of having a legal identity. Vining (1978) mentions one of those ideal expectations, which is that the legal identity formed or constructed by state law must take into account the uniqueness of the individuals who are citizens. This second meaning determines the substantive aspect of legal identity. Legal identity indeed concretely provides an individual’s status of “equality before the law,” but “being the same” (formal) does not mean eliminating the uniqueness possessed by each individual due to the collective identity shared with others in their community. Therefore, legal identity does not intend to homogenize individual uniqueness. On the other hand, legal identity also cannot discriminate against individuals because of the collective identity they possess or share with their community.

The other character or the third character is the empirical character. This character illustrates how legal identity exists in real life. Legal identity is indeed formed by law, but this law is a living and evolving law in the real daily life of an individual within society.²⁴ Therefore, legal identity is also a product of the dynamics of the political process in public spaces. The formation of law by legislators or judges does not render the law purely a normative and neutral matter but imbues it with social and political context so that legal identity reflects those social and political dynamics. In this empirical character, we also find that legal identity turns out to be a tool for dominant groups to exercise and disseminate their power through everyday state practices, such as the state’s administrative identity formation practice (“state naming practice”).

The legal identity described by the scholars in the field of law (Vining, Saito, Scott-Tehrani-Mathias, Scafidi, Gad Barzilai, and Sharafi) presents a depiction of legal identity that is greatly influenced by the social, cultural, and political dynamics of society. This depiction provides additional clarification regarding the term legal identity as utilized by the World Bank, Asian Development Bank, and the Commission on Legal Empowerment for the

24 The empirical character of legal identity can also be found in Vining’s thought. When Vining talks about “shared identity,” he refers to a legal identity that should accommodate the cultural identities experienced by individuals. Influenced by communitarian thought, Vining has a very tangible view of the law. When I say that he speaks normatively, I mean that he discusses the expectations of what could and should be good about a law that constructs legal identity.

Poor, as well as the concept of formalization by De Soto.

Thus, legal identity has a meaning that is broader than merely administrative significance. Legal identity is not only formal and neutral, but can also be political. Therefore, legal identity is not just associated with authentic identity documents that serve as criteria for an individual to access services and/or protection guarantees provided by the state, but also as a political construction by the state towards its citizens in the context of differentiation politics. Legal identity is not neutral from political interests.

The non-neutrality of the legal identity in political interests shows that identities in the public space of the state are presented after passing through selection by the dominant groups that control the state. Identities that do not meet the criteria of the dominant group in the public space are not recognized and cannot be displayed in public. Legal identity is the social identity in the public space that is acceptable or deemed acceptable by the ruling group, legitimized by the prevailing laws. For instance, as described by Barzilai regarding “who is a patriot” in the state of Israel. In Barzilai’s presentation, it is shown that the selection is legitimized by law and the legal identity it produces. Laws and the activities of legal enforcement, which are administrative in nature, reveal and legitimize the dominant power operating in the real world.²⁵

To summarize the explanation of legal identity, the Author will present the definition of legal identity. Legal identity is the identity in the public space of the state established based on biological characteristics, psychological traits, and the socio-cultural attributes of an individual using the positive law of the state, thus legal identity has a normative character. On the other hand, legal identity, which is part of positive legal rules, cannot be separated from political dynamics because its formation is heavily influenced by existing power relations.

E. Three elements of legal identity

There are three elements of legal identity that the Author found. The first is social identity, which can also be seen as a cultural element. Identity is

²⁵ Barzilai, *Communities and Law*, 59.

always social because it is discovered, shaped, and shared in a community.²⁶ Vining found that shared identity becomes an element that fills legal identity and makes it not merely formal but also shapes the uniqueness within each individual standing equally before the law. In the works of Saito, Scott-Tehrani-Mathias, Scafidi, Gad Barzilai, and Sharafi, the Author found elements of identity in the legal identity they discuss. In Zwart's writing, this element is found as an existing identity that is accommodated by the state and established as a legal identity.²⁷

Identity is a set of markers attached to individuals. The forms of these markers vary depending on each actor in every situation. When together with other individuals, they may differ.²⁸ Identity is a form of self-awareness that perceives oneself in coexistence with others. This is the meaning of an individual's existence. Calhoun, as cited by Castells,²⁹ states that identity is a source of meaning and life experiences for a person. In line with this, Charles Taylor defines identity as knowledge of the individual self.³⁰ Identity indicates where a person stands and what community they feel they are a part of. Thus, an individual has meaning and feels valued. Identity is defined by their commitment to the self-identification they have chosen. That commitment is a commitment to something they value as significant and meaningful. Therefore, identity provides a horizon for an individual to behave from one event to another.

Giddens³¹ views identity as produced and maintained in reflexive individual activities. Reflexive means that these activities are interpreted by referring back to the self of the social actor. Reflexivity indicates a relationship that allows an individual to become aware of a social relationship they are experiencing. Reflective activities enable individuals to have meaningful self-knowledge formed through interactions with others. Giddens asserts that the formation of identity involves not only reflexive behavior but also the

26 Richard Jenkins, *Social Identity* (Routledge, 2014), 16.

27 Frank de Zwart, *Targeted policy in multicultural societies: accommodation, denial, and replacement, Open Forum* (UNESCO – Blackwell Publishing, 2005): 153 – 164.

28 Alex Mucchielli, *L'identité, que sais-je?* (Paris: Presses Universitaires de France, 2009), 12.

29 Manuels Castells, *The Power of Identity* (Malden, MA: Blackwell Publishing, 2004) 6.

30 Charles Taylor, *Sources of the Self, the Making of modern Identity* (Harvard University Press, 1989), 27.

31 Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford, CA: Stanford University Press, 1991), 53.

self-concept that relates to the existence of others. This means that a person exists because they are with others (*esse es coesse*³²).

We cannot imagine an individual or a group of individuals without an identity. Identity is always tied to the existence of an individual because it is formed through human experiences that occur within groups or communities. Therefore, the public space, as a forum for individual interaction, is populated by a variety of identities. Various individuals and groups with different identities come together in public spaces. The multitude of identities in public spaces allows an individual to choose the identity they desire.

Man, as multi-identical and autonomous beings, can choose and possess diverse identities. However, it is not only about choosing; often, identities are imposed by entities outside of the individual. For instance, when we talk about a collective identity. A person's identity is also shaped by their cultural group identity. Language, value systems including morality, and traditional customs are acquired by an individual within their collectivity alongside their self-identity. They recognize themselves within a community, and conversely, they understand their community when they can identify themselves. Thus, an individual can possess an identity as long as they are in relation with others, and as long as they have connections to their culture. Personal identity and collective identity form the unity and entirety of an individual's identity. Individuals are capable of making choices and are also influenced by their surrounding environment.³³

A state is a social entity, just like other social entities such as social groups³⁴ that serve as the domain of communal life for an individual. A country can choose the identity that will be adopted as a common identity in its public space. This choice is based on the ideology or values upheld by the respective country. However, in the public space, it is not only the country that can shape identity. There are groups of individuals (not just one group) aside from the country that form identities in the public space. These groups, including the country, compete with each other. There is tension among them. However, because the country possesses legal legitimacy, the identity formed by the

32 The Latin expression meaning "to be means to be together."

33 Natalie Heinich, "*Ce que n'est pas l'identité*," *Le Débat* (Paris: Gallimard, 2018), 59.

34 Engin F. Isin, Patricia K. Wood, *Citizenship and Identity* (London: Sage, 1999), 26.

country is valid to be referred to as a legal identity.

The second element is Legality. Legality can be viewed as the legal element (in the positivistic sense) of legal identity. This element places identity within the framework of the state's legal system, thus transforming identity into legal identity, rather than merely a social identity. An identity that becomes a legal identity means that it is established by the state's positive law and has legal implications involving procedures, forms of accountability, sanctions, and formal institutions.

Legality is simply understood as lawfulness by virtue of conformity to a legal statute.³⁵ However, the understanding of legality then evolves to encompass not only conformity to formal rules but also to substantive ones. We can find the term substantive legality in addition to legality, which is typically understood as formal legality. Legality, as an element of legal identity, is understood as a whole in both formal and substantive senses. This gives legal identity a normative character.

Barzilai discusses legality as part of legal identity. He addresses it in conjunction with culture and political dominance. Such discussions are also found in the discourse conducted by Schmitt. He does not want to separate legality from legitimacy, particularly political legitimacy. Barzilai defines legality as: A deontological procedure that arises from diverse dispositions regarding what should and should not be done, which are composed and articulated by the dominant group.³⁶ As such, legality is first understood as procedural compliance regarding what must be done and what must not be done – he expresses this in terms of “good and evil.” The measures used to determine legality are also defined by the majority. Thus, it is clear how Barzilai links legality to culture and the political dominance that influences the criteria of legality.

Barzilai's view on the political nature of legality does not cause him to dismiss individual autonomy, which can assess the influence of dominant politics on legality. He observes that procedural legality can be examined from two perspectives. The first is the liberal perspective, which views the

35 Carl Schmitt, *Legality and Legitimacy*, transl. Jeffrey Seitzer (Durham, NC: Duke University Press, 2004), 27–36).

36 Barzilai, *Communities and Law*, 17.

individual as the subject of their own life and assumes full autonomy in an individual's life. The state is seen as a social contract entity formed by the will of many, which naturally assumes individual freedom. The state is viewed as a manifestation of the people's will to organize their lives within the public space of the nation.

The second perspective is the elitist perspective. The elites see that certain elite groups dominate the state and create a specific political culture. The dominant groups produce concepts of legality in the public sphere. These two perspectives allow Barzilai to analyze in a participatory and emancipatory manner the relationship between legality, influenced by dominant political interests, and the non-ruling community as a minority group.

From the definition proposed by Barzilai, we see a form of legality that is not just formal but also substantive. In Schmitt's exposition, we find legitimacy that actually refers to the legal foundation in a sociological and political context. This tends to be more substantive compared to written law. Meanwhile, in Barzilai's exposition, we see his definition of legality which already implies that substantive aspect, further incorporating his perspective that seeks to address overly procedural legality. Through his liberal perspective, Barzilai attempts to provide space to interpret legality not only in procedural and formal terms but also as substantive, supporting minority rights and the rules that exist in their daily lives (the rule of a non-ruling community).

What is substantive legality actually? In simple terms, substantive legality can be defined as conformity with substantive law. Gunther Teubner defines substantive legal rules. He refers to it as substantive rational law, as law designed for specific purposes in concrete situations, which is more general and open, and at the same time more particular than the classical and formal understanding of law.³⁷

Thus, substantive law is a set of rules that goes beyond formal and procedural regulations. The law from communities that do not govern or dominate (or the rule of a non-ruling community), as expressed by Barzilai, can serve as a source for that substantive law.³⁸ The actual social and political

37 Gunther Teubner, "Substantive and Reflexive Elements in Modern Law," *Law and Society Review* 17, No. 2 (1983): 239–285.

38 The text contained in positive law is not a perfect medium for providing such rich and dynamic meaning. Therefore, interpretations that go beyond the text and reach the principles inherent in

context can guide the interpretation of rules that were indeed designed from the outset as substantive rules. Therefore, we can interpret substantive legality as the alignment of human behavior with rational law that is substantive in nature. Substantive legality assesses something as legal by considering the context, which is not limited to the formal and procedural criteria already established by the state but also refers to the social norms that exist within the community.

Legality as an element of legal identity has two meanings, which are formal and substantive. The formal meaning indicates that the identity that becomes the legal identity is established and regulated in legislation that can be compared to the regulatory objects of other legislations. The legal identity of a state exists within the positive law of that state, which serves as a benchmark for certainty in establishing, guaranteeing, and protecting a person's legal identity. It constructs the identity of citizens. In this context, legal identity becomes the subject of regulation for certain legislations and serves as a guarantee for legal certainty concerning the legal identity of each citizen.³⁹

The substantive legality makes legal identity not merely a formal matter. Legal identity is contextual. It can be used as a "tool" to improve the position of an individual or a group of people. Therefore, advocating for individuals or groups whose identities are marginalized or alienated within the framework of legal identity means interpreting legal identity holistically, using an understanding of legality that is both formally procedural and substantive. Interpreting legal identity substantively allows us to see that legal identity carries a sociological value (there is a social context), anthropological-psychological value (individual personal value), and political value (power relations), both in its formation through state law and in its implementation at the bureaucratic level of the state.

The third element is the registration element. This element is administrative in nature. Registration forms the identity that has been chosen

a norm are greatly needed. See Trina Jones, "Shades of Brown: The Law of Skin Color," *Duke Law Journal* 49, No. 6 (2000): 1487.

39 The meaning of legal elements or legality for legal identity also indicates that the legal identity regulated in the positive laws of the country is inherent to the legal subject. Thus, the legal identity conveys the existence of a legal subject within the entire legal system.

by the state to identify⁴⁰ and authenticate⁴¹ individuals, legally documented within the national administrative system.⁴² The most important activity in registration is recording. What was originally spoken in oral language then becomes documented in written language through registration. Registration emerged alongside the development of modern state administrative systems in the 14th to 16th centuries in Italy, Central Europe, and Western Europe.⁴³ Over time, registration has become an inseparable part of modern state administration activities. Registration has become part of the bureaucratic history at the beginning of modern European history, which pertains to the practice of authentication and identification.⁴⁴

Authentication and identification have evolved from such simple evidence⁴⁵ tools to modern ones like electronic identity cards and biometric identification. The authentication and identification processes are usually carried out in the context of entitlement. An individual who has been identified and authenticated as a citizen has the entitlement to possess, fulfill, and guarantee their rights as a citizen. Therefore, registration becomes an essential part of granting, fulfilling, and ensuring citizens' rights.

Simon Szreter states that without a legally approved, safe, and accessible capacity to prove a person's identity, political rhetoric about human rights, and academic discourse regarding rights, functions, and capabilities advocated by the Senate remain, at the very least, a set of ideals and hopes for the unknown poor people around the world.⁴⁶ He points to registration as a system that practically, securely, and legally provides the capacity or enables an individual to prove their identity. Such a system, namely registration, can ground and

40 Identification is the activity of indicating and classifying someone as a recognized legal subject.

41 In contrast to identification, authentication is an activity by the authority that certifies whether a citizen (of a country) is entitled to the services and guarantees provided by that authority.

42 The difference between identification and authentication is well explained by David Lyon and Colin J. Bennett, "Playing the ID Card: Understanding the Significance of Identity Card Systems," in *Playing the Identity Card: Surveillance, Security, and Identification in Global Perspective*, eds. Colin J. Bennett and David Lyon (London: Routledge, 2008), 3–20.

43 Valentin Groebner, "Describing the Person, Reading the Signs in Late Medieval and Renaissance Europe: Identity Papers, Vested Figures, and the Limits of Identification, 1400–1600," in *Documenting Individual Identity: The Development of State Practices in the Modern World*, eds. Jane Caplan and John Torpey (Princeton, NJ: Princeton University Press, 2001), 13–27.

44 Ibid, 5.

45 Ibid, 16.

46 Simon Szreter, "The Right of Registration: Development, Identity Registration, and Social Security," *Historical Perspective World Development* 35, No. 1 (2007): 67–86.

operationalize the ideas and aspirations of human rights protection that aim to empower the poor. The United Nations also shares the view that registration ensures the fulfillment of individuals' human rights to have social status and access benefits as citizens.

Szreter's statement is based on his historical study of registration practices that have been implemented in England for a long time, since the 16th century. According to him, there is a significant correlation between the regularity of registration and improvements in economic well-being (equitable distribution of economic outcomes). During that century, England underwent a remarkable industrialization process that caused changes in the structure of society. Mapping and registration of the population helped the relevant parties to plan economic activities. Therefore, it is well understood when CLEP and other international donors view registration as vital in discussions regarding legal identity. Legal identity, which indeed emphasizes the meaning of written identity documents, presupposes well-organized and accurate registration.

Registration thus becomes such an operational element of legal identity. Registration allows information about an individual's identity to be recorded and documented. Thus, registration, as a system for recording identities, provides information that is then presented in legal identity documents that are useful for identifying and authenticating an individual. With this identification and authentication, a person who has a certain status related to their presence within a country's territory has the right to enjoy specific services and guarantees provided by the State. In other words, a valid and authentic identity within the legal system of the State is made possible through established registration activities and processes.

There are two types of registrations that are very relevant to the existence of legal identity. The first is population registration, which relates to the data collection and recording of individual identities as residents of a specific country. Andrea Geselle observes that population registration is closely tied to efforts to control the movement of people from one region to another within the country. This activity is not separate from the country's immigration policies.⁴⁷ The second is civil registration, which documents important events

47 Andrea Gaselle, "Domenica Saba Takes to the Road: Origins and Development of a Modern Passport System in Lombardy-Veneto," in *Documenting Individual Identity: The Development of*

in a person's life. It records and documents significant occurrences experienced by an individual, from birth to death, including marriage, divorce, changes in nationality, and others. Civil records are useful in capturing an individual's civil status.⁴⁸ Gérard Noiriel notes that in the 19th century, civil registration was related to one of the military obligations that an individual had to fulfill. The existence of marriage, evidenced by a marriage certificate, can be a reason for someone to refuse this military obligation.⁴⁹ A person's marital status can be grounds for refusing military service. Therefore, knowing an individual's civil status is important.

The two types of registration result in different recording documents. Population records, for example, produce a residence permit or identity card, such as the Resident Identity Card (KTP) in Indonesia. Civil registration generates civil documents such as birth certificates and marriage certificates. Sometimes the presence of one document from one type of registration is a requirement for obtaining or issuing a document from another type of record. For instance, the KTP is an administrative requirement for the issuance of a marriage certificate in Indonesia.

Regarding social identity that is recorded, the registration of an individual's social identity for legal identity purposes cannot be conducted on any identity that may pose a threat to someone's human rights (which also implies a threat to the legitimacy of that legal identity, especially the substantive aspects). Registration of identities that may violate an individual's human rights cannot be justified. For example, the registration of a person's ethnicity or religion that then is presented in legal identity documents as information about a person in a society vulnerable to social conflicts based on that identity, or the occurrence of discrimination against groups with that identity. This serves as an example that not every identity of an individual can be recorded and included in legal identity documents.⁵⁰ This inclusion may

State Practices in the Modern World, ed. Jane Caplan and John Torpey (Princeton, NJ: Princeton University Press, 2001), 199–217.

48 *Handbook on Training in Civil Registration and Vital Statistics System* (New York: United Nation, 2002).

49 Gérard Noiriel, "The Identification of the Citizen: The Birth of Republican Civil Status in France," in *Documenting Individual Identity: The Development of State Practices in the Modern World*, ed. Jane Caplan and John Torpey (Princeton, NJ: Princeton University Press, 2001), 28–27.

50 Timothy Longman, "Identity Cards, Ethnic Self-Perception, and Genocide in Rwanda," in *Documenting Individual Identity: The Development of State Practices in the Modern World*, ed.

There are limitations in the field of record-keeping in the context of protecting an individual's human rights. The United Nations emphasizes the importance of maintaining the confidentiality of vital registration records.⁵² Confidentiality is necessary to protect the individual's privacy. Privacy is a right that should be upheld and fulfilled by the State. This aligns with the provisions in Article 17 of the International Covenant on Civil and Political Rights (ICCPR).⁵³ Furthermore, the United Nations states that registration, in this case within the civil registration system, aims to be an effective tool for safeguarding and protecting a person's human rights and ensuring that individuals can enjoy the services and guarantees provided by the State. Even in the Population Administration Law, which regulates civil registration in the Republic of Indonesia, data confidentiality in order to maintain an individual's privacy is established as a separate article. This indicates that registration, although an administrative activity, still considers substantive matters such as the protection of an individual's human rights.

Is there a specific provision that protects religion as a social identity from being recorded in the process of legal identity registration? General Comments No. 22, which further explains Article 18 of the ICCPR, states in explanation No. 2 that "Article 18 protects theistic, non-theistic, and atheistic beliefs, as well as the right not to adhere to any religion or belief."⁵⁴ This means that every individual is free not to declare their religion in the context of respecting freedom of religion and belief. Thus, identifying a person based on religious or belief criteria should not be conducted by the state, as an individual's acknowledgment of their religion or belief cannot be coerced or required by the state for various reasons, including administrative reasons for legal identity registration.

Special provisions that protect the ethnicity or racial character of an individual can be found in the International Convention on the Elimination of All Forms of Racial Discrimination. The convention prevents any form of discrimination against individuals based on race or ethnicity, except in the

52 *Handbook on Training in Civil Registration and Vital Statistics System*, 36.

53 **Undang-Undang R.I., No. 12 Tahun 2005 tentang Pengesahan International Covenant on Civil and Political Rights, L.N.R.I. 2005/No. 119; International Covenant on Civil and Political Rights (ICCPR) Article 17**

54 *Ibid.*, Article 18

context of advocating for the equal status of certain races or ethnic groups, such as in the case of affirmative action. However, this must be done cautiously to avoid creating discrimination or segregation within society.⁵⁵

We can conclude that registration, as an administrative element of legal identity, cannot be used by the State to compel an individual to acknowledge their religion and beliefs for reasons that appear so neutral and apolitical. On the contrary, registration, in order to respect an individual's privacy and human rights, should avoid recording identity categories that require a person to acknowledge their identity due to an affiliation with something protected by norms, such as a person's acknowledgment of their faith or beliefs, whether they adhere to them or not.

The identity, which is an element of culture in legal identity, legality as an element of the law of legal identity, and registration as an administrative element of legal identity, form a complete legal identity. Together, they make legal identity not merely a cultural element without legal implications, but a legal construction enacted by the state concerning individuals, with legal implications that follow and manifest in the form of written documents for the purpose of identifying and authenticating an individual. Through the identification and authentication of an individual via legal identity, the state can provide protection, services, and fulfillment of an individual's rights regarding their needs for public services and facilities provided by the state.

F. Conclusion

The research the Author conducted on legal identity terms and concepts reveals the characteristics and elements of legal identity. These characteristics and elements make legal identity not just a formal and technical administrative concept referring to identity documents issued by the State. The term legal identity also reflects the relationship between individuals, society, and the State. In legal identity, as manifested in population documents and civil records concerning significant life events, we primarily see how the State has a vested interest in its citizens. However, we can also observe how citizens respond to the identity constructs made by the State and how they present

⁵⁵ Undang-Undang R.I., No. 29 Tahun 1999 tentang Pengesahan International Convention on the Elimination of All Forms of Racial Discrimination, L.N.R.I. 1999/No. 83, Pasal 1 Ayat (4).

themselves with the identity that has been constructed by the State. Therefore, legal identity is not merely an administrative term that can be considered neutral and value-free. Legal identity should indeed be understood within the context of State power that operates over the individuals who are its citizens.

Legal identity, therefore, is not only formally, administratively, and neutrally meaningful, but it also carries political significance. It is a political product that encompasses various interests and reflects the interests of certain dominant groups. However, it also possesses a normative character that can be imbued with specific ideas, much like the law itself. For example, the idea of the common good. Thus, it is very possible that legal identity can become a tool used to access the common good. However, focusing solely on the administrative and formal aspects of legal identity would lead to a misunderstanding of its true nature. Therefore, understanding legal identity in its broad and deep dimensions is essential to further optimize our understanding of legal identity and the access it provides to public services and facilities offered by the State.

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