

## Introduction: allegiance and identity in a globalised world

FIONA JENKINS, MARK NOLAN AND KIM RUBENSTEIN

### 1. Introduction

Interrogating the concepts of allegiance and identity in a globalised world involves challenging long-standing attempts to describe, recognise and regulate membership, connection and participation within and beyond the nation-state. On the one hand, concepts of allegiance and identity can be used quite simplistically to define a singular national identity and common connection to a nation-state. Yet, on the other hand, allegiance and identity are notions that can help us understand the capacity for nation-states, and members of nation-states, to maintain diversity, and to build allegiance with others outside of the border. For example, in forging transnational entities that share norms, values, laws and social practices transcending singular national concerns, the sphere of national identity and allegiance becomes far more complex than traditional figures of commitment and belonging can encompass. Indeed, understanding how allegiance and identity are being reconfigured helps us understand diversity and social (dis)harmony within and beyond nation-states.

Controversies surrounding allegiance and identity are both similar and different for domestic public lawyers and international lawyers. While each of these legal perspectives, the domestic and the international, involve viewing the nation-state as fundamental to concepts of allegiance and identity, they also see the world slightly differently, depending upon the frame of public law or international law. Indeed, scholars contributing to this volume, in addition to thinking from both the public law and international law vantage, have used multiple disciplinary perspectives to examine allegiance and identity in a range of socio-legal contexts. Some have examined the tensions created by the legal description, recognition and regulation of national (public law) citizenship or nationality, regional identity and

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constitutional identity. A central set of questions here is the extent to which law can and should help constitute identity as a basis for engendering a form of allegiance that includes identity to the polity. Other contributors have sought to understand indigenous identity and customary law in contrast to the identity and laws of a dominant public law culture co-existing with the indigenous peoples. Moving to the international framing, others expose the contemporary realities and emerging challenges of temporary or permanent, forced or voluntary migration, including asylum seeking. The intersection between security concerns, principally counter-terrorism law, and migration and citizenship claims is also investigated within this volume and, as explained further below, is an interesting site for the intersection of public and international law. Further, important questions of allegiance and identity can also be examined by asking questions about the nature of the resultant social inclusion or exclusion facilitated by legal regimes and national, regional or international policy-making. Finally, the international law and transnational law dimensions highlight the impact of globalisation on an individual's sense of membership beyond the nation-state that illuminates further the intersections between the public and international.

Indeed, this book is the fourth in a series connecting public and international law.<sup>1</sup> As a volume in this series, it continues to highlight how domestic public law and international law intersect; together with suggesting how disciplines other than law are relevant for the public or international lawyer who seeks an understanding of allegiance and identity in a globalised world. The intersection is particularly rich within this theme because of the capacity to reflect on the place of the individual within and beyond the nation-state. This happens in a domestic public law sense by thinking about how the state regulates the formal status of individuals and their membership within the nation-state, and indeed beyond it extra-territorially. Further, within international law, we see the multiple ways international law has dealt and engaged with the national in an international framework, shedding further light on the tensions (highlighted in the first three volumes) that can occur when these disciplines within law collide.

<sup>1</sup> The first three volumes are Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, 2009), Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds.), *Access to Essential Medicines: Public Health and International Law* (Cambridge University Press, 2010), and Brad Jessup and Kim Rubenstein (eds.), *Environmental Discourses in International and Public Law* (Cambridge University Press, 2012).

## 2. Allegiance and identity

Allegiance and identity are related concepts and some may suggest that all allegiance is a simple consequence of embracing a single, valued identity. However true that may be, much definitional and conceptual complexity surrounds each concept so we begin by discussing how these concepts are understood before highlighting the particular ways in which both allegiance and identity are discussed by contributors to this volume who have utilised a range of disciplines to provide conceptual clarity.

For many politicians, policy-makers and social commentators, the goal of social inclusion, harmony, security and national or international peace and well-being may well be thought to flow simply from encouraging the 'right' form of identification, from which the 'right' form of allegiance and related behaviour flows. Perhaps the 'right' form of both identity and allegiance is thought to be that which encourages majoritarian and democratic legal processes in pursuit of uniformity of identity and allegiance. However, diverse and globalised nations, states or regions, with histories that include both conflict and peace, or political stability and (revolutionary) regime change, should rarely be analysed in such simplistic ways. As Chryssochoou clearly comments in the European context: 'cultural homogeneity within national borders is no longer the reality for many European nations and ceases to constitute the basis of the national project of "living together"'.<sup>2</sup> In this vein scholars of politics, international relations, law, philosophy and social psychology should be affronted by a simplistic model suggesting that one true allegiance to complex entities flows from one central identity persisting over time. A more nuanced model of the relationship between allegiance and identity could conceive of both identity and allegiance in a number of ways. Some of the possibilities are sketched out further below.

### 2.1 Identity

One might consider that the least problematic, pure and non-coerced of identifications would be an identity which is freely chosen, and correlates with a psychologically-internalised self-description. Further, one might say

<sup>2</sup> Xenia Chryssochoou, 'Development, (Re)Construction, and Expression of Collective Identities' in Assad E. Azzi, Xenia Chryssochoou, Bert Klandermans and Bernd Simon (eds.), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Wiley-Blackwell, 2011), p. 5.

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that ideally the relevant socio-legal context would allow it to be politically possible to live the identity you wish, however complex an identity that may be, as it best suits your psychological or other needs. This may apply both to a personal identity (as 'me'), or a social identity (as one of 'us'). However, for many of the people entangled in the domestic and international legal regimes discussed in this volume, a true self-identification of this type is elusive if not impossible. This may be the case because a desired identity is constituted socially as a devalued, minority group status, the identification with which causes considerable tension if not personal and collective danger within the dominant political culture. Often in such circumstances, the legal and/or social identity actually described, recognised and regulated by law or politics is better thought of as an ascribed identity of some sort. In this case, a person or member of a social group has found it advantageous to adopt and live according to some form of socially-scripted identity which is bestowed upon them rather than being chosen enthusiastically by them for the purposes of self-definition.

The next set of conceptual problems worth noting relates to understandings of how identity and identification works over time and in response to complex situational demands, threats and social circumstances. Here we could ask the question: do we all possess just one identity or many? Does one identity remain the sole, complete, relevant and optimal way of describing our personal or social self over time? Is there anything wrong with admitting that in some situations our self-definition should emphasise only one or some of our identities or one or some aspects of our identity over others? Should a discussion of allegiance and identity in a globalised world and within domestic, regional and international legal regimes, admit that psychological, political, ethical, social or legal reasons may demand such selective emphasis in order to satisfy psychological need and the reality of self-expression under the demands of intergroup relations?

Many theorists, from social constructivists through to political psychologists, would see no problem with an assertion that there must be selective 'salience' or relevance of one or a few of our multiple and possible identities (and/or combinations of those identities) depending on context. This is a challenge to the idea that personal ('me') or social ('us') identities are unitary, of equal strength and relevance across time ('chronically-salient identities'), and are robust to threats and situational demands. However, identity theorists who prefer to think we construct our identities in response to historical and contemporary needs and demands do use models of identity salience which can explain the self-selection of different relevant

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identities from multiple possible identities according to social context,<sup>3</sup> rather than suggesting that behaviour is forever dictated by a very small number of chronically-salient identities.

Asking questions about the identity-based causes of allegiance in the context of diverse societies and entities (members of national states, regional political groupings and international organisations) seems to imply more complex and context-dependent understandings of personal and social identity. In order to understand the rich examples studied in this volume, a simpler model of identity and identification is unlikely to satisfy the analytical demands posed. Perhaps most importantly, in constitutional or legal disputes over memberships such as citizenship and residence, we should note that legal recognition of identity in a new land creates complex or hybrid forms of identification constituted by two or more social-level identities.<sup>4</sup> True examples of biculturalism are becoming a reality for the many generations who draw their sense of self from post-migration experience.<sup>5</sup> Sometimes referred to as dual or hybrid identities, these salient and contextually-relevant combinations of identities may remain psychologically important for a migrant granted citizenship, even when allegiance that is of a form indistinguishable from that of a citizen born in the shared country of residence is on display.

Many of the chapters in this volume could be said to be posing conceptual questions about how the simultaneous salience or importance of many identities (national, ethnic, religious, occupational etc.), and the inter-relationship between those social identities, contributes to expressions of allegiance, perceptions of belonging, reactions to social exclusion and feelings of injustice. For example, what are the simultaneously salient identities (or otherwise) of a citizen of Hong Kong or the EU when the superordinate polity (China or the EU) decides policy with a direct, and perhaps negative implication for the local identity (as a Hong Kong resident or, say, as a French national)? How does the nature of the identity or identities relevant in that context, in turn, shape resultant allegiance to one or more political

<sup>3</sup> Penelope Oakes, 'The Salience of Social Categories', in John C. Turner, Michael Hogg, Penelope Oakes, Steve Reicher and Margaret Wetherell (eds.), *Rediscovering the Social Group: A Self-categorization Theory* (Basil Blackwell, 1987), pp. 117–41.

<sup>4</sup> Mark Nolan and Kim Rubenstein, 'Citizenship and Identity in Diverse Societies', (2009) 15(1) *Humanities Research* 29–44.

<sup>5</sup> Shaun Wiley and Kay Deaux, 'The Bicultural Identity Performance of Immigrants', in Assad E. Azzi, Xenia Chrysoschoou, Bert Klandermans and Bernd Simon (eds.), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Wiley-Blackwell, 2011), pp. 49–68.

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groupings? Other identity controversies studied in this volume include how a second (perhaps simultaneously salient) identity or ethnic heritage is the source of potential suspicion if not exclusion from a country of birth or citizenship. Some chapters in this volume describe apparent denials of protection of citizens via effective consular support or the expected civil and political rights enjoyed by fellow citizens within a criminal justice system due to the shadow cast by additional identities and their consequent apparent allegiances. In this way, some authors contributing to this volume ask how identity-based status, religious or ideological relationships other than a particular citizenship or residence status arouse suspicion in the context of national security and counter-terrorism law including at the level of administrative decision-making relevant to character test assessments for visa determinations.

Perhaps it would be simpler if everyone were to put into practice<sup>6</sup> only one chronically-salient (national) identity in a simplistic world of homogenous nation-states. However, the range of identities and identity relationships actively lived by citizens, dual or multiple citizens, temporary and permanent migrants, refugees and asylum seekers, and indigenous peoples alike are much more complex than that. The reality of life with two or more passports, with relevant multiple, self-chosen and/or ascribed social identities, requires a more subtle analysis by the authors contributing to this volume. The concept of identity and identification, and the meta-theory demanded for analysis of such complex domestic and international legal controversies, require detailed attention in the contemporary world.

A survey of the chapters collected together in this volume highlights the various ways in which identity is conceptualised and discussed by the contributing authors. This also enables us to list the ways in which identity has been described and analysed in this volume. For example, identity has been invoked, described and analysed as *national identity* by many contributors. Balint discusses national identity in comparison with national cultural identity and military identity; Bessell does so alongside discussions of citizenship, alien identity and family identity; Jenkins invites us to consider the nature of 'thick' and 'thin' national identities in contrast to ethnic identities; Kneebone, as well as Ottonelli and Torresi, ask whether migrant workers need to share national identity; Platow, Grace and Smithson investigate contemporary perceptions of

<sup>6</sup> Steve Reicher, 'Putting Identity Into Practice', (2005) 3 *New Review of Social Psychology* 47–54.

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the prototypical Australian; and Thwaites examines the exclusory effects of identifying enemies of a purported national identity that is figured as a shared identification with liberal democracy.

Identities above the level of the nation-state (e.g. *regional and transnational identities*) are discussed in separate contributions from Breda and Jiménez Lobeira (the EU<sup>7</sup>), as well as from Marsden (the self-autonomous region of Hong Kong). A discussion of *racial, ethnic or cultural identities* is had by authors such as Lester, Kneebone and Zagor. This volume also includes analysis of *indigenous identities* within a conquering or colonising nation-state (Monson and Hoa'au as well as Wood and Weinman), with Wood and Weinman doubting the utility of the historic use of an undifferentiated 'pan-indigenous' identity. An identity which fits in this group, conceptually, could be a '*diasporan identity*' discussed by Neoh, Rothwell and Rubenstein.

A discussion of *legal notions of identity* in this volume spans both the use of domestic and international law to determine the content of recognised identities. For example, at the domestic level, this discussion includes an examination of ascribed constitutional identities including the identities of internal or external territorians within Australia (Arcioni) and of aliens (Jenkins; Bessell; Arcioni). The legal concept of a child's right to identity is described by Bessell. Breda questions the utility of constitutional demands to communal rights based on collective identity. Wood and Weinman highlight controversies surrounding legal proof of continuing identification in the context of native title disputes in a way similar to the history of identification relevant in claims made by child migrants (Bessell). Customary law notions of identity derived from land, place and cohabitation (Monson and Hoa'au; Wood and Weinman) are also discussed, as are identities recognised by legal regimes by issuing identity cards (Kneebone). Zagor is fascinated by whether domestic refugee status determination proceedings give self-narration autonomy to refugee applicants wishing to express their relevant identities.

At the international level, nationality as an identity determined by international legal principles is studied by Neoh, Rothwell and Rubenstein. How international law shapes identity is further examined by Shahabuddin who questions the international treaty law and practice helping to define identity

<sup>7</sup> See, also, related work by Ruud Koopmans and Paul Statham, 'Winners and Losers in the Europeanization of Public Policy Debates', in Assad E. Azzi, Xenia Chrysoschoou, Bert Klandermans and Bernd Simon (eds.), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Wiley-Blackwell, 2011), pp. 93–113.



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as a minority group. Similarly, Spiro investigates how international law relating to nationality helps shape the accepted national identity of Olympic athletes in a context of much doubt surrounding rather instrumental grants of citizenship to elite athletes. Gulati is also concerned about the limits of and distinct character of the international law notion of nationality, especially in comparison with the domestic legal notion of citizenship; and in more difficult cases of independent political communities and modern, globalised, technological relationships within cyberspace. Finally, Hoffmann analyses decisions of the International Criminal Tribunal for the Former Yugoslavia in order to expose how international humanitarian law and international criminal law has been using the concept of nationality to assist determinations of who is a protected person in the context of an ethnic conflict where ethnicity and nationality are not always completely separate identities.

The nature of identity-formation and its maintenance has also been described by authors in the following ways: as self-constructed and recreated identities versus imposed or ascribed or essentialised identities (e.g. Bessell; Wood and Weinman; Jenkins; Lester; Platow, Grace and Smithson); as denied identities (Wood and Weinman); in terms of a process of enacting or performing identity (Jenkins) or as a political role played out within the nation-state (including for groups advocating use of political violence: Golder and Michaelsen).

Finally, the consequences of identification are variously described as social inclusion, social exclusion (e.g. citizenship stripping provisions in the counter-terrorism context: Thwaites; Harris Rimmer) or the curious blend of these, being strangers inside (Jenkins) or suffering from marginalising racism (Platow, Grace and Smithson). At the international law level, citizenship identity is examined in terms of the diplomatic protection that may or may not be extended to Australian citizens who have other citizenships or identities which have complicated, quite controversially, decisions relating to consular assistance (e.g. Neoh, Rothwell and Rubenstein).

## 2.2 *Allegiance*

Contributors to this volume have used concepts of allegiance in a variety of senses. What unites discussion of allegiance, though, is that it is a social and political concept deriving from identity and sometimes doubted or qualified in an ad hoc or other fashion with implications for how identity is then viewed and tolerated.



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First, allegiance can be thought to derive from a legally constructed and ascribed national identity creating an *obligation*, usually a duty of obedience in exchange for protection. This is the way in which Arcioni describes a rather inconsistent constitutional history of recognition (or not) of the membership and allegiance of members of external Australian territories. Her analysis of how the courts have failed to acknowledge membership and allegiance to the Australian sovereign owed by Papua New Guineans contrasts starkly to other legal decisions confirming that allegiance is owed to the Australian sovereign by Norfolk Islanders as members of another external Australian territory. The flip side of allegiance as an obligation of the citizen is the expectation by the citizen that prior citizenship and allegiance entitles citizens to consular protection (Neoh, Rothwell and Rubenstein).

Arcioni also highlights how perceptions of allegiance possible from dual citizens reaches back to further qualify ascribed legal identity and membership resulting in social exclusion and limits on the political expression of allegiance and identity. Here, dual identity raises doubts about trustworthiness as members and the genuine nature of the allegiance expressed, resulting in the exclusion of those dual citizens who may wish to demonstrate their allegiance via being elected to public office. In Australia, the perceived allegiance of dual citizens prevents them from participating in Australian political life, as Australian constitutional law does not allow dual citizens to be elected to Federal Parliament.<sup>8</sup> This link between concerns over possibly ambiguous or divided loyalty and allegiance for dual citizens and ascribed legal identities as members with full constitutional rights of democratic participation, raises the empirical question of exactly how dual identity can relate to voluntary expressions of allegiance. This is not only important to study in the case of two simultaneously salient national identities (as in the case of dual citizenship) but perhaps also in the case of national identities existing alongside religious identities in complex blended identities (e.g. Muslim Australians).<sup>9</sup>

A similar form of (legal) suspicion surrounding multiple allegiance, perhaps derived from the existence of a complex multiple identity, can be

<sup>8</sup> Section 44(i) of the Australian Constitution.

<sup>9</sup> Nolan and Rubenstein, above n. 4; Maykel Verkuyten, 'Religious Identity and Socio-Political Participation: Muslim Minorities in Western Europe', in Assad E. Azzi, Xenia Chrysoschoou, Bert Klandermans and Bernd Simon (eds.), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Wiley-Blackwell, 2011), pp. 32–48.

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seen in the chapters relating to security and counter-terrorism concerns (e.g. Golder and Michaelsen; Harris Rimmer; Thwaites; see also the issue of multiple allegiances as natural as in Neoh, Rothwell and Rubenstein with the concept of humans as *zoon politikon* with natural unitary allegiances). What is interesting in these chapters is how legal tests have invited doubts over allegiance by raising suspicions about complex identities. Golder and Michaelsen utilise Foucauldian theory and concepts of true citizens versus ‘enemies within’ who break the original social contract, to suggest how quickly the link between positive perceptions about allegiance and citizenship status can be severed in the face of potential, though often indeterminate, fears about future terrorism threats beyond and within the nation-state.

Other examples of legally defined notions of allegiance owed to sovereigns or states included in this volume are the allegiance concepts inherent in the Basic Law defining the relationship between the Special Autonomous Region of Hong Kong and the sovereignty of mainland China (Marsden). Here the relevant concern is how realistic this legal specification of multiple allegiances may be in addition to legal or constitutional specification of an ascribed local identity.

Balint suggests that allegiance can flow from a shared cultural identity but may also exist as a form of institutional belonging allowing, in turn, adequate access to the goods of a political community.<sup>10</sup> Other contributors describe allegiance as an emotional and psychological ‘tie’ to a nation-state or group (e.g. Bessell; Ottonelli and Torresi), which is often of legal relevance in legal tests of ascribed legal identities. Some contributors describe such ties between (ethnic) identity and group as being regarded as ‘primordial’ in some sense (e.g. Shahabuddin).

Jenkins examines the relevance of and symbolic importance of citizenship pledges as an indicator of allegiance that is derived from granted or ascribed legal identities. However, she also highlights the controversy surrounding ways in which identity is enacted in order to satisfy societal demands (social scripts) for credibly demonstrating allegiance to that society. Her chapter suggests how attempts to enact identity may be judged as insufficient in the eyes of some fellow members, resulting in social exclusion or the creation of ‘strangers inside’ who are of doubtful allegiance or obedience or obligation

<sup>10</sup> See also Juliet R.H. Wakefield, Nick Hopkins, Clave Cockburn, Ka Man Shek, Alison Muirhead, Stephen Reicher and Wendy van Rijswijk, ‘The Impact of Adopting Ethnic or Civic Conceptions of National Belonging for Others Treatment’, (2011) 37 *Personality and Social Psychology Bulletin* 1599–610.