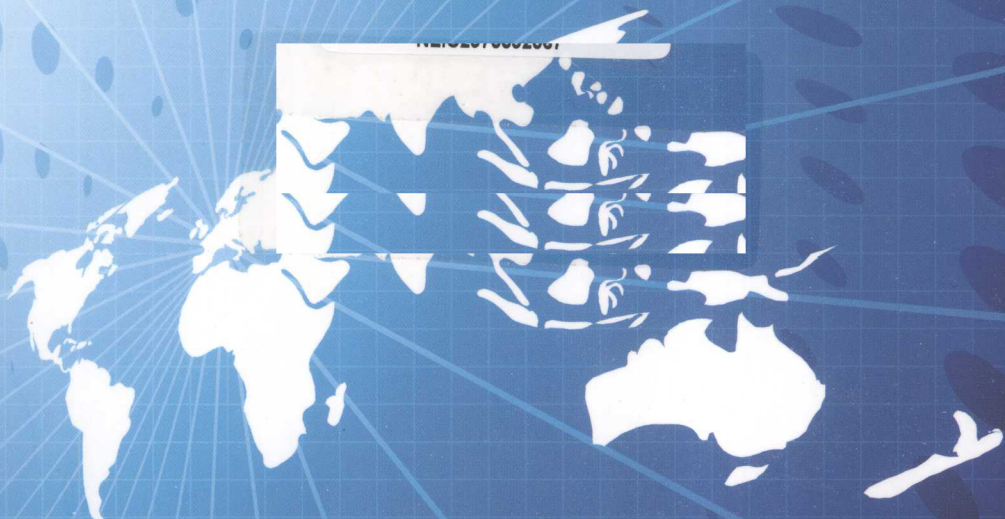


A Study on the Problems of  
Nationality in private International Law

# 国际私法中的 国籍问题研究

| 张庆元 著



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## 中文摘要

21 世纪以来,由于科学技术的发展和全球化运动的推进,人类社会已步入以硅、电脑、网络为基础的信息时代。国籍作为国际私法连结因素以及国际民事管辖权的根据,遭到前所未有的挑战。随着我国改革开放的深入,经济的快速发展,中国对外交往日益频繁。改革中国国际私法和制定新的国际私法的法律法规,迫在眉睫。其中,作为属人法重要的连结因素的国籍研究显得尤为重要。

国籍与国家相伴而生,但真正法律意义上的国籍是资产阶级民主制度的产物。从狭义上看,国籍专指自然人的国籍,是指自然人属于某一国家国民或公民的法律资格,其表明一个人与某一特定国家之间的固定的法律联系,是某一国家行使外交保护的法律依据。但是,国籍的概念早已有所突破,不仅包括自然人的国籍,也包括作为拟制人的法人的国籍,甚至还包括某些法律关系客体的国籍。也就是说,国籍是指自然人、法人、船舶、航空器及某些财产与某一特定国家间具有特定的法律关系时,依据国际法原则,该国国内法为行使管辖权赋予的法律关系。

国籍与公民籍、区域籍与全球籍等概念之间既有联系,也有区别。国籍主要强调某一个人隶属于某一特定国家的法律联系,关键在于法律权利、义务的设定;公民籍则侧重表达某一个人其政治权利的享有,而这两者在当今国籍法领域中已互为通用。区域籍、全球籍这两个概念的提出体现了各国学者对国籍在现代及今后区域化、全球化发展趋势下的思考。区域籍无论是在体系建构还是在立法实践上已具雏形,而全球籍则还处在理论设想阶段。无论如何,这两个概念的提出深化了我们对国籍制度的认识,丰富了国籍制度的本质内涵。

国籍在国际私法中具有重大意义。在法律适用领域里,不论是自然人还是法人,它们的国际民商事关系常适用属人法。传统属人法包括当事人本国法与当事人住所地法,这也是属人法的两大原则。因此,国籍成为国际民商事法律适用中的重要连结因素;在涉外民事案件的管辖权中,国籍是一个重要的管辖权依据,尤其在拉丁法系国家甚至被作为唯一或主要的国际民商事管辖权的根据;在法院判决的承认

与执行中,国籍是判断外国判决的一个重要的标准。同时,国籍在外国人民事法律地位、外国民事诉讼法律地位以及国际商事裁决中,都起到不可替代的作用。

国籍问题原则上属于每个国家主权的事项,各国有权以自己的法律决定谁是它的公民。不同的国家,甚至同一个国家在不同历史时期在制定其国籍法时所采取的原则和规则不尽相同,这样就导致国籍冲突现象的产生。自然人国籍冲突主要表现为两种情况,一是一个人拥有两个或两个以上国家的国籍;另一是一个人不具有任何国家的国籍。前者被称之为自然人国籍的积极冲突,后者被称之为自然人国籍的消极冲突。在国际私法上解决自然人国籍冲突存在两种不同的方法:一是实体法的方法,就是通过缔结国际条约,明确规定避免和消除多国籍和无国籍现象;二是冲突法的方法,即在多国籍、无国籍冲突无法实体解决的情况下,由法律确定究竟应当依据哪一个国籍为其国籍,以确定当事人的本国法。

在国际私法中,法人国籍的冲突是指一个法人同时具有两个或两个以上国家的国籍以及一个法人无任何国家国籍的状况。各国确立法人国籍的不同标准就成为法人国籍冲突产生的主要原因。概括起来,各国确立法人国籍的标准主要有以下几种:法人住所地说、法人注册地说、资本控制说和复合标准说。由于国际上并无确定法人国籍的统一标准,各国都是从本国的利益出发来确定法人的国籍,并且采取的标准并非一成不变,而是随着本国经济、政治环境和国际环境的改变而做出相应的变化。根据各国在处理案件时其案件本身是否涉及本国利益,对于法人国籍的积极冲突有两种不同的解决途径:如果受理该案的法院对该案的解决具有利害关系时,该国法院一般会确定对己有利的国家的法律作为其本国法;当法院地所在国对受理该案没有利害关系时的解决途径有主义近似说、时间先后说、惯常住所说和最密切联系说。

船舶国籍是指船舶所有人按照某一国家的船舶登记管理规范进行登记,取得该国签发的船舶国籍证书并悬挂该国国旗航行,从而使船舶隶属于登记国的一种法律上的身份。国际私法中船舶国籍冲突是指某一船舶所属国籍不确定或者没有所属国籍而造成的管辖混乱,或者在前后国籍转换法律规定不明确的情形下造成的法律适用的困难。对于船舶积极冲突解决,理应根据船舶与哪一国家有实际联系来决定,不可简单地按照先后顺序处理。对于船舶国籍消极冲突的解决,现代国际社会至今尚未找到最佳办法和途径,有待于更深入的研究和讨论。

属人法是国际私法中的特有概念,是以涉外民商事法律关系当事人国籍、住所等为连结点,并用来解决当事人的身份、能力、婚姻、家庭、继承等方面的法律冲突问题的系属公式。自19世纪起,随着爱国主义思潮及民族国家的兴起,国籍在属人法事项中日益重要。受《法国民法典》的影响,许多大陆法系国家采用了国籍作为属人

法的连结点,而英美法系国家则采用住所作为属人法的连结点,从而形成了住所地法主义和本国法主义的对立。国籍作为属人法的连结点具有国籍比住所更稳定、国籍比住所更容易确定、更能够体现国家对其国民的属人主权等优点。本国法在具体适用过程中,会产生诸如国际私法中的反致问题、多法域法律的认定问题、人际法律冲突问题、时际法律冲突以及法律规避问题等。

在早期国际私法理论中,本国法仅仅是指自然人的国籍国法。随着国际私法理论和实践的发展,法人、船舶和航空(天)器在国籍法律关系中也享有一定权利,承担一定义务。从法人的本质来看,无论是根据法人拟制说、契约说,还是实在说,法人同自然人一样,与某一特定的国家的法律存在本质和必然的联系。也就是说,法人的存在是依赖某一特定的国家法律的,这个特定的法律就是法人的属人法。船舶本国法就是船旗国法,即船舶悬挂旗帜所属国家的法律。船旗国法原则也构成了海事冲突法中最基本的法律选择原则。航空器本国法就是航空器的登记地国法,即航空器登记地所属国家的法律。

一般说来,在国际民事诉讼中,国籍是判断内外国人的法律依据,是给予外国人民事诉讼地位的依据,同时国籍是确定国际民商事管辖权的一种根据。在国际商事仲裁中,主要涉及国际商事仲裁裁决的国籍问题。实践中,以法国为代表的拉丁法系国家以及参加了1928年《布斯塔曼特法典》的拉丁美洲国家均采取属人管辖原则。国际商事仲裁裁决的国籍是指国际商事仲裁裁决作为特定国家的法律文书而构成该国法律秩序组成部分的一种法律上的标志。在一些国家的立法和国际仲裁公约中,裁决作出地对于确定仲裁裁决国籍具有决定性的作用。

我国现行的国籍法是在1980年9月10日被第五届全国人民代表大会第三次会议通过的。在此之前,我国共颁布了三部国籍法,即1909年《大清国籍条例》、1912年北京政府《中华民国国籍法》、1929年《中华民国国籍法》。虽然我国1980年《国籍法》一再强调不承认双重国籍原则,但由于国籍的承认乃各国的国家主权事项,同时,即使在1980年《国籍法》框架下,仍会出现国籍冲突的现象。我国现行的国际私法有关国籍规则方面的立法存在粗糙、内容矛盾、重复、周延性欠缺等缺陷,甚至有许多问题并没有规定。为此,中国国际私法学会制定了中国国际私法的民间立法——《中华人民共和国国际私法示范法》,该民间法的制定为完善我国国际私法,包括国际私法中国籍问题方面的规则,起到了重要的作用。在我国《民法》(草案)中,也基本上照搬了示范法的规定。我们应该结合我国实际情况,探讨国籍这个连结点在新形势下的具体作用,构建我国和谐的国籍制度,并努力完善我国的国籍方面的规定。

在国际私法法律适用中,国籍作为连结点的角色,不会因为全球化、互联网时代

的到来而归于湮灭。国籍作为连结点有其不可替代的优势。尤其是随着全球化、互联网时代的到来,组成法律关系的各种因素都呈现泛化或缺乏稳定等特性,而身具稳定性、明确性的国籍在国际私法法律适用中将继续发挥重要作用。

**关键词:** 国籍 本国法 国际私法

## Abstract

Since the humanity entered the 21st century, as a result of the development of science and technology and the advance of globalization movement, the international society has entered to a silicon, computers and network – based information age. As a connecting factor of private international law and the basis of international civil jurisdiction, nationality encounters the unprecedented challenge. With the deepening of China's reform and opening up and rapid economic development, China's foreign relations have become increasingly frequent. The reform and even enactment of new act and regulations of Chinese private international law are extremely urgent. Among them, as an important connecting factor of *lex personalis*, research on nationality is of particular importance.

Nationality and state exist concomitantly, but the legal sense's nationality is the product of the bourgeois democratic system. In the narrow sense, nationality refers specifically to the nationality of natural persons. It is defined as the legal qualifications of natural persons belonging to national or citizen of a state. It indicates that there are fixed legal relation between one person and some specific state. It is the legal basis that some states exercise diplomatic protection. But from a development perspective, the concept of nationality has some breakthrough at present, not only including the nationality of natural persons, but also the nationality of artificial person such as legal person, even including the nationality of some objects of legal relationship. In other words, nationality refers to the legal relationship of the natural persons, legal persons, ships, aircraft and certain property when they have the specific legal relationship with some specific state, according to the principles of international law, domestic law of that state exercise jurisdiction.

There are relationships and differences between the concepts of nationality and



citizenship, region nationality and global nationality etc. Nationality mainly emphasizes the legal relationship that someone subjects to some specific state, and the key point lies in the stipulations of the legal rights and obligations; citizenship is focused on an individual's enjoyment of their political rights. Nationality and citizenship are referred to the same in today's nationality law field. The two proposed concepts of regional nationality and global nationality have manifested various theorists' thought on the regionalization and globalization trends of the nationality at present and in the future. System construction and legislative practice in region nationality are both in already embryonic form, but the global nationality is still in the phase of theoretical ideas. In any event, the two concepts deepened our interactive understanding of nationality system and enriched the connotation of nationality system.

The nationality plays a great significant role in the private international law. In the field of choice of law, whether natural or legal persons, their international civil and commercial relations between the parties are often governed by the *lex personalis*, i. e. *lex patriae* and *lex domicilii*, which are also the two major principles of the *lex personalis*. Therefore, the nationality is an important connecting factor in the course of the international civil and commercial cases. In addition, nationality is an important jurisdiction basis, particularly in the states belongs to Latin legal system. Nationality is also an important standard for the foreign judgments in the recognition and enforcement of foreign judgments. Meanwhile, the nationality plays a unique role in determining the civil legal status and civil action legal status of the alien and the international commercial arbitration.

The nationality belongs to the domestic matters of each sovereign state, and all states have the right to determine who their citizen according to their own laws is. Different states, even an identical state in different historical period adopts the dissimilar principles and the rules when formulates its naturalization laws, which causes the conflicts of nationality. The conflicts of nationality of natural persons is embodied in two kind of types, one is a person who has two or more states' nationalities; the other is a person who has none state's nationality. The former is called positive conflict of the natural person's nationality, and the latter is called negative conflict of the natural person's nationality. There are two methods to solve the conflicts of nationality of natural persons in the private international law. First, the substantive law method, the states conclude the international treaty stipulating explicitly provisions to avoid and

eliminate the multi – nationalities and the stateless phenomenon; Second, conflicts of law method, namely, if it is unable to solve the multi – nationalities and the stateless conflict, the law determined which nationality for its nationality to determine the parties' *lex patriae*.

In private international law, the legal person nationality's conflict is referred to as a legal person simultaneously to have two or two above states' nationalities as well as a legal person does not have any state's nationality. That various states establish the legal person nationality according to different standards is the primary reason for the conflicts of nationality of the legal persons. In sum, various states establish the nationality of the legal persons according to such standards as the legal persons' residence place theory, the legal persons' registration place theory, the capital control theory and the mixed standards theory. Because there is no uniform standard to determine the legal persons' nationality in the international society, various states determine legal person's nationality from their own interests, and the standard is by no means irrevocable, but make the corresponding change along with their own economy, the political context and international environment's change. According to whether involve the states' own interests, there are two methods to solve the positive conflicts of the legal persons' nationality; When the court seized has the stake to the action, this state's court will generally determine the national law to the state's advantage as *lex patriae*; When the court seized has no interest relationships in the action, there are several methods such as the approximate principle theory, the successive time theory, habitual residence theory and the closest relationship theory.

Nationality of the ship is a legal identity, which means that the ship owner registers the ship in accordance with the state's ship registration regulations, and obtains its certificate of nationality issued by that state and navigates with the state's flag, so that the ship is subject to registration state under. Conflicts of ship's nationality in private international law nationality means that the jurisdiction confusion cause by a ship's nationality uncertain or even without nationality or the difficulties in the application of the law when the nationality's former and latter change in an uncertain legal situations. As to the positive conflict of ship's nationality, it is ought to be handled on the ship's real link with the states, not simply in accordance with the registration's time. As to the negative conflict of ship's nationality, the modern international community has yet not found the best ways and means to solve the problems and it is worth more in – depth

study and discussion.

The *lex personalis*, a formula of attributio based on the connecting factor of nationality and domicile, which is used to solve the parties' status, capacity, marriage, family and succession and etc. conflicts of laws, is a unique concept in private international law. In the 19th century, with the rise of patriotism and nation - state, nationality has become increasingly important in matters of *lex personalis*. Under the influence of The French Civil Code, many civil law states used nationality as a connecting factor of *lex personalis*, and common law states still used domicile as a connecting factor of *lex personalis*, which formed a shelter between the *lex patriae* and *lex domicilii*. Compared to the domicile, nationality as a connecting factor is more stable; more easily determined and embodied the states' personal sovereignty over its national. In the course of specific application, *lex patriae* will result in many problems such as *renvoi*, intertemporal conflicts of laws, interregional conflicts of laws, interpersonal conflicts of laws and evasion of law.

In the early private international law theory, the *lex patriae* merely refers to natural person's *lex patriae*. Along with the development of private international law theory and the practice, the legal person, the ships and the aircraft (aviation) also enjoy certain right and undertake certain duty in the nationality legal relationships. From the nature of the legal person, whether under the legal fiction theory, contract theory or the substance theory, the legal person was the same with the natural person, with a particular state the existence of legal nature and the inevitable link. In other words, the existence of legal persons is dependent on a specific national law of a state, and this particular law is the personal law of legal person. The *lex patriae* of the ships is law of the flag, i. e., the ships are hoisted the banner of their respective states. The law of the flag also constitutes a fundamental principle of choice of law in the maritime conflict. The *lex patriae* of the aircraft is the law which the aircraft registered, i. e., the national law of the registration place.

In general, in international civil proceedings, the nationality is the legal basis to determine the national and alien and the basis to accord the foreigners with the civil action status and the jurisdiction basis of international civil and commercial matters. In the international commercial arbitration, nationality issues mainly involve the nationality of international commercial arbitration award. In the practice, the states belongs to Latin legal system especially its representative France as well as those Latin American states

who participated in Bustamante Code of 1928 adopt the principle of personal jurisdiction. The nationality of international commercial arbitration award refers to international commercial arbitration award as a state – specific legal instrument and constitutes the state's legal order integral part of a legal landmark. In some state's legislation and international arbitration conventions, the award places a decisive role in the determination of nationality of arbitration award.

China's current Nationality Law was enacted by the third conference of the fifth National People's Congress on the September 10, 1980. Prior to this, China promulgated three Nationality Acts, i. e. , the Nationality Regulation of 1909 enacted by Qing Dynasty, Nationality Law of Republic of China of 1912 enacted by the Beijing government and Nationality Law of Republic of China of 1929 enacted by the NanJing government. While our Nationality Law of 1980 has repeatedly stressed that the principle of non-recognition of dual nationality, but because nationality is the domestic matters of every sovereign state, there will still be the conflict of nationality. the China's existing legislative rules of private international law on nationality exists such defects as rough, the contents of contradictions, or even many issues in deficiency. For this reason, Chinese Society of Private International Law drafted Model Law of Private International Law of the People's Republic of China, which played an important role in the improvement of China's private international law, including nationality rules of the private international law. Some provisions of Civil Code ( draft) are basically a copy of the provisions of the Model Law. We should combine China's actual situation to explore the specific role of the nationality in the new situation and construct a harmonious system and improve our efforts with respect to the nationality requirement.

In applicable law field of the private international law, the nationality's role as a connecting factor will not disappear because of the advent of globalization and Internet age. Nationality as a connecting factor has its irreplaceable advantages. Especially with the advent of globalization and Internet age, the composition of the legal relationship between the various factors have shown generalization or lack of stability, and the nationality with stability and clarity is even more unique in private international law.

**Key Words:** Nationality Lex Patriae Private International Law

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# 第一章 导 论

## 第一节 背景与意义

20 世纪 90 年代以来,全球化浪潮汹涌而至,网络技术不断推进,国际私法面临着诸多机遇与挑战。随着我国市场经济体制的建立与深入,特别是我国加入世界贸易组织之后,我国对外的民商事交往日益频繁与活跃,涉外民商事纠纷逐渐增多,冲突法的地位与作用将日益彰显。然而,我国国际私法立法存在着诸多不足与缺陷,远远不能适应我国目前形势和未来发展的需要。国籍作为国际私法属人法的连结因素和国际民事管辖权的连结根据之一,具有极为重要的地位和作用。目前,我国国际私法对于这方面的规定存在立法真空或立法不完善等问题。我国国际私法的立法正处在关键的时刻,对其在立法中如何运用是摆在立法者面前的一个现实问题。与此同时,为了加强我国国际私法的立法与研究,中国国际私法研究会(后改名为中国国际私法学会)在 1993 年深圳年会上决定起草《中华人民共和国国际私法示范法》(以下简称《示范法》),并成立了以韩德培先生为组长的起草小组。经过数年努力,《示范法》于 1999 年定稿,并于 2000 年出版发行。《示范法》中多处涉及国籍连结点的运用问题。在新的形势下,国籍问题所面临的困境与改革,引起了笔者的研究兴趣,笔者试图通过对国籍的基本理论、国际私法中的国籍冲突、国际私法中的本国法的适用及国际民事程序中的国籍等问题的深刻剖析,以期对我国未来的有关立法有所裨益。

### 一、背景

21 世纪以来,由于科学技术的发展和全球化运动的推进,人类社会进入以硅、电脑、网络为基础的信息时代。<sup>①</sup> 这个以信息技术产业为核心的经济发展时期,不仅改

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<sup>①</sup> 甄炳喜:“信息革命与资本主义世界经济第五长周期”,载《国际问题研究》1998 年第 2 期,第 8—13 页。



变着人类生产和生活形式的内容,而且在新技术革命直接促成的新的世界经济环境下,国际分工和合作不断发展,国际经济贸易规模扩大,速度加快,范围更广。随着网络的应用,整个国际社会的交往愈来愈不受地域的限制,涉外民商事法律关系的主体日趋多元化,各种关系越来越复杂。现代通讯工具、交通工具的广泛使用,不仅使得涉外法律行为的时间流程大为缩短,涉外法律行为的空间地位也变得极不稳定。<sup>①</sup> 随着我国改革开放的深入,经济的快速发展,中国对外交往日益频繁。2008年北京奥运会的成功举办,有力地说明了中国的发展和国际交往的扩大。但是,作为构建国际民商事秩序法律基础的中国国际私法由于历史的原因,不能适应历史的发展潮流,改革中国国际私法和制定新的国际私法的法律法规,迫在眉睫。其中,作为属人法重要的连结因素的国籍研究显得尤为重要。

### (一)全球化

全球化对当代国际社会具有重大的影响已是不争的事实。尤其是20世纪90年代以来,随着两极对立的“冷战”时代的结束,全球化浪潮汹涌而至,人类真正进入了全球共存与竞争的全球化时代,由此而出现了经济全球化、政治全球化、生态全球化、法律全球化等诸多全球化现象。<sup>②</sup> 在全球化发展的背景下,国家主权以及与此密切相关的国籍遭到前所未有的挑战。因为全球化遵循的是无国界、全球性漫游,其后果是直接削弱了民族国家的功能,国籍作为连结因素的地位已经受到动摇。对于全球化的概念,学术界没有统一的认识。国际货币基金组织(IMF)将其定义为:“全球化是跨国商品与服务贸易及国际资本规模和形式增加,以及技术的广泛迅速传播使世界各国经济的依赖性增加。”德国教授德尔布鲁克(Delbruck)认为:“全球化是市场、法律和政治的非国家化进程,它为了共同的利益而将各民族和个人联接在一起。”美国学者詹姆斯·密特曼(James Mittelman)指出,全球化是不同的跨国过程和国内结构的结合,导致一国的经济、政治、文化和思想向别国渗透。全球化是“一种市场导向、政策取向的构成。”他还认为,全球化是减少国家间隔阂、增加经济、政治、社会互动的过程,反映为相互联系、相互依存的不断加强。国内有学者认为,全球化就是人类不断地跨越空间障碍和制度、文化等,在全球范围内实现物质、信息的充分沟通的过程,是达成更多的共识与共行的行动过程。也有学者指出,一般意义上讲,“全球化”是指个别的地域国家打破国界束缚,走向国际社会的过程。严格意义上讲,“全球化”是指由于科技革命的推动,全球范围内具有共同特征的经济、政治、文化样式逐步扩展及普及,并形成一种全球通行的标准。还有学者认为,全球化是

① 郑自文:“最密切联系原则的哲学思考”,载《法学评论》1994年第6期,第33页。

② 周永坤:“全球化与法学思维方式的革命”,载《法学》1999年第11期,第9页。