

NATIONALITY AND REGISTRATION OF SHIPS: A LEGAL ANALYSIS OF THE CONCEPT OF 'GENUINE LINK' BETWEEN A SHIP AND ITS FLAG STATE

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ABSTRACT

Nationality of a ship floating on the International sea is determined by the country it is registered with. Registration gives the flag-state, where the ship is registered, the right to exercise jurisdiction over the ship. The flag-state has the right to protect vessel under international law and is endowed with some collateral rights and duties. Under the principle of 'Genuine Link' enunciated in in the Nottebohm case (1955), the nationality of vessel is to be based on the existence of a 'real and effective link' between the state and the ship. The article commences with a general overview of the existing literature and case laws on registration and nationality of a ship, different functions of registration, connecting factors between the flag-state and ship etc. Thereon, it reexamines the concept of 'Genuine' Link with an aim to render the relevance and efficacy of the concept in today's world.

I. INTRODUCTION

Nationality is a legal relationship between a State and its citizen. Nationality of ships is a legal tie between a vessel and her flag State. Flag State is a State where the vessel is registered and hence entitled to fly her flag.

Ships are deemed to have a nationality for international law purposes. Normally, a ship is registered under the law of a particular State and is then, under that State's law, both entitled to fly its flag and deemed to have its nationality.¹ Nationality is a legal institution linking a ship to a State and indicating that that State known as the State of nationality or flag State (or State of registry) has the right to exercise jurisdiction over the ship, is responsible for it, and has the right to protect it under international law. Nationality also implies that the ship has been registered in a State and has been granted the right to fly its flag.² Since the ship is accorded the nationality of the flag State, even within another State's territorial waters, the jurisdiction of the flag State applies for those who live and

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¹ Harris David, *Cases and Materials on International Law*, London, 2010, at p.367.

² Ademuni-Odeki, *Bareboat and Charter (ship) Registration*, Boston, 1998, at p.13.

are on board of the ship in all matters including birth, death, marriage etc. Offences committed on board of a ship are triable by the courts of the country of the ship's nationality and according to the criminal law of that country. Of course, littoral States can also claim concurrent jurisdiction in respect of offences committed on board of a ship while sailing in territorial waters, but unless interest of the State are affected no jurisdiction is usually claimed in respect of offences.

In *R vs Anderson*,³ the court of Criminal Appeal in the U.K declared that an American national who had committed manslaughter on board a British ship in French internal waters was subject to jurisdiction of the British courts, even though he was also within the sovereignty of the French justice being littoral State and also to American justice by reason of nationality of the accused person. And thus, could correctly be convicted by the English court. The US Supreme Court in *Wildenbus* case⁴ held that the American court had jurisdiction to try a crew member of a Belgian vessel for the murder of another Belgian national when the ship was docked in the port of Jersey, Newyork.

A ship will be subject to the laws of the country of its registration, because by reason of registration in a particular State, it has been adopted into that State's legal system. Hence it is said that the ship is the floating island of the territory of its flag State. A foreign ship also has the right of innocent passage over the territorial sea of a State without interruption. On the high seas a State can exercise jurisdiction only over ships of its own nationality; no other State may arrest or detain its ships, even for the purpose of investigation. Therefore, if a ship is involved in a collision or other navigational accident on the high seas, only its flag State, or the State of nationality of the master or other person in the service of the ship, may exercise criminal or disciplinary jurisdiction over them.⁵

In *Lotus case*,⁶ the Permanent Court of International Justice applied the victim ship principle with respect to jurisdiction and held that a ship on the high seas is assimilated to the territory of the State of the flag of which it flies, for just as in its own territory, that State exercises its authority upon it, and no other way to do so. It may be noted that the exercise of jurisdiction on the basis of victim ship principle as held in Lotus case is overturned by the 1958 Geneva Convention on the High seas. In *R vs Anderson*⁷, the Court referred to a ship "*like being a floating island*" and stated that: "*a ship on the high seas, carrying a national flag, is part of the territory of that nation whose*

³ 11 (1868) Cox Crim. Case. 198.

⁴ 120 (1887) US 1.

⁵ United Nations Convention on the Law of Sea (UNCLOS), Art. 97, https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. (Last Visited on February 18, 2021.)

⁶ *France vs Turkey*, (1927) P.C.I.J. Series A No. 10.

⁷ 11 (1868) Cox Crim. Cas. 198.

flag she carries; and all person on board her are to be considered as subject to the jurisdiction of the laws of the nation, as much so as if they had been on the land with the territory.”

In *Muscat Dhow’s*⁸, between Great Britain and France concerning the legality of granting the right to fly French flag to Dhow’s owned by subjects of the Sultan of Muscat. Permanent Court of Arbitration held that France was entitled to authorize its flag to vessels belonging to subjects of His Highness, the Sultan of Muscat to fly the French Flag, only bound by her own legislation and administration. Further, the Court said that “*generally speaking it belongs to every sovereign State to decide to whom he will accord the right to fly his flag and to prescribe the rules covering such grant*”.

Necessity of nationality of ships are-(i) Freedom of high seas; (ii) Right of navigation; (iii) Need for public order on the high sea; (iv) Ships are inherently mobile; (v) Significant high value of ships; (vi) To avoid legal vacuum; and (vii) Ships are built to accommodate humans.

II. REGISTRATION OF SHIPS

Registration is an administrative act by which the nationality and collateral rights and duties are conferred on vessels. Entry of the vessel in the public records of the flag State is formalized by registration. Registration also signifies the official confirmation that the vessel meets the relevant national requirements. Issuance to a vessel by the competent authority of the State a document evidencing its nationality and conferment to her the right to fly the national flag. Usually, at first a provisional certificate of registration is issued for six months, thereafter, upon deposition of ownership document permanent registration is completed. In *Liverpool Borough Bank Ltd. vs Turner*⁹ Court said that as a matter of procedure, a certificate of registry issued by the flag State serves as an evidence of registration and nationality. This certificate is part of documentation which is kept on board. By analogy to an individual it is akin to a passport. An unregistered vessel is considered as stateless one and does not have any protection under international law. She is unable to be engaged in any lawful trade since ports will deny her entry. A ship is not entitled to sail without a flag in the high sea, if it does so, is treated as equivalent to a stateless person.

In *Naim Molvan vs Attorney General for Palestine*,¹⁰ the vessel ‘Aysa’ flying no flag and carrying no papers was arrested by a British destroyer 100 miles off the Palestine coast in 1948. Although when challenged she hoisted the Turkish flag and when boarded the Zionist flag. The vessel was attempting to land Jewish settlers contrary to Immigration Ordinance in force in Palestine. The Palestine

⁸ France v Great Britain, Award, (1961) XI RIAA 83, ICGJ 406 (PCA 1905).

⁹ 29 (1860) LJ ch 827.

¹⁰ (1948) A.C. 351 at 369-370.