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杨利雅◎著

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序　言

自1993年中国国际私法学会在深圳年会上酝酿起草《中华人民共和国国际私法示范法》以来，新中国国际私法学界已在法典化的道路上努力前行近二十载。的确，在成文法传统及思维模式占主导性影响的中国，法典化无疑在相当意义上标志着一个部门法的发展水平及成熟程度。仅凭此点，几代学人为之贡献心智并孜孜以求便是值得的。

我以为，欲形成一部高质量的国际私法法典，旁征博引式的条文论证与制度设计固不可少，但关于整个国际私法体系的价值追求、运行机理及核心理念的反思性研究亦有不容忽视之意义。

毋庸讳言，改革开放后我国自主培养的一批青年学者在知识背景、信息获取能力及研究问题的视角等方面与我们相比已有了较大进步。基于此，我十分赞成并鼓励广大青年学者大胆尝试与国际私法体系性问题相关的更具思辨性的研究方向。

应当认为，杨利雅博士的这本专著正是其朝着这个方向努力的阶段性成果。在本书中，她尝试厘清冲突法中单边主义的内涵，梳理单边主义的历史演变，论证单边主义在冲突法中的正当性，界定单边主义在冲突法中的地位，并以单边主义为视角检视我国冲突法的立法。

虽然本书在一些观点的成熟度及论证的严谨性方面尚存可待完善之处，但通读全书之后仍不难感受到作者的问题意识与思辨精神。这种对学术的热情与执着应当得到充分的肯定。

我想，学界同仁出自善意的每一点肯定、指正乃至批评，都将成为帮助作者在学术道路上不断进步的宝贵财富。

是为序。

刘想树 *

2010 年 5 月于重庆

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* 刘想树，西南政法大学教授、博士研究生导师、教务处处长。兼任中国国际私法学会常务理事，重庆仲裁委员会仲裁员，西安仲裁委员会仲裁员。

内 容 摘 要

经济全球化似乎是我们对现今世界的一个注释。随着生产要素在全球范围内自由流动和优化配置，人员和财产也如潮涌动。交往的频繁，产生的摩擦也就相应增多。完备的冲突法是解决涉外民商事纠纷的法律保障。我国涉外民商事法律适用法的立法，即冲突法的立法工作也就提上了日程。如何应对冲突法近年来的发展，如何将各种法律选择方法进行完美整合，是我们急需解决的问题。

涉外民商事法律冲突的解决在方法上，有实体法方法、法域选择方法、法规区别方法和意思自治方法之分；在理念上有形式主义与实质主义、民族主义与国家主义和单边主义与多边主义等区分。各种法律选择方法有其所属领域，有其发挥作用的方式和特点，也有其不同的法域环境要求。各种选择方法中显示的“理念”表明了法律主体的价值追求和利益取向，其中单边主义与多边主义的区分方式是最具代表性及时代意义的。在众多法学家的著述中，多边主义以其将世界等量齐观的伟大胸怀而独领风骚。但司法实践者，也包括一些实证主义的法学者，却对法院地法的单边主义有着深深的执着。传统冲突法模式以萨维尼法律关系本座说为代

表,其主要手段是通过法域选择来确定法律适用。这种模式有其固有的逻辑结构,“连接点”既是其决定性因素,同时也是20世纪以后受人诟弊的原因之所在。多边主义法选择方法追求法律适用的可预见性、确定性和一致性,所以往往采用僵硬、单一的连接点,不注重法律调整的实际结果,也不注重冲突法的社会作用。单边主义方法受到的推崇很多,诋毁也同样的多。法学家可以是世界的,一部法律却应首先是国家的,而后才是世界的。随着美国冲突法革命序幕的拉开,方法对规则、单边对多边、实质正义对冲突正义的批判和颠覆也开始了他的历程。有的学者将这一过程称为单边主义回归,也有的称其为冲突法的危机。单边主义作为一种法选择取向,早在20世纪50、60年代就重新引起了西方国家学者们的关注。我国对于单边主义方法的研究,“古”局限于法则区别说,“今”禁锢于“直接适用的法”,缺乏对单边主义宏观性的、脉络性的把握,也缺乏对其生存环境的理性界定。本书正是基于这种考虑试图从“理论基础→实证分析→立法探讨”的路径对单边主义进行一个总体的研究,并为我国单边主义立法提出一些建议。

与上述基本思路相应,本书在结构上主要分为五章,分别研究了冲突法中的单边主义内涵、单边主义的历史演变、单边主义的正当性、单边主义在冲突法中的地位以及中国冲突法立法的困境及构想。

第一章,冲突法的单边主义解析。涉外民商事纠纷法律选择有“方法”和“主义”的区分。在制度安排和适用时,我们应当践行“主义引导方法,方法实行主义”的原则。在对冲突法方法进行分析的基础上,研究各种主义采用的表现形式,并以单边主义为本书研究的重点和线索。在冲突法语境中,单边主义尚未有系统的描

述，对此许多中外学者，如李浩培、韩德培、荣格、道奇等都进行过自己的阐释。对他们的观点进行系统分析之后，我们发现单边主义是一个动态过程，是在立法和司法过程中所体现的，内国或法院地法优先的各种方法、手段和理论的总称。立法中的单边主义首先要求我们把单边冲突规范和单边主义冲突规范区分开。单边主义的立法模式主要有三种：直接指明法院地法适用的规则；明确实现法院地法优先的内向性规则；表面上是中立的，但却具有单边主义目的规则。司法单边主义则分为一般状态下的单边主义和美国特殊的单边主义。一般状态下的单边主义是各个国家都具有的，是在冲突法适用的各个制度中存在的单边主义，是由于法官固有的法律思维模式而形成的单边主义。美国特殊的单边主义是以柯里的政府利益分析说为典型代表，其主要体现在方法对规则的颠覆以及案件审理过程中政府利益实现的考量。

第二章，单边主义的历史演变。单边主义法选择方法是从法律制度的性质或内国利益出发来决定应适用的准据法的方法。单边主义方法是最早的法选择方法，经过了一段时间的“潜伏”，现在又以一个不同于前生的方式回到我们的视野中。一般认为冲突法起源于巴托鲁斯的法则区别说，实际上在此之前我们的前人就进行过若干种法选择方法的尝试。我们将巴托鲁斯的法则区别说时期称为朴素的单边主义时期，因为那时主权观念还没有产生，涉外民商事冲突所涉的范围和影响力有限。其只是将法则按其性质简单的“二分”、“三分”来确定其适用范围。萨维尼法律关系本座说的出现使单边主义进入了衰微期，但是单边主义从未离开。例如，程序问题从未采用过多边主义、法官理念中的单边主义、制度中的单边主义，等等。20 世纪中期随着社会关系和国家职能的变

化，单边主义又重新回到舞台上。但是这种单边主义的回归在美国以及欧洲大陆却采用了不同的方式：前者采用司法单边主义模式，主张法律适用中政府利益的实现，并创造了“最密切联系”这一弹性规则；后者以德国为代表采用立法单边主义模式，突出宪法在冲突法体系中的作用。

第三章，单边主义的正当性。作为一种内国的法选择方法，单边主义具有比多边主义更合理的存在基础。国家主权是单边主义存在的理论保障，主权范畴的演变与扩大决定着冲突法法律选择方法的更迭，主权安全和需要决定着法律选择方法所应持有的主义。立法管辖权是国家主权的重要体现，同时也是单边主义法选择方法和多边主义法选择方法差异的关键。排他的立法管辖权，意味着司法上的多边主义；并存的立法管辖权则意味着司法上的单边主义。各国基于对自己利益的保护，都会尽量扩展自己立法管辖权的范围，这是单边主义存在的直接原因。单边主义既是冲突法适用的本质要求，是冲突法自身特点造就的，更是冲突法生存的社会环境所决定的。冲突法存在的现实基础与其产生时自由竞争的社会环境出现了较大的差异。由于国家对经济的干预以及福利国家的出现，民商事领域已经不是单纯的“市民社会”了。民事法律关系的主体、客体和行为都产生了巨大的变革。资本的扩张及影响力的增大要求国家对一定经济行为进行监管来保证国家安全和社会秩序的稳定，在这种情况下“直接适用的法”出现了。从立法上说，冲突法属于内国法而非国际法，这就要求其体现内国利益并为主权者服务；冲突法为法律适用法，区别于实体法与程序法；冲突法与内国实体法具有关联性。从司法上说，无论是传统规则的适用、冲突法制度的适用还是法官观念中都存在着单边主义

倾向。

第四章,单边主义在冲突法中的地位。研究近年来冲突法发展的路径,分析单边主义在冲突法中的地位,可以让我们知道立法中单边主义和多边主义应然的存在方式。在总结美国冲突法革命和欧洲冲突法变革成果和弊端的基础上,得出传统冲突法单一、僵化规则已废弃,代之以其他的冲突规则或方法、单边主义回归趋势等结论。在现今冲突法领域中,是多边主义为主、单边主义为辅,两者同时并存的状态。单边主义的作用,实际上就是冲突法社会作用的体现。多边主义强调的是冲突法的规范作用,单边主义则将其纳入内国的法律秩序整体中进行考量。对于单边主义而言,其有实现国家政治利益、维护国家经济管理职能、实现内国全球经济战略、保障基本人权实现的作用。但是单边主义不能无限制的扩张,应该考虑调控事件与内国具有客观上的关联性,事件对内国的国际、区际利益产生的影响,符合当事人合理期待以及符合社会一般公平要求等。

第五章,中国冲突法立法的困境与构想。我国现行的冲突法立法存在法律冲突解决手段过于单一,缺乏单边主义方法的宏观构筑,冲突规范适用制度规制不明晰,对跨域商事关系法律适用分析不足等问题。现今情况下的立法,首先,我们要正确认识我国所处的国际环境。和平与发展成为时代主题,各国经济依存度显著提高,经济的衍生性增强;等等。其次,我们还要明了我国冲突法立法宗旨:注重冲突法的科学性,体现我国的立法需求,恪守国际交往底线,公平合理地解决纠纷。最后,提出我国单边主义立法模式,"一个依据——两个制度——若干规则"。即以宪法为依据,确立宪法在冲突法立法、司法及守法中的最高地位;通过公共秩序

保留和法律规避两个制度来实现对国际交往底线的维护；对于涉及国家利益、政府利益和社会利益行为的法律适用，涉及国家经济安全、需要国家对经济行为进行监管的领域，建立若干对主体、行为各个方法直接规制的冲突规则。

Abstract

Economic globalization seems to be an unarguable fact in our world today. With the productive factors flowing freely from east to west, civil and commercial disputes increase considerably in this process, which makes Conflict of Law more important than ever. China's Choice-of-Law Rules for Foreign-related Civil Relationships, that is, Conflict Law codification, is about to be put on the legislative agenda formally. How to go with the development of Conflict Law in recent years, and how to integrate the various choice-of-law methods, is the most important thing that we should solve. There are four methods to settle the foreign-related civil and commercial legal conflicts, which are the substantial, the choice of jurisdictions, the definition of laws and the autonomy; those are divided with subjective orientation into the formalism and the realism, the nationalism and the internationalism, the unilateralism and the multilateralism. Those methods exist in their own respective areas, show their own respective characteristics and play own respective roles, have their own respective demand to the jurisdictions. Variety of options displayed in the "isms" that the legal

pursuit of value and orientation of interest, which the distinction between the unilateralism and the multilateralism is the most representative and significant. The multilateralism won his leadership for the equal treatment to all nations' laws in the writings of jurists. However, Legal practitioners as well as some legal positivist scholars play great favor in the unilateralism that engages in the lex for application deeply. The traditional mode of conflict laws represented by Savigny's doctrine of "Sitz des kechtsverh altuisses" choice the applied law through determining the jurisdiction. This model has the inherent logical structure, in which the contact point is not only the decisive factor, but also the disadvantages shamed by the people after the 20th century. The multilateralism method of the choice-of-law aims at the predictability, certainty and consistency in the application of law, that's why it uses rigid, single contact point and ignoring the actual results of the legal regulation and the social role of Conflict Law. The unilateralism method gets the praise as much as the criticism. Jurists may belong to the world, but the law first does the work to their own country and then the world. With the beginning of the conflict-law-revolutionary in the United States, the change is on the road that from rules to methods, from unilateralism to multilateralism, from the substantial justice to the conflict justice. Some scholars call this process the return of unilateralism, while others call it Conflict Law crisis. The method of unilateralism as a choice-of-law approach re-aroused the scholars' attention in western countries in the 50s last century. The study on the unilateralism in our country is lack of Mac-

roeconomic, systemic and social, defined in the Statute Theory on the ancient and the "immediate-application law" today. This article intends to explore a path of unilateralism to the overall study, "the theoretical foundation→ the empirical analysis→ legislative discussion", and make some suggestions to China's unilateral legislation.

In accordance with the aforementioned framework, this dissertation falls into five chapters, which respectively expound on the definition of unilateralism in Conflict Law, the historical evolution of unilateralism, justification analysis of unilateralism, the status of unilateralism in Conflict Law and China's legislative formation of unilateralism.

Chapter Ⅰ: The Definition of Unilateralism in Conflict Law. Choice-of-law process in foreign-related civil and commercial cases is differentiated as "methods" and "ism". We shall adopt the "ism to guide method, method to implement ism" principle in institutional arrangements and legal practice. We should study the forms of various "ism" based on analysis of methods, and focus on the unilateralism. The connotation of unilateralism in conflict law has not a systematic description yet, though many Chinese and foreign scholars, such as Li Hao-pei, Han De-pei, Geng Yong, Friedrich K. Juenger, William S. Dodge, have given their own interpretations of it. After a thorough analysis of them, the author find that unilateralism is a dynamic process, which combines methods, tools and general theory to the priority of the native law and the lex fori embodied in both legislative and judicial process. There are three models in legislative

unilateralism, that is, the "immediate-application law", unilateralist conflict rules for the interests of the forum, and some "neutral" multilateral rules aiming at unilateralism. Judicial Unilateralism is further divided into general unilateralism and special unilateralism adopted by U. S. General unilateralism, common in the various countries, presents itself in the application of the conflict systems and inherent thinking of judges formed. Currie's Governmental Interest Analysis is typical of the special unilateralism of U. S., and is reflected in the way of subversion of the rules to the method and express pursuit of government's interests in judicial proceedings.

Chapter Ⅱ: The Historical Evolution of Unilateralism. The choice-of-law of unilateralism is the method to find the lex causae from the nature of the legal system or the native interests. Unilateralism is the first choice-of-law, pre-existence back to our horizon with a new imagination after a period of "latent". Our predecessors had done a great deal of effort to the various choice-of-law before the Bartolus' Statute Theory generally believed the origination of Conflict Law. We call the period of Statute Theory origin from Bartolus the simple unilateralism, because the concept of sovereignty has not yet created at that time and the scope and impact is limited involved in the foreign-related civil and commercial matters. Statutes were divided into two or three parts by their nature to determine its scope of application. The emergence of Savigny's "Sitz des kechtsverh altuisses" made the unilateralism enter a bleak period, but unilateralism has never left. For example, the unilateralism is in the procedure never employed multi-

lateralism, the unilateralism in the judges' ideal, and the unilateralism in legal regime, etc. The middle of last century, unilateralism returned to the stage with the changes of social relations and state's functions. The regression of unilateralism takes on the different models in the U. S. and Europe. The latter, represented by Germany, adopts the form of legislative unilateralism embodying dominance of the Constitution to the system in Conflict Law; The former, just as U. S. , advocates the model of judicial unilateralism expressing the Government's interest in the application of laws and creates the principle of "the most significant relationship", the flexible rule.

Chapter Ⅲ: The Legitimacy of Unilateralism. As a choice-of-law method, unilateralism has a more rational basis than multilateralism's. National sovereignty is the theoretical foundation of the unilateralism, whose evolution is decided by sovereignty's evolution, and the needs of sovereignty determine which "ism" is to be adopted by conflict law. Legislative jurisdiction is not only an important embodiment of national sovereignty, but also a key standard to choice-of law method of unilateralism and multilateralism. Exclusive legislative jurisdiction demand multilateralism in judicial practice, but concurrent legislative jurisdictions means unilateralism in judicial practice. Countries will try to expand the scope of their own legislative jurisdictions, based on the protection of their interests, which is a direct cause of the existence of unilateralism. Unilateralism is the requirement of Conflict Law formed by its own characteristics and determined by its social environment. Tremendous changes have taken place in the social foundation of

Conflict Law since the era of free competition when it emerged. As state's intervention of economy and welfare state has become a common phenomenon, the field of civil and commercial matters is not simply a "civil society". Great changes happened to the subject, object and behaviors of civil legal relations. The expansion and increasing influence of capital demand the state to regulate certain economic acts to ensure national security and social stability, that's why the "immediate-application law" comes into being. In legislation, Conflict Law is national law rather than international law, which requires it to serve for national interests. Conflict law is a body of choice-of-law rules which distinguishes itself from both substantive law and procedural law—it is more political than private. In justice, whether the application of the traditional rules or the statutes of Conflict Law, or judges' ideas all tend to unilateralism.

Chapter Ⅳ: The Functions of Unilateralism in Conflict of Laws. The United States and Europe adopted two different methods toward unilateralism, i. e., revolution v. evolution. Beginning with an analysis on recent major conflict codifications, this chapter comes to certain tendencies of recent conflict codifications, which include the application of softening process and the return of unilateralism in Conflict of Laws. Unilateralism has become a beneficial supplement to multilateralism and serves to enhance national political and economic interests, and the protection of human rights, while multilateralism focuses on the equal and foreseeable application of conflict rules. However, unilateralism surely has its boundaries. Connections like