

Extended Order in Formulating International Law on the Apostille Convention

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Abstract: Extended order in formulating domestic laws could be founded on ripple effect from Chinese villages, which could be innovatively combined with Hayek's theory in construction of international treaties, especially the Apostille. Take Apostille as an example, regional rules originating from the Europe could be used as a tool to shed light on the implementation of Apostille later in international community. Therefore, regional rules could be treated as a good point to re-examine the formulation of international treaties and trace specific implementation of Apostille in different contracting states. Meanwhile, The formulation of a treaty is also not a destination of developing extended orders in electronic era.

Keywords: Extended Order, Apostille, Fragmentation of International law

1. INTRODUCTION

In Economics, ripples expand across the water when an object is dropped into it, an effect from an initial state can be followed outwards incrementally, which is call ripple effect. Mr Fei Xiaotong, mentioned another theory on neighborly rule called ripple effect in *Earthbound China* (Fei, 1989), which is a domestic version of extended order in China. Such ripple effect describes how traditions, usage or quasi-rules in networking formed in a small village or Kongsu at the very beginning, faded away through the expanded scope of human activities. The fading ripple effect in a small Chinese village seems to be the opposite of the growth of extended order between strangers' cooperating society (Kurniawan et al., 2023). The definition of order or extended order has material connect to international law. Order is difficult to be defined. "As a verb or noun, 'order' may be used to describe either the results of a mental activity of arranging or classifying objects or events in various aspects according to our sense perception, as the scientific re-arrangement of the sensory world tells us to do, or as the particular physical arrangements that objects or events either are supposed to possess or which are attributed to them at a certain time" (Von Hayek, 1991). Arrangement, classifications are what international law developed from different documents like conventions or multination customs or general principles for different issues of international society. Periodical, referred to as "at a certain time", definitely

translated into the reform and termination of specific international rules, which were usually found in the history of international law. It is believed that extended orders developed in community where people who are not familiar with each other can systemically coordinate. Applying in the international community, it is idealistic to say there were no more than 300 countries in this world, which is easy for all states living in the planet to cooperate with each other without extended orders, traditions in neighbors or tribes are enough to apply. However, the reality of international law practice is far away from such hypothesis. The reason for such failure is that a state cannot deal with normal business like a natural person, who can learn from or inherit from predecessors or ancestors in the tribe. State is an abstract creation, of which organs may get selected periodically in democratic countries. It is hard to say that one state will never set back and forth during different selection time. It is them who live there exploiting extended orders, strangers living in one state to another state, to formulate, develop and terminate international rules, which makes inspection of growth of international rules meaningful (Harvey, 1970). The extended order mentioned by Hayek is a great mode to account for the formulation of rules in civilization, including international law rules. International law, public or private, have mostly already been believed to be stipulated in Article 38 of Statute of International Court of Justice. It is convincing to dig out the existence of extended orders prior to the negotiation table to explore the formation of specific international rules. Extended orders have great roots in Darwin's theory, featuring that the leading concept in the formation of orders or rules is mutual interests developed from the social cooperation. Rather than forming in neighbors, such orders greatly depend on the market-oriented economy, which is parallel to the formation of international law originating from agreements and cooperative behavior.

2. FILLING THE GAP PRIOR TO EXTENDED ORDER TIMES

With more and more people joining in the “neighborhood” or living in small tribes, people may not know neighborly rules very well because the community is too large to make everyone aware of the issuer's voice. Rigid constant requirement to obey neighborly rules, which will set back the development of extended orders. Prior to extended order times, neighborly rules were supporting the formation of extended orders, rather than be replaced or discarded by that. Treating extended order as mutually exclusive to neighbor rules, and inevitably superior to the neighborly rules,

we may fall into the dualistic view of the neighborly rules and extended orders. Such dualistic view cannot explain the rule phenomenon of human society, especially the rule of international law from the point of extended order. The formation of the extended order is not Darwinian. The structure of extended order formation covers overlapping sub-orders coming from neighborly rules or old instinctual responses. To put it another way, neighborly rules are assisting in the formation of extended orders, solidarity and altruism, continuing to retain some importance by assisting voluntary collaboration, even though they are incapable, by themselves, of creating a basis for the more extended order (Von Hayek, 1991).

2.1 Tribes Traditions Contribute to Domestic Extended Orders

To put extended orders from Hayek in international law aside momentarily. It has been said that when tribes first evolved into following common traditions (rules) is ambiguous to determine and extended cooperation had been slowly developed. Property is definitely significant in developing extended orders when Hayek treated tribes as no private property groups, hence tribes could not be argued as “from which cultural evolution began” (Von Hayek, 1991). However, this article analyzes the phenomenon of tribes’ traditions which were assisting in creating extended orders. Here is a good example slightly different from the above point about behavior modes prior to extended orders. The Owenke living in northern China are particular roving bands of hunters and gatherers as described as people who have to share food or place of shelter with their fellows. However, it is arbitrary to decide that there was no extended order in nomadic herding. It is a tradition for the Owenke in the woods who would store extra food in the wooden houses called “Kaolaobao”, which would not be locked for other Owenke hunters in emergency (Jiang, 2020). It is arguable in such situation that tribes could not be treated as from which civilization began due to property. Even though the Owenke realized that no food or property would be turned back in Kaolaobao, they chose to donate for neighbors and strangers they did not know. This article prefers to contend that such rules originating from tribes, religion or Polis constitute the initial pattern of extended orders. Unlike extended orders, the traditions or customs prior to extended order times were created for mutual assistance and altruism. It was formed by instincts that have evolved in humans over hundreds of thousands of years, dominating the formation of neighbor rules. Generally, there are a large number of such rules in groups like the Owenke, such as religion customs and taboos. Kaolaobao was developed in dense forests for ensuring the reproduction and survival

of the nation in harsh mountainous conditions on a larger scale. The practice of reserving food in wooden houses gradually became a neighbor rule for the Owenke living in forested areas. Similarly, to instincts evolved in other animals, such as cooperation in wolves or mass migrations in elephant herds. The cooperation of animals is also altruistic and beneficial to their survival. Just because humans have created writing and language, this habitual behavior evolved from instincts as cultural instincts, or neighbor rules, which would be new generations inherited through written copies. Such process produced extended orders. Just as Hayek refutes Aristotle's view that "Even Aristotle, who comes fairly late, still believed that order among men could extend only so far as the voice of a herald could reach (Ethics, IX, x), and that a state numbering a hundred thousand people was thus impossible(Von Hayek, 1991)." expressing a reflection on the existence of expanded order between instinct and reason and its impact on the formation of human social order. Interaction limited to mutual understanding and trust among compatriots produces neighbor rules within the group, meaning common goals and shared risks. For the issuers of rules, namely the commanders, they not only hear their own commanders but also usually know them personally, commanders to be neighbors, which is also the reason why neighbor rules are named after them in this article. Today, the order among humans is no longer limited to countries with populations of less than a hundred thousand. Similarly, traditions like Good Samaritan law in Owenke tribes have already been integrated into domestic extended orders, developing into rules or law principles written in codes.

2.2 Regional Rules Contribute to International Extended Orders.

If the tribes' traditions and its sequential domestic rules work in one specific region, what if the domestic rules spreading out and followed by other states? Parallel to the formation of normal domestic extended orders, international extended orders formed from the integration of many different domestic rules. The "neighborly rule" to this extent is what the common practice in neighborly countries or countries have been in treaty of collaborative behavior. Here, the definition of neighborly rule evolved from geography to constructive alliance in international law. The development of Apostille Convention (Urgensi, 2019) in 1961 is a fruitful accomplishment in the process of regional rules extend themselves to be international law. Till now, the Apostille Convention has over 125 Contracting Parties, and has become one of the most widely applied multilateral treaties in the area of legal cooperation. Apostille is what the

Convention adopt, replacing diplomatic or consular legalisation chain, to the acceleration of foreign documents circulation among countries. Apostille, at the very beginning of the drafting process, is a “brand-new” concept or rule to other countries outside the Continental. However, the adoption of Apostille rule does not mean that it is a pure new-born rule in the international community. It is wrong to believe that apostille is an evidence for the creation of constructive rationalism even if the design of Apostille is up to artificial abstract wisdom. Apostille is one of the extended orders developed from regional rules in the Europe. Never can an extended order be a production constructivist rationalism. It is undisputable that rationalism has the ability to improve various norms and institutions, such as reforming social systems and rules with the goal of justice, and Hayek recognized that the extended orders can be improved through rationalistic reform (Von Hayek, 1991). However, it is undeniable that the improvement of the whole must also be achieved by reviewing all aspects of the system, which is almost impossible since no rationalism can realize such object. For people who have no idea about the preparatory documents of Apostille, it is a trick question that whether the Apostille was invented by contracting countries or is Apostille a result of constructive rationalism. To answer such a question, this article must look for where did this extended order—Apostille came from. This article argues that a simple glimpse of rational correction or institutional construction may lead to the immoral consequences of extended order as a whole, a developed rule originated from extend orders instead of constructive rationalism. This is also the reason why the extended order is considered to exist between instinct and reason, and that the extended order is not spontaneous, so it is fundamentally different from constructive rationalism. The BASIC extended order through the Apostille Convention is a procedure “bearing desired effect as regards proof” (Loussouarn, 1951), in other words, the country that issued the public document or the country in which the document is produced or executed requires the certification to be conducted during the exchange of affairs between unfamiliar subjects. Foreign public documents must be under some conditions so that to be executed, which is the extended order of the international document’s circulation. Before the time of Apostille, diplomatic or consular legalization was also designed for such order that most countries, both drafting and executing documents foreign documents, shall comply with legalisation. Apostille is just a simplified formality, the effect of which is also constrained to covering the abolishment on formality of legalisation in its

strict sense, specifically, “the diplomatic or consular agents certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears (Van Loon, 2007).” Therefore, apostille is not created or constructed based on nothing, which could also be regarded as the evolution of the basic extended order of endorsement on public documents. Besides, the Apostille Convention does make protective system to detect potential fraud or false information. Article 7 of Keeping a register or card index comes from “the precedent of the bilateral Conventions concluded between Germany on the one hand and Switzerland, Denmark and Austria on the other shows that during thirty years there has in practice been no single case for verification and control of foreign documents” (Loussouarn, 1951), which is a good example of explaining the relationship between extended order and regional rules. Through card index, a regional rule stipulated in bilateral conventions, the Apostille Convention adopted it as an extended order for every contracting state as international law.

3. COMBINATION OF EXTENDED ORDERS AND INTERNATIONAL LAW

As mentioned above, extended orders of international law are coexisting with regional rules, from time to time the later one favoring in the former's accomplishments, which offer a new explanation of fragmentation of international law. For people living in the community in multiple orders (neighborly rules and extended orders), we need to adjust to different prevailing rules. There are indeed contracting states adopt different attitudes towards the effect of verification. For some states there are certain States where legalisation has or can have more far-reaching effects. Diplomatic or consular agents in which could certify the competence of the public officer or authority signing the document. For public documents circulated in those states, the Apostille certificate is more “powerful” than that in other countries. Just like the initial mode of extended orders and neighborly rules, it would be problematic to substitute the way of behavior in the small association (neighborly rules) into a community where the dominant order for adjustment is the extended order (laws, prohibitions, general rules of conduct applicable to all). The rules of the extended order cannot be substituted for intimate groups too. For example, existing marriage and custody relationship are grounds for the suspension of the

statute of limitations in China (Rongji, 2011). Such stipulations are designed to separate intimate groups from strangers' society rule for which neighborly rules prevail, pursuing harmonization and non-litigation dispute settlement.

3.1 Coexistence of Neighborly Rules within International Extended Orders

Similarly, neighborly rules and extended order exist in the practice of the international community. A river that flows through multiple countries brings in neighborly rules related to international rivers, such as the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (Commission, 1995) concluded by Thailand, Cambodia, Laos and Viet Nam, which established Mekong River Commission to address water use and inter-basin waterways transfers. However, Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Tanzi et al., 2015), The 1997 UN Watercourses Convention which provides universal protection of international water bodies, which should have been written forms of extended order of international law, however, contracting states to those conventions are still regional alliance. Against the backdrop of patterns of multi-polarization and regionalized international cooperation, the coexistence of neighborly rules and extended order is more common to see. The Apostille Convention is also a typical representation of such coexistence. The effect of apostille certificates in place of traditional diplomatic or consular legalisation is limited to verifying the authenticity of the signature and other formalities as this article mentioned above. However, in some countries like Germany, such certificates have already had a more extensive superseding effect before entering the Apostille Convention. These countries allow diplomatic or consular representatives to certify the competence (competent authority) of the staff or institutions signing the document. In other words, in these countries, it is possible to prove that the relevant institutions or persons are indeed qualified to make present public documents, rather than merely certifying those formalities. The apostille conveys authenticity of official documents' signatures and signatures a step further and involves substantive certification; Diplomatic or consular authentication by some countries can prove the validity of official documents from the perspective of the place of legal action. The Apostille Convention does not put much effort into the extent to which diplomatic or consular legalisation can be replaced, but only focuses on the authenticity of the signature and the identity of the signer mentioned above. Will these countries that have broader domestic regulations or

agreements with each other on the validity of diplomatic or consular authentication become more troublesome in their small-scale exchanges of public documents with neighboring countries because they have joined the Apostille Convention? In other words, after signing the convention, the function of signature authentication by its diplomatic or consular representative will be greatly reduced. Because prior to signing the convention, the certificates issued by them of diplomatic or consular authentication has substantial effectiveness. The unified and broad attitude of the above-mentioned countries towards diplomatic and consular legalisation actually depends on counterpart countries having a similar understanding of the effectiveness of authentication, so that the broader effect of diplomatic or consular legalisation can be recognized in other countries. It is not difficult that Denmark, Germany, and Switzerland had adopted similar coding or certification numbers shared by multiple countries before the birth of the Apostille Convention, and broader diplomatic or consular authentication effects had long existed among the above-mentioned countries as neighborly rules. Compared with the extended order, the neighborly rule is more specific and expediential applying to groups that are familiar with each other. On the question of whether it will be greatly reduced after signing the convention, the article believes that the convention leaves room for the application of simpler neighbor rules. Article 3 of the Apostille Convention stipulates that the only formalities that may be required to prove the authenticity of the signature, the capacity in which the person signing the document has acted...is the addition of the certificate. The subparagraph of Article 3 provided that the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it or exempt the document itself from legalization (Permanent Bureau of the Hague Conference on Private International Law, 2020). This rule uses the word “may” to emphasize two points. Firstly, the additional certificate is something that a contracting state can impose on a foreign country that is present in its own country. The maximum formal requirements attached to the document shall apply, and a contracting state shall not attach any conditions to the recognition of a foreign public document other than the attachment of a certificate. Secondly, it is the right of a contracting state to attach a certificate. In other words, a contracting state can choose not to join the apostille certificate system and accept the production of official documents from other contracting states that do not have an apostille

certificate. In this article, if the contracting states or contracting states have canceled or simplified the formal requirements for additional certificates through domestic laws or inter-state arrangements, and the formal procedures under the Convention would no longer be applicable. The adoption of measures on the broad effectiveness of diplomatic or consular legislation could be saved. In the case of a contracting state with a more liberal approach, the neighborly rule can be implemented.

3.2 E-apostille in Forming New International Extended Orders

Compared with that in 1961, the implementation environment of the Apostille Convention has undergone great changes. The launch of the e-APP platform has made electronic apostille certificates and electronic registration gradually become an important way for the transmission of foreign public documents between contracting states. The issuance of electronic apostille certificates (electronic signatures) and the transmission of electronic attachment certificates can be realized through the Internet. The conditions to be met for the issuance of an electronic additional certificate are not different from those for paper applications, except for the corresponding additional certificate number, a QR code or captcha is used when presenting an electronic additional certificate, which is considered to be effective in protecting the privacy of other applicants for an electronic additional certificate. Obviously, in the past 60 years, the Convention may have changed in practice as a result of electronification in order to facilitate the smooth circulation of foreign public documents among the contracting states. The attached e-certificate brings more than just paper lessness. The Apostille Convention recommends that Contracting States, especially those with more than one issuing authority or with multiple offices of one issuing authority, should preferably retain only one electronic issuing authority to affix additional certificates to all public documents (Verstappen, 2023). China has assigned 31 local foreign affairs offices to handle the issuance of additional certificates, but only one electronic issuing agency has been established. For example, in the old times when there was no electronic additional certificate, the Convention has promoted the ability of all contracting parties to recognize and accept additional certificates issued by other contracting parties by unifying the template of certificates attached to public documents and requiring all contracting parties to comply with the provisions of Article 7 of the Convention. Problems sprung up in the recognition of the form and number of apostille certificates in other countries, such as the size of the paper, the color of the paper, the way in which the additional certificate is

attached, etc., which may cause the additional certificate to be unrecognizable in the past have been solved by electronic certificates. First of all, whether the issued apostille certificate is “attached” or affixed is a common reason for rejecting the public documents by the presenting country in the circulation of the paper documents, but under the operation of the electronic issuing authority, the electronic form of the certified public document can also be obtained through the electronic issuing authority. Therefore, when the electronic attached certificate plays a role in proving the official documents, the requirements for “attaching” are greatly reduced. The extended order of legalization of foreign public documents has once again developed, due to new technologies (Von Hayek, 1978). According to the latest report of the Hague Conference on Private International Law, a total of 53 Contracting States have adopted electronic issuance systems, and in a questionnaire issued by the 2021 Hague Conference on Private International Law to the permanent offices of States Parties to the Convention, it was indicated that the number of issuances by electronic issuing agencies was much higher than the number of non-electronic additional certificates contained in Article 7 of the Convention, and 35 per cent of the Contracting States surveyed indicated that the issuing authority of an entity received no more than ten requests for issuance per year compared to electronic issuance. In 2021, the Hague Conference on Private International Law has begun to explore the emerging technologies applicable to e-APP, which is also the first time that the project of electronic additional certificates has officially entered the agenda of the private law conference, which shows that the Convention and the electronic additional certificate system are constantly evolving.

4. CONCLUSION

In answering the question of what kind of rules of conduct produce a social order, Hayek articulated the basic idea that “an individual’s response to a particular situation can produce a whole order only when the individual follows those rules that produce a general order (Von Hayek, 1978).” So Hayek added a crucial provision to the rules that produce a holistic extended order, “namely, the usefulness of the rules by natural selection.” Society, therefore, can exist only if the rules that guide individuals to behave in a way that makes social life possible have evolved through human choices in cheery pick-up. The birth of the Apostille Convention and the history of its implementation illustrate that when the requirements for the

legalisation of foreign public documents have become a necessary and inherent rule in the exchanges between countries, the need for an endorsement procedure between countries has become an orderly requirement for the circulation of foreign public documents. The rules of lengthy procedures of diplomatic or consular legalisation before the 1960s called for simplification, but the complete abolition would lead to distrust between States in public documents from other countries, which further illustrates that the alternative form of additional certificates is a useful rule, after voluntarily choosing, under the previous order. In this article, the final formation of an extended order of the rules of international law represents a pondering process. The choice of this rule is considered by contracting parties to be conducive to the realization of the purpose of that, since rules are written in the form of “conventions” that are open to all countries to join. The existence of bilateral treaties between states, which are applied only on a small scale, may provide a basis for the formation of an extended order of international law that is universally applicable to the international community, but it is not easy to establish an extended order in one domain. If diplomatic relations exist between States and then bilateral or multilateral arrangements in the nature of neighborly rules arise in a certain aspect. When there are more bilateral or multilateral arrangements of the same nature, an expanded order in this area may begin to be established. The Apostille Convention was born out of diplomatic or consular legalization arrangements between States, and then absorbs the rules of some countries on the card index of certificates, and finally forms the simple formality of apostille certificates. Some other international extended order can also be found in the recognition and enforcement of foreign arbitral awards, the recognition and enforcement of foreign judgments, and the arrangement of judicial assistance between countries, which may be experiencing the first stage of the formation of the corresponding expanded order, or may be facing the further development of the corresponding expanded order.

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