

Social Science

Japan

38

March 2008



The Draft Charter for an East Asian Community

Published by:

The Information Center for Social
Science Research on Japan
Institute of Social Science
University of Tokyo

Editorial Committee:

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Distribution

Social Science Japan is available on
the World Wide Web at:
<http://newslet.iss.u-tokyo.ac.jp>

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Cover Photo

CREP 2007 International
Symposium "Future East Asian
Regionalism: Proposal for an East
Asian Charter"
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Editorial Notes*Personal Names*

All personal names are given in
the customary order in the
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Hence in Japanese names, the
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Western names the family
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This issue of Social Science Japan spotlights the Comparative Regionalism Project (CREP) at the Institute of Social Science (*Shaken*). CREP sees researchers from *Shaken* and elsewhere work together to study regionalism in three different regions (Europe, America and Asia). We feature five articles from CREP in this edition.

Professor Nakamura Tamio's article explains the aims of CREP and the significance of the "Draft Charter of the East Asian Community" the CREP researchers presented in July of 2007. This Draft Charter is one of their major achievements. An international symposium on the Draft Charter attracted a large audience from academe, government and the media. In addition, Professor Sato Yoshiaki details the importance of this effort to draft a Charter for East Asia. And Professor Suami Takao, who was in charge of drafting the section of "Community Policies," describes his and his fellow researchers' conceptualizations of it. Their vision of the East Asian Community focuses on dialogue among the member states and is not limited to economic concerns.

Professor Usui Yoichiro emphasizes the contribution of the Draft Charter as "the incubator for regional community-building." He explains this in terms of identity, governance and norms in East Asia.

The last article from CREP is by Professor Marukawa Tomoo, who tells us an interesting (and prescient) story about Japan-China relations. China is now Japan's biggest trading partner, and in some categories of foodstuffs Japan is heavily dependent on China. This article was written before imported Chinese dumplings laced with pesticide made dozens of Japanese consumers quite ill and provoked a tsunami of media coverage.

As international exchanges deepen, the potential for such problems increases. The Chinese dumpling incident offers a good, readily understood example of the importance of achieving an enhanced framework for the East Asian Community.

For more detailed information on CREP, please see:
<http://project.iss.u-tokyo.ac.jp/crep/e-index.htm>

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The Draft Charter for an Evolving East Asian Community: Finding a Politics-Law Interface

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I. Introduction

The Draft Charter declares the establishment of an East Asian Community. While its adoption and entering into force would be a drafter team's dream, this would only be possible after some hard political negotiations, or 'grand bargains'. Such a 'political big bang', however, would not be the end of the story. Even if the dream comes true, a long and winding story would start soon after that: the story of institutional evolution. Indeed, the Draft Charter never assumes institution-building as an once-and-for-all historical event. Rather, its aim is to establish an institutional framework to serve as an 'incubator' for an ever-evolving East Asian Community. To this end, the Draft Charter designs the institutional architecture of an East Asian Community in a progressive way, with the lowest possible sovereignty cost, which presumably would make political consensus much easier than a more ambitious proposal to establish an EU-type hard legal regime. In this short essay, I would like to shed light upon three

conceptual aspects of the soft legal regime that the Draft Charter assumes as the incubator for regional community-building. These three aspects are concerned with identity, governance and norms.

II. An East Asian Identity

Any regionalist project entails an identity claim. And as with any identity claim, a regional identification differentiates between inside and outside. If an international region conducts institution-building without identity-building, such regional institutionalisation may not work as a regionalist project; it would more likely be part of an open multilateral project. Hence, regionalism would seem to be an exclusive identity-building project. There is no need to understand this closedness as being absolute, however. International region-building is not the same as historical nation-state building, so regional identity can be constructed in a more open way. In general, discourses of constructing regional identity are twofold. One makes a story of particular geographical/cultural ties in a shared history. The other draws on the cause of the regional realisation of universal values, such as global good governance. The former discourse rhetorically constructs particular geographical/cultural ties as being inherent, or a pre-existing property; but the latter discourse presumes that regional identity as a unit pursuing universal values can be acquired through the evolutionary process of a regional community. While both identity discourses are required in any region-building project, the cultural/geographical rhetoric can also be framed within a universal value discourse that advocates regionalism complementary to global good governance. I think that the Draft Charter combines these two identity discourses in this manner.

The Draft Charter assumes the ASEAN Plus Three countries to be the initial members of the East Asian Community, evoking 'the historical, geographical and cultural ties that the peoples of

the region have shared' (Preamble, para. 3). However, this does not mean to insist any closed geographical/cultural bond among those 13 countries. Indeed, the Draft Charter never submits the precise territorial definition of 'East Asia'. It just suggests that 'Any East Asian state which accepts all the provisions of this Charter without reservation may apply to become a member of the Community' (Article 39). This 'East Asia' shall be a politically constructed, open-ended concept. I think that the Draft Charter attempts to construct 'East Asia' from two viewpoints: 1) regional reconciliation; and 2) global good governance.

1) The region-building project envisioned by the Draft Charter encompasses justice and reconciliation projects. Many neighbouring countries around the world have repeated blood-shedding wars, many cases of which have involved a hegemonic power carrying out an invasion. Japanese history in modern East Asia is a typical example of this sort. Besides this bloody history, there have emerged many conflicts, and thereby many killing fields, throughout the region. One of the fundamental objectives set up by the Draft Charter is to foster 'an everlasting reconciliation' (Preamble, para. 6). 'East Asia' needs to be conceptualised as a region that maintains the mission of accomplishing these reconciliation processes. The regional identity of East Asia can be found in this collective effort of justice and reconciliation projects.

2) Along with the justice and reconciliation projects, the Draft Charter aims to support East Asian contributions to global good governance. Article 5 requires Member States to foster 'peaceful and open regional cooperation in harmony with globally shared fundamental values and universal principles' (para. 1). In addition, Article 4 reconfirms the idea of international *jus cogens* and lists its catalogue (paras. 5-8). No specific East Asian value is premised here. Rather, it is advocated that East Asia should be a region that pursues global good governance as a unit. The Draft Charter assumes this self-understanding as one of the important elements of an East Asian identity.

The selection of the original Member States of the East Asian Community needs to be understood precisely from this point of view. As suggested

above, the Draft Charter never assumes the identity discourse of geographical/cultural closedness. Here, attention needs to be paid to the position of ASEAN Plus Three countries as part of a multi-tiered/faceted regionalist trend in East Asia. All of these 13 countries belong to all of the international fora in East Asia (APEC, ASEM, ARF, PMC, ACD, and EAS); therefore, ASEAN Plus Three can be considered the core of East Asian regionalism. Indeed, there would be no effective common action plan without a consensus between China, Japan, Korea and ASEAN. These countries have already organised 48 meetings in 17 policy areas, on the basis of the 2002 Report of the East Asian Study Group which originated in Kim Dea-jung's initiative. This is one advantage over the 16 countries of the East Asian Summit (EAS), or ASEAN Plus Three Plus Three. The membership policy of the Draft Charter is thus based on the necessity of a gradually emerging regional governance. At the current stage, ASEAN Plus Three has much more potential to create a comprehensive and coherent governance system including non-economic action areas beyond mere free trade areas. Other Plus Three countries, such as New Zealand, Australia and India, will be able to access, at first, individual action plans as part of the regional governance system arranged by the East Asian Community.

III. East Asian Governance

With regard to this orientation towards institution-building for governance, the Draft Charter is not particular at all. Any regionalism is a political project to establish its own regional governance system. During the Cold War era, the EEC and ASEAN were certainly sorts of political coalitions countervailing against the communist regimes. However, even those regionalist projects entailed, or at least sought, the making of common public policies among member countries. This way to establish a regional governance system has made progress under the era of globalisation. The Draft Charter attempts to further promote this trend. It endeavours to construct East Asian governance that complements global good governance, as suggested above. This means to transform the political state of affairs of this region from a zero-sum game to a win-win situation. Above all, China-Japan relations are quite important. While

no policy area is exempt, the two big powers' collaboration would be especially effective in preparing capacity-building projects for the so-called CLMV countries (Cambodia, Laos, Myanmar and Vietnam). This is undoubtedly a key issue for the stability of an East Asian Community.

An East Asian governance system is proposed to be constructed progressively, through the developmental process of Community and National Action Plans prescribed by Articles 32 and 33 of the Draft Charter. These action plans are required to be made in 14 policy areas. Articles 7-20 of the Draft Charter provide action plans for areas such as regional security; international crime; pandemics and natural disasters; food crises; development gaps; market building; financial and monetary issues; energy; transportation/information infrastructures; statistics; environment; science and education; people's movement; and legal cooperation. In carrying out these plans, Member States are obliged to be in conformity with the abovementioned basic values and principles (Articles 2 and 4-6). The 14 policy areas are selected alongside agendas *already* on the table, especially in the ASEAN Plus Three process. In this regard, the Draft Charter attempts to construct an East Asian policy *acquis*, encompassing the total substance of all shared norms and promised measures.

In this way, the membership policy of the Draft Charter, suggesting the 13 countries of ASEAN Plus Three as a first wave, follows a functional logic, not a geographical/cultural discourse. The Draft Charter intends to contextualise this functional logic with the aforementioned universal values of global good governance.

IV. An East Asian Normative Order

One point that needs to be considered is how to ensure the effective implementation of the Community and National Action Plans. While there have already been many individual meetings in a number of East Asian fora, these fora tend to be little more than politicians' cheap talk, despite their steady agenda-setting activities. Besides, while making an action plan in itself can be interpreted as a legal obligation under the Draft Char-

ter, Member States are never obliged to adopt legal instruments for their own plans. While Article 30 provides the Community with an option to use 'framework agreements' or 'international conventions' for its own action plans, the use of these legal instruments cannot be assumed to be the normal practice in Community business. Each Member State is likely to have a final say with regard to the precision of policy goals, as well as the legal nature of policy measures. In addition, no judicial review procedure is prepared under the Draft Charter. Even if Member States fail to adopt a policy measure that they promised to in their National Action Plans, it is presumably quite difficult to recognise this failure as a legal infringement. Notwithstanding this institutional fragility, the current Charter has certainly been drafted as a document that is expected to be ratified by Member States in order to establish a legal regime in East Asia, in which basic principles are declared and policy-making procedures are set up. In any event, an EU-like legal regime cannot be expected, at least in the early stages of an evolving East Asian Community. How is it possible, then, that the policy *acquis* can gain resilience under this kind of a soft legal regime of the Draft Charter?

For this question, I think, it is important to consider the roles of law in political terms. It is generally assumed that there are two ways of understanding the roles of law (See Trubek et al. 2005). On the one hand, law is simply a tool for regulating actors' behaviour, and actors navigate legal rules as they pursue their own fixed preferences. Therefore, some form of sanction must be prepared for the stable implementation of legal rules. In contrast, law is also a tool for transforming actors' behaviour, by influencing their self-understanding, or identity. In this view, law is a catalyst for norm diffusion through mutual learning. In considering these two viewpoints, it can be said that the Draft Charter first assumes the role of law as a transformative tool in terms of norm diffusion, and then tries to exalt the evolutionary nature of legalisation in the respective 14 policy areas.

Here, I would like to draw attention to the policy review system that the Draft Charter envisions in Articles 23, 24, 32 and 33. This review system can

be expected to enable normative evolution. It requires each Member State to submit their own National Action Plans and their policy reports to the Council of Ministers, which will discuss them and specify the best practices (Article 24). In this review cycle, individual action plans shall be scrutinised not only by governmental actors (the East Asian Summit and Council of Ministers), but also parliamentarians (the National Parliamentarians Committee) as well as societal actors (registered NGOs) (respectively Articles 28 and 29). In this way, the policy review system of the Draft Charter establishes regular, routinized policy communication, and this system is expected to foster an East Asian normative order. But, how is this possible?

Through the process of issue-oriented policy communication, I think, a trans-border and 'multi-actor coalition' (Söderbaum 2003: 1-2) is expected to emerge in each policy area. Along with arranging regular, routinized policy communication, this trans-border, multi-actor coalition comprises not only governmental, but also parliamentarian as well as societal actors. In this coalition formation, pro-regionalist discourses would gradually attain footholds in national political scenes, and as these discourses become pervasive, the substantive norms of each policy area would progressively be shared. To put this in simple political terms, the Draft Charter provides an opportunity for cross-border/multi-level actor networks to appear on the scene of a regionalist project, and then these networks would be enhanced to pro-regionalist discourse coalitions, in which governmental as well as non-governmental actors would share regionalist minds towards ever deeper regional collaboration. Then, the normative framework of the Draft Charter would orient these pro-regionalist discourses towards the abovementioned justice and reconciliation projects and global good governance.

In this view, what undoubtedly becomes important is the personnel capacity of the East Asian Secretariat and the selection of the Secretary-General (Article 26), as well as the moral support of the Eminent Persons Committee (Article 27). They must play the roles of catalysts that stimulate pro-regionalist discourses.

In this way, the policy review system can help enable the policy *acquis* to become resilient, by catalysing the formation of trans-border discourse coalitions between governmental, parliamentarian and societal actors. I think that this political orientation is an advantage of the institutional architecture of the Draft Charter, in comparison with other existing international fora in East Asia.

V. Concluding Remarks

Existing international fora in East Asia have already organised intergovernmental political processes. These fora have certainly provided policy agendas that may lead to the construction of an East Asian policy *acquis*. On this basis, an East Asian governance system can be established. However, it must also be pointed out that there has been a gap between East Asian countries. What can be expected to close this gap is precisely the day-to-day institutional practice of making Community and National Action plans and of carrying out the abovementioned policy review system for those plans. I think that a politics-law interface can be found precisely in this formation of discourse coalitions: the coalitions that pursue region-building orientated towards justice and reconciliation projects, as well as global good governance. The idea is that the shaping and sharing of norms become possible through the formation of this type of pro-regionalist discourse coalition, and the emergence of this type of coalition will enable the evolution of a regional legal regime that penetrates into each Member State's legal order. In my understanding, the Draft Charter can open up exactly this opportunity.

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