

Can ASEAN Learn about Human Rights from Africa?

Dominic J. Nardi, Jr. (freedom4@mac.com) is a visiting research fellow with the Governance Institute, a legal think-tank dedicated to promoting the rule of law. He has worked with human rights organizations in Southeast Asia and advised women's rights NGOs in East Africa. In addition, he has a J.D. from Georgetown Law and a Masters in Southeast Asian Studies from Johns Hopkins SAIS.

Even before its birth this past weekend at the 15th ASEAN Summit in Cha-am, Thailand, many commentators expressed disappointment with the ASEAN Intergovernmental Commission on Human Rights (AICHR). Human rights activists allege that ASEAN stripped the commission of any "teeth" in order to appease perennial human rights violators, such as Burma. Defenders counter that the result was a necessary political compromise in accord with the "ASEAN Way." Indeed, measuring the AICHR against the European Court of Human Rights would seem unfair because Europe consists exclusively of liberal democracies. However, even when compared to the rest of the developing world, ASEAN still has much to learn about much about establishing an effective human rights body from – of all places – Africa.

Despite the continent's many challenges, the African Union has developed a fairly advanced human rights system. During the 1980s, African leaders adopted the Banjul Charter on Human and People's Rights. Since then, the region has also adopted treaties protecting children's and women's rights, as well as a charter on democratic governance. Africa's human rights system exists not only on paper, but also has teeth: the African Commission on Human and People's Rights. African Union member countries elect 11 commissioners for a six-year renewable term. These commissioners are independent from their respective governments and must be human rights experts of the "highest reputation."

Impressively, the Commission has both the mandate and political will to rule against African governments for discrimination, censorship, arbitrary detention, torture, and a variety of other rights violations. In the late 1990s, the Commission ordered Nigeria's military junta to release a journalist who had been arrested without a warrant and prosecuted in a military tribunal. In 2004, it ruled that the president of Guinea violated the Banjul Charter by inciting soldiers to evict, rape, and torture Sierra Leonean refugees. The Commission has interpreted African treaties broadly, proclaiming that a state of emergency does not justify violating human rights. It has even ventured into political disputes, condemning the king of Swaziland for prohibiting political parties. According to one study, African governments have either fully or partially complied with over 70 percent of Commission decisions issued between 1987 and 2003.

Admittedly, the African human rights system is far from perfect. The Commission has no independent enforcement mechanisms against those governments that refuse to comply. Also, the Commission's docket has become backlogged as it only meets for two 15-day sessions each year. However, the Commission has taken important steps toward not only supporting individual human rights victims, but also promoting human rights norms throughout the continent. Despite Africa's concern for national sovereignty after the horrors of European colonialism, many Africans now consider it appropriate to intervene in order to protect human rights. In 2005, the African Union even suspended Togo in response to an unconstitutional seizure of power, which convinced the government to call new elections. Moreover, the African Union is currently establishing an African Court of Justice and Human Rights with enforcement powers that will work alongside the Commission. As a result, according to Freedom House, Africans on the whole currently enjoy more civil and political freedom than Southeast Asians. While Africa still faces many challenges, human rights violations are no longer considered acceptable thanks in part to the African Commission on Human and People's Rights.

By contrast, ASEAN has yet to adopt a regional human rights treaty and struggles to condemn gross rights violations committed by members. Unlike African human rights treaties, neither the ASEAN Charter nor the AICHR Terms of Reference detail specific rights, but rather list vague principles, such as "non-discrimination." ASEAN's human rights declarations only cover migrant workers and human trafficking. Furthermore, the AICHR will not be able to rely upon international human rights conventions because only two have been ratified by all ten members: the Convention on the Rights of the Child and Committee on the Elimination of Discrimination against Women. Thus, it is not even clear whether Southeast Asians possess the same human rights that Africans currently enjoy.

Moreover, the AICHR will not be nearly as strong as its African counterpart. It cannot hear individual complaints from ASEAN citizens whose rights have been violated. In addition, the Commission has no power to monitor or investigate abuses in ASEAN countries. Rather, its main function appears to be merely promoting human rights awareness. The Terms of Reference provides little guidance on the qualifications for commissioners – a far cry from the Africa Union's requirement that its commissioners be human rights experts of the "highest reputation." All of the commissioners appointed during the ASEAN summit were government representatives, except for those of Thailand and Indonesia. More ominously, should a commissioner become too vocal, the Terms of Reference allows the government to remove him at any time.

ASEAN and the Africa Union are two very different regions. Nonetheless, the comparison provides some useful lessons for the AICHR. First, a strong regional human body can coexist with political diversity, conservative cultures, and national sovereignty. The African Commission hears individual complaints from human rights victims who live under authoritarian governments. This may embarrass politicians, but has certainly not threatened the regimes of dictators such as Zimbabwe's Robert Mugabe. It is likewise difficult to see how a stronger AICHR would topple Burma's Than Shwe.

Part of the African Commission's success derives from its application of nuanced legal interpretations to balance the concerns of sovereign governments with the imperative of protecting rights. For example, under the principle of exhaustion of local remedies, the Commission requires human rights victims to work within their country's own justice system before appealing to the Commission. This allows governments the first chance to redress any rights violations and prevent embarrassing litigation. Moreover, the principle of progressive realization acknowledges that some governments may not have the institutional or financial capacity to implement all human rights immediately, but requires that they at least respect rights and remedy any violations.

Rather than formulating a similar compromise, ASEAN seems to have simply hid behind the mantra of the "ASEAN Way." Indeed, the AIHRC got off to a poor start when the Thai Foreign Ministry refused to allow several civil society delegates to attend the Cha-am summit. As a possible path to compromise, Southeast Asian policymakers and human rights activists should study other regional human rights bodies, particularly Africa's, in order to appreciate the variety of models available. ASEAN itself has admitted that the AIHRC is a "work in progress" and plans to review the Terms of Reference every five years. In the next draft, ASEAN could adopt the principles of exhaustion of remedies, progressive realization, or "ASEAN minus X" in order to strengthen the AICHR. Doing so will help create a stronger ASEAN Community and provide both ASEAN and its member governments more legitimacy in the eyes of their citizens. In fact, given Africa's relative experience with human rights, perhaps we will soon see African Union legal advisors sent to Southeast Asia in order to help the AICHR comply with international human rights standards.