During negotiations of mega-regional trade agreements, state representatives have the incentive to demand that other parties align with their entrenched regulatory practices. Indeed, a country’s exporters will derive extensive benefits if negotiating partners fulfill these demands. Strictly pursuing self-interest, however, often leads to stalemate.

When the United States (US) and European Union (EU) entered into negotiations of the Transatlantic Trade and Investment Partnership (TTIP), they sought to more effectively align transatlantic regulation and associated practices. Although extant literature indicates that relatively similar, rich, and developed countries should easily conclude agreements due to shared interests, negotiations between the US and EU in the regulatory area of genetically modified organisms (GMOs) deteriorated. By 2016, this matter effectively fell off the TTIP negotiating agenda.

This article identifies the factors that stymied negotiations over GMOs. We argue that non-state actors, including independent regulatory agencies, transnational coalitions of private sector organizations, and non-government organizations, play a critical, mediating role in alignment of state interests. In mega-regional trade agreements, non-state actors are often responsible for implementing salient regulations and managing relevant bureaucracy. We find that the strength of independent agencies involved in negotiations, coupled with interest group lobbying, hampered a successful conclusion of TTIP in GMOs and data privacy. By exploring the influence that non-state actors have over mega-regional trade negotiations, we highlight how independent agencies may influence agreement design and constrain cooperation between states.

I. Genetically Modified Organisms

Generally, states have allowed exemptions from free trade in agricultural products on scientifically justified health-related grounds. Indeed, this norm is entrenched in the World Trade Organization (WTO) agreement on Sanitary and Phytosanitary (SPS) measures. While this principle is straightforward to articulate, much of it relies on what constitutes proper scientific evidence, acceptable levels of risk, appropriate times to intervene, and the procedures, tim-
ing, and costs associated with regulatory approval processes. Across countries, there are wide differences in the public acceptability of GMO foods. In North and South America, GMO foods are widely accepted and cultivated. In the EU, this is not the case. Indeed, in 2014, certain key bureaucratic players used divisions among member states to propose reforms to the approval processes concerning not just the cultivation of, but also the trade in, GMOs within the EU. At present, the EU imports genetically modified maize, cotton, soybeans, grape seed oil, and sugar beet. Many of these products are used as inputs for sale to buyers further down the agricultural supply chain, implicating a range of producer interests in the EU.

At the beginning of the TTIP negotiations, both US and EU representatives sought to remove unnecessary barriers to trade and investment in GMO foods. The European Commission’s negotiating mandate, as set by the European Council, specifically listed SPS matters in a chapter on regulatory and non-tariff matters. However, this mandate also made clear that the right to regulate would be protected and employs standards that “each side deems appropriate.” For its part, the US has long had reservations about the manner in which the EU regulates what it refers to as “agricultural biotechnology.” The US went so far as to challenge the EU’s biotech approval system at the WTO, winning a favorable judgment in November 2006. Arguably, this has not addressed all of the US’s concerns for its 2014 Report on Sanitary and Phytosanitary measures. The US Trade Representative (USTR) observed that “the United States continues to engage the European Commission in an effort to normalize trade in GE products.” That report provides an overview of outstanding US concerns, especially as they relate to the approval process for biotech and have arguably shaped the stance taken by US officials and corporate interests during the TTIP negotiation.

I. US bureaucracy, interest group lobbying, and GMOs
The US Department of Agriculture (USDA) has historically taken a strong interest in advancing American agricultural interests in trade negotiations. This necessitates a division of labor within the USTR. In this case, USDA representatives appear to have taken the lead in articulating the US negotiating position. Of course, Congressional oversight of both federal agencies provides US corporate interests with direct and indirect means of lobbying US negotiators.

The central US objective concerning GMOs in TTIP relates to increasing the speed and efficiency of the EU’s GMO approval process so that new US biotech agricultural exports can more quickly reach the European market. The approval process for genetically engineered or altered seeds, feeds, and other products take, on average, about eighteen months in the US as opposed to forty-five months in the EU. US officials have stressed that aligning timetables for approval processes does not, in their view, challenge the EU’s right to regulate food. Perhaps as a means to encourage EU engagement on negotiations relating to GMO approval procedures, Secretary Vilsack has acknowledged that the EU might want to see changes in US procedures.

The US agriculture sector is heavily reliant upon the use of genetically engineered crops. According to the USDA’s National Agricultural Statistics Service, over 90 percent of corn, cotton, and soybean acreage in the US produced GM harvests. Meanwhile, the EU has remained wary of utilizing these innovations in biotech and has been slow in allowing GMO food production. In 2012, only 1.4 percent of corn produced in the EU utilized a Monsanto GMO strain of seed and was only cultivated in Spain.

TTIP’s potential to open EU agricultural markets has attracted the attention of influential producer lobby groups including the American Farm Bureau, The American Meat Institute, American Sugar Alliance, CropLife International (representing Monsanto, Bayer, BASF, CropScience, and Dow Agrisciences, among other firms), Fonterra USA, National Association of Wheat Growers, National Corn Growers Association, USA Poultry and Egg Export Council, among other coalitions. These groups have expressed their concerns about current EU SPS measures by, among other steps, directly engaging with EU regulatory agencies and negotiators. In a letter from the US Biotech Crops Alliance to EU Health & Food Safety Commissioner Vytenis Andriukaitis in March 2015, the group stated their grievances about their inability to access European markets and included a list of demands to reform the biotech approval processes by making it more transparent, limiting approvals to a window of eighteen months, and for more accountability to be placed on the European Food Safety Authority (EFSA)’s role in approving biotech.

Some US corporations have been particularly critical of EU biotech regulations. Certain US producers believe that considerations other than science EU regulatory policy, contradicting at least the spirit of the WTO SPS accord. A review of the specialist trade press indicates that US producer interests have passed on their concerns to elected and appointed US officials accounting for, perhaps, the alignment between their interests and stated the US negotiating position in TTIP.

II. EU bureaucracy, interest group lobbying, and GMOs
The range of US bureaucratic interests impinging upon TTIP negotiations pales in comparison to that of the EU. The EU’s twenty-eight member states retain some responsibility for food safety and promotion of agriculture and are not shy about making their preferences heard. In addition to these national-level factors, there are at least five important supranational players: the EFSA, DG Trade, DG Sanco (responsible for health and food safety), DG Agri (responsible for agriculture and rural development), and the
Presidency of the European Commission.¹²

Until 2014, approval of new biotech traits rested with the EFSA, which was supposed to make decisions on a scientific basis. However, EU member states were consulted for their views on potential approvals. In what appears to have been a pivotal decision in February 2014, EFSA approved a strain of GMO maize referred to as Pioneer 1507, despite nineteen member states opposing the decision and only five in support.¹³ This strain was developed by Dupont and Dow Chemical. Earlier in January 2014, the European Parliament had voted against authorization by 385 to 201. This particular exercise of independent regulatory power would become significant later.

If the European Commission’s trade negotiators had wanted to preserve options by adopting a comprehensive negotiating agenda in SPS, then this did not come to pass. Replying to Secretary Vilsack’s comments made during a visit to Brussels in June 2014 (and reported above), EU Trade Commissioner DeGucht reiterated the European Commission’s opposition to “inclusion of GMOs in TTIP.”¹⁴ While these statements may be consistent with a negotiation on the administrative implementation of GMO regulation that the US seeks, some might interpret the EU’s statements as ruling that out as well. However, the formal mandate given to EU trade negotiators by the European Council does not specifically mention GMOs, which muddies the water further.

European civil society organizations with a stake in the issue have, for a large part, opposed negotiations on GMO-related matters in TTIP. For example, in a 6 May 2014 position paper the European Consumer Organisation (BEUC) stated that GMO labeling requirements must not change and that the EU’s “precautionary principle” for assessing food risks and “other legitimate factors” in food regulation were non-negotiable.¹⁵ A representative of Greenpeace has claimed that the very negotiation of TTIP was putting pressure on EU officials to speed up biotech authorizations.¹⁶

In contrast to the consumer interests outlined above, EU producer interests have been divided. Copa-Cogeca, Coceral, Fediol, Fefac, and avec represent the major agriculture industries in the EU and share some of the same concerns as US agriculture producers. These EU firms have expressed their concern to the Commission that, if it continues to rigidly object to approving more biotech, an integral component to US agricultural exports, or continues to delay the approval process, it will create economic losses for both sides’ firms.¹⁷ As a result, these European firms and interest groups have lobbied the Commission to expedite their approval processes, further liberalizing trade relations and preventing significant costs, ranging from €1 billion for the operations of EU farmers to €5 billion for the EU agri-food industry, who would have to locate alternative feed suppliers if thirteen new biotech strains were not approved.¹⁸

Small and medium-sized farmers and agricultural enterprises have taken a particular stand against the negotiations of GMO rules in TTIP. For example, Gottfried Härle, a fourth generation brewer from Luetkirch, Germany, was quoted as stating “Consumers won’t be able to tell anymore which product is made from genetically modified organisms and which isn’t. For me as an organic producer, that’s a big problem.”¹⁹ A January 2016 study published by UnternehmensGrü, a German group of companies and managers supporting the “green economy,” contended that small European farmers would be unable to compete with low cost US GMO crops.²⁰ The report also contends that the European Commission ignores the interests of small and medium-sized farmers.

III. Negotiations blocked

The start of the Junckers-led European Commission, which officially took place on 1 November 2014, materially influenced TTIP-related deliberations on GMOs. On 14 July 2014, in a presentation on his future plans as President of the European Commission, Mr. Jean-Claude Juncker ensured that “the procedural rules governing the various authorizations of GMOs is reviewed.”²¹ He emphasized that he “would not want the Commission to be able to take a decision when a majority of Member States had not encouraged it to do so.”²²

As a result of this announcement, the European Commission proposed a new set of rules for GMO approval that were accepted by the Member States and European parliament (EP). According to one specialist press report, “the Council of the European Union formally decided in March 2015 that member states should have the ability to ban or restrict the cultivation of GMOs for reasons other than health or safety, a policy that had already been approved by the EP.”²³ In justifying its move, the European Commission noted that this topic was a “controversial area of great public interest,” alluding to the salience of the issue area.²⁴

This move essentially “nationalized” an important part of the decision-making process with respect to GMO approval. By October 2015, sixteen Member States, or regions within those Member States, had chosen to ban the cultivation and importation of GMO crops. Concerns have been raised that this decision fragments the European Single Market as well as potentially disadvantaging exporters of GMO crops. Moreover, in taking this step, the European Commission gave up its sole control of both approvals and GMO-related market access while retaining its right to be the sole TTIP negotiator on the part of the EU. Reactions from U.S. officials and from corporate interests on both sides of the Atlantic have been critical. When the proposal was announced in April 2015, USTR Froman immediately saw the linkage to
the TTIP negotiations, and expressed the US’s disappointment and described the move as unproductive. Specifically, USTR Froman stated that “dividing the EU into 28 separate markets for the circulation of certain products seems at odds with the EU’s goal of deepening the internal market.”

In October 2015, three EU agricultural industry groups, Coceral, Fediol, and Fefac, published estimates of the impact of banning GMO soyabeans and meal on the downstream industry in the EU. Costs would rise by 15 percent, or €2.8 billion, and would erode competitiveness and exports of poultry and the like. In a separate intervention, the Deputy Secretary-General of the Coceral association of grain importers stated, “We fear that this approach will reverse the achievements of the European customs union and single market. We have a single market, so if you import a product it must be entitled to free circulation.”

At the conclusion of the Obama Administration, the stalemate on GMOs in the TTIP negotiation remained. It should be noted that, before the nationalization of GMO market access within the EU, it was unclear whether agreement on a negotiating agenda—let alone the outcome of the negotiation—had been reached. Nationalization complicates matters as US firms and negotiators now face sixteen import bans and having gained the power to block GMO imports. In negotiating parlance, very generous terms would likely have to be offered by the US to encourage Member States to give up this new right. Rather, the US may fancy its chances at WTO dispute settlement, a course of action that would cast a pall over any TTIP GMO negotiations for several years.

It is worth pondering why the European Commission gave the right to set market access terms for GMO crops to member states, an unusual move for a body that has successfully sought to expand its mandate over time. Contemporary news reports point to dissent within the EU over GMO approval processes, with one interpretation that Member States were unwilling to accept scientific rulings on a matter upon which much of the European electorate hold strong views. The 1907 decision was the straw that broke the camel’s back and the appointment of a new Commission created the opportunity for bureaucratic entrepreneurship. Now our attention turns from a salient regulation in what might be characterized as an “old economy sector” to a high-profile regulation of the burgeoning digital economy.

IV. Concluding remarks
Given that the barriers to contemporary cross-border commerce often do not involve tariffs, the focus here was on behind-the-border regulatory policies like those that regulate GMOs. This observation is not that remarkable; after all, trade negotiators have sought to tackle non-tariff barriers in the GATT for decades. Moreover, measures concerning such policies have been included in many regional trade agreements signed over the past twenty years. However, where those measures have had teeth, they have almost exclusively been associated with accords where there are substantial asymmetries in negotiating clout between partners. The TTIP negotiations, in contrast, involve parties with established regulatory traditions, where firms have formulated their commercial plans and made investments given extant regulatory structures, and where enforcers frequently enjoy autonomy, have legal mandates defined in national terms, and have little need to cooperate in ordinary times with national trade negotiators. Despite these considerations, EU and US trade negotiators talk of TTIP as a vehicle to devise new global rules in many areas of economic regulation.

A precondition for TTIP being a catalyst to reform worldwide in a regulatory area is that the EU and US negotiate new rules in that area or new ways to enforce rules. As the above case study demonstrated, regulators on either side of the Atlantic have spurned entreaties to participate in TTIP and precious little has been done about it. The salience among the public and legislators of the policy goals that these regulators say they are pursuing appeals to have given them the ability to thwart substantive negotiations of new rules in their issue area. These regulators appear willing to bear any costs of refusing to negotiate rather than allow a negotiation to commerce that risks resulting in unwanted changes, compared to some baseline scenario. Alternatively put, the cost of taking matters in their own hands and refusing to allow the matter to be negotiated in TTIP in the regulatory area examined here was too low to alter the calculus of the actor that has essentially stymied negotiations.

That those costs weren’t high enough is remarkable given that the parties to this negotiation represent two of the world’s largest trading powers. That regulators and official players other than trade negotiators have been able to veto talks in the face of market access–issue linkages and trans-national coalitions of firms is all the more remarkable. Such considerations beg the question: just how much weight has the US and the EU really put on regulatory convergence? In sum, then, the incentives and objectives of bureaucratic players outside of trade ministries and the perceived opportunity cost of engaging in negotiations appear to be important determinants of the degree to which TTIP, or indeed any mega-regional trade deal, can “tame” important elements of the regulatory state.

Note: This article has been abridged from Vinod K. Aggarwal and Simon J. Evenett, “Resisting Behind the Border Talks in TTIP: The Cases of GMOs and Data Privacy,” Business and Politics, Vol. 19, Issue 4, 2017.
DIRECTOR’S NOTE

Dear Colleague,

Thank you for your continued interest in the Berkeley APEC Study Center (BASC). This newsletter presents recent updates on two of BASC’s three main research programs, namely disaster management and cybersecurity, focused on the Asia-Pacific. It also presents our most recent research on the factors that influence ASEAN’s non-intervention in the Rohingya genocide, current developments in ASEAN Member States’ data privacy policies, how democratic development and religious tensions in East Asian states can increase intolerance, and the effects of growing Islamic fundamentalism in Malaysian society.

First, Somi Yi identifies potential explanations for ASEAN’s non-intervention in, and unwillingness to condemn, the Rohingya genocide in Myanmar. She argues that ASEAN’s institutional weakness - namely its deference to its Member States’ sovereignty - prevents the organization from developing the leadership necessary to prevent genocide and other egregious human rights violations. To assess her argument, Yi provides extensive examples of ASEAN Member States’ explicit commitment to principles of non-intervention, and public statements using these principles to justify non-intervention in Myanmar.

Second, Lilac Peterson calls attention to the incoherence in national-level data policies in ASEAN Member States. She discusses various regional efforts to harmonize data privacy policies, namely the Asia-Pacific Economic Cooperation’s (APEC) Cross-border Privacy Rules system (CBPR) and the Regional Comprehensive Economic Partnership (RCEP). Peterson describes how these regional frameworks’ ability to effectively synchronize national-level policies is constrained by states’s differing preferences and priorities across the region.

Third, Anastasia Pyrinis highlights how developing democracies, particularly those that have a religious majority and various ethnic minorities, are especially vulnerable to majority-rule, making it more difficult to separate church and state. By examining Buddhists’ persecution of the Rohingya in Myanmar and Muslims’ discrimination against non-Muslim minorities in Malaysia, Pyrinis shows that, when the religious majority controls state institutions, religious intolerance increases, facilitating discrimination against minorities.

Last but not least, Mahshad Badii provides a comprehensive account of the increasing influence that Islam has over the legal system in Malaysia. Focusing on how the strength of Sharia courts vis a vis secular courts has changed overtime, Badii demonstrates how the formal integration of Sharia law in the legal system polarizes the political and social spheres.

I hope this newsletter will help enhance your understanding of politics, economics, and business in the Asia-Pacific. The Berkeley APEC Study Center is grateful for support from the Institute of East Asian Studies, Center for Chinese Studies, Center for Japanese Studies, Center for Korean Studies, EU Center for Excellence and the Institute of International Studies at UC Berkeley and the University of St. Gallen for our cooperative projects. We are also deeply grateful for the sustained support of the Ron and Stacey Gutfleish Foundation.

Vinod K. Aggarwal
Director, Berkeley APEC Study Center
This semester, BASC’s disaster management team focused on laying the groundwork for our upcoming conference, entitle...
Our most recent conference, supported by the Institute for East Asian Studies, hosted speakers from universities in the United States, Asia, and Europe, to address the question of how governments are responding to the challenges posed by cybersecurity. Specifically, paper writers evaluated the role of firms, governments, and other key stakeholders in the rise of industrial policy in states playing critical roles in the cybersecurity industry. During the course of the conference, we examined the US, China, Taiwan, Japan, the EU and key European states.

Our goals were as follows: 1) to examine the motivation for government promotion of the cybersecurity industry; 2) to inventory existing measures employed by these countries; 3) to understand the driving forces of cybersecurity industrial policy in these countries; and 4) to examine the likelihood that conflicts that will arise from the competitive pursuit of such industrial policies and how they might possibly be resolved through international cooperation using a common analytical framework from international political economy to serve as the comparative structure for this project.

I. Framing the Project
The first paper, presented by Prof. Vinod Aggarwal and Andrew Reddie, evaluates the role of firms, governments, and other key stakeholders in the pivot of industrial policy in the United States toward the cybersecurity sector. In the presentation, they pointed to various initiatives carried out by the United States to foster the cybersecurity industry including direct investment, seed funding, government ventures capital, and various service programs designed to increase the number of computer scientists and engineers working on cybersecurity-related tasks in government. The presentation also inventoried the various programs related to the building of human capital. Alongside the government efforts noted above, the presentation also considered the varied interests of cybersecurity, IT, and IT adjacent firms and efforts to advocate for a “light-footprint” regulatory role for the government.

II. The View from Europe
In the second presentation, Madeline Carr of University College London examines the UK case. She notes that the British government has placed a strong emphasis on skill and education because the British economy is particularly vulnerable, given that it has the largest Internet economy as a percentage of GDP in the world and that 10% of its employment and 20% of its exports are related to the digital economy. Given its importance, cybersecurity began as a small task in a small department and then began to permeate in all kinds of agencies and departments. Now, there is a tendency to talk about cybersecurity as being everywhere in the government—whether related to social policy or financial policy. These efforts, Carr notes, are particularly necessary given continuing and ongoing data breaches, given the fact that many networks are insecure and are still suffering breaches at the most basic level—primarily related to human failure—and given that market forces have not driven increased cybersecurity. These failures are magnified by a documented skills gap and the reputation costs associated with disclosing breaches.

Danilo D’Elia’s presentation focused on French efforts to maintain cyber and technological sovereignty and to build a domestic cybersecurity market and decrease its reliance upon foreign companies and products. These efforts, D’Elia notes, have been driven by several strategic attacks against critical information networks that led the French government to state an ambition of becoming a world leader in cyber defense over the past ten years. The French government
has also sought to maintain the privacy of citizens (from surveillance) via a series of legislative and legal challenges concerning foreign data collection.

The fourth paper from Paul Timmers explores the policies at the EU-level and offers a unique regional perspective to the challenges posed by cybersecurity. He notes that European concerns related to cybersecurity occur across three domains. The first is economic, with efforts undertaken to maintain and build a resilient Single Market. The second concerns internal security and the use of cyber insecurities to tackle crime or terrorism. The third, the least robust from the EU perspective, is the external dimension concerning defense, the creation of norms and values, and global cooperation. In addressing these challenges, Timmers points to a series of challenges. The first concerns political fragmentation and the limits of the EU mandate vis à vis state parties inside the EU. The second concerns inadequate investment and consolidation in the market in Europe as states operate independently. As Timmers points out, information sharing remains limited and efforts to expand the 2013 Network and Information Security Directive to increase trust, reduce market fragmentation, lower costs, and ease public procurement of cybersecurity products are ongoing.

III. The View from Asia

Jackie Kerr, in her presentation titled “Authoritarian Soft Power? Russia, International Cyber Conflict, and the Rise of Information Warfare,” uses the mass political protests in Russia in 2011 as a starting point for her discussion of the tension between the use of social media “liberation technologies” by activists and state efforts to control Internet technology for its own purposes. In the presentation, Kerr usefully defines the various types of cyber attacks ranging from brute force attacks to softer interventions such as site defacement, media manipulation, and doxxing. In several case studies including Estonia in 2007, Georgia in 2008, and Ukraine in the present, Kerr outlines the disinformation campaigns, propaganda, censorship, and use of plausible deniability as well as critical infrastructure attacks, trolling, and bots that have become a significant part of the Russian policy in cyberspace borne out of early efforts by the Putin government to discredit the Russian media and oligarchs that funded it during the 2000s.

Examining the Taiwanese case, Prof. Hsini Huang describes a growing cybersecurity market in a country that has stated that “cybersecurity is national security.” Indeed, she points to the year-to-year rise in value of the cybersecurity market but slowing growth in the sector. She also notes that most firms tend to be small; only one firm headquartered in Japan—Trend Micro—has more than one thousand employees. These various firms provide the context for a government focused on strengthening domestic defense industry. Indeed, cybersecurity, aerospace, and missile technology have been noted as strategic prerogatives for the government seeking to increase market demand and stimulate national industry with a focus on niche companies rather than “full-service” firms.

Prof. Tai Ming Cheung’s paper, “The Rise of China as a Cybersecurity Industrial Power: Principles, Drivers, Policies, and International Implications,” notes that in China, cybersecurity is a big but weak industry with few well-known Chinese cyber firms. As a result, Xi’s policies over the last couple of years have focused on a top-down approach in the near, medium, and long-term to transform China into a strong cybersecurity power and strength national security by relying on domestically-produced innovations. As a result, the time horizons for these policies stretch over ten to twenty years. Internationally, Cheung argues that China seeks a multilateral, transparent, and democratic framework in which decisions are made by state actors and not by non-state actors (or overt dominance by Western actors).

In his paper concerning Japan, Ben Bartlett notes that the government has been taking security seriously and, as a consequence, has enjoyed some successes. Bartlett ties these successes to the high levels of representation of private industry within government and strong efforts to promote information sharing between companies, industries, and the government. Mirroring Carr’s notes above, however, Bartlett also recognizes the human capital challenges facing the Japanese market. In brief, Bartlett outlines the tax and loan policies designed to encourage small and medium-sized companies to improve cybersecurity, including tax exemptions for research into cybersecurity. He also examines the nature of the market with few cybersecurity firms and a larger number of large IT firms and Internet adjacent firms. Given the existence of these traditional players, firms appear to prefer having the government set standards with little lobbying. On the other hand, the government—specifically METI and MIC—doesn’t appear to want to provide these standards in an effort to avoid lowest common denominator standard-setting.

IV. Conclusion

Taken together, these papers point to the varied efforts of states to build their own domestic cybersecurity markets in response to one of the most significant economic and security challenges of the 21st century. There is no doubt that this issue will remain a concern moving forward and offer scholars various opportunities to examine the interplay between economic policy-making in markets with security consequences.
ASEAN on the Rohingya Genocide: All Talk, No Walk

By Somi Yi, BASC Research Assistant

As Myanmar’s military expels hundreds of thousands of Rohingya with little, if any, response from the international community, human rights activists and proponents of the responsibility to protect are left wondering where the world went wrong after promising “never again.” In addition to the widespread human rights abuses in Myanmar, numerous security threats plague the region, such as the growing military conflict with ISIL in the Philippines, the widespread criminal networks engaging in smuggling and trafficking, and the widely publicized debacle regarding the South China Sea. Although ASEAN Member States formally committed to collectively promote regional peace, stability, and prosperity numerous years ago, this organization has made little headway in combating regional human rights abuses and security threats. ASEAN has failed thus far to make any sort of unified statement regarding the Rohingya crisis and the regional organization has continued to remain mired in its own institutional failures while thousands of innocent civilians are being terrorized out of their homes in Myanmar. The most recent ASEAN summit concluded in mid-November this year and there was no significant mention nor plan for action regarding Myanmar’s violence against the Rohingya. Why has ASEAN struggled to undertake meaningful, unified action?

I argue that weak institutional design, namely its inability to overcome Member State deference to sovereignty, prevents effective organizational leadership and response to the Rohingya crisis. Indeed, Member States have embraced the “ASEAN Way,” which encourages bare minimum political agreement and watered-down, non-constraining policies, allowing states to pursue ad hoc national policies that fit their interests.

Examining the ASEAN Charter and other treaties critical to the organization’s development indicates that weak institutional design restricts ASEAN from enforcing regional policies and disincentivizes Member States from investing in ASEAN’s strength. Specifically, the ASEAN Charter’s discussion of use of force drastically differs from the way that the United Nations (UN), as well as other regional organizations, address intervention. Chapter VII of the UN Charter specifies that the UN may use force to restore international peace and security. While Chapter VII is far from perfect, it highlights that threats to international peace and stability abrogate state sovereignty. UN Member States have thus agreed to comply with - and thus have ceded their sovereignty to - the UN. In contrast, although the ASEAN charter leaves the potential for sanctions or
legal action against violations of its commitments under the discretion of Member States, the condition of consensus often makes this all but impossible. Conversely, the first three “fundamental principles” of ASEAN, established by the Treaty of Amity and Cooperation in Southeast Asia, are basically reiterations of the importance of upholding sovereignty and non-interference. Any “serious breach of the Charter or noncompliance” is under the jurisdiction of the ASEAN summit and its corresponding community council. The ASEAN Political-Security Community Blueprint, of which the Rohingya genocide falls under the purview of, does not have a single mention regarding punishments for violating ASEAN’s commitment to human rights protection nor does it provide a framework for potential resolution. Instead, it is yet another lengthy document stressing the importance of “promoting” norms and shared values without any real call to action or consequences for noncompliance.

ASEAN’s lack of strong enforcement mechanisms means that the organization must rely on majority consensus among member states to make meaningful policy. As seen through Cambodia, acting on behalf of China, blocking any ASEAN action in the South China Sea, the requirement of unanimity has severely weakened ASEAN’s legitimacy and power as a regional organization. When ASEAN fails to enact unified policy decisions, the organization is left unable to do much except hold ceremonious meetings every year. The lack of a unified response from ASEAN regarding crises within the region, particularly the Rohingya crisis, demonstrates how divisions among Member States paralyze the organization into inaction.

Defined in September 2017 as a “text book example of ethnic cleansing” by the UN High Commissioner of Human Rights, the crisis in Rakhine state has resulted in a number of atrocities and injustices against the Rohingya. Myanmar’s military forces have been burning down Rohingya and allegedly firing into crowds of fleeing civilians. Numerous accounts of sexual assault, torture, and extrajudicial killings have been reported by survivors in refugee camps and the UN has announced that the systemic attacks against the Rohingya could potentially amount to crimes against humanity. In 2016, the UN tried to send an independent fact-finding mission into the Rakhine state, but the Myanmar government promptly denied them access to the country. With China mostly obstructing any Security Council resolutions against Myanmar, the UN has had to focus its efforts on mostly responding to the humanitarian crisis through humanitarian assistance. China has also prevented the UN from declaring that the Rohingya have a right to return to Myanmar. On a more positive note, Bangladesh has been generously cooperative with the UN and other international organizations and is working to maintain one of the world’s largest refugee camps at its border. But leaders in Myanmar fear that public benevolence will only last so long until resources, in an already poor and densely populated country, become increasingly strained. Although Bangladesh and Myanmar have come to their own bilateral agreement of starting “voluntary” repatriations of Rohingya within the next 2 months, the international relief community is worried about this move considering the Rohingya have been a historically persecuted group in Myanmar and many of their villages have been razed and their land given to others. The clamor of international activity surrounding the Rohingya genocide makes ASEAN’s silence on the issue all the more deafening.

ASEAN’s institutional weakness vis a vis its member states becomes even more apparent when looking at Member States’ individual reactions to the Rohingya crisis. Cambodian Prime Minister Hun Sen announced earlier this year that his reservations about international intervention in Myanmar were founded in the ASEAN charter’s fundamental anti-interventionist rhetoric. Conversely, in response to the increasing anger of Indonesia’s Muslim-majority population, Indonesian President Joko Widodo recently sent his foreign minister to Myanmar in an attempt to convince the government to cease its violence against the Rohingya. Singapore has gone the route of financial support and pledged $100,000 to helping the ASEAN Humanitarian Assistance Center (AHC) continue facilitating the delivery of relief aid to the displaced Rohingya in the Rakhine state. Thailand has not been consistent with its actions towards the Rohingya; while Prime Minister Prayut Chano-cha announced that Thailand would be preparing to accept Rohingya fleeing from Myanmar, the navy has indicated that they will push Rohingya-filled boats out of Thai waters. Malaysia and the Philippines have exchanged tense dialogue regarding ASEAN’s response to the Rohingya crisis. Malaysia has criticized the Philippines for making an official statement on behalf of ASEAN that condemned the Arakan Rohingya Salvation Army for attacking the Myanmar military rather than denouncing the Myanmar military’s systematic use of violence against Rohingya. Moreover, the Malaysian government announced that its Coast Guard would not turn away fleeing Rohingya and would provide temporary shelter in immigration detention centers while declaring that Myanmar must “halt atrocities which have unleashed a full-scale humanitarian crisis.”

These various, conflicting responses to the Rohingya genocide indicate that, rather than working through or strengthening ASEAN enforcement mechanisms, Member States prefer to unilaterally take action, exacerbating the divisive effects of the organization’s implicit design failures. ASEAN demands very little from its Member States. Because
there is no real threat of significant external influence and/or intervention, individual countries have little incentive to comply with the organization. This is perhaps why, despite being supposedly so against ceding sovereignty to an external organization, all ASEAN Member States are also part of the UN. Signing onto the UN, on top of providing access to a global network of benefits through mechanisms like the World Bank, World Health Organization, and the UN Development Programme, gives recognition and legitimacy in our current international system. The UN, for all its problems and controversies, has carried out interventions, be it economic or military, in a way that ASEAN has not even come close to enacting. While ASEAN has signed plenty of regional treaties and agreements, the lack of legal obligation results in few tangible results. The lack of action over the Rohingya genocide so far has shown how once a country becomes an ASEAN Member State, the organization has little practical power to hold anyone accountable. Without the institutional framework and precedent for the potential of external interventions and such, ASEAN will remain chained by the very treaties and charter that created it in the first place.

So is there any hope moving forward? The possibility of ASEAN implementing a ‘boots on the ground’ intervention is slim to say the least, so perhaps the future for the organization lies in institutionalizing enforcement mechanisms that revolve around its influence on the South-East Asian economy. Through increasing regional economic integration, ASEAN Member States now form a market of 600 million consumers with a combined GDP of over $2.4 trillion. The ASEAN Economic Community has paved the way for free flow of labor and virtually erased tariffs among its Member States while also facilitating numerous free trade agreements with large, nearby economies including China, Japan, and Australia. These are privileges that ASEAN could take away for noncompliant members. Historically, ASEAN’s original purpose was much more economically driven and so it could potentially be significant to condition lucrative economic benefits on providing human rights protections, implementing environmental regulations, etc. Whether it’s with sanctions, restrictions, or just expelling noncompliant members, the key is to actually give ASEAN some sort of tangible power that collectively, would be greater than that of an individual Member State, thus incentivizing Member States to be more willing to cede their sovereignty to a certain extent. Otherwise, Member States will continue to disregard ASEAN policies and decisions that they disagree with and not take seriously the potential the organization could have to benefit the region as a whole.

For now, the future of ASEAN taking unified action on human rights issues looks dismal at best, and will remain so until institutional foundations of the organization itself are adjusted so that a proper response to issues like the Rohingya crisis is not only possible, but the norm. When a great evil takes place, an equally strong willingness to do good is needed for balance, but the Rohingya are learning the hard way that the world’s promise of “never again” does not apply to them.
Established in 2015, the ASEAN Economic Community (AEC) has prioritized the development of a “coherent and comprehensive framework for personal data protection” by 2025. In pursuit of this goal, the AEC has designed the “Regional Data Protection and Privacy Principles” to align the data privacy laws of ASEAN Member States. Despite these regional policies, data privacy laws among ASEAN members are traveling on two separate trajectories. Some Member States, namely the Philippines, Indonesia, and Singapore, have pursued internal initiatives to drive strong enforcement mechanisms, while Vietnam has inadequate enforcement mechanisms. While Indonesia and Vietnam have introduced legislation that brings both the private and public sector up to international standards, other member states, such as Thailand, Cambodia, Laos, Brunei, and Myanmar, have not taken any steps towards protecting data privacy. The disjointed adoption of these data privacy policies implies that the AEC has not fulfilled its goal of overarching acceptance of these principles. Is it possible to induce coherence among the distinct policies pursued by ASEAN member states?

While two overarching regional privacy frameworks - the Asia-Pacific Economic Cooperation’s (APEC) Cross-border Privacy Rules system (CBPR) and the Regional Comprehensive Economic Partnership (RCEP) - could harmonize policies, their efficacy is limited by domestic preferences and priorities across the region.

The voluntary CBPR system, created in 2011, was APEC’s acknowledgment of the sheer complexity of the data transfer ecosystem between nations with varying privacy laws. It improves accountability in the privacy sphere by requiring participants to have enacted privacy laws, appointed authorities/bureaus to enforce regulations, earned a trust-mark through APEC-approved providers (such as TRUSTe), and clearly established that domestic privacy legislation is following the APEC Privacy Framework.

On the other hand, RCEP, the multilateral trade agreement which includes 10 ASEAN members, as well as China, India, Japan, Australia, New Zealand, and South Korea, does not appear to be actively constructing a novel framework for data privacy. In a May policy brief, the Asian Trade Centre stated that “RCEP will need to include feedback mechanisms to ensure that provisions for data protection and privacy remain relevant,” and praised CBPR for inducing coherence. The extent of its policy recommendation was to establish a domestic central agency, department, or grouping of agencies to oversee data privacy issues in order to limit policy fragmentation. RCEP stands in stark contrast to the recently shelved Trans-Pacific Partnership, whose “digital two dozen” protections sought to prevent data localization and forced technology transfers, which many ASEAN countries conduct.

While both frameworks have the potential to induce regional coherence in data privacy norms, CBPR and RCEP could also exert a push-pull effect on the Asia-Pacific privacy ecosystem. Whether CBPR and RCEP will be competing or complementary frameworks for data privacy policy largely depends on participants’ preferences for each system, mediated by system accessibility.

While some countries that are part of ASEAN and RCEP have expressed interest in joining CBPR, others are currently ineligible. Singapore, whose Personal Data Protection Commission actively fines businesses that violate person-
al disclosure limitations and has established a TrustMark data privacy initiative, is currently considering expanding its data privacy initiatives by joining the CBPR. According to APEC’s Survey on the Readiness for Joining CBPR, the Philippines and Vietnam also plan to join CBPR. Brunei, Indonesia, and Thailand cannot join because they haven’t fulfilled the other criteria of enacting privacy laws, appointing authorities/bureaus to enforce regulations, earning a trust-mark, and clearly establishing that domestic privacy legislation is following the APEC Privacy Framework. This is most likely because the burden of meeting these requirements is unjustifiably high for countries that do not view reforming data privacy policies as a key priority anyway.

Although Vietnam has expressed interest in joining CBPR, it has strict data localization policies that clash with the principles set forth in CBPR. Vietnam forbids direct access to the Internet through foreign internet service providers (ISPs) and requires domestic ISPs to store information transmitted on the internet for at least 15 days. Its Decree 72, enacted in 2013, forces a large swath of online companies (social networks, online game providers, general information websites, etc.) to have at least one server based in Vietnam so that “competent state management agencies” can inspect how information is stored and provided. This will pose a challenge to foreign companies trying to secure data privacy in Vietnam. It also stands in opposition to the third requirement of joining CBPR: “recognition/acceptance,” which entails relaxing data privacy requirements. This will make it more difficult for APEC to approve CBPR membership for Vietnam.

Similar to Vietnam, Malaysia stands at a crossroads. While it has no intentions of joining the CBPR, Malaysia is currently prioritizing its own domestic agenda over regional policies. It is among the first countries to create a “white list” of countries to which Malaysians’ personal data can be transferred. This is the more promising alternative to a negative list, which would list all countries that Malaysia prohibits personal data transfers to. In Malaysia’s policy, whitelisted countries include those that have either (i) enacted comprehensive data protection law(s), or (ii) have no comprehensive data protection laws but are subjected to binding commitments (multilateral/bilateral agreements and others), and/or (iii) have a code of practice or national co-regulatory data protection mechanisms.

Points ii and iii provide a middle ground for countries that don’t have a robust legal framework for data protection and thus are ineligible for CBPRs. This appears to be the most significant obstacle hindering the AEC and the promulgation of CBPRs. Therefore, adopting a similar policy to Malaysia’s could nudge these countries towards qualifying for point i and eventually joining CBPRs. This means that Malaysia’s white list is somewhat promising for interoperability on data privacy regulations between Asia-Pacific countries, and for other countries to look to Malaysia as a model for their own domestic regulations.

Compared to CBPR, Malaysia’s regulations cannot serve as a base regional standard for integrity, however, because the wording is deliberately vague, there is no set date for enactment, and there is nothing specific beyond the existence of the white list, which includes the European Economic Area, several OECD countries, small island nations, the Dubai International Financial Centre (DIFC), and Japan, Korea, China, Hong Kong, Taiwan, Singapore, and the Philippines. Additionally, Malaysia’s 2013 Personal Data Protection Act prevents personal data from being transferred outside Malaysia without government approval. There are only three exceptions: first, when the transfer is part of a contract between the data subject and data user that the Malaysian government cannot interfere with; second, if reasonable steps have been taken to protect the data; and third, if the transfer is necessary to protect the data subject’s vital interests. It is worth noting that a consent requirement for transferring data abroad imposes a significant burden.

It seems likely that ASEAN members will continue to embrace data localization in the name of data privacy, even if this undercutts economic growth and hurts foreign competitors. According to the Information Technology and Innovation Foundation (ITIF), imposing data localization and other barriers reduces United States GDP by 0.1 to 0.36 percent, and reduces GDP by 0.7 to 1.7 percent in Brazil, China, the European Union, India, Indonesia, Korea, and Vietnam, which have all either proposed or enacted data localization policies.

In light of the push-pull effects of CBPR and RCEP and the negative effects of Member States’ push for data localization, CBPRs currently stand as the Asia-Pacific’s best hope for establishing a safer, more secure privacy environment for multinational companies. CBPR protects privacy without meddling in digital trade. In addition, they don’t directly interfere with domestic privacy regimes, but instead allow cross-border data transfers between organizations that meet basic accountability standards. This interoperability grants a high level of cross-border privacy protection without burdening businesses with data localization implementation costs and security concerns. However, a regional shift towards CBPR will take time: only the United States, Mexico, Canada, and Japan have used CBPR until recently. It remains to be seen whether Asia-Pacific countries will designate data privacy policy as important enough of a priority to justify making reforms in order to join CBPR.
The democratization of any state leads to new challenges that can arise in the form of economic turmoil, violence, or political instability. When societies consist of a religious majority and various ethnic minorities, the process of democratization can lead to religious majority rule at the expense of minorities. Although democratic development and effectiveness has been quite different in Myanmar than in Malaysia, the intersection of religion and political power has led to mounting tensions between the dominant religion and religious minorities in each state. Through the examination of the persecution of the Rohingya by Buddhists in Myanmar and the gradually increasing persecution of non-Muslim religious minorities in Malaysia, I argue that one main vulnerability of a developing democracy is an inability to separate church and state - a weakness that can lead to religious intolerance.

Myanmar and Malaysia have vastly different historical experiences with democratization. While Myanmar is a semi-democracy still in transition, Malaysia is a fully established democracy with weak, ineffective institutions whose legitimacy are often questioned. Although each country has different democratic experiences, democratization has allowed the religious majority in each country to capture political power and pursue oppressive policies against ethnic and religious minorities. In Myanmar, democratization has empowered Buddhists leaders, who gained political influence through their resistance to military rule, facilitating their abuse of the Rohingya community, a Muslim minority in the country. Although Malaysia has a long history as a 'functioning' democracy, emphasis on the superiority of ethnic Malays has led to the increasing power of Islamic law and the persecution of all non-Muslim religious minorities.

Myanmar’s political history is turbulent. Intermittent periods of democracy have been surrounded by overbearing periods of military rule, leaving citizens of Myanmar calling for democracy, an effort championed by Buddhist monks and political leaders alike. Following Myanmar’s independence from British colonial rule, an early period of democratization began under the leadership of devout Buddhist, U Nu. Despite this early democratization, Ne Win, a military leader, rose to power via a coup d’état and served as an authoritarian political leader from 1958 to 1960. Despite U Nu’s brief attempt to restore democracy in 1960, Ne Win regained political power in 1962 and remained in power until he stepped down in 1988 due to anti-government protests brought about by a finan-
cial crisis and widespread corruption. This period also saw the return of Aung San Suu Kyi, the daughter of Aung San, to Myanmar, a political leader who later organized the successful National League for Democracy (NLD).5

In response to rising inequality, Buddhist monks led the Saffron Revolution of 2007, a non-violent movement, in response to greater governmental regulation of fuel prices. In an attempt to regain legitimacy amidst widespread civilian protests, the military government tried to appeal to the approximately 90% Buddhist majority in Myanmar by associating its own rule with Buddhism.6 However, the Saffron Revolution gave rise to politically engaged Buddhist monks who openly protested military rule and encouraged Buddhist citizens to practice mass “lay meditation,” meditation to be practiced by the “lay” person in order to encourage citizens to become more politically and socially active as well as gain closer ties to the country’s religion, Buddhism.7 As a consequence of this movement’s traction, military leader Thein Sein has persuaded military leaders to move forward with a democratic transition which culminated in the 2010 elections and the political victory of the Union Solidarity and Development Party (USDP).8 Because Buddhist religious activism led this return to democracy, politics and civil society in Myanmar are inextricably linked to Buddhism.

The widespread support of Buddhism and religious tensions between Buddhists and Muslims began to rise following the 2010 elections, particularly against the Rohingya population, a Muslim minority in the Rakhine state. Though a persecuted group since the 1980s (Rohingyas’ citizenship was revoked in 1982), when combined with Buddhist-backing, Myanmar’s humanitarian crisis and mistreatment of the Rohingya minority has worsened with time.9 This religious violence was further perpetrated by the rising Buddhist nationalist movement which began in 2012.10 Led by Buddhist monk Ashin Wirathu, the 969 Movement cautioned that Myanmar’s new-found democracy could be exploited by Muslims. Ashin Wirathu’s inflammatory speeches have propagated ideas such as “if we are weak, our land will become Muslim.”11 Coupled with Buddhism’s popularity, Ashin Wirathu’s movement has resulted in widespread violence against Muslims. In 2013, for example, 200 Muslims were lynched and 150,000 more were forcibly ousted from their homes.12 Perhaps as a consequence of Myanmar’s new-found freedom “after decades of military rule,” this movement gained much traction, a fact only heightened by the return of Aung San Suu Kyi, the daughter of Aung San, to Myanmar, a political leader who later organized the successful National League for Democracy (NLD).5

Buddhist majority.14

With the 2015 elections, however, the international community was hopeful that there would be a reversal in governmental policy regarding the blatant abuse and persecution of the Muslim Rohingya minority, both physically and politically.15 This hope, however, was short-lived. Despite greater ethnic diversity in the 2015 elections, a fact which led to the landslide victory of the National League for Democracy (NLD), USDP’s rival party, “a notable exception to this growing diversity is” the lack of representation among “Muslim candidates, many of whose applications were rejected by the UEC [Union Election Commission], citing lack of proof of citizenship.”16 Of the candidates running for elections in 2015, 5130 candidates were Buddhist, with only 28 being Muslim, all of which were unsuccessful in their election attempts.17 The non-representation of Muslims and the UEC’s citation of improper citizenship proof is a testament to the growing animosity among Buddhists towards Muslims and is characteristic with Myanmar’s withdrawal of citizenship of Rohingya as early as 1982.18

Furthermore, despite Aung San Suu Kyi’s and NLD’s rise to power, international humanitarian organizations such as Amnesty International began to assert that the NLD had not sought “to prioritize the human rights situation in Rakhine State.”19 After assessing the situation, Amnesty International reported that the NLD has downplayed “the situation [Rohingya abuse], casting doubt on reports of abuses against the Rohingya.”20 As a consequence of Myanmar’s position, Amnesty International’s Director for Southeast Asia and the Pacific, Rafendi Djamin, announced that “men, women, children, whole families and entire villages [Rohingya] have been attacked and abused, as a form of collective punishment.”21 In response, the NLD-led government announced via spokeswoman Aye Aye Soe that Myanmar is the “victim of fake news and a disinformation campaign” perpetrated by Amnesty International.22 While it is uncertain what lies ahead in terms of the fate of the Rohingya population, one thing is certain: a Buddhist-led movement catalyzed the anti-Muslim and anti-Rohingya sentiment in Myanmar, a sentiment that was bolstered by Buddhism’s association with democracy and civil society.

Malaysia, unlike Myanmar, has not experienced widespread human rights abuses and violent oppression of religious minorities. However, the rising influence of Islam and a historical emphasis on ethnic-based politics presents similar challenges in terms of the treatment of minorities by the religious majority. Much like Myanmar, minorities’ disproportionately low political participation originates in the early years of Malaysia’s democratization. Following its emancipation from British rule in 1957, the 1969 “Race Riots” ensued after ethnic Chinese candidates were elected in two districts near the capital.23 In response, the government issued the “Bumiputra Policy,” a
form of affirmative action for the Muslim Malay majority made possible via rhetoric that ethnic Malays did not have their best interests in mind when voting for Chinese. The emphasis on voting for your own “race,” a policy that can be extended to one’s own ethnicity or religion, subsequently became deeply engrained within Malaysian society. In present day, Malaysian politics is organized around a race-based system, thus entrenching racial, ethnic, and religious divisions. Though the United Malays National Organization (UMNO), as a party has held power since its independence, Malaysia, considering itself an Islamic state, has seen the rise of numerous opposition groups, one in particular being Parti Islam SeMalaysia (PAS), a party whose primary mission is preserving Islamic interests. Regardless of party, UMNO or PAS, an essential part of being ethnic “Malay” is being Muslim. Article 160 in the Malaysian Constitution, for example, outlines that in order for an individual to be considered “Malay,” “they must profess the religion of Islam.” Due to the importance for this state to maintain a Malay majority, a majority that is already slim, being just slightly above 50%, the government has maintained policies catering to its Muslim Malay majority, especially made possible given the government narrative that Chinese and Indian citizens can leave the country at any time if they wish. While this is a non-forced narrative unlike the forced expulsion of Rohingya in Myanmar, the lack of political power for minority ethnicities and religions is highly problematic for the future of Malaysia’s democracy.

Unlike Myanmar, where political oppression comes largely in the form of Buddhist-led efforts, Malaysia’s political oppression is more deeply ingrained institutionally, and is thus more easily detected. Fearing the decline of Islamic influence, in January of 1997, Jabatan Kemajuan Islam Malaysia (JAKIM), otherwise known as the Department of Islamic Development Malaysia, was created along with the National Fatwa Council with the expressed purpose of issuing fatwas, or rulings on Islamic law. Parti Islam SeMalaysia (PAS), in particular, has served as a “rallying cry for... party-based conservative [Islamic] voices, which were supported by the Malay lanague mainstream media and Malay-Muslim NGOs, groups that have perpetrated “incendiary remarks on ethno-religious matters.” In 2007, Malaysia sent its first astronaut into space (a Muslim Malay) and developed a small booklet which served as a guide for Islamic religious practice in space, an endeavor that Malaysia hoped “would make a not so subtle statement about Malaysia’s newly claimed position of influence in the Islamic world.”

As Islamic religious values became institutionalized in the Malaysian political landscape, the mid-2000s simultaneously saw rising levels of religious intolerance. For example, in 2008, Malaysia’s “Religious Enforcement Police” conducted “midnight raids” to confiscate Christian bibles at locations such as the Bible Society of Malaysia (BSM), deeming them offensive to Muslims and calling for their banishment. Then, in August of 2009, the “cow head protests” began in Shah Alam, which were organized by Muslims protesting the building of a Hindu temple, a protest that “unveiled disrespect and hatred toward Hindu citizens.” This was followed by the torching of three churches in early 2010 in Klang Valley. Similarly, in 2012, in an effort to confiscate banned material, a printing house publishing a book by a “liberal Muslim activist calling for greater religious tolerance” was raided. In addition to this violence, legislative proposals in Parliament have sought “a stricter enforcement of Syariah law that may result in the amputation of limbs for certain crimes,” compulsory Islamic “civilization studies at private universities,” and forced “conversion of minors to Islam based on only one parent’s approval.” Combined with an outbreak of religious-based violence and proposed parliamentary law, it is clear that Islam has been institutionalized in the Malaysian government, an issue that presents great challenges as Malaysia moves forward as a democracy. Despite this, however, there have been movements such as Bersih 5 which calls for greater multicultural acceptance and distance from the race-based political system, a fact that brings some hope that such religious and ethnic persecution may be nearing its end in Malaysia.

While not all theocratic democracies face the same issues as Myanmar and Malaysia, that fact does not diminish their struggle nor the concern it places upon the future of democracy in each state. While Malaysia may have a stronger democracy than Myanmar, a key element in a successful democratic transition is a state’s treatment of minority groups. An inability to secure equal political or social rights for minorities indicates a failure of a supposed democratic state. In the case of Myanmar, the Muslim Rohingya population has been unjustly persecuted by a Buddhist majority while in Malaysia, Muslims have targeted non-Muslim minorities. Though different religions are perpetrating this violence and political persecution, both originated from a similar religiously or ethnically-led democratization process.
Since the turn of the century, Malaysia has struggled to uphold a political system divided against itself: on one end of the spectrum, there exists the established secular state, and on the other, a push for Islamic governance by conservative factions of the United Malays National Organization (UMNO) and Malaysian Islamic Party (PAS). This push goes beyond the position of Islam as defined by the Malaysia’s Constitution: while Islam is the official religion of the Federation, Islamic law only applies to Muslims in regards to personal laws and at the state-level. Non-Muslims, meanwhile, are free to practice their faiths openly.

Despite the lack of grounds in the Constitution for Malaysia being an Islamic state, over the past two decades, Islam has become increasingly integrated into state rhetoric, with traditional factions steadily gaining more power among political parties and Malaysian youth increasingly embracing Islamist fundamentalism. Granted, the politicization of Islam in Malaysia is not a new phenomenon: UMNO, the dominant political party, actively promotes the preservation of Islamic values and the protection of ethnic Malay interests. Demographically, this is a sound decision: ethnic Malays are an overwhelming majority of the population, tailed only by ethnic Chinese and Indian minorities. Similarly, per Article 160 of the Malaysian Constitution, all ethnic Malays are all Muslims. Malaysia is the only state in Southeast Asia following a federal system of law. Nine out of thirteen states are headed by a sultan, or Islamic King, although much of governance is done by the state assembly. Moreover, the growing embrace of Islamic fundamentalism has not only wrought crisis in the court system over the role of civil and syariah states vis a vis each other, but also encouraged the stifling of civil liberties among non-Muslim minorities. What will be the impact of the permeation of Islam into the state on the future of Malaysian governance and society? Through an analysis of Islam and the Malay judicial system and legislature, I demonstrate that a shift toward Islamic law will undermine the integrity of the judicial system and lay the foundation for an Islamic state that infringes on non-Muslim rights.

I. Islam in the Judiciary
A product of the British common law court structure, Malaysia’s civil court system is largely familiar to Western nations. Under the 1957 Federal Constitution of Malaysia, subordinate courts hold general jurisdiction in civil and criminal matters, while Superior Courts, consisting of the High Courts of Malaya, Sabah, and Sarawak, the Court of Appeals, and the Federal Court, as well as their respective Appellate Courts, hear appeals against lower court decisions. However, parallel to this common civil court system
exists state-level syariah courts established to deal with issues of Islamic law. That is, in states that have syariah courts, syariah courts have jurisdiction over matters of “Islamic law and personal and family law of persons professing the religion of Islam.” Per traditional common law, syariah courts would be classified as state courts, subjecting them to the superior review power of the High Courts. However, such hierarchical division of power was challenged in the infamous 2007 Lina Joy vs. Islamic Religious Council of the Federal Territories case.

Lina Joy, born Azlina Jailani, was a Malay, and according to Article 160 of the Constitution, a Muslim by law. Jailani converted to Christianity and successfully changed her name to Lina Joy on her government-issued ID. Nonetheless, her multiple applications to remove ‘Islam’ from her identity card were all rejected, and upon losing appeals in both the High Court (2001) and Court of Appeal (2005), the Federal Court ultimately ruled against Joy, deferring jurisdiction to syariah courts on issues of apostasy and concluding that allowing Joy to leave Islam would offend the Muslim community. Besides violating the right to freedom of religion guaranteed to Malaysians per Article 11 of the Constitution, the Superior Court’s deferral to a state-level court challenged the integrity of the entire Malaysian court system. This decision afforded state-level syariah courts higher jurisdiction than the highest court in the land, and set a precedent for a secular court to prioritize Islamic law over civil law and civil liberties.

The High Court’s ruling in the Lina Joy case, however, contradicts the syariah court’s findings in the 2008 case of Siti Fatimah Tan Abdullah. Abdullah, an ethnic Chinese woman born Tan Ean Huang, had converted to Islam per Islamic marriage law upon marrying her Muslim lover in 1998. Upon their divorce in 2006, Abdullah sought to reclaim her old name and religion. The Penang Syariah High Court ruled that Abdullah could renounce her faith on the account of never truly practicing Islam—a ruling in stark contradiction to that of the Lina Joy Case less than a year earlier. Malaysia’s dual court system today has thus birthed a crisis of jurisprudence—superior courts refer to syariah courts, non-Muslims find themselves subjected to Islamic law in an inconsistent manner, and thus a tale of two courts has perpetuated a cycle of chaos and confusion.

II. Islam in the Legislature

This crisis of governance, particularly over the role of Islam in the legal system, extends beyond the court room and into the legislature in an arguably more oppressive manner. The conservative faction of the People’s Action Party (PAS) has increasingly gained traction in calling for the wide-scale implementation of hudud penalties for Muslims who breach Islamic law, including punishments such as amputations and stoning for adultery, drinking, or apostasy. Pro-Syariah sentiments have also been echoed by more radical voices in within UMNO. Currently, only the states of Pahang, Perlis, and Kelantan have implemented hudud laws, but PAS and UMNO have looked to expanding hudud to the federal level.

Yet, it would be a mistake to portray the rising support for hudud as the product of a minute, conservative faction seizing power and implementing Islamic law against popular will. In early February 2017, tens of thousands of Malaysians rallied in Kuala Lumpur in support of a bill to be proposed in the March 2018 parliamentary session that seeks to incorporate sections of the Islamic penal code into the Malaysian legal system. Minorities fear that the bill was a slippery-slope to imposition of hudud at the national level on a multi-religious and multi-ethnic society. Malaysia has drastically diverged from its first prime minister, Tunku Abdul Rahman, who once stated “this country is not an Islamist state as it is generally understood, we merely provide that Islam shall be the official religion of the state.”

III. Malay Means Muslim?

Akin to the sentiment expressed by Malaysians who rallied early February, the idea of “Malaysia for Malays,” and, by extension, for Muslims, has gained much traction in the last few decades, beyond that which was escribed by Article 160 of the Constitution. Since the 1970s, an increasing number of Malaysians have chosen to follow a stricter, more “orthodox” Islam emphasizing rigorous religious study and exact interpretation of the Quran. Numerous Islamic civil society organizations, such as the Islamic student organization (ABIM), have been established to support this stricter practice of religion. As evidence of the growing influence of conservative Islam across the Malaysian community, in September 2017, a laundromat in the state of Johor was found to provide business only to Muslims. The owner of the business defended himself, stating he was providing a suci or pure laundromat to Muslims by turning away “impure” ethnic Chinese and Indian minorities.

The increasing trend in Islamic conservatism has been accompanied by radicalization. As of 2016 there have been nearly 160 arrests in Malaysia of persons with suspected ties to ISIS, with Malaysian intelligence reporting that nearly 60 youths have joined ranks with ISIS in Syria and have announced their intentions to return home. The permeation of Islamic fundamentalism and desire for a “pure” Islamic state into Malaysian society is best reflected by a 2015 Pew Research Center poll, which found that only
26% of Malaysians were concerned about the rise of Islamic extremism in their country.\textsuperscript{7}

**IV. Looking Toward the Future**

Other elements of Malaysian society have pushed back against Islamic fundamentalism and governance. Pakatan Harapan, an alliance consisting of the Wan Azizah-led Justice Party, National Trust Party, and Malaysian United Indigenous Party, promotes a multi-ethnic society and issue-based politics. More importantly, Pakatan Harapan is the second largest coalition in Parliament, holding 74 out of 222 seats, suggesting there is still Malaysian support for secular policy and diversity.

What is clear, however, is that Malaysia is becoming increasingly polarized. While some legal and political actors are swiftly institutionalizing Islamic values at the expense of ethnic minorities, other citizens are taking to the polls and voting for platforms of multiculturalism such as Pakatan Harapan, paving the way for a secular, liberal, and diverse society and political system. In 2018, Malaysians will have the opportunity to go to the polls in the next general election and decide which of these two paths to continue upon. Until then, loopholes and chaos of jurisdiction will continue to define the dual court system, while Chinese and Indian minorities are turned away from businesses for not being “Malaysian” enough and political parties in power continue to preach a seemingly ironic message of unity, multiculturalism, and a more tolerant tomorrow.
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