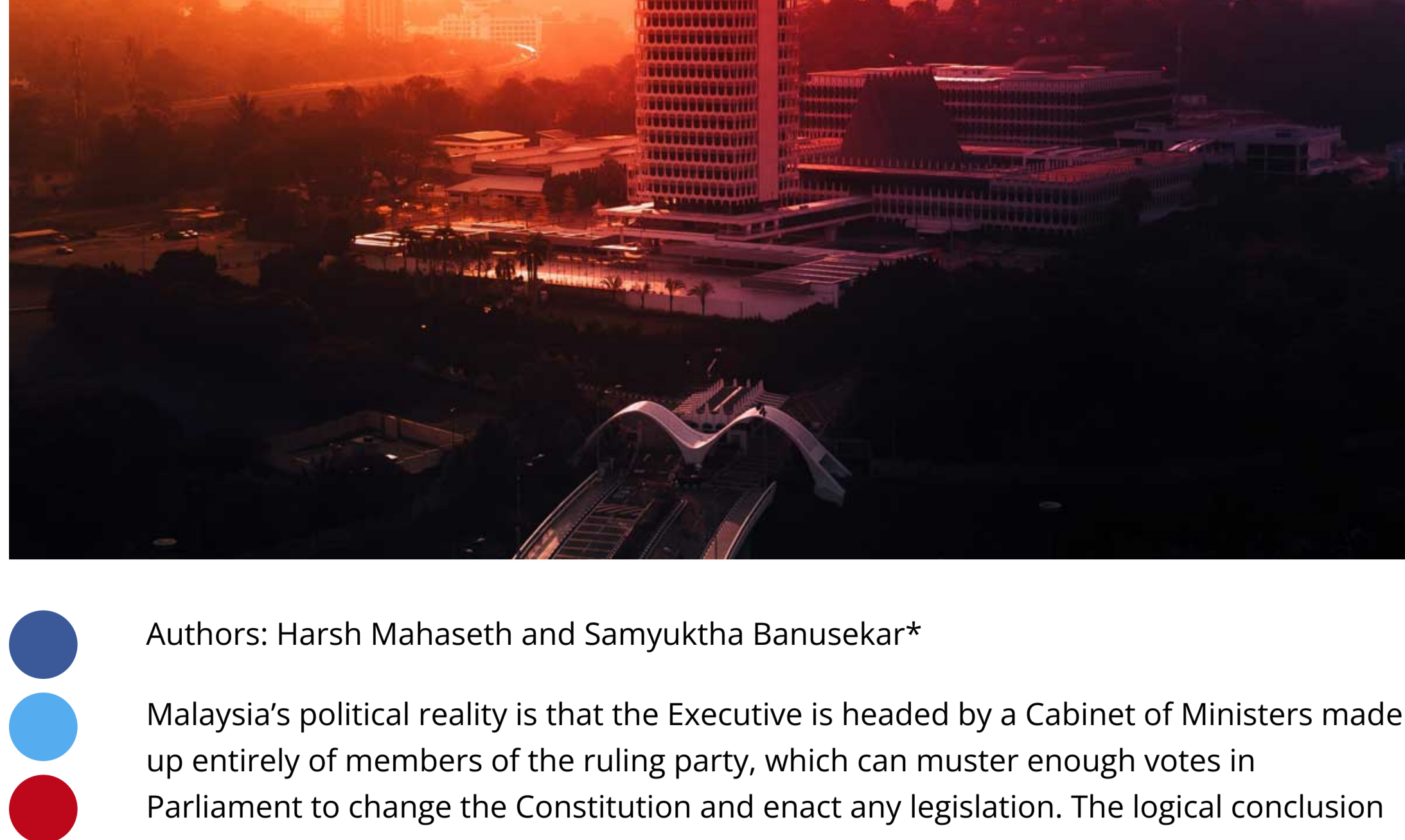


SOUTHEAST ASIA

# The Gap Between the Judiciary and the Executive in Malaysia

Published 7 hours ago on June 23, 2022  
By Harsh Mahaseth



Authors: Harsh Mahaseth and Samyuktha Banusekar\*

Malaysia's political reality is that the Executive is headed by a Cabinet of Ministers made up entirely of members of the ruling party, which can muster enough votes in Parliament to change the Constitution and enact any legislation. The logical conclusion is that the Legislature and the Executive assist each other in achieving similar goals and policies. The Judiciary is the weakest governing institution due to the sum total of their Constitutional powers. As a result, it is argued that all legislative and executive actions affecting the judiciary must be treated with caution.[1]

In 2002, there was a case in the High Court to entertain a writ of certiorari to quash the decision of the Sabah State Government which revoked the entry permit of the petitioner on the grounds of morality. The High Court observed that the ouster clause in Section 59a of the Immigration Act 1959/63 must be interpreted in a manner where the Courts did not have grounds for review of the Sabah Government's decision. The petitioner appealed to the Court of Appeal, where the writ was granted and ouster clauses were sought as unconstitutional. The Malaysian Federal Court however, on appeal by Sabah authorities, held that Constitutional Rights are not absolute and can be done away with in accordance with statutory law and the Section is conclusive on exclusion of judicial review.[2] This portrays a clear deviation from separation of power and abuse of power by the Executive. There exists a vagueness in the doctrine of separation of powers in itself in Malaysia and the doctrine is understood to have diminished as the role of the Executive has significantly grown.[3]

If Malaysia courts retain a judicial attitude of not interfering with the Executive's power of detention under the ISA while laying down contradictory rules to obey in such cases, the courts would be vulnerable to criticism and public distrust. If this is the case, questions will be raised about whether the courts are doing their job in protecting fundamental liberties, especially when it comes to personal liberty, in preventive detention cases.

The Malaysian Parliament amended Article 121(1) of the Federal Constitution ("Constitution") in 1988 to remove a clause that specifically vested "the judicial power of the Federation" in the country's High Courts and lower courts. As a result, Article 121(1) now simply states that such courts "have such authority and powers as may be conferred by or under federal statute." The amendment sparked a lot of controversy. There were some reservations about its precise effect. "So where does judicial power now lie?"—"Some critics feared that the courts will have full judicial power"—"So where does judicial power now lie?" "No one is certain." A report by the International Commission of Jurists, on the other hand, presumed that "judicial control" remained with the courts, but expressed concern that: Section 121 wording renders the High Court's authority and powers reliant on federal statute, implying that the court lacks legally enshrined original jurisdiction. This compromises the separation of powers and creates a subtle form of control over judicial decision-making. This makes the High Court's activity reliant on the legislature and jeopardizes the judiciary's institutional independence.[4]

The Amendment to Article 121(1) has created the perception that the Executive wishes the silence the Judiciary in Malaysia and this has led to many judges accepting that they are not even an independent pillar of the Constitution.[5] Only the establishment of proper separation of powers in Malaysia would ensure clarity in the legal system of Malaysia, including Immigration law and rights of refugees in Malaysia.

\*Samyuktha Banusekar is a fourth year law student pursuing B.Com. LL.B. (Hons.) at School of Law, SASTRA Deemed University, India.

[1] Yeong Sien SEU, "Clarity or Controversy- The Meaning of Judicial Independence in Singapore and Malaysia" (1992) 13 Singapore Law Review at 87.

[2] *Case of reinstatement of entry permit to Sabah (Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan)*, Decision of 2009, (2002) 3 MLJ 72; Mohideen Abdul KADER, "Access to Justice by Mohideen Abdul Kader" Bar Council of Malaysia (24 November 2005), online: Bar Council of Malaysia <<https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/access-to-justice-by-mohideen-abdul-kader>>.

[3] H.P. LEE, "The Malaysian Constitution after 50 years: Retrospective, Prospective and Comparative Perspectives" (2007) 9 (2) Monash University Faculty of Law Legal Studies Research Paper Series at 307-320; Mahaletchumi BALAKRISHNAN, "The Judiciary and the Lost Doctrine of Separation of Powers" *Bar Council of Malaysia* (12 January 2010), online: Bar Council of Malaysia <<https://www.malaysianbar.org.my/article/about-us/committees/constitutional-law-committee/the-judiciary-and-the-lost-doctrine-of-separation-of-powers>>.

[4] Richard S.K. FOO, "Malaysia- Death of a Separate Constitutional Judicial Power" (2010) Singapore Journal of Legal Studies at 227-228.

[5] Dr. Shad Saleem FARUQI, "Restoring Judicial Power" *The Star* (16 April 2008), online: The Star <<https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2008/04/16/restoring-judicial-power>>.

Subscribe to our Newsletter

Signup today for free and be the first to get notified on new updates.

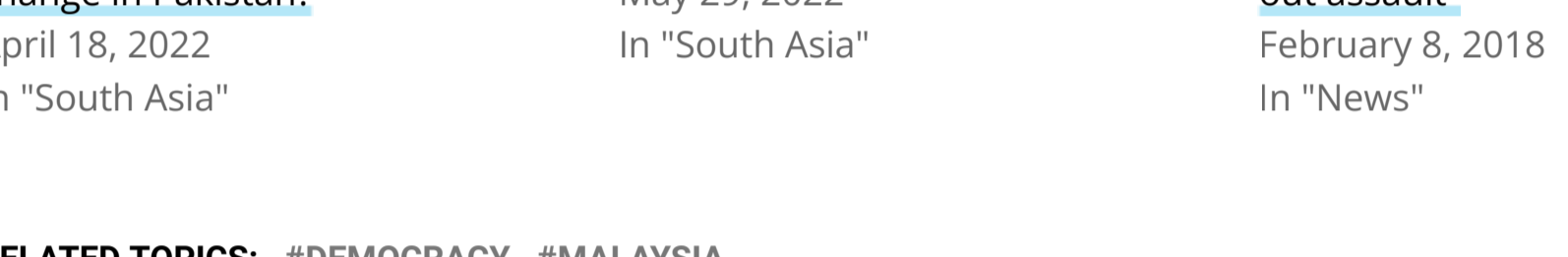
Enter your email

Subscribe

And don't worry, we hate spam too! You can unsubscribe at anytime.

powered by MailMunch

Share this:



Related

- Was there a US-backed regime change in Pakistan? April 18, 2022 In "South Asia"
- India's draconian sedition law May 29, 2022 In "South Asia"
- Maldives: Democracy under "all-out assault" February 8, 2018 In "News"

RELATED TOPICS: #DEMOCRACY #MALAYSIA

DONT MISS G20 Indonesia: Steps Towards Sustainable Environmental Sustainability

Harsh Mahaseth

Harsh Mahaseth is an Assistant Professor and Assistant Dean (Academic Affairs) at Jindal Global Law School, and a Senior Research Analyst at the Nehruvian Pappas Center for Southeast Asian Studies, O.P. Jindal Global University, Sonapat, India.

YOU MAY LIKE

- Indonesian Elections and Security Politics in the Face of Global Threats
- Alliance of Democracies Could Transform United Kingdom
- Towards the Presidential Elections of 2024: Is Mexico Transitioning Backwards?
- West African Leaders Still Concern About French-Speaking Republics' Transition to Constitutional Rule
- The May 27 Coup: An Attempt to Analyze Politics in Gracscian Terms
- The Other Political Parties in the People's Republic of China: Activities

COMMENTS

ALSO ON MODERN DIPLOMACY

- Apparent Poor Planning by Putin of ... a month ago • 2 comments
- U.S & UK Announce Aim to Create New ... 7 days ago • 1 comment
- Decoding Biden's Saudi Arabia-Israel ... 2 days ago • 1 comment
- What 'Alt-N Report' About ... 2 months ago • 1 comment

SOUTHEAST ASIA

# G20 Indonesia: Steps Towards Sustainable Environmental Sustainability

Published 1 day ago on June 22, 2022  
By Usawah Alayudns



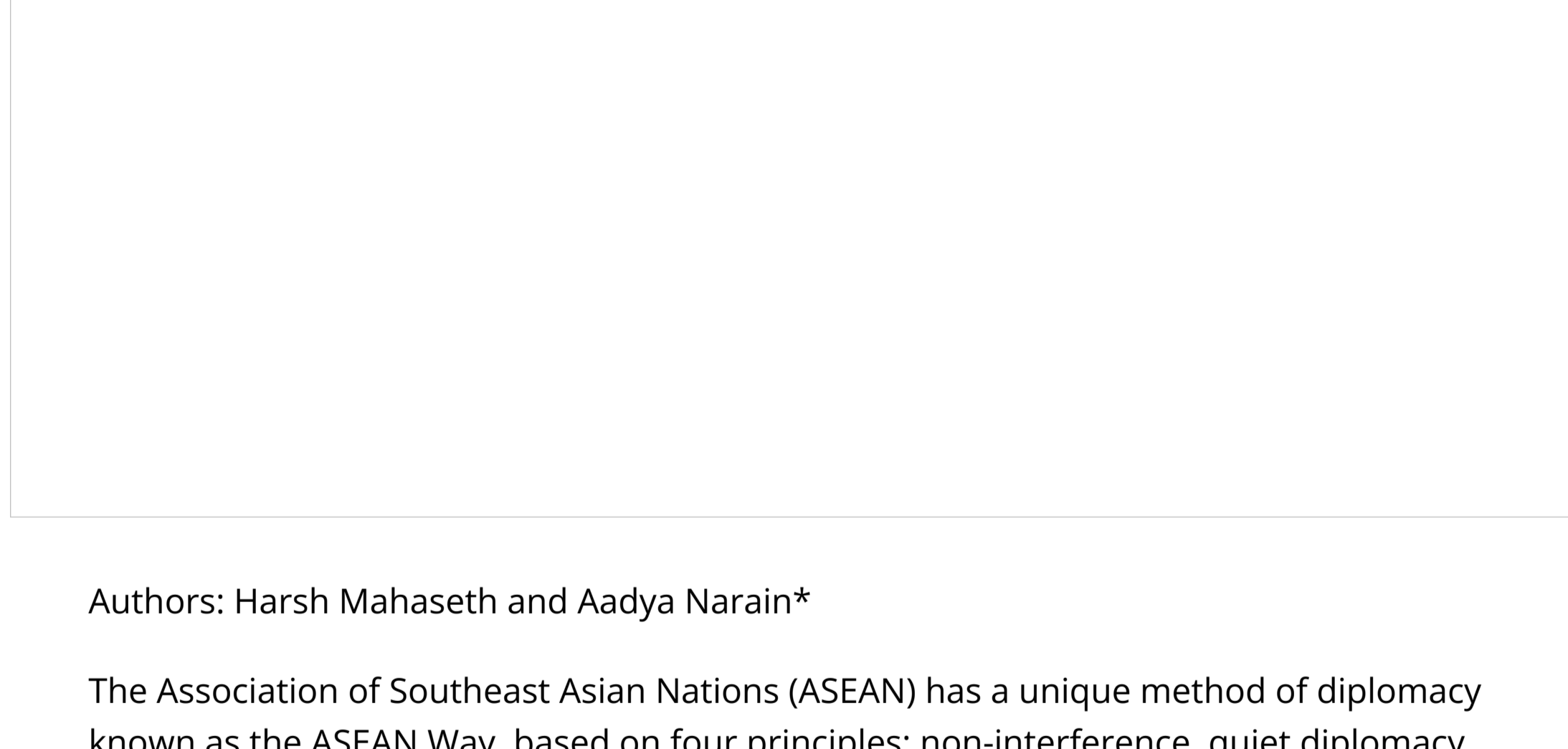
Currently, Indonesia is still struggling to improve, ensure, and protect the environment. There are several environmental problems that are still Indonesia's homework, namely Pollution of the air, soil, water that has not been completed. Then the denuded forests because they are often cut down for land clearing and excessive use of wood have resulted in the problem of forest and land fires, which are still at a stalemate. In fact, the forest is a reservoir of germplasm and water for life. Deforestation also causes floods and landslides during the rainy season every year. Indonesia's environmental issues that have not been resolved until now are the extinction of flora and fauna due to imbalance in the ecosystem and also illegal hunting of animals. River pollution and

CONTINUE READING

SOUTHEAST ASIA

# The Use of The ASEAN Way In Resolving Disputes

Published 1 day ago on June 22, 2022  
By Harsh Mahaseth



Authors: Harsh Mahaseth and Aadya Narain\*

The Association of Southeast Asian Nations (ASEAN) has a unique method of diplomacy known as the ASEAN Way, based on four principles: non-interference, quiet diplomacy, non-use of force, and decision making through consensus. The principle of non-interference, considered the most important, necessitates that member countries do not interfere with internal issues. Introduced by Director Termsak, this policy was intended to emphasise that ASEAN is based on voluntary membership, it's a non-political organisation, and every country is required to preserve its identity and national government. This is congruent with quiet diplomacy, intended for bilateral tensions. It

CONTINUE READING

SOUTHEAST ASIA

# Indonesian Elections and Security Politics in the Face of Global Threats

Published 3 days ago on June 20, 2022  
By Agni Kurniadi



The sequence of general elections in Indonesia in 2024 is approaching, but the world's security situation appears to be deteriorating. Global challenges are on the horizon, and they are inextricably linked to Indonesia's destiny.

In Europe, the conflict between Ukraine and Russia is still underway. Apart from historical grounds, Russia's concern of Ukraine's position to join NATO was a unique element in the outbreak of the war. Now, Ukraine's position is becoming encircled by Russian army forces, and the conflict has raised the prospect of a worldwide food crises.

CONTINUE READING

TRENDING

- DEFENSE / 4 days ago: The Profits Side of the War in Ukraine
- SOUTH ASIA / 4 days ago: China's Sharp Power: The Confucius Institutes in Pakistan
- DEFENSE / 4 days ago: India's Maritime Security Strategy in the 'Century of Seas'
- SOUTHEAST ASIA / 3 days ago: Indonesian Elections and Security Politics in the Face of Global Threats
- RUSSIA / 3 days ago: Why the Russian Invasion to Ukraine is a Miscalculation on the Feasibility of Conquest
- TECH NEWS / 3 days ago: Emerging response drones to save lives in the digital skies
- EUROPE / 3 days ago: The War in Ukraine Is Waging Against Europe
- ECONOMY / 3 days ago: The Fed Faces Tougher Challenges Ahead