

Feb 20, 1956 ... The Tunku officially announces the date for Merdeka as Aug 31, 1957 at Bandar Hilir, Malacca. Next to him is a young Ghafar Baba, who rose to become deputy prime minister.

Major changes to the Constitution

THE Constitution has been called a nation's "document of destiny" and "national charter" – terms that reflect the importance of the supreme law of the land.

Like a legally binding contract, any amendment assumes fundamental significance and hence, should not be easily done.

That said, changing political, economic and social circumstances have created the need to amend the original contract – some for justifiable reasons, while others are more controversial.

For example, when Sabah, Sarawak and Singapore joined Malaya to form Malaysia in 1963, the Malaysia Act was passed in Parliament to amend the Constitution to provide for the name change and the inclusion of the three new states.

More controversial were the 1993 amendments that limited the monarchy's power, stripping the nine hereditary state rulers of immunity from prosecution. This came about after an incident where the then Sultan of Johor allegedly assaulted a sports coach.

Malaysia's Federal Constitution has been altered extensively since our independence in 1957.

Up to early this year, there have been 51 amendment Acts, said constitutional law expert Professor Shad Saleem Faruqi.

Each amendment involved a number of clauses, and if these are used to measure the extent of constitutional revision, there have been about 700 changes or "strokes of the pen" since the constitution came into force, said the Universiti Teknologi Mara law lecturer.

H.P. Lee wrote in the chapter "The Process of Constitutional Change" in *The Constitution of Malaysia – Its Development: 1957-1977*: "In subscribing to the adage that a constitution which cannot bend will ultimately be broken, one must also be aware of a constitution which is extremely easy to amend for it may

turn out to be worse than having no constitution at all."

He observed that some of the more fundamental amendments to the Malaysian Constitution has led to "a truncation of safeguards which had been considered by the Reid Commission as vital for the growth of a viable democratic nation".

The provision to amend the Constitution falls under Article 159. The Reid Commission framed it in such a way that an amendment would not be too difficult to the extent of frustrating the need for amendment, but at the same time, not too easy that it would end up weakening our constitutional safeguards.

The constitution can be altered through an amendment Act supported by two-thirds of the members of Parliament.

Sensitive Matters Amendment

One of the most controversial amendments in Malaysia's Constitution is the Constitution (Amendment) Act, 1971, which came in the wake of the May 13, 1969 racial riots.

Known as the "Sensitive Matters Amendment," it revised Article 10 – which safeguards freedom of speech – to empower Parliament to pass laws to restrict public discussion on four "sensitive" issues: citizenship; the national language and the languages of other communities; the special position and privileges of the Malays and natives of the Borneo states, and the legitimate interests of other communities; and the rulers' sovereignty.

Before the Act, the Conference of Rulers' consent was required only for amendments to provisions related to the rulers, and the special rights and privileges of the Malays and the legitimate interests of other communities.

As a result of the Act, consent was also required for other provisions, such as Article 10 (freedom of speech), Article 63 (privileges of Parliament), Article 72 (privileges of the state legislative assembly) and Article 152 (national language).

Article 153 originally provided for

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the Yang di-Pertuan Agong to be the guardian of the special position of the Malays and the legitimate interests of other communities. It also empowered him to ensure that a reasonable proportion of opportunities was reserved for the Malays in public service, education, and for permits and licences.

The 1971 amendment allowed the natives of the Borneo states to have the same status as the Malays.

It also empowered the Agong to direct any institution of higher learning to reserve a reasonable proportion of places for the Malays and natives, should the number of places be less than the number of qualified candidates.

Judiciary

Another milestone in the Constitution's evolution was the amendment to Article 121 in 1998, which effectively put the judiciary under Parliament's influence. The attorney-general was also empowered to determine the courts for cases to be heard.

To the legal fraternity and civil society, this eroded the judiciary's autonomy and weakened the separation of powers between the three branches of government – the judiciary, the executive and the legislature.

The amendment came in the wake of a series of court cases where the executive accused the judiciary of encroaching on its powers. These cases included a court ruling overturning the government's decision to revoke a foreign correspondent's work permit, judicial reviews of ministerial decisions such as the award of the North South Highway project to UEM, and the declaration of Umno as illegal following a dispute over the party's election in 1987.

Then Lord President, Tun Salleh Abas, and several judges, wrote a letter to the King about the efforts to undermine public confidence in the judiciary. He was charged with writing the letter without the approval of all the judges and displaying bias against the government, and was dismissed in August 1988.

Five Supreme Court judges who objected to the tribunal set up to decide Salleh's fate were suspended. They were the late Tan Sri Wan Suleiman Pawanteh and Tan Sri Eusoffe Abdoolcader, Tan Sri Azmi Kamaruddin, Tan Sri Wan Hamzah Salleh and Datuk George Seah.

After Salleh's dismissal, a second tribunal was convened to deal with the five judges, resulting in the dismissal of Wan Suleiman and Seah, while the others were acquitted.

Another amendment in 1988 resulted in Article 121 (1)(A), which stipulated a separation of jurisdictions between the civil and syariah courts, whereby the former would have no say over any matter under the syariah court's purview.

"The amendment left many unanswered questions. It was done with good intentions so that only lawyers trained in syariah law would handle syariah issues," Shad said.

"However, it does not offer a solution when one party is a non-Muslim, when there are international implications, if it is a constitutional issue and involves a remedy which the syariah court has no right to grant such as *habeas corpus* and *mandamus* (the domain of the High Court)."

In recent years, there have been cases where a non-Muslim party to a case has been told to seek recourse at the syariah court.

"The civil courts have started to abdicate or cede jurisdiction when there is the slightest whiff of an Islamic issue," Shad said.

"The syariah court has broken the dyke, the civil court has looked the other way."

"Malays, Chinese, Indians and other races that wish to be loyal, live together, defend the nation and work together, live in harmony, because the situation in this country is different from other countries in the world. Because of this, one race cannot take everything for itself. In order to set up an independent government, we must compromise and make sacrifices."

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*- Tunku Abdul Rahman,
speech at the Sungai Besi Airport
after returning from London,
June 3, 1957.*

TUNKU Abdul Rahman and the Malayan delegation had just returned from the final talks on independence in London when he made this reminder to the people – that they would all have a place in the new independent nation, but not without some compromise and sacrifice on everyone's part.

This bargain, or social contract, has always been a crucial, and sometimes contentious, part of the nation's Constitution. The Reid Commission and the Alliance tried hard to take into consideration the different, and at times divergent, concerns on the ground. Each clause in the Constitution was carefully negotiated and crafted. Even so, it was simply impossible to please everyone.

It would be naïve to expect any constitution, more often than not framed under trying circumstances, to be perfect. But despite what the critics say, Malaysia's Constitution has worked to a large extent. As the nation commemorates the 50th year of independence, the challenge is to ensure that it will continue to work for the generations ahead.

Constitutions reflect politics

“Constitutions are political documents. They reflect the ideals of the time, the raw realities and the workable solutions arrived at by the people who framed them,” said constitutional law expert Professor Shad Saleem Faruqi.

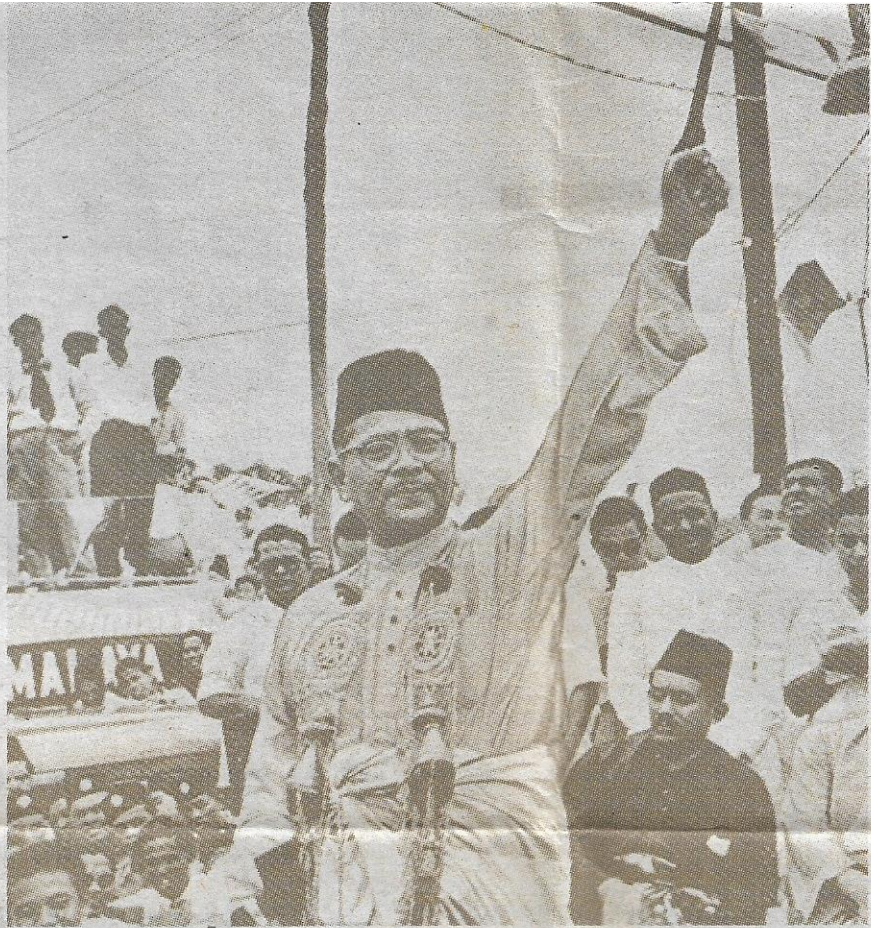
“That cannot be helped. Anywhere in the world, you have to have a constitution that is acceptable to all,” said the Universiti Teknologi Mara law lecturer.

Most nations striving for independence have had to deal with local circumstances that were far from ideal. The framers of the Indian constitution, for example, had to take into consideration the demands of both the Hindu and Muslim communities. They arrived at essentially a secular-democratic model. It might have won the support of many but it could not please everyone. The conflict between the two communities led to the partition of India and the formation of Pakistan at the stroke of midnight on Aug 15, 1947 – almost a decade before Malaya would break free from colonial rule.

The situation in Malaya, though very different, was not ideal either. The Reid Commission had to weigh all the concerns and demands of various powers, communities and organisations. Even Umno, MIC and MCA – which formed the Alliance and played a vital role in presenting the different communities' concerns and demands to the commission – faced immense pressure from the grassroots to ensure that the constitution would favour their respective communities.

“Circumstances in Malaya then were not ideal,” Shad said. There were nine rulers, a majority Malay community seeking political and economic power and a large minority group pressing for citizenship and other rights such as economic and cultural rights, he said.

To accommodate the different interests, the parties concerned negotiated a bargain. The Constitution would recognise the rulers as constitutional monarchs,



Triumphant ... Tunku Abdul Rahman in Malacca, fresh after returning from London where talks for independence were held.

the special position of the Malays, Islam as the religion of the state, and Malay its national language. At the same time, it would also safeguard the legitimate interests of the other communities – the non-Malays' rights to citizenship, language, religion and culture.

This situation was reflected in Tunku's speech in the Federal Legislative Council in Kuala Lumpur on July 10, 1957:

“Some Malays fear that their special position will not be adequately protected and that as a consequence they will gradually be overwhelmed by the other communities who have come to live in their country.

“Persons of other races, in particular the Chinese, fear, that their gain would be half as much if special privileges are given to the Malays.

“The facts are that unless the Malays are protected there will be no place for them in Malaya ... Again to those of other communities who are nervous about their future, I would say – study closely Article 153 of the Federal Constitution. They will find that the Yang di-Pertuan Agong is also required to safeguard their legitimate interests”

Shad noted that the British would not have left Malaya if the different groups did not prove they could live together. “The British did not want the same problems as with India.”

Something for everyone

The Reid Commission and political leaders' decisions were not necessarily supported by the grassroots. “It's an elitist document, drafted by the elites. Some organisations and grassroots thought they were not adequately consulted in the drafting of the document,”

he said. “All constitutions face a similar challenge and will not be able to please all parties.”

Still, the Constitution has worked better than those in some other countries. As Shad pointed out, Thailand, for example, has had 14 or more constitutions since its first in 1932. He said the Malaysian Constitution, despite the criticisms, has been able to preserve relative peace and unity.

“The Constitution gave everyone something and to no one everything. Everyone got something in terms of citizenship, cultural pluralism and economic/commercial rights. The constitution did try to walk the middle path.”

In the same 1957 speech upon returning from London, Tunku acknowledged that while it was important to have a constitution that was agreeable to most people, there would come a time when change was required. “Any constitution prepared today is not immutable. It can be changed, modified or improved according to the wishes of the people,” he said.

Since 1957, Shad said, there have been 51 amendment Acts, each with a number of clauses, which make the total number of changes to the Constitution far higher than that.

Safeguarding the Constitution

What is more important is the content or effect of the amendments – how have they changed the constitutional scheme or spirit, and did they erode or strengthen what the Constitution tried to safeguard?

For example, Article 8, which prohibits discrimination on various grounds, was amended in 2001 to formally include



Prof Dr Shad Saleem Faruqi, constitution law expert.

gender. This is seen as an important milestone in efforts to uphold gender equality.

However, some amendments are deemed to be a setback. Shad said the Constitution (Amendment) Act, 1971 significantly changed the fundamental rights which the constitution's framers tried very hard to protect.

Made in the wake of the May 13, 1969 racial riots, the amendment revised Article 10 - which safeguards freedom of speech - to empower Parliament to pass laws to restrict public discussion on four "sensitive" issues: citizenship; national language and the languages of other communities; special position and privileges of the Malays and natives of Sabah and Sarawak and legitimate interests of other communities; and the rulers' sovereignty.

Shad said there have also been significant changes to facilitate the government's desire to maintain ethnic balance and dominance. He said the *jus soli* principle - citizenship determined by place of birth - was removed in 1962. Citizenship would no longer be determined by birth in Malaysia alone but the person also needed to prove having roots in Malaya before Merdeka, he said.

According to Shad, it is "not normal" for a constitution to be amended so extensively.

"Some of the changes were triggered by defeats in the courts, which the ruling elites were not prepared to accept.

"It is worrying from the part of constitutionalism. The government of the day must internalise the Constitution and observe the spirit and letter of the Constitution," he said.

But the Constitution can also be changed without any formal amendment in Parliament. "Judges have changed the horizon of the constitution," Shad said. "Their interpretation, misinterpretation, refusal to interpret, reinterpretation or gloss on the law changes the spirit of the constitution."

He said judges should ensure that the spirit and letter of the supreme law of the land are served and protected.