

# Reflections on the first 50 years

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THE Constitution that came into effect on Aug 31, 1957, despite its Anglo-Indian genealogy and being drafted by a commission of non-Malayan jurists, has become a home-grown constitution over time.

The constitution has stretched with its application in response to local conditions, much in the way unyielding leather shoes adapt their shape to accommodate the feet of the wearer.

The constitution has encompassed geopolitical changes in the emergence of Malaysia and then separation of Singapore.

It has dealt with crises involving the autonomy of states and their internal governance. It has provided for an evolving social contract via the special privileges of Malays and natives of Sabah and Sarawak, and the legitimate interests of other communities.

It has restricted rights of freedom of expression to protect the social fabric from being rent by racially or religiously divisive pronouncements, helping Malaysia to survive a dangerous crisis which threatened to engulf the constitution and much more.

The constitution provides for the position of Islam and the practice of other religions, restricts propagation of other religions among Muslims, and continually defines the relationship between the common law and the syariah.

The constitution also provides for the constitutional monarchy and the Conference of Rulers, with their powers evolving over time.

Malaysia is a good example of a country with a home-grown constitution, despite the fact that its adherence to the Westminster model of *parliamentary democracy* is a result of colonial rule.

The attention given by the Reid Commission to local circumstances, a result of their lack of local knowledge generally, is a reason why their constitution has endured for 50 years.

If the constitution had been a shoe that pinched the wearer's feet it would have been dispensed with in 1969 or at some other juncture.

Some progress in fulfillment of the ideals of 1957 has been made, for example in providing for the enforcement of human rights.

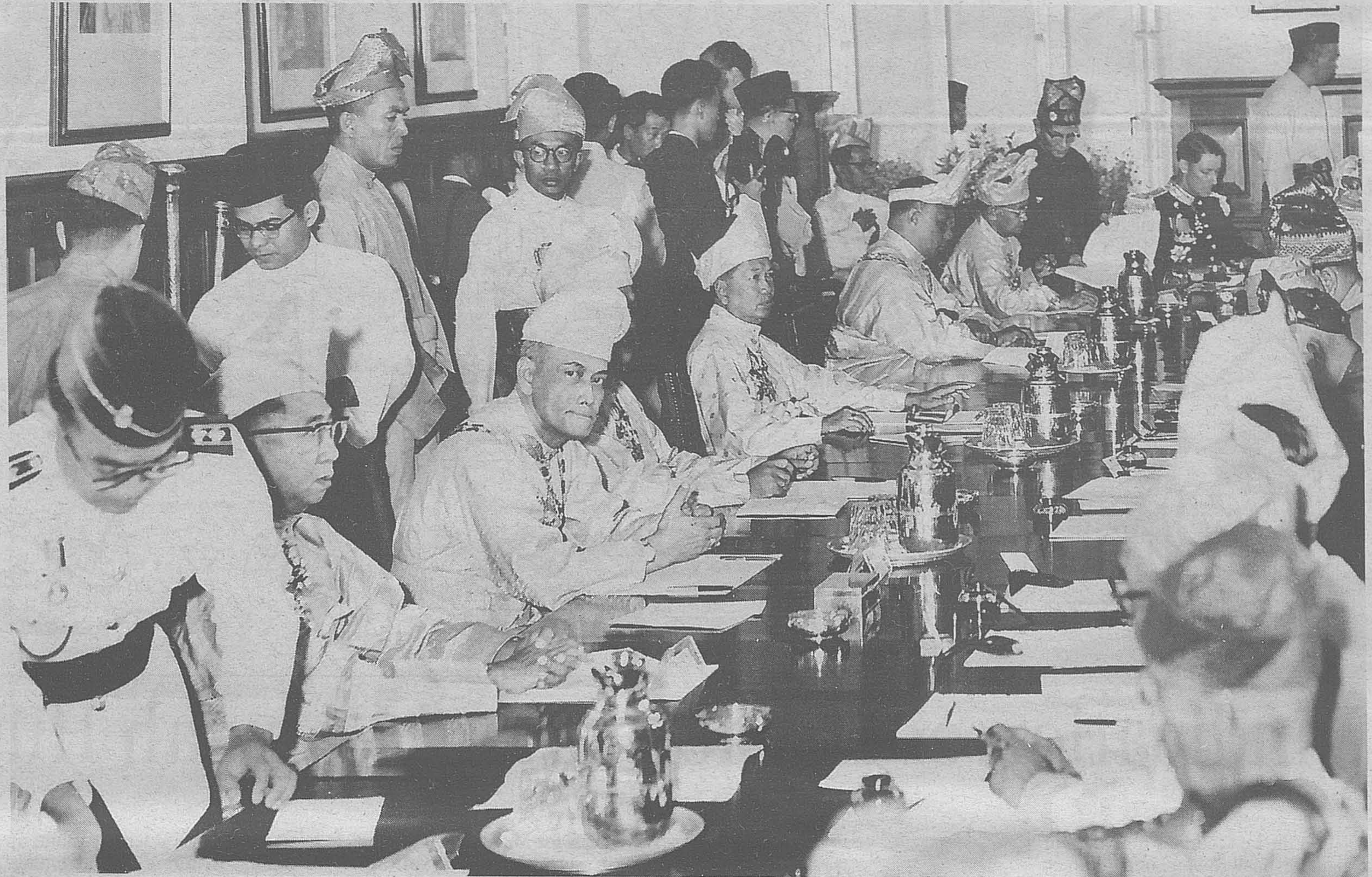
There are still of course concerns and controversies over the independence of the judiciary.

But apart from the period from 1969-71, a system of parliamentary democracy, albeit in a diluted form, underpins the governance of the country despite the several emergencies, crises and alarms.

Many amendments were unavoidable as they were required to cope with changing circumstances; for example, the expansion of the Federation of Malaya to the Federation of Malaysia, or the removal of Singapore from the federation.

However, a number of the amendments were made in order to achieve short-term political gains while others were made to facilitate long-term

As the Federal Constitution celebrates its first half-century, LexisNexis Malaysia is publishing a collection of essays by a range of experts about the signposts along the way. The following is the first of an exclusive fortnightly series of six excerpts from the book that will be launched in August



The rulers (on the left) and High Commissioner Sir Donald MacGillivray (at the end of the table) preparing to sign the Federation of Malaya agreement on Aug 5, 1957. — Arkib Negara Malaysia

expansion of executive powers.

The sum effect of the constitutional changes was the truncation of constitutional provisions pertaining to the delimitation of electoral constituencies; the composition of the Senate or Dewan Negara; freedom of speech; the scope of parliamentary privilege; the safeguards recommended by the Reid Commission regarding the exercise of emergency powers and the power of preventive detention.

Longer-term effects may not depend on how obvious or controversial a particular landmark might have been or might have seemed at the time.

For example, the disappearance of the term "judicial power" from Article 121 appeared at the time the most important aspect of the 1988 amendment. But from a 2007 perspective it seems as though the separation of civil and syariah jurisdiction achieved in that same amendment is a more fundamental issue.

Some landmarks present themselves as positive events, such as Merdeka itself; the creation of Malaysia in 1963; the successive curtailments of royal powers; the creation of Suhakam; the robust defence

of constitutionalism in Sabah; and the recognition of Orang Asli land rights.

Others are lamentable events, such as the 1988 judicial crisis; the Datuk Seri Anwar Ibrahim episode, despite the silver lining of its denouement; and the emergency proclamation of May 1969.

Yet other landmarks carry a legacy that is neither negative nor positive. The separation of Singapore was clearly important, and seemed like a disaster at the time; yet both Singapore and Malaysia have flourished, taking separate paths, since 1965.

It is important not to lose sight of the grand vision espoused by Tunku Abdul Rahman on Aug 31, 1957, that the Federation of Malaya "shall be forever a sovereign democratic and independent state founded upon the principle of liberty and justice and ever seeking the welfare and happiness of its people and the maintenance of a just peace".

Some of the landmark episodes and cases indicate a denting of this vision. The application of preventive detention laws reveals that the protection of fundamental liberties is subjugated to the authorities' per-

ception of the public good, even though this perception may be questionable.

The creation of Suhakam on the other hand gives room for some optimism that such a body can make a contribution by enlightening the public on the importance of fundamental rights.

The separation of powers is a fundamental feature of the constitutional framework. The growth of a powerful executive has been at the expense of Parliament and the judiciary.

The continued existence of nine hereditary Malay rulers and the election of a king from among one of them every five years is a unique dimension of this constitutional law.

The episodes involving a confrontation between the government and the Malay rulers have positive and negative overtones.

Before the 1983 and the 1993 constitutional crises, some of the Malay rulers behaved as if they were above the law. In a number of instances, some rulers flouted constitutional conventions.

Their subsequent confrontation with the government on two occa-

sions led to a diminution of their powers and influence.

In Malaysia, 50 years of constitutionalism have brought both benefits and problems.

Much can be learnt from countries where constitutional experimentation with checks and balances has proved successful, such as South Korea and Taiwan.

At the same time Malaysia has much to teach the rest of the world in the field of constitutional management of racial and religious difference. Fifty years of continuous constitutionalism is certainly an achievement worth celebrating.

However, only a sense of history and a realisation that constitutionalism needs constant vigilance and refurbishment will ensure that such a hope will be fulfilled.

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