

"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.

by **Cindy Tham**  
merdeka@thesundaily.com

**T**UNKU 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 155 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

**T**he 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

**W**hat 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 15, 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 *ius 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.