"Federal Constitution: Protection for All"
Public Forum
Co-organised by *Article 11* and the Malaysian Bar Council

12 March 2006
Crystal Crown Hotel, Petaling Jaya

BACKGROUND

On 12 March 2006, *Article 11* and the Malaysian Bar Council jointly organised a public forum entitled "Federal Constitution: Protection for All" at the Crystal Crown Hotel in Petaling Jaya. The forum addressed the recent court cases involving Nyonya Tahir, Moorthy and Shamala, and highlighted the problem of conflicts of jurisdiction and the need for a judicial system that will protect everyone. Approximately 620 people attended the forum, and 497 people signed the open letter[1] that was announced at the forum and available for signing afterwards.

Article 11 is a coalition of NGOs that is committed to embracing, upholding and pursuing the realisation of the fundamental rights guaranteed by the Federal Constitution and Human Rights Conventions for all Malaysians, regardless of religion, race, descent, place of birth or gender. *Article 11* comprises: All Women's Action Society (AWAM); Bar Council Malaysia; Catholic Lawyers Society; Interfaith Spiritual Fellowship; Malaysian Civil Liberties Society, Protem Committee (MCLS); Malaysian Consultative Council of Buddhism, Christianity, Hinduism & Sikhism (MCCBCHS); National Human Rights Society (HAKAM); Pure Life Society; Sisters In Islam (SIS); Suara Rakyat Malaysia (SUARAM); Vivekananda Youth Movement, Seremban; Women's Aid Organisation (WAO); and Women's Development Collective (WDC).[2]

The speakers at the forum were Ivy Josiah, Professor Dr Shad Saleem Faruqi, Datuk Dr Cyrus Das, Malik Imtiaz Sarwar and Y.B. Datuk Zaid Ibrahim.[3] Ambiga Sreenevasan of the Bar Council served as the moderator.

INTRODUCTION – AMBIGA SREENEVASAN

In recent years, Malaysians have witnessed a number of cases that have raised the issue of the jurisdictional powers of the courts – Lina Joy, Moorthy, Nyonya Tahir. From these cases the question arises: does the Federal Constitution protect us all? If so, where are the protections?

Shamala's case brought home the point that the role of the Constitution as the protector of the rights of ordinary citizens is perhaps becoming illusory. This became the force that drew together a small number of concerned NGOs and members of civil society. This group noted that besides Shamala's case, there have been other cases that have impacted the right to freedom of religion, and the right to practise one's religion, as guaranteed by Article 11 of the Federal Constitution. By May 2004, Shamala's case had given life to a coalition of NGOs that has come to be known as *Article 11*, the co-organisers of the forum this morning. All of the organisations involved in the coalition are concerned about developments in this country.

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[1] See Appendix 3 for the text of the open letter, which can be endorsed online at http://www.petitiononline.com/constsup/petition.html.
[2] See Appendix 2 for the text of the flyer about *Article 11*. *Article 11*'s website is www.article11.org.
[3] See Appendix 1 for brief biodata on the 5 members of the panel.

IVY JOSIAH

Ivy Josiah gave an overview of the facts and the impact of several recent cases involving the freedom of religion and the jurisdiction of the civil and Syariah courts.

When the *Article 11* coalition was formed, it was decided that it would have some principles of understanding. These principles are:

- No citizen shall be discriminated on the basis of religion, race, descent, place of birth or gender.
- Parents (both mother and father) are equal guardians and have equal say in all aspects of the upbringing of children.
- Children shall be protected from any form of discrimination on the grounds of religion, and in all cases, the interests of children shall be paramount.
- The freedom of thought, conscience and belief for all persons shall be fully respected, guaranteed and protected.
- Every citizen has a responsibility to condemn discrimination and intolerance based on religion or belief.
- Every citizen has a responsibility to apply their religion or belief in support of human dignity and peace.

The Prime Minister has articulated a position with regard to religious beliefs. On 8 March 2004, the New Straits Times reported that the Prime Minister said that he "… strongly believed that everyone should be sensitive to a Malaysian multi-cultural and multi-religious make up". On 9 March 2004, he reportedly stated: "I am the PM for all Malaysians, Muslims and non-Muslims alike. I would include everyone in a system for all."

Shamala's case

When Shamala filed her case in court, her lawyers approached the women's groups asking for help and counseling, and for someone to assist Shamala during her case.

The facts of the case are as follows. Shamala and her husband were married in 1998. In 2002, when her husband converted to Islam, Shamala applied for custody of their 2- and 4-year-old children in the civil courts. Shamala was initially granted custody and her husband was allowed access to the children. However, her husband applied to the Syariah Court and obtained an *ex parte* Hadanah (custody) Order in May 2003. The Syariah court issued a warrant of arrest for Shamala for non-attendance at the Syariah Court custody and divorce hearings. Using his rights of visitation granted by the civil courts, the husband took the children away from Shamala and used the Syariah Court's custody order to keep the children. He converted the children to Islam without Shamala's knowledge or permission.

In September 2003, the civil court cited the husband for contempt of court, ordered the children to be returned, and declared the Syariah court's Hadanah Order not binding on a non-Muslim. In April 2004, the High Court dismissed Shamala's application to have the conversion of her children nullified on the ground that it had no jurisdiction to hear her case. According to the court, by virtue of Article 121(1A) of the Federal Constitution, it was the Syariah Court was the qualified forum to determine the status of the children although the Syariah Court had no jurisdiction over Shamala since she was not a Muslim. Shamala was therefore left without a remedy with respect to the conversion of her children to Islam. In July 2004, both parents were given joint custody of the children by the High Court but actual custody, care and control were granted to Shamala with a caveat that custody will be revoked if she influences her children's beliefs. The present status of the case is that Shamala is appealing to the Court of Appeal to nullify the conversion. Both parents are applying for sole custody.

Shamala's case is not isolated. When *Article 11* came together, the organisations shared stories and realised that many other people are in the same position, largely women. Article 11 recognises the right of an individual to convert and embrace any religion or belief freely. But when one spouse converts to Islam, the other does not have much choice. They cannot live together as a family, and the non-converting spouse is compelled to convert, separate or initiate divorce. More than anything else, the marriage and family is in limbo. There is also the issue of the conversion of children. When one reads the Constitution and the Guardianship of Infants Act, the rights of mothers are all there, and are guaranteed. But what we found with Shamala's case was that there was abuse of the system. There was also a complicity of the religious authorities in obtaining custody and issuing a warrant of arrest against Shamala. Also, the conditions that the High Court imposed when granting actual custody to Shamala were difficult and not fair to her as the mother. Finally, in the midst of all this, the children's interests and rights have somehow been lost – who speaks for the children?

Kamariah Ali's case
According to a story by Elisia Yeo in Malaysiakini, "No one will give Kamariah Ali a job, relatives and one-time friends shun her, and much of her time is spent in the law courts – all because she no longer wants to be a Muslim. 'People look down on me because I renounced Islam. But people don't understand. Actually, religion belongs to God and you can access God in any way, not necessarily through Islam,' says the soft-spoken 54-year-old. Seven years ago, Kamariah publicly renounced Islam after being continually prosecuted and jailed by religious authorities in Kelantan who accused her of deviating from the faith."

Article 11 feels strongly that an individual may want to renounce a religion due to personal beliefs. There are many converts whose lives may have changed: broken engagements, divorce, separation, death. Anyone trying to renounce Islam lives in legal limbo between the civil and Syariah court systems, unable to resolve issues such as land ownership, inheritance rights and child custody. The question is whether all Malaysians have the right to worship freely. The right to choose one's own faith is guaranteed in Article 11 of the Federal Constitution.

Moorthy's case
Kaliammal Sinnasamy, the widow of M. Moorthy, sought the right in the civil courts to bury her husband according to Hindu burial rites. She stated to the court that he had been a practising Hindu all his life despite the contention by the Islamic religious authorities, after his death, that he had converted to Islam.

On 22 December 2005, the religious authorities went to the Syariah Court *ex parte* and obtained an order giving them the right to last rites. The Syariah Court held that Moorthy was a Muslim and should be buried as such. It dismissed the widow's application to claim the body. On 28 December, the Appellate and Special Powers division of the High Court finally ruled that it had no jurisdiction over the Syariah Court decision, even though it affected Kaliammal's rights. Moorthy was buried on 28 December 2005 according to Islamic rites.

There are several sets of issues in this case. In the absence of written wishes, shouldn't the next of kin (wife or husband, mother or father, daughter or son) have the right to decide the burial rites of their family member? Second, the rejection of Kaliammal's appeal by the High Court left her with no avenue for a legal remedy, which is a major concern. There have been discussions in the papers about whether the High Court failed in its duty to fully examine whether Moorthy's conversion was absolute. Finally, the case raises the question of the place of the Syariah Court in the judicial system.

Nyonya Tahir's case
Nyonya Tahir was born in 1918 and raised by her Malay grandmother and her Chinese grandfather who had converted to Islam. She married a Chinese man when she was 18 and practised Buddhism most of her life. In a written declaration, she said that she wanted to remain a Buddhist and wanted, upon her death, to be buried according to Buddhist rites. The Negeri Sembilan Islamic Affairs Council (MAINS) and Negeri Sembilan Islamic Affairs Department (JHEAINS) applied to the

Syariah Court for a decision on Nyonya's religious status and the request of her family to bury her according to Buddhist rites. There was also a request from her family: the children provided affidavits and 8 of Nyonya's 13 children were at the Syariah Court asking the authorities to allow them to bury her as a Buddhist. The Syariah Court declared her to be a non-Muslim and she was buried according to Buddhist rites.

There was immediate relief for Nyonya's family, but one question this case presented is whether people of faiths other than Islam, such as her children, should turn to the Syariah Court for recourse. Is this a problematic precedent?

Lina Joy's case
Lina Joy was a Muslim who embraced Christianity in 1988. She applied to the National Registration Department for a change of name and religious status in 1997. The NRD denied her request and asked her to get an exit order from the Syariah Court stating that she is no longer a Muslim. In 1998, the NRD allowed the name change, but did not recognise the change of religion. Lina Joy appealed against this decision in the High Court in 2001. The High Court ruled against the change of religion because an ethnic Malay is defined by the Constitution as "a person who professes the religion of Islam", and the jurisdiction in conversion matters lies solely in the hands of the Syariah Court.

In 2004, Lina Joy took her case to the Court of Appeal. The appeal was dismissed by a majority of 2 to 1 on the grounds that her renunciation of Islam was not confirmed by the Syariah Court or any other Islamic authority and therefore the NRD could reject her application to amend her identity card. She has applied for permission to appeal to the Federal Court.

A number of issues have been raised by Lina Joy's case. Was the NRD right in law in rejecting her request to remove the word "Islam" from her identity card? Second, she is unable to profess her faith and practise her religion and live her life as she sees fit. Besides her right to freedom of religion, she has been denied other rights, such as her right to choose a life partner and have a family. She is 41 years old, and she wants to marry, have children and start a family.

Conclusion
These are the faces we know. But there are also many other women and men who are caught in this limbo and who simply want to live their lives as they see fit. In our effort to forge national unity in a multi-ethnic society, the current trend is divisive and unhealthy as it is leading to the creation of two separate societies in one nation. We need to examine ourselves and decide if we want to play an active role in shaping a nation where, irrespective of faith, religion, belief, ethnicity, gender and class, we can live with each other and celebrate our diversity.

PROFESSOR DR SHAD SALEEM FARUQI

Professor Shad spoke in general terms about the Federal Constitution and its guarantees of protection for all.

When Malaysia's document of destiny was drafted in 1957, it contained a number of relevant features that sought to protect the rights and expectations of all of the citizens in the multi-racial, multi-religious society. For example, Article 4(1) of the Constitution declares the Constitution to be the supreme law of the Federation. Any law passed after Merdeka Day that is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. This means that the Constitution was to prevail over Parliamentary supremacy, over religious laws and over customary laws. Article 4(1) had a weakness in that it dealt with only post-Merdeka law, whereas Article 162(6)(a) dealt with pre-Merdeka Law. But the Constitution is supreme, even though supremacy has not operated quite well, and there can be no two questions about that.

The Constitution contains a chapter on fundamental rights, Articles 5-13: Article 5 is about personal liberty; 6 is about slavery and forced labour; 7 is about criminal laws, in particular about retrospective laws, and protection against double jeopardy, i.e. that no one should be prosecuted again and again for the same offence once acquitted or convicted; Article 8 is about equality before the law; 9 is about freedom of movement; 10 is about freedom of speech, assembly and association; 11 is on freedom of religion; 12 is on rights with respect to education; 13 is on the right to property. In addition, many other constitutional rights have been consecrated in the Constitution, including rights of civil servants, rights of preventive detainees, citizenship rights, electoral rights, and the principle of no taxation unless authorised by law. There are rights protected by ordinary legislation like the criminal procedure code. From an ordinary citizen's point of view, it doesn't matter how the rights are protected, whether by Constitutional grant or by ordinary legislation. What is important is how the right works.

On the issue of enforcement of fundamental rights, the Constitution is not as strong as it could have been, except for Article 5(2), which states that if someone is detained unlawfully, he or she can go to the courts to seek redress. That is a reference to *habeas corpus*. But the rest of the Constitution does not provide any specific or special remedies against violations of human rights, unlike in some countries like India, where one can go straight to the Supreme Court for redress for violations of fundamental rights.

In the last few years, the Human Rights Commission (SUHAKAM) has been established, there is a new Parliamentary committee, NGOs try to raise concerns when rights are violated, and increasingly internationalisation of human rights is taking place. Nevertheless, the enforcement of fundamental rights must be looked into again in constitutional law.

There is a federal-state division of power in the financial field, in the executive field, in relation to legislation, and in the judicial field. For a long time, things were working fairly well. But in the last 15 years or so, in relation to legislation, things are not working well. What happened is that the Constitution gave rights in respect of Islamic matters to the state assemblies. However, the Constitution imposes a number of restrictions, but the state assemblies and officers in the Attorney-General's Chambers are conveniently ignoring these restrictions. Any issue regarding Islam or that has relevance to Islam is being regarded as if it is in the state list. For example, murder, theft, gambling are matters of Islam because there is a large body of Islamic commercial and criminal law. However, it is quite clear in Schedule 9, List II, Item 1 of the Constitution that states can exercise legislative power with regard to Islamic criminal offences except in regard to matters in the Federal list or covered by Federal law. Very conveniently, the words "except in regard to matters included in the Federal list or covered by Federal law" are being ignored, and the Attorney-General's office and the courts are not providing the brakes as they are supposed to. Datuk Zaid has raised an important issue in the courts about *hudud* laws. In the area of federal-state division of legislative power, the Constitution is being silently rewritten. In the judicial field, Article 121(1A) raises important issues I will address later.

The Constitution has special powers against subversion and emergency. Article 149 permits only Parliament to restrict four fundamental rights – liberty, freedom of movement, freedom of assembly and association, and right to property – in the case of emergencies. Article 150 is a much more powerful tool through which virtually the entire Constitution can be suspended by Parliament except for six topics in Article 150(6A) – Islam and Malay custom, religion of everyone else, native law and customary law, religion, citizenship, and language – that cannot be touched or violated even in times of emergency. But remarkably, the law does not supply any time durations for emergency proclamations; once proclaimed, they can last forever. Arguably, the 1969 proclamation is still in operation! Another disturbing aspect inserted later is Article 150(8), which says that a proclamation of emergency and ordinances made by the Yang di-Pertuan Agong cannot be questioned in a court of law.

Another area that affects human rights is affirmative action policies. Article 153 does not permit affirmative action policies across the board, but only in certain enumerated areas – positions in the public service, scholarships, educational or training privileges or special facilities, permits and licenses. There is a lot of misunderstanding about this, e.g. I wonder if it is constitutional to offer a 10% discount to *bumiputras* for purchases of houses, as often advertised? Article 153 also has a number of safeguards. For example, 153(9) clearly says that you cannot take something away from someone and give it to someone else. So, for example, you cannot take a license from a Chinese person and give it to a Malay person. It also protects not only Malays, but also native peoples of Sabah and Sarawak. Legally speaking, their positions are equal. There is also protection for the Orang Asli. Also, under Article 89, if land is reserved for Malays, an equal portion shall be available and accessible to non-Malays.

The definition of Malays in the Constitution does not have to do with the Malay race – an ethnic category is defined in a non-ethnic manner. A Malay is a person who practises the religion of Islam (without specifying Shafii Islam), who follows Malay adat, who speaks the Malay language habitually, and he or his parents or grandparents were born in Malaya on or before Merdeka Day. This definition is broad enough to include persons of non-Malay races. This definition also excludes, from the definition of Malay, those Malays who were not born in this country or whose parents or grandparents were not born in this country. The net is cast wide under this definition. Some political parties were uncomfortable with this definition so they have coined a new term called *bumiputra*; there is no such thing as *bumiputra* as far as the law is concerned. This term is a clever technique to include those who are not included, and to exclude those who are included.

Article 136 states that in the Federal public services, there shall be no discrimination on the grounds of race. Obviously, Article 136 and 153 clearly clash. The late Tun Suffian gave some guidance on this. He said that at the entry point into the civil service, Article 153 applies – quotas and reservations are permitted. But once a person is already in the Federal civil service, everything should be in accordance with merit. It is not possible in constitutional law or any other law to say one article overrides the other – you have to indulge in harmonious construction. Of course, bosses say that a promotion is also an entry point, so they are able to circumvent Tun Suffian's idea. But this is not in the spirit of the Constitution. Article 136 is crystal clear.

There are special amendment procedures – the Constitution cannot be amended by a simple majority, except in those areas exempted by Article 159(4). There are various provisions that require additional protections beyond a simple majority.

A key question is whether the amendment procedure can be used to amend the Constitution drastically and thus destroy the basic structure of the Constitution. For instance, could the ruling party use the amendment procedures to increase the life of Parliament from 5 to 20 years because it fears it may not win the next elections? As long as the procedures are followed, the amendments can be made. That is why, in certain countries like India, while amendments can be used to improve the Constitution, they cannot be used destroy its basic structure. This basic structure argument has been raised and rejected in the courts in three cases but its seeds have been planted – the courts have alluded to the point that some amendments cannot be allowed even if the basic procedure is followed. This basic structure argument supplies important brakes on legislative over-exuberance.

Under Article 3, Islam is the religion of the Federation. But Article 3(4) is very important and is sadly often not taken note of. It clearly states that nothing in Article 3(1) derogates from any other clause of the Constitution. The fact that Islam is the religion of the Federation does not destroy any other constitutional right, and Article 3 must be read in the context of the rest of the Constitution. An extension would be Article 11(1), freedom of religion.

In terms of the independent judiciary, the method of appointment has come under severe questioning. There are recommendations that there should be some independent institution that can nominate potential judges. The law on tenure is excellent. Judges can be dismissed only by their brother and

sister judges. In other countries, the Parliament can dismiss judges. But of course this has not worked so well because the law is only as good as the people who administer it.

In addition to legal provisions, a number of political and social economic factors have contributed to Malaysia's success as a multi-racial, multi-religious society:

- Politics of accommodation. The alliance of Barisan National has survived over 48 years. I don't know any other country where a political marriage has lasted that long.
- Cultural pluralism. In other countries, they proudly talk about a melting pot. We didn't build that, we built a mosaic. That is a strength of the country.
- Relatively open economy, with pragmatic policies and the absence of ideological extremism.
- Minority rights in the educational field – Tamil and Chinese schools exist.
- Political pluralism, in terms of political parties.
- Until now, there has been an absence of extremism, but there is a concern that this may be changing.

There has been a gap between the promise and the performance of constitutional rights. Constitutional supremacy is often merely notional. Judicial review is a nominal feature. Some rights are protected against the executive but not against the legislature. For example, Article 5(1) states no person shall be deprived of life or liberty except in accordance with law. It does not say "reasonable law" – this means that Parliament can impose any restrictions, unlike in India where only reasonable restrictions are allowed.

There is the problem of unenumerated rights. Some rights that are explicitly mentioned are of no use unless they are supported by unenumerated rights. For instance, there is a right to go to court. But if a person is languishing in prison and is in remand for 3 or 4 years, surely the Constitution must be interpreted creatively in Article 5 to say he has a right to an expeditious trial. There are cases where a person is found guilty or not guilty, but the maximum penalty is shorter than the period he has already served in remand. Laws against subversion and emergency can suspend most rights. Articles 5 (personal liberty) and 8 (equality before the law) have untapped potential. Article 8, for example, can be used to test all arbitrary powers – any law, like the Printing Presses Act that allows the minister to grant or refuse permits at his absolute discretion. How can such a law exist in the face of Article 8's protection of equality before the law?

State powers to legislate on Islam are restricted to 9 matters explicitly listed in Schedule 9 of the Constitution, but this has been violated. On criminal matters, there are also a number of restrictions. The state power to legislate is subject to the jurisdiction conferred by federal law, e.g. the "3-5-6" rule (3 years in jail, RM5000 fine, 6 strokes of the rotan) in the Syariah Courts Criminal Jurisdiction Act 1965. But in Kelantan and Terengganu, laws were passed that go beyond this, such as providing for the death penalty. Datuk Zaid has challenged this in the courts.

The state powers to legislate on Islam cannot be exercised in derogation of Constitution provisions, especially the chapter on fundamental rights. Schedule 9, which deals with Federal powers and state powers, cannot override the rest of the Constitution. Parliamentary powers listed in the Constitution are subject to the rest of the Constitution. There are cases where federal laws have been declared null and void because they trespass on the state list. But somehow state laws on Islamic matters that are violating the Constitution are not being questioned by the courts.

Deviationist activities are being punished. Deviation should not be a criminal offence because there is freedom of religion. Unless their activities affect public order, public health and morality, deviationists should be left alone.

Many aspects of *hudud* laws are clearly unconstitutional. Article 121(1A) has caused a lot of problems. While there is justification for Syariah matters to be determined by Syariah courts, the

great weakness of Article 121(1A) is that there is no authoritative and impartial machinery for determining questions of conflict of jurisdiction. Whenever there is a dispute involving a Muslim and a non-Muslim, or when there is a constitutional issue, especially involving fundamental rights, civil courts should have jurisdiction. A special court could be created to be an impartial machinery to determine disputes of this sort. After all, there is a special court under Article 181 to handle cases against the Sultan. Perhaps a special council of the Majlis Raja Raja should be set up, or maybe the High Court should have a Syariah division where only learned Muslim scholars have a hand in determining disputes. Datuk Zaid has also recommended a special Constitutional Court.

The spirit of accommodation, moderation, tolerance and the lack of ideological overzealousness that animated the body politic in 1957 seems to have dissipated. Professor Shad closed by saying he thinks we need to go back to the spirit of Merdeka.

DATUK DR CYRUS DAS

Datuk Dr Cyrus Das discussed the importance of creating a culture of constitutionalism in Malaysian culture and society. This is an important phrase that everyone should have in their minds and hearts. Without a culture of constitutionalism, democracy cannot thrive.

The Federal Constitution that came into being in August 1957 was an excellent document. It was meant to create democratic values, and meant to be understood and practised. But for too long the Federal Constitution has been looked upon as a distant document that only lawyers are concerned with. In the evolution of society, the time has come to take it down from the shelf, dust it, and use it on a daily basis. It must be used not just by Government, but by everyone in society. The issues that we are concerned about in presently in Malaysia are rights-based issues, and that is where the Constitution becomes even more important. It is a document for the people.

Even if you don’t manage to read the whole Constitution, what you need to know are the two main features of the Federal Constitution. First, Article 4(1) – the Constitution is the supreme law of the land, and all laws inconsistent with it shall, to the extent of that inconsistency, be void. If laws are meant to be void when tested against the Constitution, then all other thoughts, ideologies and processes will likewise have to be void if they do not meet the test of constitutional validity. That is the most important feature of the Constitution. It is a cornerstone of the Constitution. If this is changed, this country and this society will become quite different from what it was when it first came into being in August 1957.

Second, Chapter II of the Constitution (Articles 5-13) is on fundamental rights. This carries a whole range of rights that we are concerned with every day, but which we take for granted – the right to life and liberty, right against slavery, freedom of association, freedom to speak, freedom of the press, freedom of religion, right to education and so on. So the Constitution starts off with freedoms. This alone tells you that the Constitution is the most important document in our lives and must be treated as such. It is meant to be a living instrument, a dynamic instrument. It was not created in 1957 to become comatose. It is meant to be used on a daily basis. Whenever you interact with governmental authorities and when you feel dissatisfied, you must ask yourself these questions: Is it constitutional, what they have done to me? Is it right? Have my legal rights been violated? Then look to the Constitution, consult a lawyer and test it in the courts.

Unfortunately, in our present society there is no culture of constitutionalism within the legal fraternity or the general public. The culture of constitutionalism must animate those who administer the country, and people must be aware of it.

Unfortunately also, there has been no development of a coherent human rights jurisprudence by our courts. In other words, cases involving human rights are decided on an *ad hoc* basis relating to the

specific facts and circumstances of that case. Ivy Josiah began this morning by narrating problems pertaining to Article 121(1A). She mentioned names that have become household names – Lina Joy, Shamala, Moorthy and Nyonya. But many more names have preceded these names – Dalip Kaur, Soon Singh, Md Hakim Lee, etc. Each of these cases concerned similar issues. We tend to look at the cases from the standpoint of legal rights – what has been claimed and what has been denied. But behind every case there is a human tragedy and human anguish. There are people unable to reconcile what is happening to them. When we leave the courtroom, they go back to homes and have problems that they have to deal with on a daily basis. Do not forget the human face to this problem.

What do these cases tell you? These cases deal with a very important principle of law that is important to everyone but which we take for granted – the question of access to justice. To the person who is a victim or who claims that his or her legal rights have been violated, it is a simple question of access to the courts for relief.

In our society, we settle problems and disputes by going to the courts for relief. But what happens if the doors are shut? Where do you turn to? How can it be said by the courts that they can't give relief because there is a provision that says so? What if this provision is found in most important document of the land – the Federal Constitution? Then there is something very wrong. That is why we are here today. It is very shocking that after 49 years of the Federal Constitution, this kind of debate can be taking place – are you entitled to knock on the doors of the court and have your relief granted to you?

The problem stems from 1988, when Article 121(1A) was amended. It says that the civil courts shall have no jurisdiction over matters falling within the jurisdiction of the Syariah courts. Initially, there was no problem. One of the first cases that handled this was Dalip Kaur's case, the case of a Sikh mother who wanted to bury her son who had supposedly converted to Islam. Dalip Kaur's case was handled by the Supreme Court, and the judge took the position that unless that particular matter is expressly conferred to the jurisdiction of the Syariah court, the civil courts will continue to exercise jurisdiction. Therefore the party who was objecting to the jurisdiction of the civil courts would have to show that this subject matter is expressly conferred as an item in the jurisdiction of the Syariah courts. It was not meant for implication or assumption; it had to be expressly conferred.

Then the courts also said in the Sukma Darmawan case that in reading 121(1A) there is another limitation. The court said it must be the exclusive jurisdiction of the Syariah court. It must be express and it must be exclusive.

But in the last 5 years a change has taken place. The change began in 1997 or 1998 with Soon Singh's case, about a Sikh boy who wanted to convert out of Islam after having converted into Islam as a teenager. The court for the first time went into a new interpretation of Article 121(1A) involving the doctrine of an implied jurisdiction of the Syariah courts.

If it is a matter related to conversion or apostasy, or generally found to be within the range of jurisdiction exercised by the Syariah courts, regardless of it not being expressly or exclusively conferred upon the Syariah courts, it will be implied that it falls within the jurisdiction of the Syariah court. That decision was followed in Md Hakim's case, which was a conversion case.

As a result of this change, this problem has arisen. If the courts applied the test of exclusive and expressly conferred jurisdiction, this problem would not exist. All the cases that have followed Soon Singh's case – Lina Joy, Moorthy, etc. – have followed this decision. One does not need to see if jurisdiction is expressly and exclusively conferred upon the Syariah courts. It is now *assumed* that any matter relating to conversion or apostasy will have to go to the Syariah courts. Shamala's case brought this issue forward in a very poignant and sad case.

There is now a big debate about what we are to do with Article 121(1A). One can only seek justice from courts of law, but how is it that the courts of law can have their doors shut? The Government is concerned and is thinking about how to reconcile this issue. Each member of the public concerned

about this situation is important. People should have their voices and views heard. Ours is a multi-cultural, multi-religious, multi-racial society, and we don't want that changed. The Federal Constitution has assured these rights in black and white.

As result of the debate over Article 121(1A) and the current interpretation that is given to it, there has been a major slip downwards of the jurisdictional power of the civil courts. If there is one court that applies to all Malaysians, regardless of who and what you are, it is the civil courts, and the jurisdiction of the civil courts cannot be whittled down. But we are beginning to see that happening, and it does not seem to matter that a person crying for relief was left without a remedy, as in Shamala's case. And then in Moorthy's case we see a further slip downwards of the power of the civil courts.

Now it is being suggested that the remedy in these matters could be for non-Muslims to approach the Syariah courts, like in Nyonya's case. For those who are working on the drawing board on this issue, they should look into this, think carefully about it, and look into the constitutionality of this. You cannot subject a person to the religious laws that do not belong to his faith.

We are dealing with part of a larger problem, which is largely due to the fact that the courts have approached the Federal Constitution as a matter purely of interpretation. They interpret it as they would interpret any other statute or piece of legislation. For example, ouster clauses are clauses that say that under no circumstances can the decision of the minister or the local authority be challenged in any court of law. Many courts in the Commonwealth read this to mean not what it actually says, because that would take someone's rights away. But our courts have tended to approach this purely as a matter of interpretation. They have taken the position that if it is clearly worded and sufficiently widely worded, then it can succeed in ousting the jurisdiction of the courts. There are cases where this has happened. How is this possible?

This purely interpretative approach of the courts has retarded the growth of human rights jurisprudence in Malaysia. In India, the United Kingdom, Australia, Canada, and other countries with the Westminster system constitution, the courts have refused to approach this issue purely as a question of interpretation. They have adopted the Rule of Law approach, which means that they are not interpreting some abstract documents, but a bill of rights, a document that gives rights to people. The courts say that these are the values that animate a democratic constitution and they will read those values into the provisions that are being interpreted. In the UK it is called the Rule of Legality approach.

In India, they have adopted two principles that lie at the forefront of everything that they do when they are dealing with the Constitution. When a provision of the Constitution can be read one way or another, they read it in the way that leans against an arbitrary and discriminatory exercise of power. Secondly, they lean against an unchecked power to change the Constitution. There is nothing in the Constitution to militate against these changes, and the Constitution cannot provide for all possible situations, but the courts work from the principle that the Government cannot change the basic pillars on which the Constitution was founded or the basic features of the Constitution, such as the democratic system, accountable government, etc.

In the United Kingdom and Australia, they follow the principle of legality. The courts work on the presumption that when Parliament enacts a law, it does not intend to interfere with the fundamental rights of the people. They start with this presumption. Unless there is a clear statement to the contrary, the courts will not read any piece of legislation as interfering with the fundamental rights of the people. I would submit that this is an approach that we should take to build a culture of constitutionalism and a coherent human rights jurisprudence, for both the public and the legal fraternity.

The setting up of a Constitutional Court will help to promote this culture of constitutionalism. The development of constitutionalism is very important, and cannot just be left to the occasional case that comes up before the courts. Currently, constitutional cases must start in the High Court, then they

move to the Court of Appeal, and then to the Federal Court. This takes a long time, for example in Lina Joy's case. We must emulate what they have in India and South Africa, where there is direct access to the final court when a party claims that his or her constitutional rights have been violated.

Look at the tremendous changes that have taken place on the legal scene in South Africa. Look at the country 20 years ago versus today. Can you have a country with greater problems, with a more unfortunate background than that country? Today, its Constitutional Court deals with rights of people and enjoys tremendous respect of the people. It has dealt with a wide range of issues, including minority rights, no matter what minority you come from, whether a cultural or non-cultural minority. Today, the Constitutional Court of South Africa keeps the people together because they know they have direct access to the Constitutional Court if their constitutional rights have been violated.

Therefore, the call for the development of a Constitutional Court in this country is well-founded. It will help create a culture of constitutionalism, and will create, most importantly, a greater awareness of constitutional rights.

MALIK IMTIAZ SARWAR

Malik Imtiaz Sarwar spoke about several reasons why the Malaysian public should be alarmed at the recent events relating to the Federal Constitution.

The first point is that the Constitution is supreme, a statement that has certain implications. It means that the kind of system and lifestyle that has been promised to citizens under this document is theirs. No one can change this. This also means that the Constitution is the source of everything. When we talk about the Federal executive power, legislative power, and the judiciary, it is the Constitution that says we can have these things. The Constitution sets a framework for the country.

When you look at it that way, it seems that the Constitution is virtually sacrosanct and it should not be altered. But since 1957 there have been 600 alterations made to the Constitution through 45 amendment acts. This means that the Constitution is being slowly and surely recast in different ways by the people whom we voted into power. These kinds of decisions to amend the Constitution can have many residual effects.

What alterations have been made? There is a whole range of issues. For instance, when the Attorney-General's post was created at the outset, he had a security of tenure like the judges have. But this was taken away, and now he is simply a civil servant who can be dismissed at will, subject to all of the usual safeguards. The question is why the founders gave that post security of tenure, and why was it so necessary to take that away?

We should also recognise that Malaysia is not an Islamic state, no matter who says it is. The law in Malaysia is secular law. We recognise the existence of Syariah law as a personal law. But when we say that the law is secular, we mean that the governing paradigm of this country is a secular paradigm. It is not a godless paradigm, but is one that does not have reference to religious principles. We go back to the universal values of all of us as Malaysian people. This is not to say that we are anti- any religion, or anti-Islamic, but that all of us must find a system that works for all Malaysians. As soon as we start saying we are an Islamic state or system, we are saying that the interests of one faction or one community are more important than the interests of the other communities, and that is absolutely wrong when one looks at the Constitution.

From that vantage point, the principal safeguard to be taken from the Constitution is one that guarantees against discrimination. Article 8 says that all people are equal before the law. This means that each of us has a right to have our aspirations articulated, to have our vision of a common society put in place, and that no one has a better right than the other. That is where we start when we talk

about constitutionality and the supremacy of the Constitution. The Supreme Court has recognised, in a case called *Che Omar Che Soh*, that we are a country with a secular system of law, so nothing about this is controversial. However, this particular decision has been found to be inconvenient by our current bench and in later cases, *Che Omar Che Soh* is not referred to, but it is there.

The second point is that there is nothing wrong with an aspiration. Many Muslims speak of a concern that as Muslims they should be aspiring to put in place a holistic and total system of life as advocated by their religion. This is an aspiration. But as noble and admirable an aspiration it may be, the Constitution does not lend itself to that system as envisaged. As much as it might be a good or bad thing, the Constitution doesn't say it. The Constitution puts in place a secular system. But the problem is that there is confusion between aspiration and actual law, and how governments should be. There is nothing wrong with aspiration, but that aspiration must be articulated, implemented, and given life through legal procedures and constitutional means.

The third point is that we have to recognise the nexus between Malays, Islam, and "Ketuanan Melayu" thinking. In the last 49 years, a state of being has come into existence where some factions actually believe that the Article 8 equality provision works in a different way. That there are those amongst us who have better rights and have more privileges than others. There is also a feeling that Islam has a more significant role in this country than other religions. But when people who are articulating this position are sitting in seats of power, whether in leadership, on the bench, or as opinion leaders in the community, there is a problem. Because then the distinction between aspiration and what the law actually is becomes clouded and merged. We can see this phenomenon in the cases discussed before. The judges are doing what they think is correct in terms of law, but for some reason they have been clouded in their thinking on this issue. The questions are always: "Should I be doing this as a Muslim? How can I allow or assist in renunciation? How can I let a man who is a Muslim be buried as a non-Muslim?", etc.

That kind of thinking is healthy – we should all be asking questions like this. But the problem is when this kind of thinking becomes a foundation for an ideological way of thinking – i.e., some people can speak about Islam, but others cannot. Then the discourse is dominated by an extremist, conservative viewpoint that is not necessarily reflective of other Muslim viewpoints. Even within the Islamic community, there is a fear of speaking out. This results in a silencing of a very large number of moderate voices, because certain people have claimed the right to speak about Islam in priority over other people.

This kind of phenomenon is not unique. What happened in Afghanistan when the Taliban came in, what happened in Pakistan before Musharraf's reforms, what happened in Iran – it is the same kind of thinking. A small number of people began to assert their right to speak about Islam. When those people are in positions of influence, and they are blurring issues of privilege religion, and they are using their positions to put across this viewpoint, then we begin to have a problem. We may be at a crossroads in how we develop from this point onwards as a nation.

The other element in this discussion is that on the ground, there are growing numbers of Muslims who believe that this is the way it should be. PAS, for instance, has gone from advocating an Islamic state to "We need to reform the Constitution" and to ensure that an Islamic worldview and system can be put in place in the Constitution. Changes to the Constitution can happen by amendment in Parliament, and there is no basic structure doctrine in place here. This means that, logically, if there are sufficient numbers, we could become an Islamic state in the true sense.

As that process is developing, we also see other things happening with regard to the merging of aspiration and reality. For instance, the Constitution was written in English in 1957, and then it was translated into Malay and gazetted. This gazetted version says that if there is an inconsistency between the two versions, the Malay version prevails. But certain concepts haven't been or cannot be translated with the correct nuances. For example, the term "precepts". State assemblies are allowed to make law creating offences against precepts of Islam. There is a Malay translation that puts

"precepts" as "perintah", which means it has gone from a normative rule or guiding principle to an order. Using that translation, a position was put across for reading "precepts" to be anything and everything within an Islamic worldview. The Attorney-General's Chambers is putting this interpretation forward, that the state assemblies are free to legislate on all matters pertaining to Islam because everything goes back to the central tenets of Islam. This is worrying, more so because the other version I read, the original translation, puts it as "rukun", and I am not sure how we have got "perintah" from "rukun".

The next point is that there are two debates happening that we need to be aware of. These debates make it important and crucial for each of us to walk away from this forum with the firm belief that we are all stakeholders in this country, and with the commitment that we ensure that nothing can be changed unless we all agree to it as a nation. First, there is a constitutional debate. This has been articulated more recently in the last two years or so. Some academics in local universities say that the social contract discussion that we all believe started in 1957 with the Constitution actually started on May 13, 1969. The 1957 Constitution is being rejected as a postcolonial legacy that does not adequately reflect the aspirations of one particular community. This is how it is being put across, and there is therefore a constitutional debate about where exactly all of us fit in. If we take 1969 as a starting point, it establishes the privilege system or at least a mindset operating, which allows for divisions between the Malay community and the non-Malay community.

The second debate is a civilisational debate within Islam. There is a growing debate about the role and place of Islam in our lives as citizens. The question is always, "How can we do any different, as this is expected of us by the religion?" But are you a citizen first or a Muslim first? You should be a citizen first when it comes to the application of rights.

Into that mix comes the next element, which is a control of the freedom of expression, which prevents us from seeing and hearing these debates. All we hear is some views being expressed, more notably in the Malay press. For example, during the discussion of the proposed Interfaith Council, the Malay press stated that the council was anti-Islamic, anti-Constitution, that it would push an apostasy agenda, but the bill did not say that at all. There is a medium of communication being focused on a certain group of people who are then reacting accordingly. But when these people begin to shape opinion (because they claim the supremacy and the right to speak about Islam), and the rest of us keep quiet (because it is said that we can't engage because it is a discussion about Islam and we are not Muslims etc.), they carry the day.

The fifth element is the effect of these two debates, and this is where it all comes together – the aspiration is being used as a foundation of decision-making. Not long ago, there was a discussion about distributing free needles to fight HIV. The Prime Minister asked the National Fatwa Committee for its opinion. Why? There is no requirement in the Constitution that says that all decisions taken at the executive level must be consistent with Islam or must be with reference to the muftis or to the fatwa committees. But slowly and surely, this kind of thinking is happening more and more often. Whenever something "sensitive" comes up, there is a reference back to the religious figures. We respect them, but the question is the need to go to them in first place because the Constitution does not require this. And yet we have allowed this encroachment to happen.

These five points shape into a scenario that is worrying. If we allow this to progress, if we don't take back the Constitution into our own hands and assert our positions as citizens, what could happen, logically, in the next 5-10 years is that we could become a theocratic state. The politicians are using religion for political purposes – this is Political Islam. This is masking a lot of things. What is being overlooked is that on the ground, there is a groundswell, a surge. We have let the tiger go, and may be trying to catch it by its tail. When there are enough numbers of people who are dissatisfied with what is happening in their lives, such as the fuel hike, there is going to be a reaction. When that reaction is premised on aspirational values, we will have a problem.

Each of the states has a *fatwa* committee. This committee is empowered by state law to create binding and authoritative *fatwas* without reference back to the state assembly. For example, in Selangor, there is a *fatwa* gazetted that says it is *haram* to smoke. According to the enactments, this is binding on all Muslims and is authoritative in the Syariah courts, which means that the Syariah court must take the fact of this *fatwa* into consideration when it applies law. Then there is a second provision in the state enactments, which is acting contrary to a *fatwa*. You can be charged with acting against a *fatwa*, e.g. a *fatwa* against gambling. Under state law you can therefore be charged, not for gambling itself as it is a federal offence, but for acting contrary to the *fatwa* against gambling. Through this back door, the *fatwa* committees are making offences that even the state assemblies cannot make under the Constitution. For instance, state assemblies cannot create the offence of smoking because it is not an offence against precepts of Islam (which is the limitation imposed by the Constitution). However, because of the existence of the *fatwa* against smoking, and the offence of acting contrary to *fatwa*, the offence is indirectly set up.

This means that the state assembly has in effect created an independent legislative chamber or has abdicated its function. With this *fatwa* committee and the *fatwas* being issued as binding and authoritative law, there is the steady and slow process of the widening of religious law beyond what the Constitution says.

There is a *fatwa* in Perlis that has not yet been gazetted. Until it is gazetted, it is merely a "keputusan" by the *fatwa* committee – it does not have a binding effect. This "keputusan" says that any woman who converts into Islam for marriage, and then attempts to convert out, must be killed. But the *fatwa* recognises that this cannot happen because Islamic law has not been codified yet, so it encourages the incarceration of the woman until death. There is a website called e-fatwa, and you can find this "keputusan" and others on that site.[4]

When you hear about this, how can you say that the Constitution is actually operational? The members of the *fatwa* committees are constitutional agents that must be limited by the constitutional parameters. And yet you hear more and more that we are answerable to God only. That is fine as an aspiration, but the law as it stands would not support it.

Malik Imtiaz closed by encouraging the participants to be worried, to go home and think about this, and to tell their friends.

Y.B. DATUK ZAID IBRAHIM

Datuk Zaid presented on the political dimensions of the issue.

This is Malaysia's fiftieth year of independence, and it is good to see that so many people want to talk about this subject. This country is blessed in so many ways. It started with a firm foundation and a good Constitution, and we have developed in more ways than one. But then something happened.

It is important that all Malaysians must feel protected under the Constitution. The nature of the reality of politics, the dynamics of politics are such that you cannot hope to achieve meaningful change unless you understand the Malay Muslim mindset. There are so many Malays who think they have more rights than others because they were told this by their leaders. This is not just from uneducated groups, but from Members of Parliament. They believe that Article 153, for example, gives them something more than just permits, quotas and scholarships. Some of them pretend not to know about provisions such as the equality provision of the Constitution.

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[4] http://www.e-*fatwa*.gov.my/mufti/*fatwa*_warta_list.asp?IDstate=09.

It is important that the principles of the Constitution be explained at many levels. People have to speak out. Non-Malays have to speak out too. Many of them are not as interested in politics and shy away from political issues, maybe because doing business is better, or more convenient. But you cannot defend your rights in isolation. Malays have more than enough rights in this country – we don't need any more. We have 67% of seats. We make up the majority of civil servants and judges. But what good does it do to you? What kind of race will we become? Do we use this power for the good of the country, or for the narrow vested interests of some?

If you understand this issue, you have to convince many other Malays that they are assured of their place under the sun. If there is any weakness that they have, it is because of themselves. We don't have to take the country away from anyone, or divide the country into segments or groups or systems. What our founding fathers have done is good enough.

Let's talk about Malaysia's Muslims. How do we realise our aspirations as Muslims in a secular society, under a secular Constitution? If our aspirations are truly Islamic, then there is no problem at all. When Muslims pray, they start with: "This is my prayer, I give my life and my death to the service of God." But God does not need bodyguards. We don't have to force or punish people. The service of God is to protect the rights of everybody. Islam is about liberation, freedom and justice. The Fourth Caliph, the Prophet's own son-in-law, said there are only two groups of human beings: one is my brother in religion; the other is my brother in ethics. We just have to do right together, for everybody, and to be fair.

If you go through the history of Islam, the greatest religious scholars stated that *fatwas* must be based on sound reasoning, on logic, on rationality, and that service to humanity is paramount. This is central to the *fiqh*, the Islamic jurisprudence. But the essence of Islam has been hijacked by people who are lazy. It is easy to portray Islam as rules and punishments, but it is more difficult to develop the intellectual culture that truly reflects Islam. That's what this country needs, and is what everyone must do to help.

As Muslims in this country, do not feel remorse about modernity. Do not feel threatened by non-Muslims, by Christians, Jews, Chinese, etc. The world is open to everyone, including ourselves. Look at the Muslims in Indonesia – there are 220 million of them. They can live under a secular constitution. They believe in plurality, and have open discourse on radio and TV, and in forums, on all these so-called "sensitive" issues. They have produced intellectuals. Who do we produce here? Look at other countries, such as Morocco. Is it less Islamic because it has a secular constitution? In Morocco, there is a very progressive Muslim family law. A man cannot just divorce his wife with three *talaqs*. But this is not by decree, but by consultation and discussion involving intellectuals, politicians and the public. There will always be conservative elements in any society. But if you believe in the goodness of human beings, you can win this fight.

Islamic minorities live securely in secular countries. In India, for example, there are 100 million Muslims living in a secular system, where the laws are equal for everyone. If the Muslims can benefit from the institutions of that country, why should we not grant the same rights to others? Why are our leaders so scared of the word "secular"? It is just a system of government, and probably the best we can think of. It is not perfect, but it allows for plurality, multiculturalism and human rights. If you have no God in your heart, you have no God, whatever labels you put or dress you wear.

If others in the world can do it, if the Muslim minorities in other countries can be protected, we must do the same. The future of this country depends on both the Malays and the non-Malays, the Muslims and the non-Muslims. We all have the same values.

There is a Christian philosopher named Thomas Aquinas who wrote about natural rights and human rights. He talked about enjoining what is good and discouraging what is bad. He must have read it from some Islamic work! A Hindu or Buddhist book would come out with that as well. We all want

the same thing. In terms of values, if you want to reform this country and the institutions of this country, you must get the values right. That is not difficult or irreconcilable.

Datuk Zaid closed with a story about a grandfather and a grandson. The grandfather told the grandson that there were two wolves, which were always fighting. One is good, fair, kind and just. The other is greedy, corrupt and power-crazy. The grandson asked, “So which wolf will win this fight?” And the grandfather answered, “The one that we feed.”

APPENDIX 1: BRIEF BIODATA OF THE SPEAKERS

Ivy Josiah is the Executive Director of Women's Aid Organisation, and a former member of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police.

Professor Dr Shad Saleem Faruqi is a legal advisor to Universiti Teknologi MARA (UiTM). He is also a Senior Professor of Law at the Faculty of Law of UiTM. He has served the university in various capacities, including Assistant Vice-Chancellor (Legal Affairs). He was formerly an Associate Professor of Law at the International Islamic University. He is the author of numerous articles and books, including *Media Law in Malaysia*; *Human Rights, Globalisation and the Asian Economic Crisis*; and *Is Malaysia an Islamic State?* He has presented seminars and speeches in 14 countries.

Datuk Dr Cyrus Das is a member of the Malaysian Bar, former President of the Malaysian Bar from 1997-1999 and past president of the Commonwealth Lawyers Association. He serves on the advisory panel of the Faculty of Law at Universiti Malaya. He has authored several books, the latest being *Judges and Judicial Accountability*.

Malik Imtiaz Sarwar is a member of the Malaysian Bar, Deputy President of the National Human Rights Society (HAKAM), pro-tem Secretary of the Malaysian Civil Liberties Society, and a human rights practitioner. He was recently awarded a Master's degree in international human rights from Oxford University. He has served as counsel in many controversial cases, including *Zaid Ibrahim v Government of Kelantan*, in relation to whether the Islamic *hudud* law is *ultra vires* the Constitution, and the *Daud Mamat* case, which is a Federal Court appeal on the right to renounce the religion of Islam.

Y.B. Datuk Zaid Ibrahim is a member of the Malaysian Bar and is currently a Member of Parliament representing Kota Bharu. He is Chairman of the Pro-Democracy Myanmar Caucus (Malaysian Parliament) and ASEAN Inter-Parliamentary Myanmar Caucus (AIPMC). He is the founder and first President of the Muslim Lawyers Association of Malaysia, former secretary of the Bar Council of Malaysia, founder of the Malaysian Civil Liberties Society, and active and vocal human rights advocate.

APPENDIX 2: TEXT OF FORUM HANDOUT ON *ARTICLE 11*

ARTICLE 11[i]

The coalition of NGOs known as *Article 11* is committed to embracing, upholding and pursuing the realisation of the following principles as guaranteed by the Federal Constitution and Human Rights Conventions:

- no citizen shall be discriminated on the basis of religion, race, descent, place of birth or gender
- parents (both mother and father) are equal guardians and have equal say in all aspects of the upbringing of children
- children shall be protected from any form of discrimination on the grounds of religion and in all cases, the interests of children shall be paramount
- the freedom of thought, conscience and belief for all persons shall be fully respected, guaranteed and protected
- every citizen has a responsibility to condemn discrimination and intolerance based on religion or belief
- every citizen has a responsibility to apply religion or belief in support of human dignity and peace.

Article 11 is fully committed to upholding those fundamental rights for all Malaysians regardless of religion, race, descent, place of birth or gender.

Article 11 comprises:

- All Women's Action Society (AWAM)
- Bar Council Malaysia
- Catholic Lawyers Society
- Interfaith Spiritual Fellowship
- Malaysian Civil Liberties Society, Protem Committee (MCLS)
- Malaysian Consultative Council of Buddhism, Christianity, Hinduism & Sikhism (MCCBCHS)
- National Human Rights Society (HAKAM)
- Pure Life Society
- Sisters In Islam (SIS)
- Suara Rakyat Malaysia (SUARAM)
- Vivekananda Youth Movement, Seremban
- Women's Aid Organisation (WAO)
- Women's Development Collective (WDC)

Background to the Formation of *Article 11*

In April 2004, the civil High Court in Kuala Lumpur granted custody of 2 young boys aged 2 and 4 years to their Hindu mother. The judge imposed one condition – she was not to expose her sons to her Hindu faith. The 2 boys were previously, without her knowledge or consent, converted to Islam by her estranged husband, himself a recent convert to Islam. The same court had earlier dismissed an application by the Hindu mother for a declaration that the conversion of the 2 young children to Islam violated her parental right to co-determine the religious upbringing of the children. The reasoning of the court was that it had no jurisdiction, as the children were now Muslim and the correctness or otherwise of their conversion was a matter for the Syariah Court.

Shamala's case brought home the point that the constitutional role of the civil High Court as the protector of the rights of the ordinary citizen was fast becoming illusory. The implications of this case, however, became the rallying force that drew together a small number of concerned NGOs and members of civil society. This group noted that besides Shamala's case, there were other cases that had impacted the right of belief and the right to practise one's belief as guaranteed under Article 11 of the Federal Constitution. By May 2004, Shamala's case had given life to a coalition of NGOs, which has come to be known as *Article 11.*

Joint secretariats of *Article 11* are WAO[ii] and SIS[iii].

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[i] Article 11 of the Federal Constitution. Article 11(1): Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.
[ii] Women's Aid Organisation, P.O. Box 493, Jalan Sultan, 46760 Petaling Jaya, Selangor. Tel: 03 7957 5636/0636 www.wao.org.my, E-mail: wao@po.jaring.my
[iii] SIS Forum Malaysia, No. 25, Jalan 5/31, 46000 Petaling Jaya, Selangor. Tel: 03 7960 6121 www.sistersinislam.org.my, E-mail: sistersinislam@pd.jaring.my

APPENDIX 3: TEXT OF OPEN LETTER

To: The Malaysian Government

Reaffirming the supremacy of the Federal Constitution

We, the undersigned, Malaysian men and women from all ethnic and faith backgrounds, are concerned about recent events and statements that undermine the supremacy of the Federal Constitution.

We wish to remind our national leaders that Article 4(1) emphatically declares that the Constitution is the supreme law of the Federation and that the oath of office of all parliamentarians, cabinet ministers and judges is singularly to defend the Constitution.

Further, Article 3(1) of the Federal Constitution states that 'Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation'. The Federation of Malaya Constitutional Commission, 1956-57 Report, states that this Article 'shall not imply that the State is not a secular State'. The Supreme Court decision in *Che Omar Che Soh* (1988) reaffirmed that "the law in this country is still what it is today, secular law".

Yet, increasingly we hear claims that Malaysia is an Islamic state.

Liberty and justice for all Malaysians may only effectively be realised through an independent judiciary with full powers of review. Sadly, Malaysians have witnessed the abdication of this power by our judges largely due to an ill-conceived amendment to the Constitution in 1988. In recent cases in the High Courts, judges have declined to adjudicate on pressing issues simply because they involved some elements of Islamic law, leaving litigants without any remedy. This is a most unsatisfactory state of affairs and one which no civil society must endure.

We recognise that the spirit of the Constitution encompasses universal values of democracy, good governance and respect for all. This is compatible with the principles of all faiths represented in Malaysia.

We therefore

- call on the government and judiciary to uphold the supremacy of the Federal Constitution;
- call upon the government to ensure governance in accordance with the Federal Constitution and premised on the universal values of all Malaysian peoples;
- call upon the government to reaffirm that Malaysia shall not become a theocratic state;
- call upon the government to recognise the proper position of the judiciary within the Constitutional framework, as an independent and equal arm of Government

Sincerely,

The Undersigned